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LIST OF ABREVIATIONS

ACHR	–	American Convention on Human Rights
ADF	–	Augmented Dickey-Fuller test
AIFMs	–	Alternative Investment Funds Managers
AIFs	–	Alternative Investment Funds
art.	–	article(s)
ASATs	–	Anti-satellite Weapons
ASF	–	Romanian Financial Supervisory Authority
CA	–	Bulgarian Commerce Act
CAP	–	Common Agricultural Policy
CCR	–	Constitutional Court of Romania
CIA	–	Central Intelligence Agency
civ. s.	–	civil section
CJEU	–	Court of Justice of European Union
CNATDCU	–	Romanian National Council for Accreditation of University Degrees, Diplomas and Certificates
coord.	–	coordinator(s)
crim. s.	–	criminal section
CRT	–	Critical Race Theory
CTR	–	European Counter-Terrorism Judicial Register
CVM	–	Cooperation and Verification Mechanism
DER	–	Distributed Energy Resource
e.g.	–	*exempli gratia* (lat.) / for example (engl.)
EBSI	–	European Blockchain Services Infrastructure
EC	–	European Council
ECB	–	European Central Bank
ECHR	–	European Convention of Human Rights
ECtHR	–	European Court of Human Rights
ed.	–	edition
EESC	–	European Economic and Social Committee
EI	–	Enterprise Interoperability
EIOPA	–	European Insurance and Occupational Pensions Authority

EPPO	–	European Public Prosecutor's Office
ESA	–	European Space Agency
ESMA	–	European Securities and Markets Authority
et seq.	–	*et sequens* (lat.) / and the following (engl.)
etc.	–	*et caetera* (lat.) / and so on (engl.)
EU	–	European Union
EUIPO	–	European Union Intellectual Property Office
EuSEF	–	European Social Entrepreneurship Funds
EuVECA	–	European Venture Capital Fund
EVA	–	Extravehicular Activity
GAAP	–	Generally Accepted Accounting Principles
GDP	–	Gross Domestic Product
GDPR	–	General Data Protection Regulation
GEO	–	Government Emergency Ordinance
GO	–	Government Ordinance
HCCJ	–	High Court of Cassation and Justice of Romania
i.e.	–	*id est* (lat.) / that is (engl.)
IACHR	–	Inter-American Court of Human Rights
ICAO	–	International Civil Aviation Organization
ICC	–	International Criminal Court
ICJ	–	International Court of Justice
ICTR	–	International Criminal Tribunal for Rwanda
ICTY	–	International Criminal Tribunal for the former Yugoslavia
IDEA	–	Institute for Democracy and Electoral Assistance
ILO	–	International Labor Organization
IOP	–	Interaction Oriented Programming
ISO	–	International Organization for Standardization
JHA	–	Justice and Home Affairs Council
JIT	–	Joint Investigation Teams
KPSS	–	Kwiatkowski-Phillips-Schmidt-Shin test
LEO	–	Low Earth Orbit
LGDJ	–	Librairie Générale de Droit et de Jurisprudence
loc. cit.	–	*loco citato* (lat.) / in the place cited (engl.)

MS(s)	–	Microgrid(s)
NAEO	–	National Agency for Equal Opportunities between Women and Men
NAFA	–	North American Framework Agreement
NASA	–	National Aeronautics and Space Administration
NATO	–	North Atlantic Treaty Organization
NF	–	Negotiation Framework
NFR	–	Necessary Working Capital
NFT	–	Non-fungible token
NO	–	Negotiation Object
no.	–	number
OCA	–	Bulgarian Obligations and Contracts Act
OCSSP	–	On line Content Sharing Service Provider
OECD	–	Organization for Economic Cooperation and Development
OJ	–	Official Journal of the European Union
op. cit.	–	*opere citato* (lat.) / in the work cited (engl.)
ORNISS	–	Romanian Office of the National Register of State Secret Information
OST	–	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967)
p.	–	page
para.	–	paragraph(s)
PE	–	Private Equity
pp.	–	pages
PPO	–	Provisional Protection Order
RDI	–	Research-Development-Innovation sector
RSICC	–	Rome Statute of the International Criminal Court
SAF-T	–	Standard Audit File for Tax
SDG(s)	–	Sustainable Development Goal(s)
SMEs	–	Small and Medium Enterprises
SMET	–	Single Market Enforcement Task Force
StPO	–	German Code of Criminal Procedure
STS	–	Space Transportation System
SURE	–	(European Instrument for Temporary) Support to mitigate Unemployment Risks in an Emergency

TEC	–	Treaty establishing the European Community
TEU	–	Treaty on the European Union
TFEU	–	Treaty on the Functioning of the European Union
TSIPC	–	Bulgarian Tax and Social Insurance Procedure Code
TUC	–	Trade Union Congress
UCITS	–	Undertakings for Collective Investment in Transferable Securities
UNCHR	–	United Nations High Commissioner for Refugees
USAF	–	United States Air Force
v.	–	*versus* (lat.)
VC	–	Venture Capital
VE	–	Virtual Enterprise
vol.	–	volume
WCTS	–	Water Collection, Treatment and Supply
WHO	–	World Health Organization
WTD	–	Working Time Directive

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE ISSUANCE OF EUROPEAN INVESTIGATION ORDER

Alina ANDRESCU*

Abstract

The chosen topic, through its novelty in the field of international judicial cooperation in criminal matters, presents both theoretical and practical importance through the procedural-criminal implications it determines.

The author analyzes both synthetically and analytically the functionality of the institution of the European investigation order, determining its content, application limits and subjects involved in the criminal trial report, highlighting the aspects of non-correlation of the objective with the intended purpose.

The conclusions materialized in proposals to complete and improve the existing legislative framework, represented by Law no. 236/2017.

Keywords: *international judicial cooperation in criminal matters, the European Investigation Order, Law no. 302/2004 on international judicial cooperation in criminal matters.*

1. Introduction

The European Investigation Order, which is an expression of the existing international judicial cooperation at European level, is part of the set of judicial procedural acts, representing an effective judicial instrument whose purpose is the swift administration of evidence in criminal proceedings.

Although the European Parliament has adopted the European Investigation Order since March 2014[1], in Romania, despite being a member of the European Union, the Directive no. 2014/41 was implemented only at the end of 2017[2].

From a procedural point of view, the reason and purpose envisaged by the European Parliament when adopting the European Investigation Order are based on the need to make judicial proceedings more flexible / efficient between Member States as part of investigative measures in order to achieve the standard of procedural speed which is necessary in the administration of justice.

Both in relation to the other legal rules governing judicial proceedings for international judicial cooperation and in relation to domestic judicial rules, the procedure for issuing and enforcing the European Investigation Order is of a special nature and is a matter of priority and strict execution[3].

From an objective point of view, the European Investigation Order is based on the realities and needs of judicial practice which are based on the principles of finding out the truth and legality of the entire criminal process.

In this sense, all European states, through their own criminal procedural legislation, acknowledge that *the activity of probation of criminal acts* occupies a central place, decisive for finding out the truth and for carrying out the act of justice.

Judicial proof is a decision-making body which includes the means of proof and the evidence obtained, the latter having an essentially deductive component, derived from the means of proof.

2. Procedural aspects of the European Investigation Order

A) The European Investigation Order is the decision-making procedural act by which *evidentiary activities* are requested to be performed or *the evidence* in the possession of the requesting state or *obtained* by the latter on the basis of a previous request *is transferred* as a form of judicial cooperation.

According to provisions of art. 268^{25} para. (1) of Law no. 236/2017, the object requested through the European Investigation Order may also consist of, taking any necessary measures to conceal, destroy, alienate, transform or move items that may be used as evidence", thus as a means and measure of protection / preservation of evidence.

Given the strictly restrictive object of the European Investigation Order, from which results its

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[1] At the level of the European Union, the European Investigation Order in criminal matters was adopted by Directive no. 2014/41/EU of 03.04.2014 of the European Parliament and of the Council, published in the Official Journal of the European Union.

[2] Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette of Romania, Part I, no. 993 dated 14.12.2017.

[3] In this sense, see the conclusion decision no. 431 of 19th July 2018, delivered by the HCCJ, having as object the resolution of the conflict of competence.

special character, through which it is not possible to request, for example, the communication of judgments given by the courts of the requested State in other criminal cases or acts concerning the duration of the execution of criminal punishments in the execution procedure [4].

In order to carry out these activities, the requesting judicial bodies have at their disposal other judicial instruments regulated by the international legal assistance provided by art. 228 letter b) combined with the provisions of art. 254 para. (2) of Law no. 302/2004[5], as amended, which have as their object the communication of procedural documents between Member States.

The European Investigation Order has a double procedural-criminal significance, it includes both a decision-making component, in the sense of a firm measure, expressed by the judicial body of the requesting State, and a component of clear and predictable determination of the means of evidence to be administered and the factual aspects to be clarified.

The practical function of the European Investigation Order is to request and carry out investigative measures by the execution of means and evidentiary procedures regulated by law (part of the judicial investigation) and to obtain and transmit evidence by the requested State (third party within the judicial proceedings initiated / invigorated by the requesting state).

In relation to the judicial role of the European Investigation Order it is obvious that the *evaluation and determination of the probative value*, *i.e.* the logical-rational activity of analysing the facts established after performing the requested activity, is the attribute of the judicial body in the requesting state.

This is an intrinsic limitation of the European Investigation Order related to the analytical side of the evidence, while the explicit limitation is the impossibility of establishing a joint investigation team and the joint gathering of evidence by such a team, explicit prohibition established by art. 2681 para. (1), letter a), the second thesis of Law no. 236/2017[6].

The ban on the establishment of joint investigation teams by the European investigation order itself is due to the following reasons:

- the establishment, activities and functional competences of joint teams, including officials from two or more Member States, can only be arranged on the basis of normative provisions, and not on the basis of a procedural act;
- the investigative activity, materialized in judicial acts, can only be carried out by judicial bodies, materially and territorially competent in relation to the object and place of carrying out the requested judicial activity;
- the requested investigative activity must be carried out in compliance with the principle of sovereignty / independence of the requested State, that is why procedural acts must be issued only by the judicial authorities of the requested State.

B) The analysis of the subjects involved in the issuance of the request and in the execution of the European Investigation Order involves some discussions, on the one hand determined by the bilateral nature of the obligations recognized between the states parties from which the concerned judicial bodies come, and on the other hand, the scope and competence of the bodies empowered to issue and execute the European Investigation Order.

Thus, while *the issuing authority* within the requesting / issuing State may be represented by both a judicial body and an administrative body competent in gathering evidence for the purpose of referral to judicial bodies (in which case, the request must be validated by the competent judicial body prior to its transmission), the executor, within the requested State, can only be *a judicial authority*.

C) The substantial, substantive conditions underlying the issuance of the European Investigation Order (opportunity, proportionality of the procedural measure and similarity with the conditions of the internal letters rogatory) are mandatory criteria, the analysis of which falls within the competence of the issuing State, while the judicial authority of the requested State, at the time of recognition of the European order, verifies the *formal criteria* of the procedural act.

The component of recognition of the validity of judicial acts issued by judicial bodies is regulated in the legislation of both states involved (issuing state and

[4] In national judicial practice, there have been situations in which, contrary to the special provisions of the European Investigation Order, a Romanian court, using the European Investigation Order, has requested a Correctional Court in France to provide information on the length of detention of a convicted person, see in this regard, the conclusion of 13.12.2019 pronounced by the Oradea Court of Appeal, crim. s. and cases with minors, in the criminal case no. 1479/177/2018, published on www.portal.just.ro.

[5] Law no. 302/2004 on international judicial cooperation in criminal matters, was republished in the Official Gazette of Romania, Part I, no. 411 dated 27.05.2019.

[6] It is true that, both through art. 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Framework Decision 2002/465/JHA of the Council of the European Union, the establishment of joint investigation teams was regulated, but the purpose and activity of these teams is to ensure a high level of protection of individual liberty in a specific area within the European Union where members can move freely, consisting of police forces and customs authorities.

Consequently, the primary purpose of setting up joint teams comprising police officers and customs bodies from different countries of the European Union is to ensure a climate of order and social freedom between the Member States and, only in the alternative, to carry out legal acts in order to obtain evidence, only if it has arisen as a result of incidents related to the activity of monitoring the climate of order.

executing state) belonging exclusively to judicial bodies.

In this respect, the requested State, through its own judicial bodies, by virtue of its own authority, has the power to recognize a European Investigation Order and to ensure its execution by direct reference to its own judicial rules capable of providing procedural guarantees related to the essence of the principle of legality and fairness.

D) The substantial, substantive conditions to be met in order to issue or validate the European Investigation Order shall be based on a set of objective criteria which, in particular, justify the measure taken.

The Romanian legislator provided these criteria in art. 268^4 para. (1), letter a) and b) of Law no. 236/2017 respectively, *the necessity and proportionality* of the measure in relation to the purpose of the criminal proceedings, taking into account the rights of the suspect or defendant and the measure or measures ordered / indicated by means of the European Investigation Order may be decided, under the same conditions, in a similar internal case.

a) The criteria provided by the Romanian legislator include a series of criticisms that appear, in excess, in the activity of validating a European Investigation Order requested by an administrative body with responsibilities for verifying factual situations and gathering evidence or clues necessary in order to notify the judicial bodies.

In this respect, since in the procedure for issuing the European Investigation Order, the legislator imposes the condition that the rights of the suspect or defendant be respected, it would be inferred that this act can only be issued against passive procedural subjects, therefore only in a criminal case in which the initiation of the criminal investigation was ordered or in which the initiation of the criminal action was ordered.

However, this condition contradicts the attributes of preliminary control and the quality of administrative body with investigative role (in the broad sense of the term, for example NAFA, Court of Accounts, Environmental Guard, Customs Authority), which, pursuant to art. 4 of Directive no. 2014/41, has attributions and can carry out preliminary activities to gather evidence in order to notify the judicial bodies.

Also, art. 4 letter b) of the European Directive 2014/41, which is the seat of the matter of the European Investigation Order, according to which "the order may also be issued / requested by an administrative authority", therefore in civil / administrative procedures", seems to justify the reason for reintroducing in the Romanian legislation *the procedural documents prior to* the beginning of the criminal investigation, an institution previously regulated by art. 224 of the Code of Criminal Procedure of 1969.

The establishment of such a condition in the Romanian legislation seems to limit the bodies and the circumstances in which one can appeal to the judicial instrument represented by the European Investigation Order, therefore to restrict their scope regulated by Directive no. 2014/41.

These aspects produce direct legal effects within the judicial procedures based on the issuance and especially the capitalization of the European Investigation Order and, especially, within the criminal process, since, in art. 20 para. (2) of the Romanian Constitution, priority is given to the application of national law if national laws contain more favorable provisions (real exception of the principle of priority of application in domestic law of international legal norms in case of discrepancies between domestic law and that of the international treaties to which Romania has acceded).

Consequently, since our criminal procedure legislation no longer recognizes the validity of the procedures carried out with the title of "preliminary acts" and, through the provisions of art. 268^4 para. (1), letter a) of Law no. 236/2017, includes passive criminal proceedings among the conditions to be met at the time of issuing the European investigation order, it is clear that acts issued or recognized by administrative and judicial authorities outside the criminal proceedings are null and void.

In the same key of reasoning, considering that the object of the investigation order requires the administration of evidence, on the basis of art. 102 para. (3) of Code of Criminal Procedure, the interested procedural subjects could invoke the nullity of the act by which the administration of a trial was ordered, therefore of the European order itself.

De lege ferenda, we propose the modification of art. 268^4 para. (1), letter a) of Law no. 236/2017, in the sense of replacing the terms "suspect" and "defendant", which, in our law, are qualified as subjects or procedural parties with the terms "suspected person", the equivalent of the term "suspect" (perpetrator / author of an action or omissions), that is, a person suspected of having engaged in a particular conduct, activity capable of producing certain criminal legal consequences, or "accused person", *i.e.* a person in whose name there is a complaint or a denunciation, but in respect of whom no criminal proceedings have been issued.

The proposed solution is supported even by the text of Directive 2014/41 in which, at art. 6 - marginally called "the conditions for issuing and transmitting a European Investigation Order", at para. (1), leter a) speaks of "suspects or accused", terms that confer a wider scope of coverage than those used in art. 268^4 para. (1), letter a) of Law no. 236/2017, making

efficient and applicable art. 4, letter b) of Directive 2014/41.

Unfortunately, in the case of Romania, at the time of transposition of the content of Directive 2014/41 into national law, either due to a translation error (which is unlikely, given that the Directive was prior to the adoption of the law translated on the official website of the Journal of the Union), or with the intention of limiting / diminishing the effectiveness of the European Investigation Order, the terms "suspect and accused person" have been translated / transposed as "suspect and defendant", which, of course, seems unfortunate, especially since, in order to transpose, it took the Romanian state more than 3 years.

Moreover, art. 268^4 para. (1), letter a) generates confusion, considering that, at annex 11 of Law no. 236/2017, where the legislator described the content of the form of the European Investigation Order, the text refers to the "suspected or accused person", an inconsistency that needs to be corrected as soon as possible.

b) regarding the criteria *of the necessity* and *proportionality* of the issuance of the European Investigation Order, these are objective, substantial conditions specific to restrictive measures of subjective rights or freedoms.

The criterion *of necessity* must be analysed in the light of a democratic society based on the principles of the rule of law.

The need to request evidence by means of a European Investigation Order must contain an objective statement of reasons, *i.e.* the only way in which evidence can be obtained (for example, it is only on the territory of the requested State and can only be obtained on that state territory).

Also, in order to analyse the *proportionality* of the measure ordered, the European Investigation Order must contain an enumeration of the rights and freedoms affected or the risks related to them (for example, indication of imprisonment and all existing criminal consequences in the present case).

E) With regard to the fairness of the procedures for obtaining evidence by means of the European Investigation Order, there are multiple criticisms in the judicial practice related to the exercise of the right of defence as part of legal aid and the right of the defence to question at the time of obtaining evidence.

Although Law no. 236/2017 does not provide anything regarding the procedural guarantees granted to interested parties, we believe that the issuing body, at the time of the hearing or at their express request, has the obligation to notify them, especially in cases where they have the quality of parties in the criminal proceedings, regarding the issuance and object of the European Investigation Order, as well as about the possibility of participation / assistance of their lawyer at the time of carrying out the evidentiary activity.

We believe that this activity is an implicit obligation of the judicial bodies to inform and present evidence, activities inherent in ensuring the exercise of the right of defence of the procedural subjects.

The effectiveness and exercise of the right of defence, provided by art. 92 para. (1) of Code of criminal procedure, in the composition of the legal assistance occasioned by the execution of the European Investigation Order - right provided by art. 6, points 1 and 3, letter b) The European Convention on Human Rights and art. 24 para. (2) of the Romanian Constitution - seem to conflict with the provisions of art. 268^{14} of Law no. 236/2017, marginally called ,,confidentiality", which stipulates that "both in case Romania is an issuing state and in case it is an executing state, the Romanian authorities will respect the confidential nature of the investigation, according to Romanian law, to the extent necessary for the execution of the investigation measure. This obligation takes into account both the existence and the content of a European Investigation Order".

Unfortunately, the legislator, at the time of the implementation of the Directive, limited its regulatory activity only when taking over the art. 19 of Directive 2014/41, without describing concrete ways to ensure confidentiality, without indicating the gradual and proportionality of the restriction of the right of subjects to "know", which will generate contradictory judicial practices at national level, which will lead to a decrease in public confidence in the act of justice.

During the criminal investigation, such a restriction of the rights of the defense lawyer to consult the documents of the case, may be ordered, according to art. 94 para. (4) of Code of criminal procedure, for the entire period in which the client has the status of suspect, but, after the moment of initiating the criminal action, the restriction may not exceed 10 days.

However, we believe that, at the time of the judicial activity, the object of the European Investigation Order, its content and purpose cannot be hidden from the person to whom it refers, all the more so if the activity directly involves him/her (*e.g.*, hearing, confrontation, recognition from photographs, etc.), all these activities, must be carried out in compliance with procedural guarantees and the principle of loyalty under the sanction of nullity and exclusion of evidence.

In our opinion, confidentiality would be easier to achieve if the European Investigation Order targeted the *suspected* or *accused* persons, in the meanings indicated above, which further strengthens the idea of amending art. 268^4, letter a) of Law no. 236/2017.

F) The remedies against the European Investigation Order issued by the Romanian authorities

are provided, succinctly, in art. 268^{11} of Law no. 236/2017, within the same article being regulated the procedure of contesting the European Investigation Order within which Romania has the quality of requested executor state.

This overlap of normative hypotheses creates some confusion in judicial practice, the text attracting some confusion regarding the possibility and admissibility of challenging the European Investigation Order issued by the Romanian state before the judge of rights and freedoms. The analysis is of both theoretical and practical importance, given that, in essence, the challenge and the remedies relate to the substance of the right of access to justice, a defining component of the right to a fair trial.

Thus, in para. (2) within art. 268^{11} of Law no. 236/2017, it was provided that "the substantive reasons for the European Investigation Order may be challenged only before the issuing authority". We deduce that the contestation of the formal reasons (for example, the lack of form provided by the annex of the law or the lack of the issuer's signature) would be inadmissible, which has as immediate purpose the violation of the right of access to justice in Romania, the issuing country.

Also, imposing the contestation of the substantive conditions only before the issuing authority, seems to be a preliminary judicial procedure, similar to the one regulated by art. 336-339 of Code of criminal procedure, which brings the European Investigation Order closer to the order issued by the prosecutor, in terms of the legal regime.

For identity reason, we believe that this appeal must also be filed with the Prosecutor's Office even if the order was issued by an administrative body of investigation and was validated by a prosecutor. In the latter case, the appeal will be filed in the criminal case filed as a result of the validation report issued by the administrative body.

The legislator did not stipulate the procedural act for settling the appeal issued by the issuing body. We believe that this act can only be the order, if the issuer is the prosecutor, or the closing of the hearing, if the requesting issuer is the judge.

Against the solution issued by the Romanian judicial authority, as the issuing / requesting state, as a result of the exercise of the appeal, the legislator failed to clarify, explicitly, whether the given solution can be challenged before the judge of rights and freedoms, which also represents a form of violation / limitation of the right of access to justice provided by art. 21 para. (1) of the Romanian Constitution. In these circumstances, obviously, the appeal against the solution given by the issuing body becomes inadmissible.

3. Conclusions

De lege ferenda, it is necessary to adopt a much clearer and more effective procedure, which should also include the possibility to challenge the order of the prosecutor by which the appeal was settled, component part of the right of access to justice.

Also, *de lege ferenda*, it is necessary to regulate the possibility of contesting the European Investigation Order issued by the Romanian judicial authorities and for non-fulfilment of its formal conditions, because, for these reasons, it is absurd to challenge, the order before the judicial authorities in the requested country, when this right is restricted in the issuing country whose nationality is usually held by interested parties.

From the content of para. (5) of art. 268^{11} of Law no. 236/2017, there is obviously a different legal treatment in terms of the legal-criminal effects deriving from the admission of the appeal or the remedy of the European Investigation Order.

Thus, without exposing objective reasoning, the Romanian legislator gave efficiency to the sanction of excluding the evidence based on art. 102 of the Code of criminal procedure only for the situations in which the appeal has been admitted in the executing state failing to provide the sanction or the applicable procedural remedy, in case the contestation by the issuing state of the order would be admitted.

For the fairness of the solution, *de lege ferenda*, we believe that it is necessary to regulate the sanction of nullity of the criminal procedural act in case the appeal against the European Investigation Order was admitted.

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- Council Framework Decision 2002/465/JHA on joint investigation teams.

THE COMPETENCE OF THE TRAINEE PROSECUTOR IN THE CRIMINAL JUSTICE SYSTEM

George Gabriel BOGDAN*

Abstract

This article deals with and analyzes the competence of the trainee prosecutor, related to the provisions of art. 23 para. (2) of Law no. 303/2004 on the status of judges and prosecutors, according to which trainee prosecutors have the right to draw conclusions in court, to perform and sign procedural acts, under the coordination of a full power prosecutor.

If the law seems clear with regard to the prosecutor in terms of functional competence and describes the acts or measures that he can take or approve, the situation is different in the case of the trainee prosecutor. First of all, what kind of act is the coordinating act of the prosecutor, how does it materialize in the criminal case and what is the competence of the coordinator in relation to the criminal investigation activity carried out or conducted by the trainee prosecutor?

The procedural criminal law states clearly concerning the way of coordinating the trainee prosecutor's solutions, by countersigning them, the situation of coordinating the procedural acts or that of the conclusions before the court is not the same. It should be noted that during the internship, the prosecutor does not enjoy independence in taking measures and resolving cases, but only in stability, carrying out his activity under the coordination of a full power prosecutor. However, the law does not state how the coordinating prosecutor actually exercises this coordination of the trainee prosecutor, respectively if he issues a procedural act or countersigns the trainee prosecutor's procedural acts, or if he has the possibility to overturn the act which, according to common law, is an exclusive attribute of the hierarchically superior prosecutor.

Secondly, how is the requirement of predictability of the law fulfilled in relation to the „coordination act" of the full rights prosecutor? In other words, if the coordinating prosecutor does not issue an act, as seems to suggest the art. 23 para. (2) of Law no. 303/2004, in what way can an interested person become aware of the content of the coordination that he/she exercises, and how can he/she concretely challenge it? What is the limit beyond which coordination becomes the supervision and conduct of criminal proceedings, thus removing the competence of the trainee prosecutor and to what extent are the instructions issued by the coordinator mandatory for the trainee prosecutor?

Keywords: *trainee prosecutor, jurisdiction, hierarchical control, predictability of the law, coordination act, legal detention, function of criminal investigation.*

1. Preliminary aspects

The prosecutor is the judicial body with constitutional status that represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens[1]. The prosecutor is part of the judicial[2] authority, given that the role and status of the prosecutor are regulated in Section 2, called „Public Prosecution Service" in Chapter VI - „Judicial Authority". Although the prosecutor does not do justice, which is done exclusively by the courts, the Criminal procedure code refers to the prosecutor as a judicial body, along with the judge, respectively the criminal investigation bodies[3].

In the General Part of the Criminal procedure code, the legislator established both the general principles on the basis of which the criminal proceedings are conducted and the general rules of procedure common to the three categories of judicial actors. Each of these bodies will make its own assessment of the facts, acting on the basis of expressly established powers.

The prosecutor initiates and exercises the criminal action in the criminal process, constructing the accusation that he brings to the defendant, carrying out, directly or through the criminal investigation bodies[4],

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[1] Art. 131 para. (1) of the Romanian Constitution republished.

[2] Derived from the verb to judge, with the etymology in Latin - jūdicāre, iūdicāre, the long infinitive form of the verb iūdicō - to judge, to pass / pass judgment.

[3] Art. 30 The specialized bodies of the state that carry out the judicial activity are:
a) criminal investigation bodies;
b) the prosecutor;
c) the judge of rights and freedoms;
d) the judge of the preliminary chamber;
e) the courts.

[4] Art. 55 para. (6) of the Criminal procedure Code, The criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out the activity of criminal investigation under the leadership and supervision of the prosecutor.

the criminal investigation activity - an investigative approach that involves a set of evidentiary proceedings, establish a plausible factual situation in order to determine whether or not there are grounds for prosecution[5].

According to art. 300 para. (1) of the Criminal procedure code, *the prosecutor, in the exercise of his power to lead and supervise the activity of criminal investigation bodies, ensures that the acts of criminal investigation are carried out in compliance with the legal provisions*, which means that the prosecutor has the functional power to refute the documents drawn up by the criminal investigation bodies and to bring the criminal proceedings back into the sphere of legality.

As such, given that the criminal justice system plays a key role in protecting the rule of law[6], it is necessary for the prosecutor, as the sole holder of the Criminal action, to conduct his activity freely, unaffected by intrusion, in accordance with the principles of legality[7], impartiality and hierarchical control, as it appears from the content of art. 132 para. (1) of the Romanian Constitution.

These three principles are a corollary of the work of the Public Ministry and are closely linked. Although the principle of legality has constitutional validity[8], it is repeated in the Criminal procedure code[9], and the legislator expressly states the reason for its establishment, consisting in the fact that *the rules of criminal procedure seek to ensure the effective exercise of the powers of the other participants in the criminal proceedings, so as to respect the provisions of the Constitution, of the constitutive treaties of the European Union, of the other regulations of the European Union in criminal proceedings, as well as of the pacts and treaties on fundamental human rights to which Romania is part of*[10]. Consequently, the measure of compliance with the principle of legality is given by the observance of the rights of the parties and of the other participants in the criminal proceedings.

The principle of legality is complemented by the principle of hierarchical control, also regulated at a constitutional level, as well as at the level of organic law, which means that against the acts and measures taken by the prosecutor or as a result of his provisions, the person whose rights or legitimate interests have been affected may address a complaint to the hierarchically superior prosecutor[11].

Two elements are of particular importance, namely: the concrete identification of the act or measure taken, which violates the rights and freedoms of the person, respectively the holder of the act or measure allegedly illegal. These issues provide the future framework for resolving the complaint, by establishing the general and abstract procedural provisions applicable to the challenged act or measure, to which the hierarchically superior prosecutor will refer and which he will use as a standard in the matter.

2. Inaccuracies regarding the legislation of the competence of the trainee prosecutor

If the law seems clear with regard to the full power prosecutor in terms of functional competence and describes the acts or measures that he can take or approve, the situation is different in the case of the trainee prosecutor. Thus, in accordance with art. 23 para. (2) of Law no. 303/2004 on the status of judges and prosecutors, *trainee prosecutors have the right to draw conclusions in court, to perform and sign procedural and procedural acts, under the coordination of a full power prosecutor,* and in accordance with para. (22) of the same article, *trainee judges and prosecutors do not have the right to order custodial or restrictive measures.*

Regarding the solutions that the trainee prosecutor can pronounce, art. 23 para. (3) of Law no. 303/2004 provides that *the solutions of trainee prosecutors are countersigned by the prosecutors who coordinate them*. Also relevant is art. 21 para. (8) of the same law, according to which *trainee judges and trainee prosecutors enjoy stability.*

As art. 286 para. (1) of the Criminal procedure code states, the prosecutor decides on the acts or procedural measures and solves the case by ordinance,

[5] Art. 3 para. (4) of the Criminal procedure Code.

[6] Considerations from Recommendation (2000) 19 of the Committee of Ministers of the Member States on the role of prosecution in the criminal justice system.

[7] According to the Decision no. 385/2010 of the Constitutional Court, Official Gazette of Romania. no. 317/14.05.2010, the principle of legality is, in the sense assigned by the Basic Law, specific to the activity of prosecutors, who, by virtue of it, have the obligation that, in exercising the powers provided by law, must follow the provisions of law act on the basis of opportunity criteria, either in the adoption of measures or in the choice of procedures. Thus, acting on the principle of legality, the prosecutor cannot refuse to initiate criminal proceedings or initiate criminal proceedings in other cases than those provided by law, nor does he have the right to request the court to acquit a defendant guilty of a crime, on reason that political, economic, social or other interests make it inappropriate to condemn him.

[8] Art. 1 para. (5) of the Romanian Constitution, interpreted and developed by the Constitutional Court.

[9] Art. 2 of the Code of Criminal Procedure

The criminal trial is conducted according to the provisions of the law.

[10] Art. 1 para. (2) of the Romanian Constitution.

[11] Regarding the notion of hierarchically superior prosecutor, see Decision no. 18 of June 19, 2020, pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues in criminal matters, published in the Official Gazette of Romania, Part I, no. 869 of September 23, 2020; G.G. Bogdan, *Short assessments regarding the functional competence of the hierarchically superior prosecutor*, in Dreptul no. 10/2021.

unless the law provides otherwise, and in para. (4) it is shown that the criminal investigation bodies dispose, by ordinance, on the procedural acts and measures and formulate proposals through the report. The prosecutor is also the one in charge and supervised the activity of the Criminal investigation bodies - art. 299 para. (1) and 300 para. (1) of the Criminal procedure code - and may request for verification any file from the criminal investigation body - art. 300 para. (4) of the Criminal procedure code.

From the corroboration of art. 23 para. (2) and art. (22) of Law no. 303/2004 on the status of judges and prosecutors with the provisions cited above in the Criminal procedure code, will result the following conclusions: the trainee prosecutor is competent to carry out the criminal investigation and to supervise the activity of the Criminal investigation bodies of the judicial police, judicial activity, which he carries out under the coordination of a full power prosecutor, but do not have the right to order measures depriving or restricting the liberty of the person.

In the exercise of the judicial function of criminal investigation, provided by the legislator at art. 3 para. (1) letter a) in relation with art. 299 para. (1) of the Criminal procedure code, *the trainee prosecutor verifies the legality and validity of the acts performed by the criminal investigation bodies of the judicial police*. The verification is performed not only upon notification of a party or interested person, but also *ex officio*, as the sole holder of the Criminal action. If he finds that an act or measure is unlawful, the trainee prosecutor is obliged to order the annulment of the act, a *legal mechanism that represents the guarantee of the defendant, the injured person and the other parties to a fair trial.*

The verification mechanism implies that *the trainee prosecutor continuously exercises the supervision of the Criminal investigation bodies*, and not exceptionally, when the file is in his possession, and when he finds violations of the law, he immediately takes measures to remedy it. Any violation of the legal provisions in which either the legislator establishes the existence of an injury or the court finds *ex officio* or upon request, must be remedied, with the application of expressly provided sanctions, which are intended to bring the criminal proceedings into the sphere of preeminence of law and ensure the parties have the right to a fair trial, provided by art. 6 of the Convention, in all its components, as interpreted by the ECtHR.

There is a real doubt about the two essential elements we referred to earlier, namely the holder of the act or measure taken, respectively the act or measure taken, given that, according to the legal provisions, the trainee prosecutor has the functional competence shared with a coordinating prosecutor. Several issues need to be addressed and treated separately.

First of all, what kind of act is the coordination act of the full power prosecutor, how does it materialize in the criminal case and what is the competence of the coordinator in relation to the criminal investigation activity carried out or conducted by the trainee prosecutor?

The analyzed text concerns a norm of competence of the trainee prosecutor, in fact being included in Law no. 303/2004 on the status of judges and prosecutors, a competence that radiates on the manner of exercising the judicial function of criminal investigation, reason for which the predictability and accessibility of the law are mandatory[12]. Essentially, the correspondence between the acts exercised by the trainee prosecutor and the rules of jurisdiction established by the legislator will provide the measure to exercise the specific judicial function and will produce the foreseeable effects, consisting either in pronouncing a solution of dismissal, waiver or prosecution, or in application of specific sanctions, directly by the trainee prosecutor, by the hierarchically superior prosecutor or by the judge of the preliminary chamber, as the case may be.

Therefore, as noted, on one hand, the law must comply with constitutional and human rights standards, ant to provide very clear procedural rules, and on the other hand, it is necessary that the acts be performed in accordance with the law. The principle of legality imposes on the legislator the obligation to provide the procedural rules in an organic law or emergency ordinance, as well as to draft the text clearly and predictably, so that any person can realize which procedural activities falls under the influence of the law and are performed by the judiciary[13].

If the manner of coordination in the case of the trainee prosecutor's solutions is a clear and explicit one, by countersigning them, the situation of coordinating the procedural acts or that of the conclusions before the court is not the same. It should be noted that during the internship, the prosecutor does not enjoy independence in taking measures and resolving cases, but only stability, carrying out his activity under the coordination of a full power prosecutor. However, the law does not state how the full power prosecutor actually exercises this coordination of the trainee prosecutor, respectively if he issues a procedural act, countersigns the procedural acts of the trainee

[12] ECtHR, Judgment of 22 November 1995 in the case of S.W. v. Great Britain, para. 34-36, according to which: the law must first be adequately accessible. The accessibility of the law takes into account the possibility of the person to know the content of the legal provisions. Secondly, the law must be predictable, that is to say, it must be drafted with sufficient precision in such a way as to allow any person - who may, if necessary, to seek specialist advice - to correct his conduct.

[13] CCR Decision no. 51/2016, in which it embraced the jurisprudence of the European Court.

prosecutor, or if he has the possibility to overturn the act which, according to primary legal provisions, it is an exclusive attribute of the hierarchically superior prosecutor.

The discrepancy becomes even more obvious at a comparative analysis of the way in which the legislator regulated the competence of the trainee judge, at art. 23 para. (1) and (1^1) of Law no. 303/2004, where it is expressly indicated which are the cases he or she can hear, respectively in what is the shared competence – the trainee judge also attends court hearings with other types of cases than those provided in para. (1) (...), or *prepares an advisory report on the case and may draft the decision, at the request of the president of the panel*[14].

Secondly, how is the requirement of predictability of the law fulfilled in relation to the „coordination act" of the full power prosecutor? In other words, if the coordinating prosecutor does not issue an act, as seems to suggest art. 23 para. (2) of Law no. 303/2004, in what way can an interested person become aware of the content of the full power prosecutor's coordination, and how can he or she concretely challenge it? What is the limit beyond which coordination becomes the supervision and conduct of criminal proceedings, thus removing the competence of the trainee prosecutor and to what extent are the instructions issued by the coordinator mandatory for the trainee prosecutor?

3. The relevant legal standard

We consider that the wording „under the coordination of a full power prosecutor"[15] is at least unclear, but it has important procedural implications regarding the legality of the Criminal investigation activity. The Constitutional Court has held in its jurisprudence that any normative act must meet certain qualitative conditions, including predictability, which implies that it must be sufficiently precise and clear to be enforceable[16]. The Constitutional Court has also ruled that the meaning of *predictability* depends to a large extent on the content of the text in question and the scope it covers, both in reference to the case law of the ECtHR[17].

In the same vein, ECtHR has ruled that the law must indeed be *accessible* to the litigant and *predictable* in terms of its effects. In order for the law to satisfy the requirement of predictability, it must specify with sufficient clarity the extent and manner of exercising the discretion of the authorities in that area, taking into account the legitimate aim pursued, so that to provide the person with adequate protection against arbitrariness[18].

CCR Decision no. 302/2017 may be relevant regarding the powers to coordinate the criminal investigation, stated in art. 1 para. (5) of the Romanian Constitution, in which it held that, in its jurisprudence, it ruled that *the legislator must regulate from a normative point of view both the framework of the Criminal process and the competence of the judicial bodies and the concrete way of accomplishing each*

[14] Article 23
(1) The trainee judges hear:
a) the actions of the possessor, the requests regarding the registrations and the rectifications in the civil status registers;
b) the patrimonial litigations having as object the payment of a sum of money or the delivery of a good, in case the value of the object of the litigation does not exceed 10,000 lei;
c) the complaints against the minutes of ascertaining the contraventions and of applying the contravention sanctions, if the maximum contravention sanction provided by law is 10,000 lei;
d) the low value applications, provided in art. 1026-1033 of Law no. 134/2010 on the Code of Civil Procedure, republished, with subsequent amendments;
e) the requests having as object the replacement of the contravention fine with the sanction of performing an activity for the benefit of the community;
f) requests for abstention and recusal, as well as requests for review and appeals for annulment in cases falling within their competence;
g) rehabilitation;
h) finding the amnesty or pardon intervention;
i) the offenses provided by Law no. 286/2009 on the Criminal Code, with subsequent amendments and completions, and the special laws, for which the criminal action is initiated upon the prior complaint of the injured person, except for the offenses provided in art. 218 para. (1) and (2), art. 219 para. (1), art. 223, art. 226 and 227, as well as art. 239-241 of Law no. 286/2009, as subsequently amended and supplemented, including complaints against non-prosecution or non-prosecution, requests for confirmation of waiver solutions and requests for confirmation of reopening of criminal proceedings in cases involving such offenses.
(1^1) The trainee judges also attend court hearings with other types of cases than those provided in par. (1), by rotation, to panels of the court consisting of final judges, established by the president of the court. In the cases he attends, the trainee judge shall draw up an advisory report on the case and may draft the judgment at the request of the full power judge.

[15] The conclusion of 29.10.2020, pronounced in the file no. 13174/236/2020/ a1 by the judge of the preliminary chamber within the Giurgiu Court of First Instance, by which the CCR was notified with the except of unconstitutionality of the provisions of art. 23 para. (2) of Law no. 303/2004 on the status of judges and prosecutors in relation to the provisions of art. 1 para. (5) of the Romanian Constitution, invoked ex officio, unpublished.

[16] See, in this sense, Decision no. 189 of March 2, 2006, published in the Official Gazette of Romania, Part I, no. 307 of April 5, 2006, Decision no. 903 of July 6, 2010, published in the Official Gazette of Romania Part I, no. 584 of August 17, 2010, or Decision no. 26 of January 18, 2012, published in the Official Gazette of Romania, Part I, no. 116 of February 15, 2012.

[17] See *Cantoni v. France*, para. 35, *Dragotoniu and Militaru-Pidhorni v. Romania*, para. 35, *Sud Fondi - SRL and Others v. Italy*, para. 109.

[18] See Judgment of 4 May 2000 in *Rotaru v. Romania*, para. 52, and Judgment of 25 January 2007, in *Sissanis v. Romania*, para. 66.

subdivision, each stage of the Criminal process, as a consequence of the provisions of art. 1 para. (5) of the Basic Law, which stipulates the obligation to respect the Constitution, its supremacy and the laws. Thus, the Court found that the legislature must set out exactly the obligations of each judicial body, which must be circumscribed by the concrete manner in which they perform their duties, by establishing unequivocally the operations which they perform in exercising their duties[19].

The Court found that the regulation of the powers of the judiciary is an essential element deriving from the principle of legality, which is a component of the rule of law. This is because an essential rule of law is that the powers or competences of the authorities are defined by law. The principle of legality implies, in essence, that the judiciary acts on the basis of the power conferred on it by the legislature, and subsequently assumes that they must comply with both substantive and procedural provisions, including of the rules of jurisdiction. In this sense, the provisions of art. 58 of the Criminal procedure code regulates *the institution of the verification of competence by the criminal investigation body, which is obliged to verify its competence immediately after the notification, and if it finds that it is not competent to carry out or supervise the criminal investigation, to immediately order the declination of competence or to send the case immediately to the supervising prosecutor, in order to notify the competent body.*

On the other hand, as regards the legislator, the principle of legality - a component of the rule of law - obliges to be very clear when regulating the competence of the judiciary. In this regard, the Court has ruled that the law must specify with sufficient clarity the extent and manner of exercising the discretion of the authorities in that area, having regard to the legitimate aim pursued, in order to provide the person with adequate protection against arbitrariness[20].

However, the Court considers that the task of the legislator cannot be considered to be fulfilled only by the adoption of regulations relating to the jurisdiction of the judiciary. Given the importance of the rules of jurisdiction in criminal matters, the legislator has the obligation to adopt provisions to determine its compliance in the legal practice, by regulating appropriate sanctions applicable otherwise. This is because the effective application of the law can be obstructed by *the absence of appropriate sanctions, as well as by insufficient or selective regulation of the relevant sanctions.*

Moreover, the lack of clarity of the law determines a situation of inequity, in which the person harmed in his rights or legitimate interests will be unable to challenge the act of coordination and the reasons underlying it. Of course, it can be argued that the person concerned can challenge the procedural act of the trainee prosecutor, but this compromise does not cover all the situations that may arise and that impose a direct control of the hierarchically superior prosecutor. An eloquent example could be that the trainee prosecutor draws up an act under the coordination of the full power prosecutor, which is subsequently challenged. Like the person concerned, the hierarchically superior prosecutor will be limited and will exercise strict hierarchical control over the act of the trainee prosecutor, being unable to verify the „coordinating act", which forms a common body with the coordinated act.

Likewise, there is no procedural act drafted, act regulated by the legislator, upon which the judge of rights and freedoms or the judge of the preliminary chamber can exercise a legal analysis and, possibly, sanction it as such. It should be noted that this manner of regulating cannot, in any way, ensure the right to a fair trial for parties, so that the activity of criminal prosecution to fall within the established constitutional grounds.

Also, will the coordinating prosecutor be able to lead and supervise directly the activity of the Criminal investigation bodies, with concern to the limitation given by art. 64 para. (4) of Law no. 304/2004[21]? Considering this last legal provision, the answer seems to be that the trainee prosecutor is the only one who supervises the activity of the Criminal investigation bodies, given that there was a provision for the distribution of the case by the hierarchically superior prosecutor. However, the use of the term „under coordination" seems to suggest increased powers conferred to the coordinating prosecutor, without specifying in particular the modalities of coordination. In this case, is it still necessary for the hierarchical prosecutor to assign the case, which in practice remains obsolete?

The doubt is an essential one, as it affects the competence of the prosecutor and criminal investigation bodies, whose violation is sanctioned with absolute nullity, according to art. 281 para. (1) letter b) of the Criminal procedure code, read in the

[19] See Decision no. 23 of January 20, 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016, para. 15, 16.
[20] See Decision no. 348 of June 17, 2014, published in the Official Gazette of Romania, Part I, no. 529 of 16 July 2014, para. 17.
[21] The case file assigned to one prosecutor may be transferred to another prosecutor in the following situations:
a) suspension or termination of the capacity of prosecutor, according to the law;
b) in its absence, if there are objective causes that justify the urgency and that prevent its recall;
c) leaving the case unjustifiably unresolved for more than 30 days.

light of the CCR Decision no. 392/2017. Such a situation could be the case of the detention of the suspect/defendant by the criminal investigation body. Will the trainee prosecutor be able to supervise the criminal investigation activity in such a case?

4. Implications concerning the fair and debatable application of the law

In accordance with art. 209 para. (13) of the Criminal procedure code, if the detention was ordered by the criminal investigation body, it has the obligation to inform the prosecutor about the taking of the preventive measure, immediately and by any means. Thus, the prosecutor verifies the legality of the preventive measure of deprivation of liberty taken by the police against the suspect/defendant, and in case of finding the illegality of the detention measure, orders the immediate revocation and release, according to art. 209 para. (14) 2nd thesis of the Criminal procedure code. Moreover, the legislator expressly provided in para. (14) of the same art. 209 of the Code of Procedure that *against the order of the Criminal investigation body by which the detention measure was taken, the suspect or defendant may file a complaint to the prosecutor supervising the criminal investigation, before its expiration, and the prosecutor shall immediately rule by order*.

Continuing the reasoning, it can be stated that the trainee prosecutor has a „hierarchically superior" position to the criminal investigation body, based on which the trainee prosecutor leads and supervises the criminal investigation activity, gives guidance and instructions to the investigative body, as shown in art. 55 para. (6) of the Criminal procedure code: *the criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out the activity of criminal investigation under the leadership and supervision of the prosecutor*.

It is easy to conclude and there can be no doubt that it is necessary for the trainee prosecutor to have the functional competence to perform these acts on his own, by taking the case in his own criminal investigation, according to the principle *qui potest plus, potest minus.* On the contrary, if the trainee prosecutor cannot perform an act or take a measure on his own, being expressly exempted by the legislator, even less will he be able to carry out the verification of legality and validity of the act or measure taken by the police body.

In such a case, the trainee prosecutor exercises the activity of supervising the criminal investigation carried out by the criminal investigation bodies, but in a limited way, only with regard to the acts of investigation and criminal investigation which he may take or dispose of directly, and in the example provided, strictly regarding the acts performed or the measures taken prior to the detention of the suspect/defendant. After this moment, the trainee prosecutor cannot concretely carry out the activity of supervising the criminal investigation and does not exercise the judicial function of criminal investigation, according to the competences. This is due to the fact that the trainee prosecutor does not have the functional competence to take the measure of detention, as it results from art. 23 para. (22) of Law no. 303/2004, reproduced above, so that it cannot carry out any verification of the legality and validity of this measure.

This conclusion is based on art. 209 para. (13) and (14) of the Criminal procedure code in the light of art. 286 para. (1) and art. 299 para. (1) of the Criminal procedure code, from which it follows that the starting point of the non-existence of the concrete supervision of the Criminal investigation is the one when the criminal investigation body notifies the trainee prosecutor regarding the taking of the detention measure against the suspect/defendant. The legislator expressly provided for this way of exercising control by the prosecutor precisely in order to limit as much as possible a possible illegally deprivation of liberty, by remedying the deficiencies.

Moreover, there are serious questions about how the suspect/defendant can complain against the detention measure taken by the criminal investigation body, respectively in which the trainee prosecutor appointed in the case can rule and resolve the complaint, given the limitation of competence established by art. 23 para. (22) of Law no. 303/2004. Objectively, at the moment of notification, the trainee prosecutor is deprived of any leverage to control the legality by which to revoke the measure, in contradiction with the will of the legislator, as it was materialized in art. 209 para. (13) and (14) of the Criminal procedure code. Consequently, the situation is equivalent to that in which the criminal investigation body did not notify the full power prosecutor, and who did not verify the legality of the measure and did not resolve the complaint against it.

The same conclusion is required in the situation where the trainee prosecutor draws up the report with a proposal to take the measure of pre-trial detention, that is used to notify the court, in which he considers fulfilled the conditions stated at art. 223 para. (1) or (2) of the Criminal procedure code. In this act, the trainee prosecutor makes an assessment of a preventive measure, which the legislator has expressly excluded from its powers, by art. 23 para. (22) of Law no. 303/2004. Also, by drawing up the report, the trainee prosecutor indirectly concludes that the acts performed by the criminal investigation bodies are legal, that the evidence from which the reasonable suspicion results is

legally administered, respectively that the measure of pre-trial detention is necessary and proportionate, including the order of taking the detention measure, which, according to the argument, did not have the functional competence to verify it.

Although there have been opinions in judicial practice according to which the competence of the trainee prosecutor exclusively implies the impossibility of taking a custodial or restrictive measure of liberty[22], we consider that the lack of a verification of legality and validity of the detention measure causes serious violations of human rights. The detention measure is a deprivation of liberty and represents a strong interference with the rights and legitimate interests of the suspect/defendant, and in the absence of verification, the measure will remain in force until the expiration of the 24-hour period. If the prosecutor chooses not to notify the judge of rights and freedoms with a proposal for pre-trial detention, the suspect/defendant will have been under the power of a preventive measure of deprivation of liberty without any appeal, and the jurisdiction to assess the need for the measure will rest exclusively with the police.

It should be noted that the detention implies the fulfillment of the conditions established by art. 5 para. (1) letter c) of the Convention, according to which *no one shall be deprived of his liberty, unless he has been arrested or detained for the purpose of bringing him before the competent judicial authority, where there are reasonable grounds for believing that he has committed a crime or when there are compelling reasons to prevent him or her from committing a crime or fleeing after committing it*.

In other words, the detention has as a premise the need to bring the person before the competent judicial authority, before a judge or another magistrate empowered by law with the exercise of judicial powers, as shown in para. (3) of the same art. 5. However, in the present case, the trainee prosecutor before whom the person is brought does not have, as it was argued before, functional competence to revoke the preventive measure. In this situation, the state of detention will become contrary not only to the Convention but also to national law.

5. Conclusions

As the trainee prosecutor's jurisdiction has been established, he will not be able to take the measure of deprivation of liberty of detention or the restrictive measure of freedom of judicial control, which concerns only certain limitations of rights, such as a ban on exceeding a certain territorial limit or to move to certain places established by the judicial body. Following a corroboration of the legal texts, it can be reasonably stated that if the trainee prosecutor cannot find that the conditions for taking the measure of judicial control are met, which is a restrictive and not a custodial one, even less can he find that the conditions for taking the measure of pre-trial detention by the judge of rights and freedoms are met, as a result of the referral by report.

Of course, it can be argued that the trainee prosecutor performed the act under the coordination of a full power prosecutor, but the argument would be unfounded and without substance. According to the above arguments, the law does not specifically states the manner in which this coordination is carried out with regard to the order confirming the continuation of the Criminal investigation and the initiation of criminal proceedings, which first of all must respect the principle of legality, and secondly, that of hierarchical subordination.

Moreover, the thesis that the detention measure was verified by the coordinating prosecutor is not resistant to criticism, as he was not expressly appointed by the higher hierarchical prosecutor to supervise the activity of the Criminal investigation bodies in the case, but the trainee prosecutor. The criticism becomes even more sustainable, given that the distribution of cases is made by the hierarchically superior prosecutor after an analysis based on expressly provided criteria[23], and the distribution of case files to another prosecutor takes place in strictly regulated by law situations, also after the same analysis by the hierarchically superior prosecutor. Without a written statement of intent from the coordinating prosecutor, the hierarchically superior prosecutor is deprived of the attribute of hierarchical control, which is meant to lead to unity of action on the part of the Public Ministry and to ensure the rule of law.

Based on the above arguments, we consider that it is necessary to amend the provisions governing the competence of the trainee prosecutor, in a manner similar to the competence of the trainee judge, by exhaustively listing the cases he can resolve. The express limitation of jurisdiction is recommended both to bring clarity and predictability to the way in which the trainee prosecutor exercises the function of a criminal prosecutor, and to increase the awareness of the work and individual decision-making. On the contrary, the division of the competence of the trainee

[22] The conclusion pronounced by the panel of the preliminary chamber of the Giurgiu Tribunal in file no. 13174/236/2020 / a1.1, admitting the appeal of the prosecutor's office against the decision.

[23] According to art. 19 para. (3) letter b) of the Rules of Procedure of the Prosecutor's Offices of November 14, 2019, criminal cases and other works are distributed to prosecutors based on the following objective criteria: specialization, skills, experience, number of cases in progress and their degree of complexity, the specifics of each case, the cases of incompatibility and conflict of interest, insofar as they are known, as well as other special situations.

prosecutor with a full power prosecutor coordinating prosecutor, even exclusively in the way of countersigning the solutions, will continue to raise doubts about the stability of the trainee prosecutor, which can be guaranteed and supported exclusively by the hierarchically superior prosecutor, which is mandatory in the Public Ministry.

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TERMINATION BY OPERATION OF LAW OF THE PRECAUTIONARY MEASURES

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Abstract

Precautionary measures fall within the category of procedural measures that have caused controversy in terms of doctrine and case-law. For the first time, the legislator considered it appropriate to establish a deadline by which it was established for the judicial authorities to verify the precautionary measures. The present study aimed to make an analysis of Law no. 6 of 18 February 2021, both from the perspective of the legislation, but also from the perspective of the interpretation and application, exclusively with regard to the sanction of non-compliance with the deadlines set by the legislator, but also with regard to the appeal procedure.

Keywords: *procedural measures, precautionary measures, Law no. 6 of 18 February 2021, seizure, realisation of seized assets, competent judicial authorities.*

1. Introduction

Precautionary measures are those procedural measures that are part of the range of instruments offered by the legislator in order to ensure a better conduct of procedural activities, consisting of certain constraints or means of depriving or limiting certain fundamental rights of citizens.

Precautionary measures are procedural measures which may be taken in the course of criminal trial by the public prosecutor, the preliminary chamber judge or the court and which consist of the seizure of movable or immovable property belonging to the suspect, the accused, the civilly liable party or other persons, as the case may be, with a view to special or extended confiscation, the reparation of the damage caused by the offence, as well as to guarantee the enforcement of the fine or legal costs.[1]

The present study does not aim to analyse the substance of each precautionary measure that may be ordered in criminal proceedings by the judicial authorities, but we will focus our attention on the obligation to verify them, from the point of view of the existence of the reasons for taking or maintaining the measures and the sanction that intervenes if this procedure has been disregarded. Thus, we want to analyze the reason of the legislator at the time of the regulation of art. 250^2 of the Criminal Procedure Code, as introduced by Law no. 6/2021, as well as the effects of this new institution in the practice of judicial authorities and the interpretation of specialized doctrine.

Given the fact that one year has passed since the entry into force of the above-mentioned rule, and that the practice of the judicial authorities has not crystallised from the perspective of the incidence of the sanction that intervenes if the judicial authorities do not verify the precautionary measures within the time limit set by the legislator, we consider that the present study is of particular importance for the unification of judicial practice and for guaranteeing the respect of the procedural rights of the participants whose assets are subject to these procedural measures.

2. Doctrinal and jurisprudential analysis of the verification of precautionary measures

Precautionary measures are regulated by the legislator in Title V of the Code of Criminal Procedure, entitled Preventive and other procedural measures, and are provided for in Chapter III, entitled Precautionary measures, restitution of property and restoration of the situation prior to the commission of the offence. Procedural measures are defined in the doctrine as coercive institutions that can be ordered by the criminal judiciary for the proper conduct of criminal proceedings and to ensure the achievement of the object of the actions exercised in criminal proceedings. The procedural measures are: preventive measures, medical safety measures, precautionary measures, restitution of goods and restoration of the situation prior to the offence.

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[1] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 898.

Provisions on the taking of precautionary measures have been the subject of many criticisms of unconstitutionality[2], in the period 2015-2020, 10 exceptions of unconstitutionality were invoked. Regarding art. 250 para. (1) of the Code of Criminal Procedure, the author has invoked the unconstitutionality exception, saying that the provisions of the law under criticism contravene the constitutional provisions contained in art. 21 on free access to justice and art. 44 on the right to private property, saying, in essence, that the protective measure is maintained until the final judgment in the criminal case has become final, since the duration of the proceedings may exceed a reasonable time and, at the same time, the taking of such a measure restricts the right to property for an unlimited period of time and without the possibility of reversal.

By CCR Decision no. 629/2015, it was fixed that the interference generated by the seizure of movable and immovable property of the suspect, defendant, civilly liable person or other persons in whose ownership or possession the property is located concerns fundamental rights, namely the right to property, is regulated by law, has as a legitimate purpose the conduct of the criminal investigation, is a judicial measure applicable in criminal proceedings, is imposed, is appropriate *in abstracto* to the legitimate aim pursued, is non-discriminatory and is necessary in a democratic society to protect the values of the rule of law. At the same time, the Court finds that the interference in question is proportionate to the cause which gave rise to it, since the protective measures are of a provisional nature, being ordered for the duration of the criminal proceedings, and the Court, having analysed the principle of proportionality in its settled case-law, has held that it presupposes the exceptional nature of restrictions on the exercise of fundamental rights or freedoms, which necessarily implies that they are also of a temporary nature.[3]

Decision 146 of 27 March 2018 considers the constitutionality of the provisions of art. 249 of the Code of Criminal Procedure in relation to the criticism that there is no time limit on the taking of precautionary measures, the author considering that a reasonable period must be provided for which precautionary measures may be imposed on a person's property, pointing out that, in the current legislation, the condition of proportionality of the restriction of the right to private property is not met.[4]

The Constitutional Court, referring to previous case law in which it has settled similar aspects[5], rejected, as unfounded, the objection of unconstitutionality, ruling, in essence, that the provisions of art. 249 of the Code of Criminal Procedure constitute a restriction of the right to private property, but that the restriction must be permissible, non-discriminatory, necessary for the proper conduct of the criminal proceedings, justified by the general interest and, lastly, proportionate to the aim pursued.

For the first time, the issue of the reasonable term of precautionary measures was raised by the Law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure, as well as for amending and supplementing Law no. 304/2004 on judicial organization, adopted by the Romanian Parliament on 18 June 2018. Thus, by Decision no. 633 of 12 October 2018, delivered in *a priori* control, it was requested to examine the proposal to amend the provisions of art. 249 of the Code of Criminal Procedure.[6] Therefore, the Court found that the amending provision is unconstitutional, in contravention of the principle of legal certainty, in the component relating to the clarity and predictability of the law, as well as the provisions of art. 44 para. (9) of the Constitution, according to which goods intended for, used in or resulting from offences or contraventions may be confiscated only under the conditions laid down by law.[7]

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[2] See the following CCR Decisions:
- no. 894/17.12.2015, Official Gazette of Romania no. 168/04.03.2016;
- no. 20/19.01.2016, Official Gazette of Romania no. 269/08.04.2016;
- no. 216/12.04.2016, Official Gazette of Romania no. 419/03.06.2016;
- no. 463/27.06.2017, Official Gazette of Romania no. 764/26.09.2017;
- no. 146/27.03.2018, Official Gazette of Romania no. 455/31.03.2018;
- no. 181/29.03.2018, Official Gazette of Romania no. 537/28.06.2018;
- no. 548/26.09.2019, Official Gazette of Romania no. 62/29.01.2020;
- no. 654/17.10.2019, Official Gazette of Romania no. 42/21.01.2020;
- no. 192/28.05.2020, Official Gazette of Romania no. 674/29.07.2020;
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[3] *https://legislatie.just.ro/Public/DetaliiDocumentAfis/173188.*

[4] D.M. Morar (coord.), *Codul de procedură penală în jurisprudența Curții Constituționale,* Hamangiu Publishing House, Bucharest, 2021, p. 662.

[5] CCR Decision no. 186/06.03.2007 (Official Gazette of Romania, no. 275/25.04.2007), CCR Decision no. 230/14.03.2007 (Official Gazette of Romania no. 236/05.04.2007).

[6] Art. I point 154: in art. 249, para. (4) is amended to read as follows: precautionary measures for special confiscation or extended confiscation may be taken against the property of the suspect or accused or of other persons in whose property or possession the property to be confiscated is located if there is evidence or strong indications that the property in question has been obtained from criminal activities. Precautionary measures may not exceed a reasonable duration and shall be revoked if this duration is exceeded or if the grounds for taking the precautionary measures no longer exist.

[7] *https://legislatie.just.ro/Public/DetaliiDocumentAfis/208175.*

The doctrine[8], *de lege ferenda*, stated that "*the lifting of the protective measure should also be possible when its actual duration is unreasonably long in relation to the duration and progress of the proceedings and the consequences it produces go beyond the normal effects of such a measure (e.g. the activity of a company whose accounts are seized is seriously disrupted so that employees have not been paid their salaries for a very long time). In other words, as we have already pointed out, even in maintaining the protective measure, the proportionality test must be carried out. In this respect, the ECtHR has held, for example, that the suspension of a company's right to dispose of its shares for more than 11 years does not comply with the requirement of proportionality between the general interests of the company and the interests of the company, the burden being excessive.*[9] *However, a five-year duration of the protective measure was considered by the Court to be proportionate if, given the complexity of the case, the criminal authorities did not remain passive during this period, gathering evidence, hearing witnesses and making several requests for legal assistance.*[10]"

In the economy of the new criminal procedure legislation, the legislator has not regulated a maximum duration of the precautionary measures in terms of time, the doctrinal opinion being that they can be in place throughout the criminal proceedings.

However, by Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office (EPPO), art. 250^2 was introduced into the Code of Criminal Procedure, marginally referred to as the verification of precautionary measures, with the following content: "*throughout the criminal proceedings, the public prosecutor, the preliminary chamber judge or, as the case may be, the court shall periodically verify, but not later than six months during the criminal proceedings and not later than one year during the trial, whether the grounds for taking or maintaining the precautionary measure still exist and shall, where appropriate, order the maintenance, restriction or extension of the measure ordered or the lifting of the measure ordered, the provisions of art. 250 and 250[1] applying accordingly*."

After reading the explanatory memorandum of the law mentioned, we extract the reason why it was considered appropriate to introduce this article: *in practice, there have been cases where ANABI has been notified with requests for the recovery of assets that have been unavailable for more than 5 years, which were no longer of value, the assets becoming unsaleable over time and the costs of administration exceeding the value of the assets. In order to increase the effectiveness of the measures available to ANABI, it was necessary to regulate the ex officio verification of whether an attachment measure generates disproportionate damage or costs (…) In addition, the lack of an express legislative provision requiring the judicial authorities to verify the grounds on which the precautionary measure was taken or whether new grounds have arisen to justify maintaining the measure or lifting it was highlighted by prosecutors and judges during their consultation on strengthening and streamlining the national system for the recovery of criminal debts. Art. 18 para. 2 of this draft proposes the introduction of a new article in the Code of Criminal Procedure, which would constitute an express basis for the periodic review of the seizure measure.*

Law no. 6/2021 was published on 18 February 2021 in the Official Gazette of Romania, Part 1, and entered into force, according to art. 25 of the same law, 10 days after its publication, on 28 February 2022.

We consider that the legislator's reasoning in enacting the criminal procedure rule was, on the one hand, that the duration of the perpetuation of the precautionary measures must be reasonable in relation to the complexity of the case, its subject matter, and, on the other hand, the guarantee to the judicial authorities that the assets that have been subject to seizure, following recovery, can cover the recovery of damages, legal costs, payment of fines or confiscation.

The introduction of an obligation for judicial authorities to verify the subsistence of precautionary measures within a certain period of time was a good idea, but problems have already arisen in judicial practice in terms of interpretation of the text under consideration, as the legislative technique used is clearly incomplete.

The two elements we will consider concern the calculation of the 6-month or one-year time limit and the sanction that intervenes if it is disregarded. In a first view[11] it was considered that the rule is of immediate application and, once it enters into force, is applicable to all cases pending before the courts and public prosecutors' offices in which precautionary measures have been ordered. In a second interpretation, which is such as not to give rise to a very large number of

[8] See the following: A.R. Trandafir, în M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2020, p. 1546.

[9] See the following: *ECtHR, Forminster Entreprises Limited v. Czech Republic, judgement from 9 january 2009, para. 76-78, www.hudoc.echr.coe.int.*

[10] See the following: *ECtHR, Benet Praha SPOL S.R.O. v. Czech Republic, judgement from din 28 september 2010, para. 103 and following., www.hudoc.echr.coe.int.*

[11] See the following: *https://www.chirita-law.com/verificarea-masurilor-asiguratorii-in-cursul-procesului-penal/.*

documents issued in the same period, which would lead to unjustified overcrowding of judicial bodies, the time limit runs from the date of entry into force of the law. Finally, in a third, more nuanced interpretation, for the preliminary chamber procedure or for the trial phase, the verification should be made at the first deadline already set in the case. I think a combination of these interpretations would be advisable: in the course of the prosecution, if the 6-month time limit had already expired, the prosecutor should proceed with the verification of the measure as soon as possible given the complexity of the case and its load; the preliminary chamber judge or the court should proceed with this verification at the first deadline granted in the resolution of the case.[12]

And our opinion is in the sense of verifying, immediately, the precautionary measures established in pending cases, precisely, in relation to the legislator's reasoning who considered it appropriate to establish these deadlines incumbent on the judicial bodies. Given that we have exceeded the one-year time limit from the entry into force of the law under discussion, this interpretation takes second place and we focus our attention on the penalty that applies in the event of failure to comply with the six-month time limit, *i.e.* one year.

In an initial view expressed[13] following the model of the sanction for preventive measures, the sanction should be the automatic termination of the measure. On the other hand, in the absence of an express provision to this effect, it is difficult to speak of a termination as of law. Moreover, for some assets, a document stating the legal termination would be required anyway (*e.g.* in the case of immovable property, the removal of the attachment from the land register is based on the documents provided for in the Regulation-annex to ANCPI Order no. 700/2014; the bank attachment will not be lifted in the absence of a document from the judicial body etc.).

In another opinion[14], along the lines of art. 241 para. 1 letter a) of the Code of Criminal Procedure applicable to preventive measures, the (unverified) precautionary measure should be terminated by operation of law at the expiry of these legal deadlines, and the judicial body before which the criminal case is pending should declare the termination of the precautionary measure by operation of law, *ex officio*, or at the request of the person concerned, and communicate a copy of the order or decision to the person against whom the measure was ordered and to the institutions responsible for its implementation.

In our opinion, in the absence of an express ground, the judicial authorities have at their disposal the provisions of art. 268 para. (1) and (2) of the Code of Criminal Procedure[15] where the legislator enshrines the sanction of the termination of the right when a procedural measure can only be ordered for a period of time and this period has expired. This rule is of a general nature and may constitute a legal basis for declaring that precautionary measures are automatically terminated, in the absence of a special rule, as the legislature has provided in the case of preventive measures. At the same time, *de lege lata*, we consider it appropriate to expressly regulate this sanction but also a procedure for challenging the prosecutor's order, *i.e.* the decision of the preliminary chamber judge or the court by any person who justifies an interest.

Indeed, the legal deadlines in question directly regulate in time the obligation of the judicial authorities to verify the precautionary measures (which are not ordered for a specific period of time), which is why the automatic termination of these precautionary measures, on expiry of the period within which their legality and validity should have been verified, appears rather as a procedural sanction attracted by the passivity of the judicial body - thus triggering a presumption of illegality and unreasonableness of the precautionary measure not verified within the time limits laid down by law.[16]

From the point of view of the legal nature of the period of six months, *i.e.* one year, within which the competent judicial bodies are obliged to verify the precautionary measures, this is a legal, substantial, peremptory, maximum and sequential period.[17] We consider that this term is of a substantial nature, in relation to the fact that it protects extra-procedural rights and interests of the person, from the perspective of property rights, and the method of calculation is that provided by the legislator in art. 271 of the Code of Criminal Procedure, the day on which it begins and ends being included in its duration.

However, if the judicial authority takes a decision in the procedure for review of the protective measures after the expiry of the time-limits referred to, inferentially, by way of appeal, the judge of rights and freedoms, the preliminary chamber judge of the superior court or the superior court shall uphold the

[12] *https://www.juridice.ro/729837/verificarea-periodica-a-masurilor-asiguratorii-in-cursul-procesului-penal.html#_ftn3*.
[13] *https://www.juridice.ro/729837/verificarea-periodica-a-masurilor-asiguratorii-in-cursul-procesului-penal.html#_ftn3*.
[14] V.R. Gherghe, *Verificarea măsurilor asigurătorii pe parcursul procesului penal*, in Dreptul no. 1/2022, p. 120.
[15] "(1) Where the law lays down a time-limit for the exercise of a procedural right, failure to comply with that time-limit shall entail forfeiture of the right and nullity of the act performed after the time-limit, and paragraph (2) Where a procedural measure may be taken only within a specified period, the expiry of that period shall automatically entail the cessation of the effect of the measure."
[16] V.R. Gherghe, *Verificarea măsurilor asigurătorii pe parcursul procesului penal*, in Dreptul no. 1/2022, p. 128.
[17] N. Volonciu, A.S. Uzlău, *Noul Cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, 2014, p. 438.

appeal lodged and shall dismiss the order or the decision and declare that the protective measures are automatically terminated.[18]

Indeed, by finding that the peremptory time limits of six months and one year respectively have been exceeded, the judicial body competent to rule on the appeal will find, from a procedural point of view, that the judicial body has forfeited its procedural right to order that the precautionary measure be maintained, as well as the nullity of the late procedural act of disposal, and, from a substantive point of view, the legal termination (*ope legis*) of the acts of seizure generated by the precautionary measure, which was not maintained within the mandatory legal time limits.[19]

In judicial practice[20], regarding the late verification of the precautionary measure, the court rejected the exception of the late verification of this measure, considering that the time limits of 6 months, respectively one year, are not time limits of lapse but of recommendation and moreover it was considered that a legal analogy cannot be made in criminal procedure with the time limits concerning the verification by the court of preventive measures, because in the case of precautionary measures, the legislator has not expressly provided as a cause for the legal termination of security measures the non-verification within the time limit.

An appeal was lodged against this decision and on the basis of art. 475 in conjunction with art. 468 para. (1) of the Code of Criminal Procedure, the Court of Appeal of Alba Iulia, by judgment of 22 March 2022, referred the matter to the Court of First Instance for a preliminary ruling on a question of law relating to the interpretation of art. 250^2 of the Code of Criminal Procedure, namely, what is the legal nature of the period of six months during the criminal proceedings and one year during the trial, during which it is necessary to periodically verify the continued existence of the grounds for taking or maintaining the precautionary measure.[21]

In view of the fact that the practice of the judicial bodies is not uniform from the point of view of the interpretation of the legal nature of the time limit for the verification of the precautionary measures[22], we can only follow the preliminary ruling that will be ordered by the High Court of Cassation and Justice on the occasion of the referral to the Alba Iulia Court of Appeal, so that the application of the sanction in case of non-observance of it is homogeneous.

Analysing the recitals of the judgment, reference is made to another judgment, Decision of 23 April 2021 of one Court of Appeal, in which it was held, with regard to the legal nature of the time-limits referred to, that these are substantive time-limits and that these provisions impose an obligation, and not a recommendation, on the court to carry out a review of the measure, and that the natural consequence can only be that the court forfeits its right and that the measure taken after the time-limit is null and void. In the case of this institution, it can be said to be of a mixed nature, *i.e.* substantive law in terms of the material content of the institution (existence of the right) and procedural law in terms of the formality and method of exercising this right.

From the point of view of the practice of the Court of Cassation, following an analysis of the 24 judgments in the case, in only one case is reference made to the institution of termination of rights, namely:

- Decision no. 524/25 May 2021 the court of appeal has not exceeded the period of one year within which it is required to rule on the precautionary measure taken by the criminal judgment under appeal, which is calculated from the time of entry into force of Law no. 6/2021 and even if that period had been exceeded it is concluded that the criminal procedural law does not provide for a sanction similar to that regulated in the matter of the preventive measure provided for in art. 241 para. (1) letter a), that of the automatic termination of the measure in question;

Following consultation of open sources, it appears that an exception of unconstitutionality has been invoked with regard to art. 250^2 of the Code of Criminal Procedure[23], to which three cases have been joined, the procedure being currently at the report stage. We will also follow developments in terms of the regulation of criminal procedure in relation to the Romanian Constitution, as the issue under debate is far from settled.

3. Conclusions

If, at the beginning of the drafting of this study, we considered that there was no need for legislative

[18] See the conclusion of the judge of rights and freedoms of the Bucharest Court, ordered in case 2476/3/2022.

[19] V.R. Gherghe, *Verificarea măsurilor asigurătorii pe parcursul procesului penal,* in Dreptul no. 1/2022, p. 143.

[20] By the final decision on preventive measures no. 25/03.03.20200, pronounced by one Court in the criminal case no. X/107/2017/a.9.1. it was ordered under art. 250^2.of the Code of Criminal Procedure, to maintain the measure of seizure, established by the prosecutor's order of 07.12.2016 etc.

[21] At the time of writing, as the conclusion is dated 28.03.2022 and the application is not registered on the website of the High Court of Cassation and Justice.

[22] *Decision no. 39/23.04.2021,* Court of Appeal of Brasov, contesting the precautionary measure – legal termination.

[23] *https://www.juridice.ro/769318/o-noua-perspectiva-asupra-masurilor-asiguratorii-in-procesul-penal-consecintele-incalcarii-dispozitiilor-art-250-2-cod-procedura-penala.html*; in cases 262/D/2022 on 31.01.2022, file 3791D/2021 on 16.12.2021, file 3411 D/2021 on 10.11.2021, all at report stage.

intervention or the use of instruments to unify judicial practice, we now consider that the legislator will have to intervene again, quickly, in order to regulate both the penalty for non-compliance by the judicial authorities in verifying the precautionary measures within 6 months or 1 year, respectively, and the procedure for contesting the order or the decision ordering the termination of the order.

Given that we are one year and one month from the date of entry into force of Law no. 6/2021 introducing art. 250^2 in the Code of Criminal Procedure, that the High Court of Cassation and Justice has been seized for the resolution of some legal issues regarding the legal nature of the term of verification of precautionary measures, but also that the Constitutional Court is considering the exception of unconstitutionality of the text mentioned, it is clear that the institution is not crystallized and our scientific approach requires a continuation of this study after the two pillars of reference will be pronounced.

However, we maintain the view expressed in the study that, at present, the judicial authorities have at their disposal the provisions of art. 268 para. (1) and (2) of the Code of Criminal Procedure, where the legislator enshrines the sanction of termination of the right when a procedural measure can only be ordered for a period of time and it has expired. This rule is of a general nature and may constitute a legal basis for declaring that precautionary measures are automatically terminated, in the absence of a special rule, as the legislature has provided in the case of preventive measures. At the same time, *de lege lata*, we consider it appropriate to expressly regulate this sanction and to provide for a procedure for appealing against the prosecutor's order, *i.e.* the decision of the preliminary chamber judge or the court, by any person who justifies an interest.

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ISLANDS OF ADVERSARIAL PROCEEDINGS IN THE PROSECUTION PHASE

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Abstract

The islands of the adversarial proceedings encountered in the criminal investigation phase, offer the means of evidence submitted under adversarial conditions extra reliability and are an expression of the guarantees from which the accused person benefits.

*The study is divided into three chapters, it begins with an overview of the **adversarial principle/ principle audi alteram partem** which characterizes the trial phase and is sporadically found in the prosecution phase; in the next section, different concepts and theories are discussed regarding the procedures in the criminal prosecution phase in which the adversarial principle is applicable.*

In its last part, the paper analyzes the effects of the adversarial principle on the reliability of the evidence obtained with its application, the exclusion of the evidence obtained in violation of the adversarial principle and de lege ferenda proposals of the author.

Keywords: *adversarial proceedings, criminal investigation phase, assistance of the counsel/attorney in carrying out any act of criminal investigation/ investigative act, confrontation, expertise procedure.*

1. General remarks

The notion of a fair trial presupposes the existence of an adversarial procedure, which involves the presence of the parties in taking of evidence. The European Court of Human Rights[1] has ruled that the requirements arising from the right to an adversarial procedure are, in principle, the same in both civil and criminal matters.

The principle of adversarial proceedings is closely linked to several principles characterizing the criminal proceedings. The notion of a fair trial in the light of the case law of the ECtHR[2] includes the fundamental right to an adversarial procedure in court. It is closely linked to the principle of equality of arms in the adversarial procedure.

Also, the adversarial principle is complementary to the principle of finding the truth, since the purpose of taking of evidence in adversarial proceedings is to find out the truth in criminal proceedings and to have an identity between objective truth and judicial truth.

From a semantic point of view, the term contradictory comes from the Latin *contradictorius*, which presupposes the existence of an objection, a contradictory point of view.

In philosophy, the dialectical concept was born, which is based on *audi alteram partem*, which is an old form of finding the truth. Opposite opinions are interlinked, so as to arrive at another statement with a higher epistemological content, in order to remove *audi alteram partem*.

In the criminal proceedings, the existence of an adversarial procedure is assessed globally, taking into account the entire criminal proceedings as a whole, from the moment the criminal investigation bodies are notified, until the moment the decision becomes final.

The right to a fair trial presupposes the existence of an adversarial procedure before the court, but there are also adversarial episodes in the criminal prosecution phase, when evidence is materially appraised by the criminal prosecution bodies, or when the proceedings are conducted before the magistrate judge or before the pre-trial chamber judge.

A simple analysis shows that the principle of adversarial proceedings should not characterize a certain procedural stage, but the taking of evidence. In criminal proceedings, the evidence does not have a pre-established probative value, but evidence produced in adversarial conditions ensures that the right to a fair trial is respected, as it offers to all parties the opportunity to participate **in the formation of evidence/in adducing evidence**.

Contradictory proceedings are the right of each party or the main procedural subject to participate in the presentation, showing and proof of the accusation, as well as the right to submit their own defence. Thus, adversarial proceedings represent the possibility of debating before the judge everything that is submitted *de jure* or *de facto* by the opponent and of advancing one's own version of the *de jure* or *de facto* elements.

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[1] Werner v. Austria, § 66.

[2] Renger v. Czech Republic, § 146.

In literature[3], it has been argued that the principle of adversarial proceedings is limited to the principle *audiatur et altera pars* sau *audi alteram parte*, an elementary principle applied in any controversy by virtue of which the views, assertions and arguments by which the parties exercise mutual control over their procedural opponents' assertions are brought to the attention of the court.

The adversarial principle is a fundamental principle that is specific to the preliminary chamber phase and the trial phase of the criminal trial, the criminal investigation being a predominantly non-public phase. However, in the criminal prosecution phase, there are also islands of adversarial proceedings, which provide additional reliability to the evidence produced in adversarial proceedings.

It has been noted in modern Italian literature[4] that evidence is formed dialectally if it is characterized by *audi alteram partem*. Thus, the judge is able to assess the credibility and reliability of the statements made by the person heard, and the parties to the proceedings can contribute by asking the person heard questions. In the accusatory system it is in the interest of justice that the factual situation retained in the acts of the judicial bodies should take place according to the dialectical method and at the same time allows the parties to be guaranteed the right to administer evidence in contradictory conditions.

The principle of adversarial proceedings is not an absolute one, in the jurisprudence of the conventional court[5] it was noted that the extent of an adversarial procedure may vary depending on the specifics of the case.

The criminal investigation phase, despite the fact that it is a non-public procedure, may in some cases also accept elements of adversarial nature. The non-public nature does not imply that this procedure is secret for the parties or for the main procedural subjects. Non-publicity must exist in relation to third parties, those who are not involved in the criminal proceedings, in order not to infringe the rights of those directly involved in criminal proceedings, to respect their privacy and not to infringe the presumption of innocence.

In the criminal investigation phase, the islands of adversarial proceedings presuppose the taking of evidence with the possibility for the parties or the main procedural subjects to participate, directly or through a chosen defence counsel, in the formation of evidence.

With regard to the proceedings in the criminal investigation phase which are taking place before the magistrate judge and the judge of the pre-trial chamber, they can be grouped into three categories by reference to the principle of adversarial proceedings.

The first category of proceedings in the criminal prosecution phase taking place before the magistrate judge or the judge of the preliminary chamber is characterised by a total *audi alteram partem*/adversial procedure, respectively they involve the participation of the prosecutor, the parties and the main procedural subjects, who can formulate opinions, observations, and the judge calls into question the claim, the exceptions and decides on them by reasoned decision.

This category of adversarial proceedings includes a complaint against non-prosecution or non-prosecution proceedings before the Pre-Trial Chamber Judge, an early hearing and a challenge to the length of the trial before the magistrate judge.

The difference between these adversarial proceedings is that any interested party is summoned to resolve the complaint against non-prosecution or 'non-lieu', even if he or she does not have the capacity to be a party or the subject-matter of the main proceedings while in the early hearing and in the appeal regarding the duration of the trial, only the persons who have the capacity of party or main procedural subject are summoned.

The participation of the prosecutor is mandatory, and the non-participation of the other summoned persons does not prevent the resolution of the complaint or the conduct of the early hearing.

The second category of proceedings in the criminal investigation phase carried out before the magistrate judge are characterised by a partial a adversarial proceedings, in the sense that only the persons expressly stated by the legislator participate in the conduct of such proceedings, and not all persons who are party or main procedural subject.

These procedures, including the proposal to take a precautionary measure against a natural person, the proposal to take a precautionary measure against a legal person, the proposal for the provisional application of medical safety measures involve taking measures that involve an interference with the right to liberty of persons.

Partial adversarial proceedings involve exposing the views of both the accuser, the prosecutor, and the person against whom the preventive or medical precautionary measures are sought. It is thus noted that such measures do not involve all persons who have the capacity of a party or main procedural subject, but the active subjects of the criminal legal report against whom the measure is requested and the passive subject of the criminal legal report, who is represented by the prosecutor.

[3] Tr. Pop, *Drept procesual penal*, Universul Juridic Publishing House, Bucharest, 2019, vol. I, p. 322.
[4] P. Tonini, *Manuale di procedura penale*, ventisima edizione, Giufre Francis Lefebvre Publishing House, Milano, 2019, p. 262.
[5] Hudakova and Others v. Slovakia, § 38.

The third category of proceedings in the criminal investigation phase carried out before the magistrate judge are characterised by a total lack of adversarial proceedings.

Only the magistrate judge and the prosecutor participate in procedures which involve the approval of probative proceedings involving a high level of intrusion into private life, namely the proposal for the approval of home search, the proposal for the approval of computer search, the proposal for taking technical supervision measures.

In order for the evidence obtained following such evidentiary proceedings to reflect the objective truth, it is necessary that they be applied in a confidential manner. The participation of other persons in the approval of these proceedings could lead to leakage of information, and the evidence could no longer lead to the overlapping of the objective truth and the judicial one.

In the following part we shall approach the procedure of forming evidence with the assistance of the counsel of the parties or of the main procedural subjects, the confrontation and the procedure of performing the expertise.

2. Counsel assistance in carrying out the criminal investigation acts/ investigative acts

Given the architecture of the New Code of Criminal Procedure, which is based on a continental law system, sprinkled with elements borrowed from the adversarial system, the right of the counsel of the parties or of the main procedural subjects to assist in any criminal prosecution, except where special methods of surveillance or investigation are used and body or vehicle search in the case of flagrant offenses, was regulated.

The regulation of this counsel's right is an island of *audi alteram partem* in the criminal prosecution phase, which is mainly a non-public phase of the criminal trial.

The presence of the counsel in the taking of evidentiary material in the criminal investigation phase, gives an extra reliability to the evidence, as the counsel may object to the evidence produced and may ask questions to the persons heard.

We do not agree with the opinion of some authors[6], who argue that there is a difference between assisting in the conduct of criminal prosecutions, which involves only the physical presence and participation in carrying out acts of prosecution, which also involves the right to object or to ask questions to the persons heard/ interviewed persons/ interviewees.

The term assistance comes from the Latin *asssitere* and means to stand next to someone to defend[7] them. In case the legislator would have wanted the existence of only one objective observer when carrying out the criminal prosecution acts, it would have regulated only the obligation to record audio-video hearings, not the possibility of the counsel of the parties or of main procedural subjects to assist in the criminal prosecution.

The legislator does not distinguish between the term of participation and assistance, and so according to the principle *ubi lex non distinguit, nec nos distinguere debemus*[8] the judicial bodies must allow an effective participation of the counsel in the performance of criminal proceedings.

If the prosecution consists of hearing some persons, the counsel of the parties or of the main procedural subjects has the right to formulate questions and objections. The existence of this right is also confirmed by art. 110 para. (1) of the Criminal Procedure Code, which regulates that in the statement of the defendant / witness / injured person the questions addressed during the hearing shall be recorded, mentioning who formulated them. It would be redundant for the legislator to provide that the statement and the person who made the question should be recorded in the statement, if the prosecuting authority only had been in a position to ask questions.

In addition, art. 92 para. (6) of the Criminal Procedure Code states that in the act to which the counsel assisted the objections formulated by the assisting counsel should be mentioned, which implies that the assistance does not represent the mere physical presence, but also the possibility to formulate objections and criticisms.

In the Italian procedural law system, which is similar to the Romanian one, and in which criminal investigations are generally secret, the obligation of the accused's counsel to participate in "guaranteed" criminal prosecution acts, respectively interrogation, inspection and confrontation, is regulated by art. 329 of the Italian Code of Criminal Procedure.

In such cases, the Public Prosecutor's Office sends a guarantee information to the counsel of the accused, which must contain a brief description of the facts and an invitation to appoint a counsel of choice. If the accused does not appoint a counsel of own choice, the Public Prosecutor shall appoint an *ex officio* counsel. The guarantee information must be provided in accordance with art. 180 of the Italian Code of

[6] Udroiu, Rădulețu, *Codul de procedură penală. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2020, p. 493.

[7] See *Dicționarul explicativ al limbii române* (second edition), Romanian Academy, Institute of Linguistics, Universul Enciclopedic Gold Publishing House, 2009.

[8] Where the law does not distinguish, neither should we distinguish.

Criminal Procedure before the interrogation of the accused person or before a criminal investigation is carried out. In case of failure to fulfil this obligation, the documents subsequent to the moment at which the information was to be served, become null and void. The defender has the possibility of an effective participation, by formulating questions and objections.

It is noted that the Italian system of procedural law provides in detail the obligation of the defendant's counsel to participate in the performance of certain acts of criminal prosecution. In addition, the possibility of appointing an ex officio counsel to participate in the compulsory prosecution is regulated, if the counsel of choice refuses to do so.

In the Romanian criminal procedural system, the ex officio counsel appointed by the judicial bodies for one of the parties or main procedural subjects has the right to participate in the execution of investigative acts, and the judicial bodies may attribute to such counsel an obligation to participate in any criminal prosecution, in accordance with art. 91 para. (3) of the Criminal Procedure Code.

In contrast, the criminal prosecution bodies cannot attribute such an obligation to the chosen defence counsel, who has only the power to choose whether or not to assist in the conduct of criminal proceedings.

In the German legal system, according to art. 168c of the German Code of Criminal Procedure (StPO) in the criminal investigation phase, the accused's counsel may participate in the hearing of other persons by the judge, not in the interrogations conducted by the police or prosecutor. If the person they represent is heard, they may participate, but not in the hearing of a witness or an expert.

Consequently, in the accusatory system, the dialectic, which is totally missing in the inquisitorial system, gives major importance to accusation and defence.

2.1. Conditions to be met in order to assist in the conduct of criminal proceedings. Notification on the execution of the investigative act

The right to participate in the execution of the criminal prosecution acts is stated only for persons who have a double capacity as counsel, on the one hand the capacity as counsel in accordance with Law no. 51/1995, and on the other hand the capacity as counsel designated by one of the parties or main procedural subjects.

It is thus noted that the right to witness the conduct of any act of prosecution is not stipulated in favour of the parties, the main procedural subjects or their representatives, but only in favour of the defence counsel of the parties, of the main procedural subjects. For instance, the counsel of the person indicated as the perpetrator in the criminal complaint does not have the right to participate in the performance of any act of criminal investigation, so that the client he represents does not have the quality of party or main procedural subject.

By regulating this right, the legislator pursued the possibility that only law specialists may participate in the performance of the criminal prosecution acts, and not the parties or the main procedural subjects directly. The choice of the legislator is normal, as the presence of the defendant or suspect at the hearing of a witness or injured person may induce a state of fear in the person heard with the consequence of obtaining a truncated testimony.

The jurisprudence of the Supreme Court[9] noted that the presence of only one of the chosen defenders in the criminal proceedings carried out after the formulation of the request for participation does not affect the legality of the evidence or the defendant’s right of defence.

2.2. The content of the right to assist in the conduct of criminal proceedings

The right of the counsel of the parties or of the main procedural subjects to witness the performance of any act of criminal prosecution is not an absolute one, the legislator expressly stating the acts of criminal prosecution from which the possibility of participation is exempted, respectively if special surveillance or investigation methods are used and if body or vehicles searches are carried out in the case of flagrant offenses.

Such right of the counsel of the parties or of the main procedural subjects arises a correlative obligation as the duty of the judicial bodies to inform the counsel about the date and time of the execution of the criminal investigation act. Although the legislature does not provide a period of time prior to the act at which the date and time of the criminal prosecution is to be notified, we consider that in order to ensure the effective exercise of such right, it is necessary that the notification be made in a timely manner before performing the act, so that the presence of the counsel at the place of performing the act can be ensured, without disturbing their activity.

The notification shall be made by the judicial bodies by telephone notification, fax, e-mail or by other such means, concluding a report in this respect. The notification should only include the date and time when the criminal investigation act is carried out, and not what act is to be carried out.

[9] HCCJ, crim. s., decision no. 1600/30.04.2009.

In the literature[10], it was noted that the role of the notification is, on the one hand, to ensure the participation of the counsel in the criminal investigation and, on the other hand, to validate the act performed in the absence of the counsel, as long as there is evidence of notification.

In the event legal assistance is mandatory, an *ex officio* counsel will be appointed, who is obliged to participate in the acts in which his presence is mandatory, but the judicial bodies may require such counsel to also appear at the execution of other acts of criminal prosecution during which his presence is not obligatory, ensuring a concrete and effective defence in the case.

Assistance in the execution of criminal prosecution acts does not imply only a passive assistance, but an active participation, when the counsel may formulate objections, which are mentioned in the criminal prosecution act performed by the criminal prosecution bodies.

2.3. Prosecution proceedings in which the counsel may participate

The counsel may participate in any criminal investigation, except in the case where special methods of surveillance or investigation are used and in the case of body or vehicle search in case of flagrant offenses.

In our opinion, the criminal investigation acts represent the acts of the criminal investigation bodies for taking of evidence in order to establish the factual situation and the legal classification.

In the literature[11], prosecuting acts have been defined as those procedural acts performed by criminal prosecution bodies and which concern the gathering of the necessary evidence regarding the existence of crimes, the identification of perpetrators and the establishment of their liability to determine whether it is or not the case to order prosecution.

We do not agree with the definition given to criminal prosecution by part of the literature[12], namely that criminal prosecution acts are only those procedural acts and have a limited scope being those which, after assessing the gathered evidence, provide for continued prosecution, the initiation of criminal proceedings, respectively those which provide for the taking, revocation, replacement or legal cessation of preventive measures or other procedural measures.

According to this definition, the counsel would no longer be able to assist in the taking of evidence in the criminal investigation phase, acts which in the opinion of the aforementioned author are acts of criminal investigation, but only in the procedures of taking, revoking, maintaining, replacing or legal termination of preventive measures or other procedural measures.

The counsel of the parties or of the main procedural subjects cannot effectively participate in the process of evaluating the evidence by the judicial bodies, as this is an intellectual and psychological process.

In the criminal investigation phase we also encounter acts of criminal investigation in which there is an objective impossibility of participation of the counsel of the parties or of the main procedural subjects, considering their nature. For example, the counsel of the parties or the main subjects of the proceedings may not participate in the collection of documents or in establishing a finding. For example, given that these criminal proceedings do not have a place or date, the collection of documents involves only serving the ordinance ordering the taking of measures to the person from whom the documents are collected, and the finding involves only the service of the order ordering the taking of the measure to the specialist who works within or outside the judicial bodies, and the counsel of the parties or of the main procedural subjects is in an objective impossibility to participate in these acts.

The counsel has the right to participate in the performance of any act of criminal investigation, with the exceptions stated by the legislator, without relevance if they are administered directly by the prosecutor / criminal investigation bodies, or by rogatory commission or delegation.

The legislator regulates two exceptions to the right of the counsel to assist in the performance of any act of criminal prosecution. The first exception relates to the fact that the counsel of the parties or of the subjects of the proceedings is not entitled to assist in case of use of special methods of supervision or investigation. In this case, the counsel is not allowed to participate only in the use of special methods of supervision or investigation, and not in the other acts of criminal prosecution that are carried out in the case in which such special methods were used.

The second exception stated by the legislator assumes that the counsel is not entitled to assist in the search of the body or vehicles in the case of flagrant offenses. In the event that no flagrant offense is found, the counsel has the right to participate in the search of the body or vehicles.

In the Romanian literature[13] it was appreciated that the current regulation, which establishes a series of restrictions regarding the counsel's participation in certain criminal prosecution acts, is justified by the

[10] I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea Generală*, Universul Juridic Publishing House, Bucharest, 2020, p. 277.
[11] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 930.
[12] M. Udroiu, *Sinteze de Procedură penală, Partea Specială*, C.H. Beck Publishing House, Bucharest, 2020, p. 6.
[13] I. Neagu, M. Damaschin, *op. cit.*, p. 276.

special character of the activities carried out for supervision or investigation provided in art. 138. Thus, all such activities are of a confidential nature, on the effectiveness of which depends the use of those evidentiary procedures.

When it comes to the counsel assisting with a home search, there may be several situations. In the event that the search takes place at one of the main parties or subjects of the proceedings, the counsel of the person at whose domicile the search is carried out participates, even if he has not made a request for consent to assist any criminal prosecution, art. 156 para. (9) of the Code of Criminal Procedure.[14] However, the counsel of another party or of the main subject of proceedings, other than the one at whose domicile the search is being conducted, may participate only if the request for assistance in carrying out any criminal proceedings has been granted. In this case, the notification about the performance of the criminal investigation act can be made even after the presentation of the criminal investigation body at the home of the person to be searched.

Although art. 92 para. (1) of the Code of Criminal Procedure states a counsel's right to participate in the conduct of any criminal investigation, which presupposes that the same has the right to participate or not in the prosecution, after being informed of its performance, in case the legal assistance is mandatory, the counsel of the party or of the main procedural subject has the obligation to assist certain acts of criminal investigation.

In order to exercise this right, the counsel of the party or of the main procedural subject makes a request to the judicial bodies to be notified about the date and time of the execution of the criminal investigation act.

In judicial practice[15], the requests for notification regarding the date and time of the criminal investigation act are solved by the prosecutor who supervises the criminal investigation. The analysis of the legal texts shows that the legislator does not regulate the functional or material competence of the criminal investigation body solving such request, so that such requests can be solved either by the prosecutor or by the criminal investigation body conducting the investigations.

The judicial body, which solves the request of notification of the counsel of the party or of the main procedural subject regarding the date and time of the criminal investigation, conducts an examination only regarding the double capacity as counsel of the defender and not regarding the validity of such request. Consequently, an application made by a counsel for notice regarding the date and time of the prosecution may only be rejected as inadmissible if the person making the application does not have the status of counsel, or the person the counsel represents does not have the capacity of counsel of the party or main procedural subject, as a **thorough examination/merits assessment** has not being performed.

The requests for information on the date and time of the prosecution cannot be rejected on the grounds that it would not be appropriate for the counsel to assist in the prosecution.

In the event that the person represented by the counsel acquires the status of a party or main subject of the proceedings after the prosecution, the counsel may request a re-taking of evidence in order to effectively use the right to assist in the performance of any act of prosecution.

2.4. Sanctions in case the counsel is not informed about the date and time of the criminal investigation act

The sanction operating in the case of the execution of criminal prosecution acts, without the knowledge of the counsel, who has made a request for assistance in carrying out any criminal prosecution act, is relative nullity.

Relative nullity is the sanction that intervenes in case of violation of legal provisions other than those expressly regulated by art. 281 para. (1) of the Criminal Code, which always determines the application of absolute nullity. This sanction does not operate automatically, only by violating the legal provisions, but it is necessary to have an injury to the rights of the parties or of the main procedural subjects, which cannot be removed otherwise than by the annulment of the act.

The damage must be related to the "procedural right that, due to the illegal procedural act, the party or other subject can no longer exercise or to the procedural guarantee of which the subject is deprived due to the illegal act, likely to endanger the defence of legitimate interests in criminal proceedings."[16]

Given that the legislator regulated the right of the counsel to assist in the execution of criminal prosecution acts, the disregard of such right by the criminal prosecution bodies that do not fulfil their obligation related to the counsel's right to be informed about the date and time of the criminal prosecution, the

[14] Art. 156 para. (9) Criminal Procedure Code: Persons listed under para. (5) and (6) shall be informed of their right of having a counsel participate in the search conducting. If the presence of a counsel is requested, the search initiation shall be postponed until their arrival, but no longer than two hours of the moment when this right was communicated, and steps for the preservation of the venue to be subject to search shall be taken. In exceptional situations, requiring the conducting of a search on an emergency basis, or when the counsel cannot be contacted, a search can be started even prior to the expiry of the two-hour term.

[15] Order 5053/P/2020 of 06.10.2020 of the Prosecutor's Office attached to the District 1 Court of Bucharest, unpublished.

[16] M. Giurea, I. Lazăr, *Standardul de probă a vătămării procesuale în cazul nulității actelor procesului penal*, in Dreptul no. 4/2018, p. 145.

procedural damage to the right of defence appears to be obvious, and easy to prove.

The nullity of the criminal investigation act performed without the counsel's notice may be invoked at the latest at the closing of the preliminary chamber procedure, if the violation occurred during the criminal investigation and the court was notified by indictment, or until the first trial with the legal procedure fulfilled, if the violation occurred during the criminal investigation, when the court was notified with a guilty plea.

However, the judicial practice is not uniform in terms of the time until which the nullity of the criminal prosecution acts performed without the knowledge of the counsel may be invoked. In a decision of the case[17], the Supreme Court noted that the defendants interested in excluding the witness statement could invoke the exclusion in the criminal investigation phase and could request a retrial. The deadline provided in the content of art. 282 para. (4) of the Criminal Procedure Code should be interpreted in the light of the fact that certain circumstances which give rise to possible nullities could not have been known or capitalized on in the previous phase of the criminal investigation. In reality, the possibly injured could be addressed at the request of the defendants, in the phase of criminal investigation by requesting the re-hearing of the witness.

In a contrary sense, other courts[18] have noted that in the case in which the violation of the legal provisions regarding the hearing of witnesses without the knowledge of the defendant's defence counsel was invoked within the term provided by art. 282 para. (4) letter a) of the Criminal Procedure Code, neither the lateness of its invocation nor any procedural fault for not invoking this illegality during the criminal investigation cannot be retained, all the more so as such an additional condition is not to be found in the content of art. 282 of the Criminal Procedure Code.

We consider that the nullity of the criminal investigation acts performed without the knowledge of the defence counsel of the parties or the main procedural subjects can be invoked within the term provided by art. 282 para. (4) of the Criminal Procedure Code, respectively until the closing of the preliminary chamber procedure if the court was notified by indictment, or until the first court hearing with the legally fulfilled procedure, if the court was notified by plea agreement.

It is not necessary to invoke the relative nullity in the criminal investigation phase, or to have requested the retrial of the persons heard without informing the defence counsel, as this condition is not provided by law, and the judicial bodies are called only to apply the law, not to enact it.

The relative nullity can be invoked by the prosecutor, suspect, defendant, the other parties or the injured person, when there is a procedural interest of its own in complying with the violated legal provisions.

The own interest of the parties and of the main procedural subjects shall be assessed by reference to the rights not taken into account by the violation of the norms of procedural law. For example, the defendant's counsel will not be interested in invoking the nullity of the criminal prosecution acts performed without the knowledge of the injured person's counsel.

During the criminal investigation phase, the prosecutor may ascertain, upon request or *ex officio*, the nullity of the acts performed without the counsel's knowledge and may order the exclusion of the evidence produced. In the pre-trial and trial phase, the prosecutor may request the relative nullity of the acts performed without the knowledge of the counsel of any party or main procedural subject, as the prosecutor's interest is not to formulate and support an accusation, but a general one by reference to its constitutional role is to represent the general interests of society and to uphold the rule of law and the rights and freedoms of citizens.

The relative nullity of criminal prosecution acts performed without the knowledge of the counsel cannot be invoked *ex officio* by the judge of the preliminary chamber or by the court. Initially, according to the provisions of art. 282 para. 2 of the Criminal Procedure Code, the relative nullity could not be invoked in any case by the judge of the preliminary chamber or by the court. However, following the CCR Decision no. 554/2017[19], relative nullity can be invoked ex officio by the judge of the preliminary chamber or by the court, when, by violating a legal provision protected under the sanction of relative nullity, there was not only an injury to the interests of the party but also of justice as well since they prevented the finding of the truth and the just settlement of the case.

Given that the conduct of an act by the criminal prosecution bodies without the knowledge of the counsel of the parties or of the main procedural subjects harms the interests of the party or of the main procedural subject and does not prevent the finding of the truth and fair settlement of the case, the relative nullity of a criminal investigation carried out without the knowledge of the counsel of the parties or of the main procedural subjects cannot be invoked *ex officio* by the judge of the preliminary chamber or by the court.

The damage caused by disregarding the counsel's right to witness the prosecution cannot be covered by taking the evidence in contradictory conditions.

[17] HCCJ, crim. s., sentence of 19.02.2016, unpublished.
[18] Oradea Court of Appeal, conclusion of the preliminary chamber judge of 06.04.2017, unpublished.
[19] Official Gazette of Romania no. 1013/21.12.2017.

In judicial practice,[20] it has been held that in the event of a witness being heard without the knowledge of the party's counsel or of the main subject of the proceedings, the retrial of such witness in the presence of the counsel may not cover the violation of legal provisions, the sanction for non-compliance with the legal provisions for the administration of evidence in the absence of the chosen counsel being the relative nullity prov. by art. 282 of the Criminal Procedure Code, the damage consisting in violating the right to defense conferred by art. 10 of the Criminal Procedure Code, as such damage can no longer be covered other than by annulment of the act. The re-hearing of the witness in the presence of the defendant's counsel does not mean that the nullity would be covered, as long as the prosecutor referred in the indictment to the witness's statement about which the counsel was not informed.

In addition, it cannot be argued that the damage caused by the hearing of a witness by the criminal prosecution bodies without the knowledge of the defence counsel of the parties or of the main procedural subjects can be removed by re-hearing the witness in adversarial conditions in the trial phase. First of all, this remedy, of hearing the witness at a later stage, is a hypothetical one, as there is a possibility that for objective reasons the witness may not be heard later, and his/her statement may be the basis for a conviction. Based on art. 381 para. (7) of the Criminal Procedure Code, if the hearing of any of the witnesses is not possible in the trial phase, and the same made statements in the criminal investigation phase before the criminal investigation bodies, the court orders the reading of the testimony given by the same during the criminal investigation and takes it into account when judging the case.

In this situation, the right to defence guaranteed by art. 6 para. (3) letter d) of the ECHR "*the right of the accused to interrogate witnesses in the trial*".

In order to prevent such situations, in the absence of the possibility to invoke *ex officio* the relative nullity of the criminal prosecution acts performed without the knowledge of the counsel, the courts have found procedural remedies.

In a decision of the case,[21] the court noted that in relation to the importance of infringing on the exercise of their procedural rights by the two defendants, but also to the fact that the statements of the witnesses were used against other defendants, who did not allege that the manner in which such statements were found had violated procedural provisions and caused procedural harm, it was held that the only remedy to counterbalance procedural illegality in criminal proceedings, according to ECtHR case-law, is to establish the possibility of using the three statements only in favour of the defendants, and not against them.

2.5. The effects of the assistance of the counsel of the party or of the main subject of the proceedings on the statements of persons obtained under adversarial conditions

In accordance with the case law of the ECtHR[22] the statements of persons heard in adversarial proceedings may be used by judicial bodies, as opposed to those of persons whom the accused or his defence counsel have not had the possibility to question at any stage of the proceedings, which cannot substantially or decisively substantiate a conviction.

Art. 6 of the ECHR confers the right of the accused to question witnesses in the trial. The term witness has an autonomous meaning and includes any testimony - made by a witness *stricto sensu*, expert, injured person, or a co-defendant, which is likely to substantially substantiate the conviction of the person sent to trial.

The conventional court ruled[23] that not granting the applicant the opportunity, neither in the criminal prosecution phase nor in the trial phase, to ask questions to the experts in order to verify to what extent their opinions were credible, constituted a violation of the provisions of art. 6 of the Convention.

The ECtHR has ruled that the reading of the statements of the witnesses who refused to testify before the court is not, in itself, incompatible with art. 6 of the ECHR, provided that the right of defence is respected. In the literature[24], it was noted that such testimony could not be taken into account if the accused had not been able, at any stage of the previous proceedings, to interrogate the persons whose statements were read at the court hearing and a conviction which was decisively based on the statements made by a person whom the accused or his defense counsel could not interrogate during the proceedings is likely to restrict the right of defence.

This right of the defendant guaranteed by the Convention is not an absolute one, but has been nuanced by the jurisprudence of the ECtHR. The Court noted[25] that the impossibility of the accused to hear the minor witness of 10 years who convicted him for sexual assault is not incompatible with art. 6 of the ECHR, as the defendant's counsel had the opportunity to request

[20] Bucharest Court of Appeal, conclusion of the preliminary chamber judge no. 940/C/2.12.2014, unpublished.
[21] HCCJ, crim. s.., the conclusion of the judge of the preliminary chamber from 22.01.2018, unpublished.
[22] Asch v. Austriche, Serie A, no. 203; Luca v. Italie, Recueil 2001-II.
[23] Baliste-Lideikiene v. Lituanie, Recueil 2008.
[24] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2010, p. 564.
[25] Asch v. Austriche, Serie A, no. 203.

a second cross-examination and to ask questions through the investigative bodies.

The national provisions provide a lower standard of protection than the ECHR, as there is the possibility that in certain concrete cases, the national legislation, which allows in the trial phase the reading of the testimony given by a witness during the criminal investigation, whose hearing is no longer possible, to be incompatible with art. 6 of the Convention which confers the right of the accused to question or request the hearing of the prosecution witnesses.

Consequently, the testimony of a witness who has been heard before the accused had acquired the status of a suspect, from which time his/her counsel acquires the right to assist in the conduct of any criminal investigation and whose hearing is no longer possible, cannot substantiate determinately or exclusively a conviction, as rights of the defence would be infringed. Despite the fact that the provisions of the criminal procedure, art. 381 para. (7) of the Criminal Procedure Code respectively, allow the reading, in the trial phase, of the testimony of the witness given during the criminal investigation and taking it into account, if the defendant's counsel did not have the possibility to ask questions to the witness, the substantiation of a sentence of conviction exclusively or determinately of such a testimony, is contrary to art. 6 of the ECHR.

It is not necessary for the defendant's counsel to have actually participated in the hearing and to have asked the witness questions, but it is sufficient that the defense counsel had this faculty

Given ECtHR jurisprudence, we can conclude that the testimony of a witness in which the accused's counsel had the opportunity to attend and interrogate him/her may be the basis for the conviction of the accused, if for objective reasons it was no longer possible to hear him/her in the trial phase.

It is therefore in the interest of the investigating bodies that the counsel of the accused has the effective opportunity to attend the hearings of witnesses, injured persons, co-defendants, as adversarial testimony may substantiate a conviction, unlike the one in which the counsel of the accused did not have the opportunity to participate.

For compatibility between national law and the ECHR, which is common to the case law of the Court, we propose to amend art. 381 para. (7) of the Criminal Code so that the court can take into account the testimony of a witness who cannot be heard in the trial stage and who has been heard in the criminal trial stage, only if there has been a possibility that he/she may be questioned by the accused or his/her defence counsel.

3. Confrontation

Confrontation is an evidentiary procedure, which presents elements of *audi alteram partem*. It shall be ordered only where there is a contradiction between the statements of the persons heard in the same case for their clarification.

The evidentiary procedure can be ordered by the criminal investigation body or prosecutor in the phase of criminal investigation and by the court in the phase of trial. The capacity of the confronted persons is irrelevant, and witnesses, defendants, injured persons, experts may be confronted.

In order for the confrontation to be ordered, several conditions must be met. First of all, the confrontation presupposes the previous existence of some statements, since art. 131 para. (1) of the Criminal Procedure Code provides that only when it is found that there are contradictions between the statements of the persons heard in the same case. Secondly, the confrontation presupposes the existence of contradictions between the statements of the heard persons, the purpose of the evidentiary procedure being to clarify such contradictions.

Although the trial usually involves two people who are confronted, the legal provisions do not limit the number of people who can participate in the confrontation.

The confrontation is an island of adversarial nature in the criminal investigation phase, as the criminal investigation body or the court may allow the confrontational persons to ask each other questions.

The evidentiary procedure of the confrontation is different from a hearing in a number of ways. First of all, the free narration phase is missing. Following the evidentiary procedure, a report is drawn up and the hearing is materialized in a statement.

The hearing covers all aspects of the case, all the circumstances and facts that help to establish the factual situation and finding out of the truth, while the confrontation is carried out only relative to the facts and circumstances about which the previously given statements contradict each other.

In addition to the fact that this evidentiary procedure can stimulate the memory of those confronted, it should also be emphasized that the judicial bodies have the opportunity to capture the reactions of those who were confronted, reactions that may reveal the bad faith of those confronted.[26]

The legislator does not stipulate the obligation of the judicial bodies to audio-video record the confrontation process, but it is recommended, as the reactions of the confronted persons can be studied later.

In the event that the confronted persons make false statements during the confrontation, depending on

[26] E. Stanciu, *Tratat de criminalistică*, 6th ed., revised, Universul Juridic Publishing House, Bucharest, 2015, p. 124.

their capacity in the criminal case, witnesses may be held criminally liable for the crime of perjury, if they make false statements about the essential facts or circumstances, and the injured parties may be held liable for the offense of favouring the perpetrator if the purpose of the false statements is to assist the perpetrator in order to prevent or hinder the investigation of a criminal case.

Given that the defendant may retract his statement throughout the criminal proceedings, in the event that he/she makes false statements during the confrontation, his/her criminal liability cannot be incurred.

The adversarial element of the evidentiary procedure is represented by the fact that the confronted persons, with the consent of the court or of the criminal investigation bodies, can ask each other questions. The purpose of the questions is to find out the truth about the facts and circumstances about which the above statements contradict each other.

The evidence of the confrontation may also be attended by the counsels of the main parties or of the subjects who have made a request for assistance in carrying out any act of criminal prosecution, which adds an extra contradictory nature to the procedure.

4. Expertise procedure

Expertise is an evidentiary procedure of great importance in criminal proceedings, which allows clarification or evaluation of facts or circumstances in a specialized field.

The procedure of ordering expertise in the criminal investigation phase is regulated by art. 177 of the Code of Criminal Procedure and presents several elements of *audi alteram partem*, necessary to find out the truth and to guarantee the right to a fair trial.

In the criminal investigation phase, when the criminal investigation body decides to carry out an expertise, it sets a deadline for which the parties, the main procedural subjects, as well as the expert are summoned, if appointed. The criminal investigation body orders by ordinance the performance of the expertise prior to the summoning of the parties, the main procedural subjects.

The appointment of the expert may be ordered by the same ordinance ordering the performance of the expertise, but also by a separate ordinance, following the summoning of the parties, the main procedural subjects.

The contradictory element presupposes the notice of the parties and the main procedural subjects about the object and objectives of the expertise, but also their right to comment on such questions and the possibility to request their modification or completion. For example, the parties and the main subjects of the proceedings may present their own opinions, and the accused may exercise his/her right of defence by requesting the modification of certain objectives, but also by requesting the order of new objectives in defence.

The parties, the main subjects of the proceedings and the expert, if appointed, shall be informed of the expertise subject and the questions to be answered by the expert, the parties shall be informed of their right to comment, to request the modification or deletion of the objectives or to propose other new questions to be answered by the expert. On the same occasion, the expert shall be informed of his/her obligation to analyze the subject matter of the expertise, to indicate the observations or findings and to state an objective, impartial, reasoned opinion in accordance with the rules of science.

Comments on questions, or requests to amend or supplement them, may be made either orally, the prosecuting authorities concluding a report to that effect, or in writing.

The requests of the parties may be admitted or rejected by the criminal investigation bodies, by reasoned ordinance, which also sets the deadline for the completion of the expert report.

Another adversarial element is the fact that an expert recommended by the parties or the main procedural subjects may participate in carrying out the expertise.

If the parties to the proceedings so request and participate in the performance of the expertise and an expert recommended by them, the prosecuting authority shall take note of that request and shall order by order that the application be admitted and that the expert be appointed, provided that he has as an independent expert, authorized in the respective field and not to be in a situation of incompatibility.

The regulation by the legislator of the right of the parties or the main procedural subjects to appoint a recommended expert to participate in the performance of the expertise, which is an episode of adversarial in the criminal prosecution phase, helps to clarify or assess the facts or circumstances that are important to find out the truth.

Only one person who has the capacity of an expert may be appointed by the parties or subjects to carry out the expertise, the main parties or subjects of the proceedings may not participate directly. Moreover, their participation would be redundant if they did not have knowledge of the specialized field in which the expertise is carried out.

Following the participation in the expertise, the expert appointed by the parties may comment on the technical circumstances in which the expertise was performed, which should be included in the expert report made by the expert appointed by the criminal

investigation body, or may draw up an expert report distinct.

Basically, the appointed expert is a chosen defence counsel of the parties or of the main procedural subjects, who has specialized knowledge in a certain field and who can effectively provide assistance to the parties in the field that represents his area of expertise.

In its case law[27], the European Court of Human Rights has held that an expert report can be difficult to challenge without the assistance of another expert in the field. The court is aware that the judge heard a number of proposed defence witnesses, examined several expert opinions and studied various documents. However, the question whether or not the defence enjoyed equality of arms with the prosecution and whether the trial was adversarial cannot be addressed in quantitative terms alone. In those circumstances, the manner in which the evidence was administered determined that the applicant's trial was unfair. The adversarial elements make the means of proof resulting from the probative procedure of the expertise have a reliable position, and the procedure of disposition and performance of this probative procedure guarantees the right of defence of the accused.

The sanction in case of non-compliance with the right of the parties or main procedural subjects to be informed about the performance of the expertise, to formulate objections and requests, or about the right to appoint an expert to participate in the expertise is the relative nullity and exclusion of the expertise report.

In jurisprudence[28] the violation of the provisions of art. 177 para. (1). (2) and (4) of the Criminal Procedure Code. attracts the exclusion of the expertise report. Failure to comply with the indicated criminal provisions has obviously harmed the rights of the defendant which cannot be removed other than by annulment of the act, deprived of the right to comment on questions that the expert is called upon to answer and on the possibility of appointing an expert party. The mere fact that he could raise any objections, in order to order a possible supplement of expertise, is not enough to remove the nullity of the act ordered in violation of the indicated legal provisions.

5. Conclusions

Consequently, the adversarial episodes in the prosecution phase add to the reliability of the evidence and ensure that the right to defence is respected. The non-publicity of the criminal investigation phase is not incompatible with the episodes of adversarial proceedings, which help to find out the truth and clarify the contradictions.

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[27] ECtHR, Matytsina v. Russia, judgement from 27 march 2014, para. 168-2018.
[28] Braşov Court of Appeal, the conclusion of the judge of the preliminary chamber, no. 48/4.05.2016, unpublished.

REFLECTION ON THE PRINCIPLE OF HUMANISM DURING THE EXECUTION OF CUSTODIAL SENTENCES

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Abstract:

This article aims to present some reflections on the principle of humanism of criminal law but it also considers the essential role the judge has in supervising the execution of judgements. One of the principles underlying the execution of custodial sentences is the principle of humanism. Most important of all is that enforcement of criminal sentences shall always reflect the main purposes of the penalty: the right to re-education and social reintegration of the convicted person. The re-education of offenders and their successful social reintegration should be among the basic objectives of criminal justice system and in accordance with the mandatory rules established by criminal law and criminal enforcement law.

Keywords: *custodial sentence, the judge charged with the supervision of the execution of judgements, food refusal, hearing the detainee.*

1. Introduction

The considerations in this study regarding the way how the principle of humanism should be found in executing custodial sentences starts from the inseparable link between man and law.

No matter how many the regulations are and the legal force they enjoy within the architecture of the national and international legal system is, the role of the man is indisputable, and the manner he understands to exert the responsibilities he was assumed by law will lead him to obtain some favourable results (the awareness of the social danger, re-education of the convicted persons and their preparation for social integration) or some unfavourable one (as abuses, systematic infringements of rights, as well as the enforcements of sanctions disproportionate to the social danger generated by).

On a national level the custodial sentences are regulated by the provisions stipulated in the Criminal Code[1] and resumed in the Law no. 254/2013. Within the first law there is a general presentation in the respect to the essential features and in the second one the option of the lawmaker to make a detailed presentation of the all the aspects related to the implementation and execution of the custodial sentences.

However, the general regulations represented by the Criminal Code and the special regulations represented by the Law no. 254/2013 are not to be regarded as separate and the specialized literature[2] emphasized over this aspect in the respect that they should be regarded from a comparative approach. The legal reference on criminal law is similar to the legal reference of criminal executional in the following respects:

a) both of them include definitions of the concept of "social protection", as well as the rules leading to its compliance;

b) both of them are references of public order, because the branch of criminal law is a branch of public law. The laws regulating this relationship have an imperative character, being the result of the will of the state, not of the person (which situation we could find ourselves in case of some rules with suppletive character);

c) both references present a close relationship with the rule of law, which is an aspect leading to the conclusion that the enforcement of the criminal law and of the executional criminal law it is not facultative, it is free-will applying, when the recipient of the law understands the gravity of the deed committed and the social danger he had generated, or it is enforced by constraint, when the recipient of the law does not understand neither the gravity of the deed or the social danger he had created and has the option to disregard the law.

2. The custodial sentences in Romania – notion and content

According to national law, the custodial sentences are imprisonment and life imprisonment. Both of them benefit from the general regulation of the Criminal Code and of the special regulation contained in the Law no. 254/2013.

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[1] Art. 56-60 Criminal Code.

[2] I. Chiș, A.B. Chiș, *Executarea sancțiunilor penale,* 2nd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2021, pp. 168-169.

From a criminal law approach, the specialized literature[3] has emphasized that the principle of humanism is observed in conditions where the person investigated and subsequently judged for a criminal offence is a human being – which reason for he should be treated with respect and his rights must be respected.

Moreover, the state must have the necessary means to be able to guarantee the protection to the victims of the offences, and equally to ensure the resocialization process of the persons who have committed offences[4].

No matter how the custodial sentence is applied, that is, life imprisonment or the punishment, it is important to have in view that the purposes of their enforcement are the same: to prevent new offences to be committed, and also to build up a correct behaviour in respect to the rules of social cohabitation, towards the developed activities and lawful order, and these are the aspects the legislator chooses to expressly regulate in art. 3 of the Law no. 254/2013. Because the lawmaker understood these are to be expressly stated in the regulatory deed intended to execute the custodial sentences and measures of constraint ordered by the judicial bodies during the trial, hereby we can draw the conclusion that the purposes the punishments are ordered have a special importance and we have to take them into account when their role from an approach of the principle humanism is analysed.

From my point of view, the purpose of custodial sentences must be analysed in consonance with the respect of human dignity. Although this principle is distinctly regulated in art. 4 of the Law no. 254/2013, I consider that the state cannot impose the custodial sentences and measures depriving of liberty, and even less can draw as conclusion that their purposes are fulfilled, as long as the dignity of the person is affected and violated by the methods which the competent bodies understand to put them into execution.

When we analyse the principle of humanism from an approach of the manner this is applied and observed when a person is subject to a punishment or to a measure of constraint, it is important to make reference to the Universal Declaration of Human Rights adopted in 1948.

The specialized literature[5] underlines the essential role and the fundamental character of these provisions and also the importance to accept the Declaration in order to protect and guarantee the rights of the persons who are under custodial sentence.

The applicable international regulatory framework in the field of execution the custodial sentences is completed by the Resolution adopted in the First Congress of the United Nations about prevention of crime and the treatment of delinquents - on August 30th,1955. Within this document clear rules have been established regarding the treatment applied to the delinquents and the following principles have been adopted[6]:

a) the custodial sentence shall be performed within that moral and material conditions meant to ensure the necessary respect toward the human dignity;

b) the rules shall be impartially and without discrimination applied;

c) the purpose of the treatment for persons being under custodial sentence shall such supported to protect their health and their own respect;

d) the individual rights of the detainees are protected;

e) measures against tortures and other punishments or against cruel treatments or inhuman and degrading treatments shall be adopted.

At the level of 1992, in the national legislation was proposed to be introduced a provision according to which "*through the regime and treatment during the execution of the sentence, to the convicted person shall not be caused any sufferance, physical or psychical other than those caused by the punishment itself*"[7].

Unfortunately, disregarding the principle of humanism during the execution of custodial sentences has led to some international sanctions, which Romania started to experience beginning with 2007. The ECtHR in case *Brăgădireanu v. Romania*, in December 2007[8] has delivered a judgment stating that Romania does not fulfil minimal standards necessary to execute the custodial sentence in normal conditions.

The case *Băncilă and others v. Romania*[9] was the most recent conviction Romania has received from the ECtHR, as result of the same improper conditions which the authorities provide for the persons subject to custodial sentence. The Court has find out that the rooms where the detainees were housed in were overcrowded, with insufficient natural light and that the persons under custodial sentence does not benefit from a reasonable amount of food.

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[3] F. Streteanu, D. Nițu, *Drept penal. Partea generală,* vol. I, Universul Juridic Publishing House, Bucharest, 2014, pp. 73-74.

[4] M.A. Hotca, *Manual de drept penal. Partea generală,* 2nd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2020, p. 55.

[5] I. Chiș, *Umanismul dreptului execuțional românesc – acordarea drepturilor în mediul penitenciar*, Hamangiu Publishing House, Bucharest, 2007, p. 7.

[6] *Idem*, pp. 8-9.

[7] I. Oancea, *Drept execuțional penal*, All Publishing House, Bucharest, 1996, p. 27.

[8] M.A. Hotca, *Manual de drept penal. Partea generală,* 2nd ed. revised and added, Universul Juridic Publishing House, Bucharest, 2020, p. 57.

[9] See ECtHR, judgement no. 35045/16.12.2021.

3. The role of the Custody Supervisory Judge – between humanism and efficiency

Returning to the applicable legislation at national level, a very important role is played by the custody supervisory judge. Though his position is well defined in the Law no. 254/2013, and his responsibilities are expressly specified in this regulating document, actually his position is not fully valued.

His role is defined in art. 9, para. (1) of the Law no. 254/2013, where the supervisory judge has to supervise and control the modalities the custodial sentences and privative measures of liberty are executed. Actually, the supervisory judge has an administrative role, and his responsibilities fully confirm this aspect. The supervisory judge resolves the complaints made by convicted persons; participates in commission of release on parole, participates in proceedings of refusal of food, but he also exerts other responsibilities provided by law.

In case of the complaints made by the detainees following the classification they are put into punishment enforcement regimes (maximum safety mode of incarceration, closed mode, semi-open mode and open mode of incarceration), the procedure stipulates that the detainee has the possibility to be listen by the supervisory judge, and I consider that this aspect to some extent violates the principle of humanism.

The legal provision stipulated in art. 32, para. (5) of the Law no. 254/2013 should be modified in respect that hearing to the detainee should not be facultative for the supervisory judge, but an obligation, similar to that instituted in the case of complaints made against the way in which the rights of detainees are violated.

In order to provide a better efficiency to the institution of the supervisory judge, I consider the lawmaker should rethink the legislative architecture regulating this institution and to prioritize the procedure before the supervisory judge. In this situation, the appeal exerted by the convicted person against the decision of the supervisory judge (appeal) would represent a genuine appeal, where the court will be able to administer evidence and will deliver a sentence by which to resolve the object of the appeal.

At present, the whole procedure before the supervisory judge is of administrative nature, in spite of the role he was assigned to by the legal provisions. The role of the supervisory judge can be exploited in a larger extent as long as he has the possibility to directly interact with the detainees and to perceive by his own senses the problems they are confronted with.

Indirectly, through the complaints formulated by the detainees, the lawmaker wanted to significantly reduce not only the number of abuses which the competent bodies could commit during the exercise of their duties, but also the possible errors that could occur on fulfilling the legal procedures.

The principle of humanism is applied and transposed in the case of custodial sentences and the measures privative of liberty also in Chapter IV of the Law no. 254/2013, untitled "*Conditions of imprisonment*", where the lawmaker decided some rule that must imperatively be observed within the relationship of the authorities with the persons deprived of their liberty.

Firstly, transportation of the convicted persons – regulated by the provisions of art. 46 of the Law no. 254/2013, can be performed by certain transportation means provided with adequate conditions for the fulfilment of such a procedure. The transportation means must comply with the minimal requirements for ventilation, lighting, but also for the passengers' safety during the ride, without producing humiliating physical sufferance. One of the humiliating situations the convicts can be transported by violating the principle of humanism is that when a great number of convicts are transported by a special vehicle. They have no seats to sit down, there is no artificial light inside the vehicle, there is no light coming through the windows and the ventilation system is not working. Therefore, the conditions of such a journey is performed by, could be considered as humiliating and equally causing physical sufferance.

Secondly, the transportation means must provide the least exposure of the persons deprived of their liberty to public audience. Usually, the special vehicles are provided with smoky windows that block the view from outside to inside. The discomfort that a person deprived of liberty would feel by exposing him to the public in situation when he is transported from one detention place to another or to siege of the judicial bodies, is consider contradicting the principle of humanism.

Another applicability of the principle of humanism exists within the legal provisions about the lodging conditions for the persons deprived of their liberty. The rooms of the detainees executing custodial sentence must benefit of normal living conditions. Likewise, the number of beds allotted for each room is different according to the execution mode applied to the persons lodged in them. If the convicted person is executing the punishment in maximum safety mode of incarceration, his room shall have one single bed, different from those convicts executing the punishment in closed mode, where the rooms are provided with two beds. In situation of a semi-opened mode or open mode

of incarceration, the detainees can be lodged even 10 in a room[10].

Moreover, even at international level there have been in view the provisions according to which the detainees should benefit of conditions for the execution of custodial sentences. Among the rules included in REC Recommendation (2006) of the Ministers Committee for the states member of European Union of January 11th 2006, hereby I mention the followings:

"a) the windows shall be wide enough to let the detainees be able to read and work under natural light, in normal conditions and to let fresh air to enter, excepting the rooms where there are adequate air-conditioning equipments;

b) the artificial light provided must correspond to the acknowledged technical standards of this field;

c) an alarm system must allow the detainees to contact the staff immediately[11].

It is not unimportant at all, that the regulations according to which the clothes worn by the convicted persons during the execution of the sentence must be respected. The lawmaker established the possibility the detainees to wear civil clothing, uniform not being imposed by the authorities. Such a possibility let the detainees to benefit of the goods received from family or relatives, and therefore the risk that the convicted person could wear humiliating or degradant dress it is excluded.

A special procedure, regulated in art. 54 and the followings of the Law no. 254/2013 is about refusal of food. This distinct regulation regarding the refusal of food indicates the fact that the legislator has understood, on one side the importance of such a measure, which any person deprived of his liberty can appeal to, and on the other side, the need to make a clear distinction within the rights which the convicts enjoy. The refusal of food it is not a right and it is neither qualified as such by the specialized literature, but it grants an increased importance, for which reason were established a number of measures and guarantees for the benefit of the convicted person who avails himself of such a procedure .

As I have previously mentioned, the supervisory judge, among his responsibilities it is also that of participating in the procedure of food refusal. His role is clearly defined in art. 54 para. (8) and para. (9) of the Law no. 254/2013, and according to these one, the supervisory judge has the obligation to listen to the detainee who is in situation of refusal of food (when his decision takes into account aspects related to the mode the punishment is executed, his rights or the appeal exerted against the decisions adopted by the commission of discipline). The supervisory judge can also listen to the convicted person whenever the refusal of food is justified by other causes than those the legislator established the obligation to listen to him.

The fact that the lawmaker has expressly and limitative established a number of situations where listening to the person who is in refusal of food is compulsory, indicates the fact that the principle of humanism is observed in this case too. Making a distinction from the situation where the convicted person is during the period of refusing to feed, the reasons he has chosen such a manner to protest against the authorities need a detailed analysis.

First reason the supervisory judge must listen to a detainee being in state of refusal of food it concerns the mode of his punishment execution. How this was established, as well as the changing of his execution mode, that is, from an inferior one to a superior one or from a superior to an inferior mode, all assume psychological and affective implications manifested by the convict. The rigors of the execution mode can generate severe problems which solving can be done only by the intervention of the medical staff to apply an adequate medical treatment.

The second reason concerns non-compliance with the rights of the detainee. According to the law provisions, the convicted persons benefit of a number of rights – expressly and limiting stipulated, whose violation must lead to sanctions commensurate in respect to the injured social value. The refusal of food can legally occur in the situation his rights are violated by the authorities of the prison, as well as in the situation they are violated by the other detainees.

The third reason is represented by the decisions adopted by the commission of discipline, when it is notified about the incidents the detainees are involved in. The solutions considered to be unjust by the convicted can be attacked with complaint to the supervisory judge, but this procedural approach shall not exclude the possibility for the detainee to start refusal of food.

Regarding this proceeding, it is important to mention how the whole system in the prison is working when one of the convicts starts refusal of food. Beginning with the notification method (*ex officio* notification included) until the measures of putting the detainee under observation during the whole period he refuses to feed, indicates an increased interest on the part of the legislator, taking into account the major implications that can occur with the detainee's life.

Last but not least, I shall also mention the way in which the principle of humanism is reflected in medical procedures the convicted person can benefit from. There are several situations when the detainees need

[10] I. Chiș, A.B. Chiș, *op. cit.*, p. 413.
[11] *Idem*, p. 414.

specialized medical treatments, which cannot be ensured in the penitentiary.

A relevant example is that of the pregnant women during the period of custodial sentence, and the birth happens during this period. According to the law provisions these women receive antenatal care and they are given the possibility to give birth in a medical unit outside the penitentiary.

The role that the mother has in the relationship with her own child, as well as the importance of her presence in the first part of the child's life, led to the adoption of regulations that allow women who have given birth in the penitentiary to be able to take care of their child until the age of one year, unless she is fallen of parental rights.

4. Conclusions

The principle of humanism is one of the fundamental principles that must be respected during the execution of the custodial sentence. This is expressly reflected in the regulations concerning the rights of the convicted persons, but this principle is present also in the other rules by which the lawmaker tried to establish efficient mechanism aimed to combat possible abuses that could be done both by the authorities and by other detainees too.

Failure to comply with an internationally recognized principle incur sanctions for the states in respect with the ECtHR finding irregularities that create unfair conditions for the execution of custodial sentences. On one hand, the states must insure themselves to have efficient criminal rules, leading to the accomplishment of a policy able to reduce the criminal phenomenon, and on the other hand, that convicted persons benefit from adequate means and procedures for the execution of custodial sentences, without prejudice to their health, dignity or integrity.

Within the present regulations, the role of the supervisory judge proves to be inefficient, because the whole set of procedures that he must follow in a detention place are not harmonized with the European standards on the execution of custodial sentences.

In situation where the supervising judge will exercise those duties provided by law and will have the necessary means to be effectively involved in the problems that the persons being in custodial sentence claim, then the number of abuses will decrease considerably – and this aspect it will also lead to the reduction of the reasons that currently attract convictions for Romania, as a result of the violation of the ECHR.

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CRIMINAL LIABILITY IN THE CASE OF VENDORS OF SOFTWARE AND HARDWARE FURTHER USED IN CYBERCRIME ACTIVITIES

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Abstract

In the recent years have been noticed an ascending trend in commercialization of spyware products, either for lawful government use in combatting crimes or national security threats, or for people interested in their own electronic protection or monitoring others placed under their care or legal responsibility.

While the use of this kind of wiretapping devices and programs may be legitimate under the criminal procedural laws, for example in collecting electronic evidence, digital investigations or prosecuting crimes, the illegal situations are often linked to the violations of human rights, crimes against confidentiality, integrity and availability of data and systems, infringing privacy and data protection, infringing intellectual property rights, data breaches, frauds, domestic violence, intimate partner abuse, and many more. Most of the legislations simply address the criminal liability of the final user of such devices or applications, which appear to be clear enough based on the final results of their illicit behavior, but the vendors seem to be let outside the criminal law or placed in a grey zone of legal interpretation.

Taking into consideration the scope of spyware devices and programs that results in various forms of direct or indirect (personal) abuse of another, it is important to assess the legal impact of this kind products in both social and economic relations and how the marketing of such items contributes to the further commission of crimes.

The paper thus aims at identifying the possible legal implications for the individuals and companies that deal with producing, adapting, selling, distributing or making available software applications, computer programs, scripts or hardware devices and equipment that may further be used unlawfully, without right, for infringing human rights or for performing cyber-attacks against people, businesses, administration or ICT infrastructures of any kind, and finding the best suitable legal reasons that sustain a possible criminal liability of the creators/vendors.

Keywords: *criminal liability, illegal operations, criminal law, cybercrime, spyware, mobile surveillance.*

1. The context of computer programs and devices being used for surveillance

What do names like Pegasus[1], Candiru[2], FinFisher[3], Galileo[4], mSpy, PhoneSherrif[5]and FlexiSPY, Spyera Qustodio, SpyBubble, TheWiSpy, Spyic, FamiSafe, Cocospy, MobileSpy.at, uMobix, eyeZy, Hoverwatch, XNSPY, pcTattletale, Minspy, Spyier, MobiStealth, iSpyoo have in common? They are parts of a large worldwide business enterprise dealing with producing and distributing software and hardware for eavesdropping, monitoring, data interception, wiretapping and generally all kind of electronic surveillance.

The clients? Mostly governments, either democratic or so-called dictatorial. But, also, ordinary citizens (employers, frustrated employees, teachers, students, parents of minors, legal guardians of minors or disabled people, work colleagues, intimate partners, etc.), driven by nefarious thoughts or willing to protect themselves or their family members from the online threats.

These products are often sold as for serving the law (in the destination countries), for law enforcement and national security purposes mainly. Yet, recently, strong allegations showed up and even decent proofs about such products being used for fulfilling other objectives, mainly linked with the infringing (digital) rights and unlawful surveillance of different individuals (politicians, businessmen, journalists, human rights activists etc.).

"Spyware" has been defined by the US Trade Commission as "software that aids in gathering information about a person or organization without their knowledge and that may send such information to another entity without the consumer's consent, or that asserts control over a computer without the consumer's knowledge"[6].

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[1] Notorious spyware program created by the Israeli company NSO Group from Tel Aviv, being responsible for infecting and eavesdropping mobile phone (iPhone or Android) belonging to politicians, human rights activists or journalists from more than 45 countries.

[2] Surveillance software designed for Windows OS, developed by an Israeli company with the same name.

[3] Surveillance software developed and commercialized by UK-German company Gamma International.

[4] Spyware software developed by Hacking Team company.

[5] Spyware software developed by the US company called Retina X Studios LLC.

[6] https://www.ftc.gov/sites/default/files/documents/reports/spyware-workshop-monitoring-software-your-personal-computer-spyware-adware-and-other-software-report/050307spywarerpt.pdf.

Although the definition is too general, we may exclude the situations when a code/program/script is collecting information about a user, but in the form of firmware or software updates, usage of devices (ex. Internet of Things), online behavior on websites (ex. cookies) or even social or commercial platforms (where a certain level of user consent is necessary).

Documenting the products (both software and hardware), one could notice the disclaimer the selling companies are making visible to anybody that may question the legality and legitimacy of the whole process of producing such applications and devices to the selling, distributing or making available to the interested persons.

In the vast majority of the cases, these companies claim that their products help governments and security services to fight against violent crimes, organized crime, terrorism and threats to national security. In the absence of relevant official statistics provided by governments or law enforcement agencies, we may suppose that this is true and such digital surveillance products really do the job they were created for.

For all that, no one may ascertain for sure that SW and HW designed for the surveillance of the terrorists or organized crime members are not sold, distributed or made available in any form to private entities or interested (and financially powered) individuals.

We have to recognize that this kind of software and devices fill a gap where security services or law enforcement agencies are defeated by the cutting-edge technologies and strong encryption facilities now terrorists or organized crime members are using. Simply, (cyber) criminals and terrorists have better technology for encrypting than investigators have to decrypt them[7].

Authors say that commercial spyware has grown into an industry estimated to be worth twelve million dollars, while it is largely unregulated and increasingly controversial[8].

Technically, irrespective the product is a keylogger, a trojan or a Remote Access Tool (RAT), they have almost the same features and provide specific services of accessing a device or a computer system, intercepting and reading computer data (emails, chats), capturing relevant data (usernames, passwords, card and account details, screenshots), eavesdropping the calls, tracking terminal GPS location, exfiltrating data, remotely switch on the device's microphone, monitoring the target's activity on social networks, recording the user's internet browsing history and much more.

Depending on their complexity, these surveillance products are installed in the target device (computer system, smartphone, tablet, PDA etc.) usually through Phishing attacks, other Social Engineering tactics, tools and procedures (TTP), "0-day" vulnerabilities or by exploiting human misconduct or lack of security "hygiene" related to the use of electronic devices or Internet.

There are many reasons one would like to buy, use and control such spy-enabled devices or computer programs, ranging from legitimate ones, such as tracking a stolen or lost smartphone, monitoring a child or a disabled relative or even tracking the incoming and outgoing calls or messages[9] and up to illegal ones, such as spying on a business partner, a wife, a girlfriend or a neighbor, a competitor, a boss or a designated target person (a journalist, a human rights activist, a political opponent and so).

The number of worldwide customers varies from ten-thousands to millions[10]. And the prices range from tens of euro (US dollars) to thousands (per month, if with subscription), depending on the features, stealth and capabilities.

There are public insights that various governments facilitated this spyware industry big revenue over time, in some cases even offering permissions (license) for chosen vendors to sell their surveillance products abroad, despite indicators of further possible human rights violations or other personal abuses.

Most of such products are advertised on publicly available commercial platforms, online markets, mobile stores, security forums, while some of them are imported, distributed, sold or made available in covert ways (but not necessarily out of the law), through closed commercial links, usually involving government agencies, prosecutor's office, police forces or security services.

2. Legal provisions on illegal operations with computer data, applications and devices as acts of commerce

Based on the legal provisions of the Council of Europe "Budapest" Cybercrime Convention of 2001[11], most of the European (and even non-European) countries created, modified, or updated their own criminal laws including different crimes against

[7] https://www.nytimes.com/2022/01/28/magazine/nso-group-israel-spyware.html.

[8] See Ronan Farrow, *How Democracies Spy on their Citizens*, The New Yorker, 18 April 2022, available at https://www.newyorker.com/magazine/2022/04/25/how-democracies-spy-on-their-citizens (accessed on 02.05.2022).

[9] https://www.softwaretestinghelp.com/phone-spying-apps/.

[10] mSpy product is reportedly as having nearly 2 million active customers.

[11] Available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561.

confidentiality and integrity of data and computer systems, with specific references to the illegal operations with computer data, applications and devices.

Under art. 6 – misuse of devices, the CoE Convention on Cybercrime urged states "to adopt such legislative and other measures to establish as criminal offence, when committed intentionally and without right:

a) the production, sale, procurement for use, import, distribution or otherwise making available:

- a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5;
- a computer password, access code or similar data by which the whole or any part of a computer system is capable of being accessed"[12].

This proposal of a distinct legal provision criminalizing the misuse of devices and programs has further been adopted in the substantive criminal law of many countries, such as: Austria (Section 126c of the Criminal Code), Belgium (art. 259bis, art. 314bis, art. 550bis, art. 550ter of the Criminal Code), Bulgaria (art. 319e of the Criminal Code), Canada (art. 190(1) and art. 342.2 of the Criminal Code), Estonia (art. 216^1 and art. 284 of the Criminal Code), France (art. 323-3-1 of the Criminal Code), Germany (art. 202c of the Criminal Code), Finland (chapter 34, sections 9a and 9b of the Criminal Code, and sections 6 and 42 of the Data Protection Law), Hungary (art, 300/C and art. 300/E of the Criminal Code), Lithuania (art. 198-2 of the Criminal Code), Portugal (art. 3 and art. 6 of the Law no. 109/2009 on the Cybercrime), Romania (art. 365 of the Criminal Code), Spain (art. 400 and art. 536 on cybercrime of the Criminal Code), and United States of America (18 US Code, art. 2512 on the manufacturing, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited).

Other legislations seem to be even stricter in dealing with interception or electronic surveillance devices and programs, for example the Canada Criminal Code and the New Zealand Crimes Act of 1961 (part 9A), that specifically mention that "possessing" (CA), "selling" (CA, NZ), supplying (NZ) or even "purchasing[13]" (CA) of interception devices is an offence[14], thus placing *ab initio* the commercial conduct as a crime.

Moreover, the Section 216D(1) of the same law makes it an offence "to offer for sale or supply or to offer or invite or agree to sell or supply to any person an interception device unless this is done for a lawful purpose as described in Section 216D(2)"[15].

More or less, almost all the above legal provisions have certain features in common, such as:

- the reference to products like: computer programs, applications, computer data, devices etc.;
- the products are either prohibited *de jure*, or their use may be unlawful, without right, without a legitimate reason etc.;
- the products are described as being designed, made, created, produced, manufactured, adapted etc. as for being used in a sort of specific operations, like communication intercepting[16] (US), committing an offence or a crime[17] (FR), infringement of the secrecy of telecommunications[18] (AU), to introduce a set of executable instructions…. to produce any of the non-authorized actions[19] (PT), which allow to get access to a computer system with the intention of committing crimes[20] (EE);
- the principal behavior prohibited by the law consists of specific verbs like produce, supply, distribute, make available, possess, detain, obtain (for use), offer (for sale), dispose of, introduce, sell, import, make accessible, manufacture, advertise, hold for commercial purposes etc. referring mostly to legitimate commercially-related operations;

In some of the national legal provisions, the commercial conduct represents an offence simply if committed *intentionally*, *without right, without legitimate reason* etc., but in other legislations, the commercial operations with such devices and programs constitute an offence only when put together with the real intention of the offender (ex. *knowing that the device has been used or is intended to be used to commit a crime*[21]), that is creating a computer system or a computer data-related harm to the victim. Other states preferred to join the two aspects of illicit conduct with (or misuse of) devices and programs, namely the

[12] Art. 6, CoE Convention on Cybercrime (ETS no. 185) available at https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=185 accessed on 26.04.2022.

[13] See art. 190 (1) of the Criminal Code of Canada, available at https://laws-lois.justice.gc.ca/eng/acts/c-46/page-28.html#docCont

[14] https://www.lawsociety.org.nz/news/lawtalk/issue-834/criminal-liability-for-mobile-phone-spying-in-nz/.

[15] *Ibidem.*

[16] See 18 U.S. Code chap. 2512, available at https://www.law.cornell.edu/uscode/text/18/2512, accessed on 26.04.2022.

[17] See art. 323-3-1 Code Penal Francais, available at https://www.legifrance.gouv.fr, accessed on 26.04.2022.

[18] See Section 126c of the Austrian Criminal Code, available at www.coe.int/cybercrime/documents, accessed on 26.04.2022.

[19] See art. 3, 6 and 7 on the Portugal Criminal Code, available at https://www.anacom.pt/render.jsp?contentId=985560, accessed on 26.04.2022.

[20] See art. 2161 of the Estonian Criminal Code, available at https://www.riigiteataja.ee/en/eli/522012015002/consolide, accessed on 26.04.2022.

[21] See art. 342.2 of the Criminal Code of Canada, available at https://laws-lois.justice.gc.ca/eng/acts/C-46/section-342.2.html.

"absence of permission" or "the absence of right" and the harmful bunch of actions against the victim.

We acknowledge that the vast majority of the legislations provide general indicators in describing the surveillance devices or programs (ex. *intercepting device* or *a device/computer program, designed or adapted primarily for the purpose of committing a crime* etc.), thus not offering a comprehensive definition that may cover all the situations from the real life.

For example, in such kind of broad definition, one could understand that a *packet sniffer* may fall under the prohibition of the law, whereas this device/computer program is in reality designed for helping internet service providers or network administrators to identify data traffic congestions, anomalies or to filter suspect or malicious content.

This is why, being so general, the legal provisions may be very restrictive in some occasions, while permissive in others, situation that could represent an advantage for interested persons.

The issue is very complicated due to the fact that spyware or other monitoring or surveillance devices or programs are of dual-use, meaning that they may be used for both legitimate and illegal purposes, and often only the unlawful behavior of the spyware operator could bring the legal question upon the vendor itself too.

3. The right of the seller vs. the rights of those being abused by the seller's products – possible criminal indictments

As we discovered studying a lot of commercially available surveillance products, most of the spying devices or computer programs are properly (and even carefully) advertised as helping people to protect themselves, their (electronic) property or their families (while online). Others simply claim that using the products may be legal if the target person expresses its consent for the monitoring.

It is true that on the market one can find different types of surveillance devices and programs, and depending on the legislation of the country the producer (vendor) is based, the products are commercialized in "full-feature" forms (more invasive) or in the "lite" ones (less intrusive).

There has also been observed that the vendors also make different statements on their commercial platforms, indicating that the products are capable of performing actions that may be intrusive (in the privacy of another) or regarded as illegal due to the power to facilitate an unlawful behavior of the client. It is obvious that such a disclaimer used by the vendor represents just a self-declaration of non-liability against the (criminal) law.

In other instances, researchers found that the vendors are using a "curated list of positive customer testimonies which outline how spyware provided succor to its users and solved relationship problems"[22].

Moreover, analyzing the marketing aspect round the spyware industry, one could also notice the index terms, such as "spyware", "tracking", "monitoring", "surveillance", "spouse monitoring", "employee tracking" etc., used by all the producers in order to manipulate the consciousness of the target customers, based on their internal intellectual desirability or mental predisposition, into determine them to purchase their products.

As we all see, there are numerous vendors that produce, import, distribute or make available, in any form, software applications or devices further used in (cyber) criminal activities, and thus, in doctrine as well as in judicial practice, the situation raised the question whether such a particular vendor should be or not indicted for participating in the commission of any of those (cyber-related) crimes.

App stores and web platforms that enable selling spyware programs to consumers also play a role as intermediaries that can facilitate the sales of stalkerware (surveillance/monitoring kits) through their platforms[23]. It was found that, "despite active efforts made by Apple and Google to enforce app developer policies and agreements against such apps, research shows evidence of a continued, albeit decreased, presence and availability of stalkerware on popular app stores"[24].

We continue[25] to state that, the vendor may have a criminal liability, because, acknowledging the technical details and characteristics of the software applications, computer programs or the electronic devices produced, imported, distributed or made publicly available – meaning that they could (or should) be used in cyber-related criminal activities, against

[22] D. Harkin, A. Molnar, E. Vowles, *The commodification of mobile phone surveillance: An analysis of the consumer spyware industry*, Crime, Media, Culture: An International Journal, 2019, available at https://journals.sagepub.com/doi/full/10.1177/1741659018820562 (accessed on 30.04.2022).

[23] See examples www.top10spyapps.com, www.cellspyapps.org, www.bestphonespy.com.

[24] C. Khoo, K. Robertson, R. Deibert, *Installing fear: A Canadian Legal and Policy Analysis of Using, Developing, and Selling Smartphone Spyware and Stalkerware Applications*, Citizen Lab Research Report no. 120, 2019, available on https://citizenlab.ca/2019/06/installing-fear-a-canadian-legal-and-policy-analysis-of-using-developing-and-selling-smartphone-spyware-and-stalkerware-applications/ (accessed on 30.04.2022).

[25] M. Dobrinoiu in V. Dobrinoiu and colab., *New Criminal Code Commented*, 3rd ed., Universul Juridic Publishing House, Bucharest, p. 908.

computer data and computer systems or against individuals – they have the intellectual capacity to pursuit, to foresee or to accept a criminal outcome.

Notwithstanding their initial legal disclaimer about the absence of liability, the vendors may not intend to determine someone to commit a crime while buying one of their monitoring products, but, in many cases, it was proven that they acted in a way of actually promoting the nefarious capabilities of such products, highlighting the privacy-intrusive features that changed the client's initial mental resolution (ex. to monitor his child online activity) to another mental resolution that resulted in a crime.

Analyzing the *modus operandi* in what regards the commercial behavior of the spyware vendors, researchers found that "the advertised level of data-monitoring is highly invasive, offering clear scope for disproportionate and abusive surveillance"[26] of individuals.

According to some other opinions, the vendors should not be held legally liable due to the absence of their guilt. And this may be the case of a knives or axes vendor which cannot be indicted for a manslaughter crime committed by one of his clients.

In all these particular scenarios from the objective reality, we notice that the law does not forbid the producing, the selling, the import or the distribution of any such items or tools (knives, axes, firearms, batons) that may be one day used in the commission of a violent offence.

We have to agree with other authors stating that "the surreptitious capabilities of the spyware program are what render the sale of the program illegal, even if it were theoretically possible that the program could be used in a manner that provides the individual user with a defense"[27].

Per a contrario, as CoE Convention on Cybercrime recommended (as from 2001) and many states already adapted their legislations accordingly, national legislators have chosen to criminalize, even slightly different, the commercial activities with devices or computer programs that may be used in the commission of (other) cyber-related crimes and various other offences.

Moreover, in reality, the subjective implication (*mens rea*) of the vendors (CEO, CIO, security staff, programmers etc.) of such surveillance products in the crimes further committed by their clients (most of them against the availability and confidentiality of computer data and systems) consists of intent, either a direct intent or an indirect intent. It is thus excluded the negligence.

All the scenarios and stories we detailed above, and many other incidents and cases from the judicial practice show that the creators/vendors produce many of such software applications or electronic devices with a dual final outcome: one legal – when the product is going to be used according to the laws of the nations where they are registered or the buyers are registered with, and also one illegal – when the product is designed to (help to) commit a crime, to infringe human rights, to unlawfully perform surveillance etc.

The criminal intent results from the creator/vendor's inner evaluation of the (real or eventual) illegal result of his actions, and the actual behavior or the creational/commercial-type activities that he further performs related to the spyware product, from the early stages of project, design, architecture, technical characteristics and features, capabilities enabled, functions to be provided and the presence or the lack of safeguards for the target (the individual whom the program would eventually be used against), and more important the marketing and advertising tactics meant for the "offer" to meet the (unlawful) "need".

Only this way, the "dual-use"-related defense of the vendor may be rejected as inadmissible, and his participation in the further commission of a crime with the use of his spyware product will have the meaning of criminal liability.

Criminal liability may also occur when the vendor fails to act under its legal duty (established by the criminal, civil, commercial legislation of a nation county), while he is proven as being reasonable able of doing this. But this means that there should be created new legal mechanisms (other than criminal law provisions) that may coerce or determine the companies to conduct their commercial activities in certain (ethic) ways, obligations that may be opposable to them.

4. Conclusions

Whether deployed entirely "legitimately" or illegally, spyware has the capacity to threaten persons and lives, while fueling corrosive relationships between parents and children, intimate partners, employees and employers, citizens and governments, in addition to the damage the spyware can provide when used against specific targets, such as activists, journalists, politicians or commercial actors.[28]

Although there are numerous legislations that criminalize (when intentional and without right) the making, producing, possessing, selling, offering (for

[26] D. Harkin, A. Molnar, E. Vowles, *op. cit*.
[27] C. Khoo, K. Robertson, R. Deibert, *op. cit*.
[28] See D. Harkin, A. Molnar, E. Vowles, *op. cit.*

use or for sale), purchasing, distributing or making available devices or computer programs that enable the commission of (mostly cyber-related) crimes or violations of privacy and human rights, just few cases were brought to the courts of justice.

Inexplicably, despite numerous reports in media and scientific researches about the unlawful trade and use of spyware programs or devices, there is a reluctancy from the judicial side in criminal investigating and prosecuting this kind of offence, with few exceptions[29].

In our conclusion, the creator or the vendor of spyware programs or devices may face criminal liability in all the legislations analyzed herewith, but only if it could be demonstrated that it has conducted its commercial activities in such a way that the spyware product was created, developed, advertised, distributed or sold with the intent to be used by the buying operator as a necessary and indispensable tool for the commission of a (computer-related) crime or an offence against life, physical or mental integrity, liberty, privacy, other human rights or general safety of another individual.

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- Criminal Code of Spain;
- Criminal Code of the United States of America.

[29] See Man Pleads Guilty for Selling 'StealthGenie' Spyware App and Ordered to Pay $500,000 Fine https://www.justice.gov/opa/pr/man-pleads-guilty-selling-stealthgenie-spyware-app-and-ordered-pay-500000-fine.

MEDICALLY ASSISTED SUICIDE AT THE LIMIT BETWEEN CRIME AND LAW

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Abstract

One of the most debated topics in the world is the legalization or non-legalization of euthanasia and medically assisted suicide, a fact that has given rise to many questions starting from extreme situations, whom both legislators and health professionals, as well as patients tried to give answers of the most diverse seemingly, but which have in view only a few attributes that are reduced to ethics, morality, religion. This analysis is therefore interdisciplinary, for the elucidation of which it is necessary that professionals of several professions express their point of view. Last but not least, we appreciate that the one who must be the center of the analysis is the patient, the one who is in a desperate and unsolved medical situation and needs this last release.[I]

Keywords: *medically assisted suicide, right to die, law, criminal liability.*

1. Brief considerations on the etymology of the word „euthanasia"

According to the explanatory dictionary of the Romanian language[1], the word „euthanasia" has its origins in the Greek „I" which means *good*, and „*thanatos*" which means *death*. Thus, we can define euthanasia as a *painless death*, as well as *the method of provoking (by the doctor) a painless early death to an incurable patient, in order to end a long and hard suffering.*

Starting from these origins, the Romanian legislator criminalized from a criminal point of view, euthanasia as, according to the provisions of art. 190 of the Criminal Code, *the murder committed at the explicit, serious, conscious and repeated request of the victim who was suffering from an incurable disease or a serious illness certified medically, causing permanent and unbearable suffering*. However, we will frame this method under the aspect of a common medically assisted suicide and in the provisions of art. 191 Criminal Code as the act (...) of facilitating the suicide of a person by the help that a doctor would give to a patient.

It is important to note that there are two kinds of euthanasia. Namely, active by committing acts with a view to causing death such as decommissioning of a device, administration of a drug in a lethal dose, administration of lethal dose of a medicine, as a result of a repeated request and a long reflection of a patient. Passive euthanasia involves not giving or stopping the treatment knowing that this will result in the death of the patient in question, especially if there is a possibility of keeping a patient alive through aggressive and unnecessary treatment - a practice otherwise condemned by medical ethics, the more the person in question refused this treatment.[2]

2. Incidental medical legislation in Romania

From the point of view of medical legislation, there are two instruments to be listed, namely the Romanian Code of Medical Deontology[3] and Law no. 46/2003 on patient rights.[4]

With reference to the Romanian Code of Medical Deontology, we present a first observation, namely that it does not include precise references regarding the doctor's obligation to prolong the patient's life in any circumstance on one hand, and on the other hand we note the provisions of art. 22 letter a) and of art. 11 of the above-mentioned instrument, which, together with those in the law on patient rights, we reproduce below.

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[1] Romanian Language Dictionary, 2nd ed., Univers Enciclopedic Publishing House, Bucharest, 1996, p. 352.

[2] L.M. Stănilă, *Drept penal partea specială, Infracțiuni contra persoanei, Infracțiuni contra patrimoniului,* Universul Juridic Publishing House, Bucharest, 2018, p. 22.

[3] Published in the Official Gazette of Romania no. 298/7 May 2012.

[4] Published in the Official Gazette of Romania no. 51/29 January 2003.

Art. 11. Granting and withdrawing consent (Romanian Code of Medical Deontology)

(1) No health intervention may be performed until the data subject has given his or her free and knowingly consent.

(2) Under the same conditions, the consent may be withdrawn at any time by the data subject.

(3) The provisions regarding the withdrawal of consent are also valid with regard to the consent expressed, in accordance with the law, by a person or institution other than that person.

Art. 22. Non-deontological facts and acts (Romanian Code of Medical Deontology)

The following acts, in particular, are contrary to the fundamental principles of the medical profession:

a) practicing euthanasia and eugenics[5]; (...)

Art. 13. The patient has the right to refuse or to stop a medical intervention assuming, in writing, the responsibility for his decision; the consequences of refusing or stopping medical treatment must be explained to the patient. *(Law no. 46/2003 on patient rights)*

Art. 14. When the patient cannot express his will, but an emergency medical intervention is necessary, the medical staff has the right to deduce the patient's consent from a previous expression of his will. *(Law no. 46/2003 on patient rights)*

Art. 15. In case the patient needs an emergency medical intervention, the consent of the legal representative is no longer required. *(Law no. 46/2003 on patient rights)*

Art. 16. If the consent of the legal representative is required, the patient must be involved in the decision-making process as far as his understanding ability allows. *(Law no. 46/2003 on patient rights)*

From the analysis of the legal provisions given above, especially those that regulate patient rights, we find a situation that may arise in practice, namely when the patient is unable at a particular time to express his will in his process of treating one/some condition he expressed in the past a number of different views on his willingness to intervene urgently to save his life.

The question arises to which option should the doctor choose in this case, or more precisely what and how exactly this agreement of the patient should be deduced.

We appreciate that the wording of this text of the law should be revised because at present it is susceptible to different interpretations to the detriment of both the doctor and the patient.

We also appreciate the fact that the provisions of art. 15 of the same law can create confusion in practice as long as, however, for an emergency intervention the doctor can act as he considers without the consent of the legal representative.

So, reading these provisions, we notice how the two actually differ (art. 14 from art. 15) because they rather regulate similar situations separately. Of course, a concrete review and analysis based on the cases of doctors who have faced such situations would only be welcomed, and thus would accurately address possible cases of malpractice occurring from the application of these provisions in the treatment / healing / rescue of a patient process.

Although, it is still important to make the same statement, as other researchers that, euthanasia is the deliberate act of ending a patient's life with the intention of ending his suffering. However, medically assisted suicide is a *distinct euthanasia procedure* and consists of **self**-inflicting the death (self-killing) of a patient with the direct help of a doctor. The legalization of euthanasia, but also of medically assisted suicide, provokes heated ethical, medical, legal and religious debates, practically questioning the extent to which the protection of the life right must be exercised.[6]

3. Brief considerations about „suicide"

We note that this term was introduced into the Oxford Dictionary by the doctor and philosopher Walter Charleton (1619-1707). However, it was actually used in France in 1737 by the abbot Desfontaines (1685-1745), originally a historian and journalist.[7]

According to the Explanatory Dictionary of the Romanian language, this word comes from the French language, from the verb *suicider* which translates to *taking one's own life, to kill oneself.* As pointed out by experts, two words actually merge into one, namely *self*, that is, actually the self, the physical, spiritual entity in particular, and *to kill*. Likewise, *the suicider* is the one who took or only tried to take his own life.

Studying the Dictionary of Psychology we find the definition of suicide as being a specific *form of deviant self-destructive behavior, which does not aim so much death, self-destruction[8], but especially the escape from life, the way it presents itself in the given*

[5] According to DEX, *eugenia* is the discipline that study the practical application of the biology's heredity in the genetic improvement of the individual; the set for methods that underlie this discipline.

[6] L. Stănilă, *Therapeutic obsession. Pros and cons of euthanasia – new challenges of Romanian legislation*, published in Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007- 201 3.

[7] T. Butoi, V. Iftenie, A. Boroi, M. Costescu, A. Butoi, C. Iftenie, *Sinuciderea, subtila enigmă a unui sumbru paradox*, ProUniversitaria Publishing House, Bucharest, 2019, p. 9.

[8] P.P. Neveanu, *Psychology Dictionary*, Albatros Publishing House, Bucharest, 1978, p. 661.

conditions. The Health Dictionary[9] also offers a definition by which suicide is the disorder of the conservation instinct, by which the person destroys himself, choosing a physico-chemical method (hanging, drowning, electric shock).

Another definition is given by the World Health Organization, as it is states in the Dictionary of Psychiatry[10], *so suicide is the act by which an individual seeks to destroy himself, with more or less genuine intention to lose his life, being more or less aware of his reasons.*

From a criminal point of view, as mentioned above, the incidental provisions regarding suicide are those stipulated by the provisions of art. 191 of the Criminal Code, as well as those of art. 218 para. (4) Criminal Code and art. 219 para. (3) Criminal Code, which we will report below:

Art. 191 Determining or facilitating suicide

(1) The act of determining or facilitating the suicide of a person, if the suicide took place, shall be punished by imprisonment from 3 to 7 years.

(2) When the deed provided in para. (1) was committed against a minor aged between 13 and 18 years or against a person with diminished discernment, the punishment is imprisonment from 5 to 10 years.

(3) The determination or facilitation of suicide, committed against a minor who has not reached the age of 13 or against a person who could not realize the consequences of his actions or inactions or could not control them, if the suicide took place, is punishable by imprisonment from 10 to 20 years and the prohibition of the exercise of certain rights.

(4) If the acts of determination or facilitation provided in para. (1)-(3) were followed by a suicide attempt, the special limits of the punishment are reduced by half.

Art. 218 para. (4): If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 18 years and the prohibition of the exercise of certain rights.

Art. 219 para. (3): If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.

Of course, these regulations cannot miss the appreciation that the criminal law specialist Vintilă Dongoroz made in his paperworks, according to which, *suicide is the act by which a lucid man, **being able to live**, causes his own death, out of any ethical obligation.*

Analyzing the above provisions, it appears that medically assisted suicide is that type of suicide in which a medical staff intervenes for medical reasons, of course, the quality of life becoming non-existent.

For our scientific approach, which only involves analyzing the national and international legal framework in which this type of suicide can take place without the intervention of criminal liability, it is important to emphasize, as other authors did, that, by incriminating the murder at the request of the victim, "the legislator responds to an effervescent controversy regarding the availability of the life right and the legal significance of active euthanasia as a particular form of murder on demand"[11].

We can observe that the adopted text of the law had as a source of inspiration the provisions of art. 468 Criminal Code 1936, but also the dispositions of other states such as Germany - para. 216 German Criminal Code., Austria - para. 77 Austrian Criminal Code, Spain - art. 143 para. (4) Spanish Criminal Code, Portugal - art. 134 Portuguese Criminal Code, Switzerland - art. 114 Swiss Criminal Code, Norway - para. 235 Norwegian Criminal Code [12]. We also appreciate the fact that by analyzing the typicality of the deed, the text moves away from a simple murder at the request of the victim and is, as already mentioned, **an attenuated form of active euthanasia.**

4. In pursuit of our scientific purpose, a few references to the jurisprudence of the ECtHR

Thus, the ECtHR established in its decisions two categories of cases, on one hand those in which the complainants or their relatives claimed the right to die under the Convention, and on the other hand the cases in which the complainants challenged the administration or permanent cessation of a treatment.

We also list by way of example some cases in which the plaintiffs invoked incurable diseases claiming the right to a dignified death: the case of Sanles Sanles v. Spain, the plaintiffs invoking art. 6, 8, 9, 14 of the Convention; Pretty v. the United Kingdom, the applicants relying on art. 2, 3, 8, 9 and 14 of the Convention; Haas v. Switzerland, the applicants relying on art. 8 of the Convention. In all these cases, the European Court did not find any right to be infringed[13].

With regard to the *right to life*, the ECtHR has emphasized that *the recognition of this right cannot*

[9] *Health Dictionary*, Albatros Publishing House, Bucharest, 1978.

[10] O. Gorgos, *Psychiatry Dictionary*, vol. II, Medical Publishing House, Bucharest, 1988.

[11] S. Bogdan, D.A. Șerban, G. Zlati, *Noul cod penal. Partea specială. Analize, explicații, comentarii – perspectiva clujeană*, Universul Juridic Publishing House, Bucharest, 2014, p. 33.

[12] Please see V. Dobrinoiu, N. Neagu, *Drept penal. Partea specială, Curs Universitar*, Universul Juridic Publishing House, Bucharest, 2014, p. 26.

[13] https://www.echr.coe.int/Documents/FS_Euthanasia_RON.pdf.

confer a diametrically opposite right, namely the right to die; that it cannot create a right to self-determination according to which an individual could choose death instead of life.

Moreover, the Court has ruled that *states nevertheless have a margin of appreciation in regulating euthanasia or medically assisted suicide*. This observation comes from the Court's conclusion that "in the medical field, refusal to accept a particular treatment could inevitably lead to a fatal outcome, but the imposition of medical treatment without the patient's consent, if he is an adult and in complete mental faculties, would be equivalent to a violation of the physical integrity of the person concerned, which may call into question the protected rights of the patient, art. 8 para. (1) of the ECHR. As it has been accepted in domestic case law, a person may claim the right to exercise his or her choice to die, refusing to agree to a treatment which could have the effect of prolonging his or her life. The dignity and liberty of a person represent the essence of the Convention itself. Without denying in any way the principle of the sacred character of life, protected by the ECHR, the Court considers that the notion of quality of life acquires meaning from the perspective of art. 8. In a time when we are witnessing an increase in the complexity of medicine and life expectancy, many people fear that they will not be forced to stay alive until a very old age or in a state of advanced physical or mental degradation, in contrast to the firm perception they have of themselves and their personal identity[14]".

What is also important to mention here is the Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe *regarding the protection of the human rights and human dignity of the incurable and dying people*[15], sounding the alarm for Member States to consider creating a legal framework to protect these categories of patients from dangers or fears such as the artificial prolongation of the disease course.

Furthermore, it is recommended that the dignity of terminally ill or dying patients be respected by advocating a ban on the intentional suppression of their lives, outlining the fact that a person's desire to die is not a legal ground for the death caused by a third person.

Of course, our scientific approach has to present some references to euthanasia and medically assisted suicide from the perspective of other states in the world.

Thus, we observed, for example, that voluntary euthanasia has been legalized in countries such as the Netherlands (2002)[16], Belgium (2002), Luxembourg (2008), Canada (2016).

In Colombia, for example, in May 1997, the Constitutional Court allowed voluntary euthanasia of ill patients who demanded to end their lives.

Medically assisted suicide is legal in countries such as Canada, the Netherlands, Luxembourg, Switzerland, the Australian state of Victoria and parts of United States. In the United States, there are assisted laws or court decisions that are limited to terminally ill adults[17], such as Oregon, Montana, Washington, Vermont, Maine, New Jersey, Hawaii, California, Colorado, Washington DC[18]. The legislation of these states requires that the patient's attending doctor certify the existence of the patient's discernment.

Spain is the latest country to legalize euthanasia and medically assisted suicide, the patient being able to administer the lethal dose needed to interrupt his life. Spanish law provides two alternative situations that may justify this choice, namely *the serious incurable disease* or *the chronic pain that puts him in a situation of incapacity* and that wants to stop *an intolerable suffering*. Also, the Spanish legislature established that the person requesting this procedure must be *able and aware* when making the request, without *external pressure*, and that it is necessary that the original request be renewed after fifteen days. Another interesting and noteworthy provision is the doctor's possibility of refusing to comply with the patient's request, either for reasons related to non-compliance with the law conditions, either for reasons of ethics, morals or conscience. He cannot be sanctioned for his choice not to end the life of the dying requester. The patient's claim will follow a double-checked procedure if we can call it like that, because after the "doctor's approval", the request will be submitted for approval by another doctor, as well as by an evaluation committee. The Belgian legislature adopted a similar procedure.

5. Instead of conclusions

What we deduce from the above statements is that the issue of euthanasia or medically assisted suicide is

[14] Also M. Udroiu, *Sinteze de drept penal. Partea specială*, C.H. Beck Publishing House, Bucharest, 2020, p.58.

[15] Case Lambert v. France, 5 June 2015, para. 147.

[16] In the Netherlands, it can be claimed by anyone who has reached the age of 12 and who has „unbearable suffering with no prospect of improvement". However, parental consent is required for children under the age of 16.

[17] Detailed in A.G. Svenson, *Physician-Assisted Dying and the Law in the United States: a perspective on three prospective features*, in the volume edited by M.J. Cholbi, *Euthanasia and Assisted Suicide, Global views on choosing to end a life*, Praeger Publishing House, an imprint of ABC-Clio, 2017, p. 19.

[18] D. Humphry, *Final exist. The practicalities of self-deliverance and assisted suicide for the dying*, 3rd ed., Dell Publishing, New York, 2002, p. XVII.

still considered beyond the rules of ethics, given the fact that a multitude of states have understood to regulate these incidents that can occur in the life of any person when facing an incurable disease.

The aim of this paper is to bring back to the attention of the scientific community an issue that is becoming more pressing, especially since Romania is facing legislative lacuna, suitable for various interpretations regarding the qualification of patients' rights and to what extent and medical decisions must be made when a person's health is endangered.

Moreover, we cannot ignore a report of the Ministry of Health from 2020[19] which shows that 4.3 million Romanian citizens care for a person, a patient suffering from an incurable disease in advanced or final stages. So, we can easily deduce what the approximate number of these patients would be.

Of course, a standardization of domestic law based not only on legislative instruments, but also on effective judicial practice with reference here to cases of malpractice incident to the legal provisions referred to above, but also to the circumstances which gave rise to the criminalization of killing at the request of the victim, in conjunction with the study of the population's perspective on the legislation of medically assisted suicide would be the most valuable ways in which the legislator could respond to this issue as painful, as necessary.

Finally, of course, we cannot ignore the religious part, with a view to which a researcher emphasized its essence in a few words, as follows: *The question facing Christian ethics is one facing other ethical approaches as well, namely, "What exceptions to our moral rules and our traditional moral understanding - our common agreements on such issues - are possible when modern technologies have made dying difficult and have interfered with natural death?" This question will continue to be significant for Christian ethics as well as for religious ethics grounded in other traditions and secular-philosophical ethics.*[20]

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[19] https://www.ms.ro/wp-content/uploads/2017/12/Referat-paliatie.pdf.

[20] L. Steffen, *Christian Perspectives on Assisted Dying: an issue for religious ethics*, in the volume edited by M.J. Cholbi, *Euthanasia and Assisted Suicide, Global views on choosing to end a life*, Praeger Publishing House, an imprint of ABC-Clio, 2017, p. 121.

THE ARREST OF THE ACCUSED PARTY BY THE PROSECUTOR UNDER THE BULGARIAN CRIMINAL PROCEDURE CODE

Lyuboslav LYUBENOV*

Abstract

This publication is based on one of the traditionally important scientific issues in criminal procedure, namely the relationship between personal and public interest in criminal proceedings. It is affected by a constructive analysis of the procedure for detaining the accused party by the prosecutor about taking the measure of remand in custody in pre-trial proceedings of the Republic of Bulgaria. For this purpose, the following were critically examined: the legal nature, the order, the legal grounds, the purpose and the possibilities for control of the prosecutor's arrest. The report is also valuable in that it specifies the degree of synchronization between the provisions of art. 64, para 2 of the Criminal Procedure Code and the provisions of art. 5 of the ECHR on the basis of which it can serve as a concrete solution to the problem of unsatisfactory optimization of the right to personal liberty with the requirement of public security in the legal order of the Republic of Bulgaria.

Keywords: *accused party, prosecutor's arrest, public security, right to liberty, remand in custody, court control.*

1. Introduction

The issue of prosecutorial detention is always relevant in Bulgarian legal theory, as its legislation implicitly contains more. Namely, the legislator's view of the relationship between the two interests in the criminal process - personal and public. Therefore, the publication is above all an open invitation to all tempted theorists and practitioners to think more. Here the emphasis is not so much on the defects of the procedure itself of restricting the free movement of the accused party in space, but on the possibility of the ideological justification of her specific *de lege lata* state. The critical emphasis, which is also an insight into the essence of the institute of prosecutorial arrest, is in line with the maxim: "it is better to acquit ten guilty than to convict one innocent person."[1] In other words, it is better to acquit ten guilty than to arrest one innocent person! Under no circumstances is it permissible for the criminal process to abandon its legitimate tasks and become an instrument of unnecessary violence and arbitrariness against citizens. The protection of the public interest in criminal proceedings should be achieved by taking into account and not by devaluing and neglecting the personal interest.

2. Content

There is no legal definition of the term prosecutorial arrest in the Criminal Procedure Code of the Republic of Bulgaria. It is a product of the theory, which is formulated through logical and systematic interpretation of many texts of the Code (art. 46, 63, 64, etc.) and the ECHR (art. 3, 5, 6, etc.). Guided by the understanding that any definition is dangerous[2], as well as the absence of claims to completeness, I can assume that detention is a state of loss of liberty due to forced restriction of free positioning in space (for autonomous location and residence in space). The Strasbourg Court is also not specific, not even concise in its practice in outlining the features of the concept in question. His guidelines are very general and diverse. However, it explicitly states that the measure restricting free movement requires compliance with "a whole set of criteria, such as the type, duration, consequences and manner of implementation of the measure".[3] Thus, for the application of art. 5 of the ECHR, various criteria are relevant, the manifestation of which should be judged from the general context of each case. These can be: the use of physical coercion by a non-judicial body[4], the inconvenience suffered[5], the presence of isolation[6], the inability of the detainee to return home[7], etc. The legality and justification of the forced

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[1] L. Vladimirov, *The evidence in the criminal proceedings – common part. Sofia*, Pechatnitsa „Gutenberg, 1920, p. 125.

[2] *„Omnis definitio periculosa est"*.

[3] Harris, O' Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela", 2015, p. 339.

[4] HUDOC, „*Gillan v. UK*", „MA v. Cyprus".

[5] HUDOC, „*Austin v. UK*".

[6] HUDOC, „*Novotka v. Slovakia*".

[7] HUDOC, „*Nikolova v. Bulgaria*".

restriction of the detainee's liberty are presumed[8] but rebuttable.

According to art. 64, para. 2 of the Criminal Procedure Code: " The prosecutor shall immediately ensure for the accused party to appear before court and, if needed, he/she may rule the detention of the accused party for up to 72 hours until the latter is brought before court". The cited provision is subject to strict interpretation, because it restricts the constitutionally established rights and freedoms of citizens. In this sense, from the literal understanding of the text below, several more important conclusions will be presented.

Firstly, detention within the meaning of art. 64, para. 2 of the Criminal Procedure Code can be carried out only by a prosecutor. Hence, detention is subject to a non-judicial body - a person who does not administer justice, but represents the state prosecution as a *conservator legis.* This denies the possibility of other bodies of pre-trial proceedings, such as investigators and investigative police officers, being valid subjects of detention. The systematic place of the mentioned norm is in Section II of Chapter Seven, where the remand measures are regulated, and in particular it is included in the content of the institute, taking a measure remand in custody in pre-trial phase. Prosecutorial arrest, therefore, is conceivable only in the course of pre-trial proceedings, and only in so far as it serves the legal purposes of some of the remand measures. The Bulgarian Criminal Procedure Code does not allow extra-procedural detention of a person by a prosecutor. In this regard, administrative detention is possible on the basis of a special law, such as detention under art. 72, para. 1 of the Ministry of Interior Act for a period of 24 hours.

Secondly, subject to grammatical interpretation, used in art. 64, para. 2 of the Criminal Procedure Code, the phrase " immediately ensure for the accused party to appear before court" requires the view that in the course of pre-trial proceedings a request must be made by the prosecutor for detention, namely in connection with which the appearance of the accused in court is necessary. Therefore, the opinion of Margarita Chinova can be shared that "it is not admissible for the accused to be detained for a day, two or three, waiting for the expiration of the statutory period of 72 hours and only then to make the request for detention or the person to get free".[9] It is correct to assume that a request for detention may be made at the latest at the same time as the detention itself, and in no case after the expiry of the detention period. The latter is an illegal and repressive practice!

Thirdly, the subject of prosecutorial arrest may be a person who has been constituted as a accused party. According to M. Chinova, in order for the prosecutor's detention to be valid, in addition to a proper act for constituting an accused, it is also necessary to have the general preconditions for remand in custody.[10] The author accepts that this "follows from art. 64, para. 2 of the Criminal Procedure Code, which tacitly refers to the prerequisites under art. 63, para. 1 of the Criminal Procedure Code for remand in custody".[11] This view can be supported in principle. It is true both that the legislator requires that the figure of the accused has arisen at the time of detention, and that the preconditions for remand in custody should also be present. Namely, a reasonable assumption can be made that the accused party has committed a criminal offence punishable by deprivation of liberty or another, severer punishment, and evidence case materials indicate that he/she poses a real risk of absconding or committing another criminal offence. However, it is not true that the preconditions for remand in custody are taken out by way of tacit referral. On the contrary, they are derived directly from art. 64, para. 2 of the Criminal Procedure Code, in which the legislator requires a filed request for taking remand in custody. It is obvious that in this way the personality of the accused is connected by the general preconditions for taking the measure of remand in custody, *i.e.* the arrest concerns a person for whom there are objectively grounds for taking remand of custody. One such conclusion follows directly from the overall reading of art. 64 of the Criminal Procedure Code. Moreover, the view that only a person can be detained for whom there is a reasonable suspicion of a crime or a recognized need to prevent a crime or abscond after the commission of a crime is specifically enshrined in art. 5, para. 1, letter "c" of the ECHR, which is part of the current law of the Republic of Bulgaria and has direct effect, according to art. 5, para. 4 of the Constitution of the Republic of Bulgaria. From what has been said in this paragraph, it should be summarized that on the grounds of art. 64, para. 2 of the Criminal Procedure Code, not every accused can be arrested, but only an accused for whom there are prerequisites for remand in custody.

Fourthly, from the first reading of the provision of art. 64, para. 2 of the Criminal Procedure Code, the impression remains that the arrest of the prosecutor has the legal purpose only of bringing the accused to court for consideration of the request for imposition of remand measure (remand in custody / house arrest). It is in this connection that the detention itself is understood, when it is not possible for the accused to

[8] Harris, O' Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela", 2015, p. 352.
[9] M. Chinova, *Pre-trial proceedings on CPC – theory and practice*, Sofia, „Ciela", 2013, p. 255.
[10] *Idem*, p. 250.
[11] *Idem*, p. 251.

appear in court immediately for some reason, he is detained for up to 72 hours in order not to deviate from the court proceedings for consideration of the remand measure. Detention for any other purpose is unjustified and illegal.

Fifthly, prosecutorial arrest is explicit as a subjective right. The Criminal Procedure Code deliberately states that the prosecutor "if needed, he/she may rule the detention of the accused party for up to 72 hours until the latter is brought before court." Therefore, detention is not mandatory, it should be resorted to only when in a high-probability case there is a danger that the accused will abscond or commit another crime and his immediate appearance in court is not objectively possible.[12]

Sixthly, the arrest of the accused is for up to 72 hours, not necessarily 72 hours. Thus, it is suggested that the arrest itself must in practice be proportionate to the aim pursued, that is to say, that it does not restrict freedom more than is necessary in the present case. Another issue is that the provision of detention for such a maximum period by a non-judicial body contradicts art. 30, para. 3 of the Constitution of RB, where a ban on restricting the right to free movement for more than 24 hours (without judicial control) is regulated. It is time to mention that the ECtHR in „McKay v. The United Kingdom“ has held that a four-day detention without judicial review is the maximum, not an acceptable period, it must be justified only by some specific circumstances.[13] In the theory of human rights, it is unequivocally accepted that going to court after detention must take place within 48 hours, and after this period only if it is justified by exceptional circumstances.[14] It is in this sense that in the „Kandzhov v. Bulgaria“ case, where the administrative detention was continued with a prosecutor's arrest, the Court held as follows: “the applicant was facing trial three days and twenty-three hours after his arrest. In view of the circumstances, this does not seem timely”.[15] It can be summarized that the ECtHR is inclined to treat detention by a non-judicial body for a period of 72 hours as a violation of art. 5 of the Convention and as undermining the very essence of the guarantee of timely judicial review of the lawfulness and appropriateness of detention.

Seventhly, the arrest is imposed by the prosecutor with a decree - arg. art. 199, para. 1 of the Criminal Procedure Code. As can be seen from art. 64 et seq. of the Criminal Procedure Code, the decree is from the category of non-appealable before a court. This means that under Bulgarian law there is no possibility for the legality and justification of the arrest to be verified by a court. While the accused is arrested, he may enjoy only the general protection against the decrees of the prosecutor under art. 200 of the Criminal Procedure Code, but not from protection before an independent and separate body from the prosecution. This legislative omission does not correspond to art. 5, para. 4 of the ECHR, which reads: "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court..." The idea is to enable the court, as an independent and impartial body, to order the immediate release of the detainee if the detention is unlawful! Therefore, it is necessary *de lege ferenda* in Bulgarian law to explicitly provide for both the appeal of the arrest order before a court and the shortest possible time for a court ruling. At present, this gap in our country cannot be qualitatively overcome by direct reference and application of the Convention by the interested parties, because it is difficult to specify by analogy: the competent tribunal, the competent court, the powers of the court and the appealability of the act. There is no doubt that if the prosecutor who ordered the detention (or the superior prosecutor) *ex officio* ascertains the illegality of the same, he must immediately release the accused - art. 17, para. 5 of the Criminal Procedure Code.

From all the above it can be summarized that the arrest under art. 64, para. 2 of the Criminal Procedure Code is a coercive measure affecting the right to free movement in the space of an accused person for whom there are prerequisites for remand in custody. The detention is carried out for a period of up to 72 hours by a decree of a prosecutor, which is not subject to judicial review. It is undertaken upon request for taking remand measure (remand in custody / house arrest) and aims to bring the accused before court.

3. Conclusions

The existing legislation on prosecutorial arrest is not fully synchronized with art. 5 of the ECHR. In art. 64, para. 2 of the Criminal Procedure Code does not contain a sufficiently convincing objective guarantee against arbitrary (repressive) treatment of the personality of the accused. The lack of judicial control over the detention order hypothetically allows for hasty, ill-intentioned, unscrupulous, selfish, etc.,

[12] The accused's immediate appearance in court can be thwarted by a variety of difficulties. For example, delays in the administration of the request for imposition of a measure of restraint, the establishment of the court panel in the case for taking a measure of restraint, the summoning of the accused, the physical transportation of the accused, etc.

[13] HUDOC, *McKay v. UK*.

[14] Harris, O' Boyle, Warbrick, Bates, Buckley, *Law of the European Convention on Human Rights*, Sofia, Ciela”, 2015, p. 400.

[15] HUDOC, *Kandzhov v. Bulgaria*.

restriction of personal liberty. Joining the prosecutor's arrest to administrative detention for a total of 96 hours is undesirable within the meaning of the Convention. It aggravates the situation of the accused by delaying his trial excessively, thus impairing the possibility of his timely release. In view of the above, it is good *de lege ferenda* to think about: the implementation of judicial control over arrest, the duration (term) of detention, the cumulation of administrative and prosecutorial detention.

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LEGAL CONSIDERATIONS REGARDING THE OFFENSE OF DRIVING UNDER THE INFLUENCE OF ALCOHOL

George Octavian NICOLAE[*]

Abstract

Article 336 of the Criminal Code criminalizes the act of driving a vehicle on public roads for which the law provides for the possession of a driving license by a person who, at the time of taking biological samples, has an alcohol content of more than 0.80 g/l pure blood alcohol.

In the legal doctrine and in the judicial practice there is a controversy regarding the effects of the legal disposition provided by art. 78 para. 2 of GEO. no. 195/2002, regarding the presumptive establishment of the blood alcohol value.

Thus, in a first opinion, it is considered that in order to be able to retain the meeting of the constituent elements of the crime of driving a vehicle under the influence of alcohol, it is necessary to establish beyond any doubt that the perpetrator had a higher blood alcohol level than the established one by the rule of incrimination.

In the second opinion, it is appreciated that the provisions provided by art. 78 para. 2 introduces a legal presumption, which establishes that the value of the blood alcohol level at the time of testing is also that at the time of driving on public roads, as a result of the author's violation of the obligation not to consume alcoholic beverages between the time of a car accident and timing of alcohol testing.

In this article we will analyze the two opinions present in legal doctrine and judicial practice, as well as the decisions of the High Court of Cassation and Justice and the Constitutional Court in this matter.

Keywords: *alcohol concentration, Criminal code, legal presumption, car accident, driving on public roads.*

1. Introduction

According. art. 78 para. 1 of GEO no. 195/2002[1], *the driver, agricultural or forestry tractor or tram, the certified driving instructor who is in the process of practical training of a person to obtain a driving license, as well as the examiner of the competent authority during the practical tests regarding the obtaining of the driving license or any of its categories or subcategories, involved in a traffic accident, are prohibited from consuming alcohol or substances or narcotic products or drugs with similar effects after the event and until the test to determine the concentration of alcohol in the expired air or stemming from biological samples.*

Art. 78 para. 2 of GEO no. 195/2002 establishes that *in the situation where the provisions of para. (1) are not fulfilled, the results of the test or analysis of the biological samples collected shall be deemed to reflect the condition of the driver, driving instructor or examiner concerned at the time of the accident.*

The importance of this legal norm is undeniable, given the fact that it is necessary to prohibit any consumption of alcohol or substances with similar effects after a traffic accident, in order to swiftly and accurately establish the conditions of the accident, and the condition of the driver at that time.

Moreover, in the judicial practice there are situations in which the drivers of vehicles are not identified immediately after committing the deed, and it is not possible to obtain biological samples in order to establish the blood alcohol level at a reasonable time after the moment of driving.

Art. 78 para. 2 of GEO no. 195/2002 establishes a factual presumption.

However, it must be ascertained whether the mere failure to comply with that prohibition of consumption could lead to the driver being punished for the offense mentioned in art. 336 para. 1 Criminal Code, in regards to the amendments brought by the New Criminal Code equates with committing the crime of art. 87 of GEO no. 195/2002.

There are two opinions in judicial practice, the arguments of which we will discuss below.

For an easier understanding of the analysis, we will start from a situation in which a person is prosecuted for committing the crime of driving a car under the influence of alcohol, in breach of art. 336 of the Criminal Code, on public roads on 05.05.2021, at 11.00, and after 9 hours from this moment, biological samples are collected in order to establish the blood alcohol level. According to the results of the toxicological analysis, at 22.00 the driver had a blood alcohol level of 2.00 grams / liter of pure alcohol in his blood.

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[1] Published in the Official Gazette of Romania no. 670 from 03.08.2006.

2. Content

In a first opinion, it is appreciated that the absolute legal presumption established by the provisions of art. 78 para. 1 of GEO no. 195/2002 cannot automatically lead to the criminal prosecution of a person for committing the crime of driving a vehicle under the influence of alcohol, provided by art. 336 of the Criminal Code, precisely because of the way in which this crime was conceived.

Thus, in the initial form provided by the new codification, the driving on public roads of a vehicle for which the law provides the obligation to hold a driving license by a person who, at the time of extraction of the biological samples, has an alcohol content of over 0.80 g/l of pure blood alcohol is punishable by imprisonment from one to five years or a fine.

Subsequently, in Decision no. 732/2014[2], the Constitutional Court found that the phrase "*at the time of taking biological samples*" from the provisions of art. 336 para. 1 Criminal Code is unconstitutional.

In its decision, CCR noted that *"the material element of the objective side of the crime regulated by art. 336 para. (1) of the Criminal Code is committed by the act of driving on public roads of a vehicle for which the law states the obligation to hold a driving license by a person who, at the time of extraction of biological samples, has an alcohol content of over 0.80 g / l pure blood alcohol. Alcohol soaking is the process of it permeating into the bloodstream, with the consequence of state of (alcoholic) intoxication. In terms of an immediate aftermath, it can be viewed as a dangerous crime, by endangering the safety of traffic on public roads. Being a dangerous offence, the causal link between the action that constitutes the material element of the objective side and the immediate consequence results from the very materiality of the act and does not have to be proven. Alcohol permeation is determined through a toxicological analysis of biological samples collected at a time more or less distant from the time of the crime, upon the detection of the driver of the vehicle in traffic. The condition of an alcoholic intoxication of more than 0.80 g / l of pure alcohol in the blood at the time of taking of the biological samples thus places the consumption of the crime at a time after its commission, given that the essence of the dangerous crimes is the fact that they are consumed at the time of their commission. Once the perpetrator is stopped in traffic, the state of danger for the social values protected by the provisions of art. 336 of the Criminal Code ends, so that, at the time of the extraction of biological samples, criminal prosecution is not justified. The determination of the degree of alcohol intoxication and, implicitly, the classification of the criminal offense according to the moment of taking biological samples, which cannot always be carried out immediately after the commission of the deed, reflects a random and external criterion of the perpetrator's conduct regarding the above-mentioned constitutional and conventional rules. The subjective side of the offense of driving a vehicle under the influence of alcohol involves intentional guilt, which can be direct or indirect. There is a direct intention when the driver of the vehicle foresees, as inevitable, the result of his act and, implicitly, pursues it by committing that offence. There is an indirect intention when the subject predicts the result, does not follow it, but accepts the possibility of its production. However, the manner of criminalization by granting criminal relevance to the value of alcoholism from the moment of taking biological samples does not allow the recipients of the criminal norm to foresee the consequences of its non-observance. "*

Therefore, in the case of the crime mentioned in art. 336 para. 1 Criminal Code, it is essential to establish the alcohol content from the moment of driving on public roads, and not from the moment of the extraction of biological samples.

Looking at the matter from this perspective, in this opinion, it is estimated that an alcohol level of over 0.8 g / l at over 9 hours from the moment of driving the vehicle, cannot lead to the retention of the crime prev. of art. 336 Criminal Code, a dangerous one, which is committed at the moment of driving.

By the CCR Decision no. 732/2014, infringements were noted of the constitutional provisions of art. 1 para. 5, regarding the principle of legality, of art. 20 regarding the preeminence of international treaties on human rights over domestic law, related to the provisions of art. 7 para. (1) on the legality of the criminalization of the Convention for the Protection of Human Rights and Fundamental Freedoms. The phrase "*at the time of biological sampling*" lacked predictability, given that the principle of compliance with the law and the legality of criminalization require the legislator to formulate texts as clearly and as precisely as possible, as well as ensuring the possibility of the interested persons to comply with the legal provision.

Regarding the provisions of art. 78 of GEO no. 195/2002, the application of this presumption could result in the criminal liability of the defendant, for a dangerous crime, provided by art. 336 para. 1 of the Criminal Code, by reference to the level of concentration of pure alcohol in the blood at a time which, later than the consumption of the crime, is also independent of the will of the concerned person. Or, as it has been shown in Decision no. 732/2014 (paragraph 26) *"the essence of dangerous crimes is the fact that*

[2] Published in the Official Gazette of Romania no. 69 from 27.01.2015.

they are consumed at the time of their commission. Once the perpetrator is stopped in traffic, the state of danger for the social values protected by the provisions of art. 336 of the Criminal Code ends ". By applying this reasoning to the case proposed for analysis, it can be noted that the establishment of the typicality of the offence in relation to the moment of sampling indicated in art. 78 para. 2 of GEO no. 195/2002, is not justified, and the establishment of the degree of alcohol intoxication and, implicitly, the inclusion in the sphere of criminal wrongdoing in regards to a moment subsequent to the commission of the act and, therefore, the endangerment of the social values protected by art. 336 of the Criminal Code, implies a random and external criterion of the conduct of the perpetrator in order to be held criminally liable, in contradiction with the constitutional and conventional norms mentioned above.

The legal presumption established by art. 78 of GEO no. 195/2002 renders the engagement of criminal liability dependent on an element that is external to the defendant's conduct, the only one which should have had a bearing on the analysis of the typicality of the act. Otherwise, criminal liability would be incurred even in situations where at the time of driving on public roads, the alcohol level would not have exceeded the concentration of 0.80 g / l pure alcohol in the blood. Also, another argument proposed in support of this orientation of the judicial practice is the minute prepared on the occasion of the Meeting of the Chief Prosecutors of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, the Organized Crime Investigation Directorate and Terrorism and the prosecutor's offices attached to the courts of appeal of March 9-10, 2020, in the course of which, at paragraph 4.1, was shown that, mainly, in the hypothesis of art. 78 para. 2 of GEO no. 195/2002, the principle *in dubio pro reo* is applicable.

It should be noted that in the old regulation, the act of the driver or of the instructor, in the process of training, or of the examiner of the competent authority, during the practical tests of the exam for obtaining a driving license, of consuming alcohol, drugs or narcotics or drugs with similar effects, after a traffic accident that resulted in the killing or injury of the bodily integrity or health of one or more individuals, before the collection of biological samples or testing by a technically approved and metrologically verified device or until the establishment with a certified technical means of their presence in the expired air, was a crime and punishable by imprisonment from one to 5 years.

Thus, the non-compliance with the obligation not to consume alcohol after driving a vehicle (according to art. 78 para. (2) of GEO no. 195/2002) was criminally sanctioned by art. 90 para. 1 of GEO no. 195/2002.

However, the text of art. 90 of Chapter VI was repealed on 01-Feb-2014 by art. 121, point 3. of title II of Law no. 187/2012.

This abrogation also occurred as a result of the modification of the constitutive content of the crime of driving on public roads of a motor vehicle by a driver who was under the influence of alcohol, after the new codification at art. 336 para. 1 Criminal Code in terms of focusing on the moment of the extraction of the biological samples, and not on the moment of driving of the vehicle.

In these conditions, a new incrimination regarding the sanctioning of the act of alcohol consumption after driving did not find its utility in the criminal architecture, the act of driving under the influence of alcohol being retained in any case by reference to the time of extraction and not driving.

However, after reinterpreting the content of the incrimination prev. of art. 336 Criminal Code, following the CCR Decision no. 732/2014, the offense that was provided by art. 90 para. 1 of GEO no. 195/2002 was not reinstated.

It is true that the legislator intended to reintroduce this behavior in the field of criminal wrongdoing, but the legislative process has not been completed. *(Http://www.cdep.ro/proiecte/2018/400/00/6/se557.pdf)*

Thus, through this legislative project of modification and completion of the Criminal Code, art. 336 para. (1) (marginally called the consumption of alcohol or other substances after a traffic accident) was introduced, which provided that the driver's act of consuming alcohol or other psychoactive substances, after the occurrence of a traffic accident that resulted in killing or injuring bodily integrity or the health of one or more persons, until the biological samples are taken, shall be punished by imprisonment.

According to this opinion, in this case it is not possible to reach a decision to convict the defendant for violating the ban on drinking alcohol after committing the act of driving a vehicle, because the criminalization of this crime is not provided by criminal law.

In a second opinion, it was noted that the norm provided by art. 78 of GEO no. 195/2002 is a supplementary rule, which establishes a presumption of fact allowed by the constitutional court and the Convention and provides that in the case of a person who consumed alcohol after a road accident and before the extraction of biological blood samples, his alcoholic concentration higher is than the limit from which the act constitutes a crime, then that concentration is presumed to have also been existant at the moment of driving the vehicle.

It is thus appreciated that the person in question, by virtue of the legal presumption, becomes the

perpetrator of the crime provided by art. 336 para. 1 Criminal Code.

One of the arguments of this opinion is that art. 90 of GEO no. 195/2002 (repealed) referred to the prohibition of the driver to consume alcohol after a traffic accident that resulted in the killing or injury of bodily integrity or health of one or more persons, while art. 78 para. 1 of GEO no. 195/2002 refers to the prohibition of the driver to consume alcohol, after a traffic accident, without imposing the fulfillment of the condition regarding the occurrence of a certain consequence (killing or injuring bodily integrity or health).

In this way, it is appreciated that the repeal of art. 90 of GEO no. 195/2002 does not influence in any way the applicability of art. 78 of GEO no. 195/2002, because the two incriminating texts operate in distinct situations.

Also according to this orientation of the judicial practice, it is noted that the primary norm of incrimination is represented by the provisions of art. 336 para. 1 of the Criminal Code, and the provisions of art. 78 of GEO no. 195/2002 constitutes a supplementary norm that has a non-criminal character, but completes the criminal norm, this being the matrix that characterizes the entire title that regulates traffic crimes on public roads. The incriminating norms are found in the Criminal Code, and the secondary norms are included in the adjacent legislation, the latter containing the conduct allowed to traffic participants. After the regulatory take-over of road crimes in the Criminal Code, GEO no. 195/2002 became a non-criminal law. However, this finding does not lead to the conclusion that a provision of a non-criminal supplementary law cannot constitute a viable provision of incrimination. For example, the violation of the legal speed regime, even if it is provided by the provisions of art. 48 of GEO no. 195/2002, may entail the crime of culpable homicide, provided by art. 192 para. 2 Criminal Code. In this example, the supplementary norm is only an element that gives efficiency to the incriminating norm.

Regarding the effects of the CCR Decision no. 732/2014, it is considered that by this it was established that the phrase "*at the time of taking biological samples*" in art. 336 para. 1 Criminal Code is unconstitutional.

An argument proposed by the supporters of this opinion is that in the content of Decision no. 732/2014, the CCR did not analyse the eventual unconstitutionality of the provisions of art. 78 of GEO no. 195/2002, as required by art. 31 para. 2 of Law no. 47/1992 on the organization and functioning of the Constitutional Court ("*in case of an admission of the exception, the Court will also rule on the constitutionality of other provisions of the contested act, from which, necessarily and obviously, the provisions mentioned in the notification cannot be dissociated*") .

Also mentioned is the CCR Decision no. 577/2020[3], with reference to Decisions no. 372/26.04.2012 and no. 417/15.04.2010, in which the exception of unconstitutionality was rejected as it was found that the provisions of art. 78 of GEO no. 195/2002 are constitutional, since the criticized provision is in full accordance with the fundamental law, fulfilling the requirements of clarity, predictability and accessibility, so that any subject of law can regulate his conduct according to it.

It is thus stated that art. 78 of GEO no. 195/2002 establishes a presumption of fact accepted in all systems of continental law and accepted by the ECHR.

In support of this assertion, mention is made of the decision of the ECtHR, rendered in the case of Salabiaku v. France (Judgment of 07.10.1988, application no. 10519/1983) by which it was established that in certain cases establishing a person's guilt based on factual presumptions does not contradict his or her presumption of innocence. Any system of law has such presumptions, but in criminal matters a certain proportionality must be ensured in their use, since by excessive or exclusive use, the discretion of the judge would be emptied of any content.

The Court therefore held that such presumptions were admissible only in so far as they were reasonable, operated on facts which were difficult or impossible to prove and could be rebutted by the person concerned.

Applying the reasoning of the ECtHR in the aforementioned case, it is evident that the provisions of art. 78 of GEO no. 195/2002 do not establish an absolute factual presumption. This presumption can be overturned by the accused person by administering evidence in defense or by presenting positive defenses that would lead to the vulnerability of the accusation hypothesis and to the creation of doubt regarding the existence of the crime.

In conclusion, according to this orientation of the judicial practice, the presumption established by art. 78 of GEO no. 195/2002 is a relative one, which can be combated and which does not put insurmountable obstacles to the presumption of innocence. By instituting it, only one element of the crime is considered proven, namely the soaking of blood alcohol at the time of the accident (the moment of driving on public roads), and not the commission of the act itself, thus being part of what the Court calls "*presumptive liability*", considered to be in conformity with the Convention.

[3] Published in the Official Gazette of Romania no. 1152 from 27.11.2020.

3. Conclusions

Thus, it is found that the legal presumption established by art. 78 of GEO no. 195/2002 led to the formation of two different orientations in judicial practice.

If the first states that the existence of this presumption cannot automatically lead to the conclusion of the offense of driving a motor vehicle under the influence of alcohol, provided by art. 336 of the Criminal Code, the second opinion states that this rule constitutes a norm to complete the criminal provisions and may attract criminal liability for the crime mentioned in art. 336 of the Criminal Code.

Given the existence of these different interpretations of the application of the legal presumption and taking into account its very important role, recently, it was decided to notify the CCR to analyse the unconstitutionality of art. 78 para. 2 of GEO no. 195/2002.

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RETURN OF THE CASE TO THE PUBLIC PROSECUTOR'S OFFICE FOR THE LACK OF INDIVIDUALIZATION OF THE COSTS IN THE BILL OF INDICTMENT

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Abstract

In the second stage of the criminal trial, when a person is sent to court, the bill of indictment also includes the criminal prosecution body's request to order the defendant, under art. 274 para. (1) of the Criminal Procedure Code, to cover judicial expenses advanced by the State up to a specified amount.

However, in almost any case the amount due by the person sent to the court is set unilaterally by the prosecution authorities, without specifying the way in which they are determined and without submitting to the case the documents on which the request is based.

A serious problem is raised in the hypothesis that, in a criminal case, several persons are brought to court by the same bill of indictment and the amount is set at global level, without making any distinction between the defendants and the concrete activities that have generated an expense for each party.

A fundamental principle that operates in law is that any allegation must be proved and that the person making such claim must justify it. Under the circumstances, in a criminal case, a claim of a pecuniary nature is made by the Public Ministry through the bill of indictment, without it being substantiated and based on supporting documents, a procedure which gives an inequity character to the litigants that are subject to such measures.

The practice at national level is not uniform in this respect, as there are, on the one hand, courts which consider this situation to be circumscribing as a reason for the illegality of the bill of indictment, the vice which may be referred to in the procedure of a preliminary chamber and, on the other hand, there are courts of law that consider it to be a matter related to the substance of the case, and the court is to assess when the final decision is rendered.

From this point of view, we consider that the conduct of prosecution authorities should be sanctioned from the stage of the Preliminary Chamber Procedure, this being a flaw that can lead to the cause being returned to the Prosecutor's Office in the event that the prosecutor does not explain and prove each activity that has generated any costs which the prosecutor requests under art. 274 para. (1) of the Criminal Procedure Code.

Keywords: *bill of indictment, judicial expenses, inequity, prosecution authorities, sanction.*

1. Introduction

1.1. What matter does the paper cover?

This paper addresses a common theme in judicial practice, namely the particularities of the Preliminary Chamber Procedure regarding a specific problem encountered by defendants during a criminal trial, in respect of the unlawful manner of setting judicial costs by criminal investigation bodies.

1.2. Why is the studied matter important?

The chosen topic is important from the perspective of the solution to be applied by the Judge of the Preliminary Chamber notified with an indictment in which the individualization of judicial expenses is not done accurately and proven, to ensure that the right to a fair trial and the right to defense are also respected from this point of view.

The Preliminary Chamber Procedure was introduced in 2014 by amending the Criminal Procedure legislation as an intermediate stage between the first phase of the criminal trial, respectively the criminal investigation phase and the trial stage, the phase in which the judge must observe the relevance of the indictment, the legality of performing criminal prosecution acts.

This legislative solution was also received in the national Criminal Procedural legislation precisely in order to create a buffer between the criminal investigation phase and the investigation stage of the case before the court, being necessary to clarify all the criticisms when judging the case on the merits which the parties have regarding the regularity of the bill of indictment, of the administration of the evidence and of the performance of the acts of criminal investigation. Thus, the judgment shall concentrate exclusively on the validity or unfoundedness of the criminal accusation.

Misunderstood by many legal practitioners, not without criticism and changes due to the admission of

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exceptions of unconstitutionality, the Preliminary Chamber procedure is particularly important because this procedure can exempt the person sent to trial to go through the third stage of the criminal trial, which is often of long duration, in the situation where there is no proper description of the deed within the indictment, or definitively certain evidence or all evidence or acts of criminal investigation have been annulled.

Precisely from this perspective, the Preliminary Chamber represents a guarantee of respecting the right to defense, the right to a fair trial, as well as the legality of the criminal trial that is conferred to the investigated person throughout the criminal trial by the Criminal Procedure Code, within the provisions of art. 2, art. 8, art. 10 of the Criminal Procedure Code, as well as in the provisions of art. 6 of the ECHR.

2. Procedural aspects and remedy solution of the Preliminary Chamber Judge on the defects of judiciary costs requested by the bill of indictment

Regarding the regularity of the act of notification of the court, it aims on the one hand, the complete description of the deed or facts for which the bill of indictment was ordered, the achievement of the legal classification for each deed as well as the mention of the evidence administered both in favor and to the detriment of the defendant or defendants.

From a descriptive point of view, it is important for the indictment to present the factual circumstances that substantiate the accusation, the theoretical exposition of the objective side and the subjective side of the crime retained by the person sent to trial, the evidence supporting the accusation and those that would substantiate the defense thesis. The last period of time, the idea begins to crystallize according to which the way of establishing and justifying the court costs would fall into this descriptive sphere.

By observing the provisions of art. 328 para. (1) of the Criminal Procedure Code, it is established in the charge of the prosecutor who investigated the criminal case the obligation to mention and to limit the content of the indictment to the following:

"the deed and the person for whom the criminal investigation was carried out [...], the data regarding the deed retained in the charge of the defendant and its legal classification, the evidence and the means of proof [...]"

Also, regarding the legal classification of the deed, as shown in the literature, the "*law*" section of the indictment must include an actual analysis of the constituent elements of the crimes for which the criminal prosecution began, by exemplifying the elements that are circumscribe the objective side, the subjective side and the manner in which the deed was committed (including in the situation when they are not met).[1]

In the sense of those mentioned above, within judicial practice it has been ruled that:

„regarding the description of the deed, this must include the act, the action, the inaction, the attitude of the perpetrator so as to result with certainty the acts retained in his charge, and in the case of crimes in a continuous form, each material act must be described in the same manner mentioned above."[2]

Otherwise, the non-observance of these exigencies imposed by the provisions of art. 328 para. (1) of the Criminal Procedure Code do not allow the person sent to trial to fully understand the scope of the accusation, as required by legal and conventional norms that guarantee the right to a fair trial in criminal matters.

Consequently, in the situation where the descriptive elements are missing, the ordered bill of indictment is lacking in clarity because the criteria and reasoning that formed the basis of the sentencing solution ordered by the prosecutor cannot be established, which contravenes both the legal provisions in force and the provisions of art. 6 of the ECHR, which regulates the right to a fair trial.

The indictment also includes mentions regarding the obligation of the person subject to the bill of indictment to pay the court costs, expenses that are generated, on the one hand by the administration of the evidence and, on the other hand, by the performance of specific criminal prosecution acts.

By way of example, we find in the sphere of incidence of legal expenses, the costs generated by the search activities, the interception activities of the pursued person, the performance of expertises, in cases where the administration of such evidence is ordered, authorized translations, if the case file has foreign elements.

Regarding the court expenses, especially in the period immediately following the entering into force of the Criminal Procedure Code, it is appreciated that the way of establishing the court costs is a matter related to the merits of the case, so that neither the parties nor the courts, *ex officio*, do not criticize within the Preliminary Chamber Procedure, the defects regarding the setting, the amount and the justification of the expenses.

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[1] In this respect, please see Udroiu, M., Predescu, O, *The European protection of human rights and the Romanian criminal trial*, C.H. Beck Publishing House, Bucharest, 2008, p. 703.

[2] In this regard, please see, Decision no. 93 of the Mureș Tribunal, crim. s., rendered in case file no. 2557/102/2008 on June 23, 2011, available on http://legeaz.net/spete-penal/restituirea-cauzei-la-procuror-pentru-93-2011.

However, once the case was settled, the issues related to the court costs were ignored, the courts ordering the defendant to pay the costs occasioned by the settlement of the criminal investigation phase as requested by the criminal investigation body in the structure of the indictment, in case of conviction.

Also, the negligence of the critics regarding the argumentation and justification of the court expenses incurred in the first cycle of the criminal process, made that, within the structure of the bill of indictment, the prosecutor mentions a global amount to which the defendants are obliged, without a minimum description of the algorithm that determined that amount.

In this respect, the indictments issued by all the structural prosecutor's offices include the request of the criminal investigation body to dispose of the obliged persons sent before the court, pursuant to art. 274 para. (1) of the Criminal Procedure Code, for the payment of the judicial expenses advanced by the state, without specifying the manner of establishing and without submitting to the case file documents on which the advanced request is based.

Or, considering the amount that is requested, the prosecutors must explain and justify each activity carried out exclusively for each person and attach evidence of these costs.

Moreover, there are cases in which several defendants are investigated and sent to trial and not infrequently evidence was gathered regarding other persons and facts but all defendants were obliged to the same amount without a tie being made, this being a mandatory element even in the case of joint and several liability.

In addition, some of the supervision measures used and the prosecution proceedings carried out in criminal cases could concern persons and offenses for which the case has been closed and it would be unfair that such expenses incurred in administering such evidence or performing such criminal prosecution documents to be borne by the persons for whom the bill of indictment was ordered.

Regarding the legal basis of the judicial expenses advanced by the state in the criminal cases investigated by the prosecutor's offices, this is represented by art. 177 of the Internal Regulations of the Prosecutor's Offices, approved by the Order of the Minister of Justice no. 2632/C/30.07.2014.

Thus, according to the provisions of art. 177 of the Internal Regulations of the Prosecutor's Offices:

"the establishment of judicial expenses is made according to the procedure provided by the order of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice."

Also, the order of the general prosecutor regarding which art. 177 is supplemented by the criteria established by the Internal Regulations of the Prosecutor's Offices.

Thus, in the content of Section 7 of the Regulation, having the marginal name "*Calculation of judicial expenses advanced by the state and evidence of the execution of ordinances ordering the payment of judicial expenses and judicial fines*" within art. 178-180, stipulates the express obligation of the criminal investigation bodies to highlight, justify and prove every expense they invoke:

"Art. 178 - Recovery of legal expenses

(1) The chief clerks and the first clerk, under the guidance of the prosecutors who carry out the criminal investigation or its supervision, shall ensure, according to the provisions of the Criminal Procedure Code, the recovery of judicial expenses advanced by the state during the criminal investigation and enforcement the judicial fine provided by the Criminal Code was ordered.

(2) The evidence of the judicial expenses and of the judicial fines shall be kept in the Register of evidence and execution of the obligations ordered in case of renunciation of the criminal investigation and of the judicial expenses (R-12), completing the rubric in relation to the concrete situation.

Art. 179 - Establishment of judicial expenses

The establishment of judicial expenses is made according to the procedure provided by the order of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Art. 180 - Evidence and manner of execution of ordinances

The leaders of the prosecutor's offices will control, directly or through designated prosecutors, the evidence and the manner of execution of the ordinances by which fines, judicial expenses or the obligations provided in art. 318 para. (6) of the Criminal Procedure Code and will propose measures to eliminate the irregularities found."

In addition, it is important to mention that the National Anticorruption Directorate, as a specialized structure of the Prosecutor's Office attached to the High Court of Cassation and Justice, also has its own Internal Rules of Procedure of the National Anticorruption Directorate, which at art. 162 of provides that:

„when establishing the judicial expenses, will be considered the expenses made by the criminal investigation body and by other bodies for:

a) summoning, by postal services, by telephone, telex or fax, the parties to the proceedings, witnesses, experts, interpreters and other persons;

b) payment, in the cases and under the conditions provided in Article 190 of the Criminal Procedure Code, of the sums of money due to witnesses, experts and interpreters;

c) performing technical-scientific findings and expertise;

d) lifting and preservation of material evidence, including the cost of films, covers, disks, chemicals used, packaging, transport to storage, etc .;

e) taking judicial photographs and audio-video recordings;

f) travel in the interest of solving the cases: the cost of accommodation, per diem, transport;

g) payment of ex officio defenders' fees;

h) the equivalent value of the paper, printed matter and other materials that make up the criminal files;

i) the value of other works performed during the criminal investigation, which required payments from the budgetary funds."

Regarding the documents based on which the amount of legal expenses is established, the provisions of art. 163 of the same Regulation, according to which:

"the calculation of judicial expenses will be made, in each case solved by the prosecutor, on the basis of the following supporting documents:

a) the documents drawn up by the persons who performed the works, ordered by the criminal investigation body, in which the costs of the works are mentioned, under the conditions provided by law;

b) the documents on the basis of which the witnesses, experts and interpreters justify, the expenses incurred, under the conditions provided by law;

c) the documents issued by law firms, which mention the fees paid to the defense counsel ex officio;

d) the note drawn up by the chief clerk, under the guidance of the prosecutor who carried out the criminal investigation, regarding the expenses made by the Public Ministry during the criminal investigation, for correspondence, telephone, telex or fax calls, travel, consumption of materials, etc."

It follows that, during the criminal investigation phase, in its specific activities, the criminal investigation bodies incur expenses which, in the event that the person is found guilty, in addition to the main punishment, the accessory and complementary punishments, will have to bear the expenses incurred by the criminal investigation bodies, in addition to possible civil damages.

However, the simple mention, within the indictment, regarding the obligation of the defendant to bear judicial expenses is not enough to be considered complete the descriptive component of the bill of indictment. These costs must be argued and breakdown per each and every defendant.

At the same time, the case file must include all supporting documentation that represents the basis for the withholding of the respective judicial expense, the proof of the costs that the case prosecutor claims to be incurred being necessary.

A fundamental principle that operates in law is that any claim must be proven, and the claimant is required to justify it. Under these conditions, a pecuniary claim is formulated by the Public Ministry without this being argued and based on supporting documents.

From this perspective, the practice of the courts sanctioned this behavior of the criminal investigation bodies, being worth mentioning the recent Conclusion of the Bucharest Tribunal, issued on May 10, 2021, within the file no. 32671/3/2020/a1, by which the court remitted the indictment to the Directorate for the Investigation of Organized Crime and Terrorism - Central Structure, stating that such conduct represents:

"non-compliance with the legal provisions regarding the manner of establishing the judicial expenses borne by the state during the phase of the criminal investigation".

Thus, given that neither specification is made in the act of indictment forwarded to the court regarding the object of the expenses occasioned by the criminal investigation in the case, at the part of expenses made strictly for the criminal investigation of the alleged deed committed by the defendant nor with regard to the documents proving the amount of these expenses, the Preliminary Chamber Judge of the competent court to judge the case in the first cycle must find that the request of the criminal investigation body is unjustified and the method of determining the amount of court costs is arbitrary.

The decision is natural, in our opinion, since once the case has reached the trial stage on the merits of the case, it is difficult, if not impossible, in the absence of a minimum description of the court costs incurred during the criminal investigation and supporting documents to be able to draw conclusions on this aspect, and for the judge to assess the veracity or not of the request of the criminal investigation bodies.

Also, although it could be considered that the insufficient description of the court costs and the lack of documentation on which the prosecutor of the case bases his accusation can find a solution once the Preliminary Chamber Procedure is over, by the court's assessment of the founded or not character of the claim, as it is analyzed and the merits of the accusation, we cannot agree with such a thesis.

This is because, the Preliminary Chamber Procedure aims, prima facie, at the regularity of the bill of indictment forwarded to court, regularity that implies a complete description of the deed as well as an effective argumentation of all the requests that the case prosecutor invokes before the court that will render the decision on the case.

3. Conclusions

In respect of the constitutive elements of the deed, the indictment is verified in the Preliminary Chamber procedure precisely because in the stage of the trial the descriptive elements of the accusation can no longer be invoked.

The same situation arises with regard to the matter of court costs which, on the merits, can be assessed as well-founded or not in relation to the necessity and usefulness of administering evidence (for example, conducting an expertise without utility in question), but the conclusions regarding the non-description of the costs and the supporting financial documentation can no longer be reiterated before the Court of First Instance or the Court of Appeal, if the party could effectively criticize these descriptive defects in the Preliminary Chamber Procedure.

From another perspective, it is necessary for the criminal investigation bodies to draft a bill of indictment in the most rigorous conditions, approaching in detail each component part of it, from the description of the factual circumstances of the deed, to the theoretical exposition of the two sides of the crime are the object of the indictment, the objective side and the subjective side, of the means of proof, of the description of the procedural and procedural acts performed, until the mention, in real and effective way, of the court costs that are requested to the defendant under the art. 274 para. (1) of the Criminal Procedure Code.

Consequently, the Preliminary Chamber Judge within the competent court to judge the case in the first instance must, from this procedure, order the restitution of the case to the prosecutor's office in order to remedy this irregularity of the bill of indictment, in case that the costs are not properly described within the indictment.

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THE INADMISSIBILITY OF THE COMPLAINT AGAINST THE ORDER ISSUED BY THE SUPERIOR PROSECUTOR IN THE PROCEDURE ESTABLISHED BY ART. 340 OF THE CRIMINAL PROCEDURE CODE

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Abstract

The national legislation gives the right to the litigant to appeal in case of dissatisfaction with the classification solution that the case prosecutor can issue in the first cycle of the criminal trial.

Thus, the classification of the prosecutor can be assessed at first instance by his superior prosecutor and, in case of maintaining the solution of not referring to the case, the interested party may appeal to the judge of the preliminary chamber of the competent court to rule on the legality and regularity of the grading order.

This procedure for checking the correctness of the classification solution is laid down in the texts of art. 339 and 340 of the Criminal Procedure Code before the superior prosecutor, according to the provisions of art. 339 of the Criminal Procedure Code.

And, in the light of the provisions of art. 340 para. (1) of the Criminal Procedure Code, by the marginal name "the complaint against remedies for non-prosecution or non-referral", it appears that the person whose complaint against the solution to the prosecution or the waiver of prosecution, issued by the order or the bill of indictment, has been rejected in accordance with art. 339, can make a complaint within 20 days after the notification, to the judge of the preliminary chamber of the court to which the court would be empowered under the law to judge the case in the first court.

It follows from the interpretation of the abovementioned legal text that the procedure laid down in art. 340 of the Criminal Procedure Code provides that solely the solution to the classification ordered by the case prosecutor's order may be subject to the submission of the court control and not the verdict of the superior prosecutor in the stage of the preliminary procedure within the prosecutor's office.

However, in the practice of courts, petitioners often criticize the solution given by the superior prosecutor through his order, by which the complaint against the case prosecutor's classification solution is rejected.

In such cases, although the practice is not uniform, I believe that the complaint made before the court by which criticism is made of the order issued by the superior prosecutor in the procedure established by the provisions of art. 339 of the Criminal Procedure Code is to be rejected as inadmissible.

Keywords: *dismissal solution, complaint, superior prosecutor, bill of indictment, inadmissibility.*

1. Introduction

1.1. What matter does the paper cover?

This paper addresses a common theme in judicial practice, namely the particularities of a remedy at law during the criminal investigation, namely the complaint against the order by which the case prosecutor dismisses the case, which is often wrongly formulated by the petitioners, in the sense that the complaint is filed against the order of the hierarchically superior prosecutor verifying the case prosecutor's order and confirming the dismissal solution.

1.2. Why is the studied matter important?

The subject chosen by the authors is of particular importance, as the national legislation offers the possibility, in an investigation in the first cycle of the criminal process (respectively in the criminal investigation phase) that, in the event that a dismissal solution is ordered by the case prosecutor, the party dissatisfied with this decision should contest.

The Criminal Procedure Code imposes a strict procedure that the party that wishes to contest the case prosecutor's filing solution must follow, in this case there are two stages regulated by the provisions of art. 339-340.

Thus, pursuant to the provisions of art. 339 of the Criminal Procedure Code, against the dismissal solution ordered by the case prosecutor, the interested party may file a complaint, within 20 days from the communication of the ordinance to the hierarchically superior prosecutor who is, as the case may be, the chief prosecutor of the prosecutor's office when the case is investigated. to the prosecutor's offices attached to the judges and to the prosecutor's offices attached to the courts, the prosecutor general of the prosecutor's office attached to the court of appeal, when the case is investigated by the prosecutor's offices attached to the courts of appeal or by the chief prosecutor near the High Court of Cassation and Justice, when the criminal

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case was investigated by a section of the General Prosecutor's Office (*e.g.* pardon, criminal prosecution and forensics section, military prosecutor's office section) or when it is investigated by a specialized structure such as the National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism.

Thus, in a first stage, the dismissal solution is verified by the hierarchical prosecutor of the one who ordered such solution, this being able to ascertain the validity of the reasons underlying the complaint, with the consequence of the reversal of the ordinance by which the dismissal was ordered, or it can be assessed that the dismissal solution is legal and thorough, thus rejecting the complaint as unfounded. Also, if the complaint is not filed within the procedural term of 20 days imposed by the provisions of art. 339 para. (4) of the Criminal Procedure Code then the complaint shall be rejected as late.

It should be mentioned that the same procedure must be followed by the interested person also in the hypothesis in which the dismissal solution is ordered by the indictment, the Criminal Procedure Code allowing the prosecutor, as provided for in art. 314, art. 328 referred to in art. 340 para. (1) to order the dismissal solutions also by the act by which the case is forwarded to court for other facts or for other defendants.

If the complaint is rejected by the hierarchically superior prosecutor, the person who challenged the dismissal solution still has the possibility to submit this decision of the case prosecutor to the legality control of a court.

The solution is natural since the legislator wanted to give the litigants all the guarantees of impartiality regarding the verification of a solution by which the criminal investigation against certain facts and persons complained to the criminal investigation bodies is concluded. Thus, it is appreciated that all the procedural rights of the petitioner are respected by verifying the filing solution by an institution independent of the one that issued the ordinance or indictment.

As in the case of the complaint filed before the hierarchically superior prosecutor, and in the case of the complaint addressed to the court, this must be done within the mandatory term of 20 days from the communication of the ordinance rejecting the complaint against the dismissal solution, otherwise the person being deprived of the right to submit for analysis the dismissal solution before the courts, the action having to be rejected as late.

Also, art. 340 para. (3) of the Criminal Procedure Code provides the obligatory mentions that must contain the complaint addressed to the courts, the petitioner, in case we are in the presence of an interested natural person, must mention his name, surname, personal numerical code as well as his domicile, or in case petitioner is a legal person, the name, headquarters and indication of the legal representative or the conventional representative, the date of the ordinance or indictment ordering the filing solution, the number of the criminal investigation file, the name of the issuing prosecutor's office and the factual and legal reasons which substantiates the complaint.

2. Procedural issues and the resolution of the complaint by the competent court

The jurisdiction of the Preliminary Chamber within the court which would have the competence to judge the case in the first instance belongs to the Judge of the Preliminary Chamber if it were invested with the indictment, as an act of notification of the court. The Judge of the Preliminary Chamber may order, in cases where, during the criminal investigation, it was not ordered to initiate the criminal action either to admit the complaint in order to initiate or complete the criminal investigation, as the case may be, or to initiate the criminal action and complete the criminal investigation, admits the complaint and changes the basis of the classification if it is not more valid for the person who made the complaint, or rejects the complaint as unfounded, late or inadmissible.

If the criminal action was initiated during the criminal investigation, the Preliminary Chamber Judge may reject the complaint as late or inadmissible or may admit the complaint in case he may send a motivated case to the prosecutor to complete the criminal investigation. The Judge may also repeal the contested solution and order the trial of the facts and persons who are subject of the case and for whom the criminal action was initiated, verifying the legality and sufficiency of the evidentiary material and sending the case for random distribution, or may change the basis of the classification, if this change does not create a more unfavorable situation for the person who filed the complaint.

However, even in this situation, what is subject to analysis by the Preliminary Chamber Judge within the competent court is also the ordinance disposing the solution of not prosecuting the case prosecutor, and not the solution of the hierarchically superior prosecutor rejecting the dismissal solution.

In practice, confusion is often created regarding the act to be challenged in the procedure established by the provisions of art. 340 of the Criminal Procedure Code, which is probably due to the wording of para. (1) of this legal text in which the legislator states as follows: *"The person whose complaint against the classification solution, disposed by ordinance or indictment, was rejected according to art. 339 may file*

a complaint, within 20 days of communication, to the Judge of the Preliminary Chamber of the court which would have, according to the law, the competence to judge the case in the first court".

Thus, persons whose complaint is rejected by the prosecutor who has ruled on the legality and validity of the non-prosecution solution tend to criticize the latter ordinance and not the dismissal solution ordered by the case prosecutor's ordinance.

In these conditions, in practice different solutions were offered, there are courts that have overlooked this lack of compliance, appreciating that, in essence, it criticizes the dismissal solution and other courts that, analysing the formal conditions found that the complaint is directed against the solution of the hierarchically superior prosecutor and not of the one who ordered the dismissal solution, even if the criticisms are fundamentally aimed at the dismissal solution.

We are of the opinion that, in the event that the ordinance of the case prosecutor by which he rendered the solution of non-trial is not exclusively challenged, the solution imposed in the case would be that of rejection as inadmissible of the complaint by the Preliminary Chamber Judge within the competent court.

This solution is justified because, from the interpretation of the text of art. 340 of the Criminal Procedure Code it results that the object of this procedure is exclusively the submission of the control of the courts to the dismissal solution ordered by the ordinance of the case prosecutor, and not to the release made by the hierarchically superior prosecutor during the preliminary procedure within the prosecutor's office.

In this sense, there is also the doctrine in criminal matters which stated as follows:

"*[...] in the procedure regulated within art. 340 of the New Criminal Procedure Code verifies solely the legality and validity of the solution of dismissal or waiver of the criminal investigation given by the case prosecutor, in this procedure the judge cannot examine the ordinance of the prosecutor or the superior admits the complaint, disproves the solution from the prosecutor's ordinance or the disposition from the dismissal indictment and gives the same or another dismissal solution, for other reasons or for some of the reasons invoked by the petitioner, the above rule is applicable).*

Thus, the Judge of the Preliminary Chamber cannot examine the legality and validity of the ordinance of the prosecutor who solves and rejects the complaint under art. 339 of the New Criminal Procedure Code or the criticism regarding the non-observance by the prosecutor of the term for solving the complaint provided by art. 338 because, from the perspective of the technique of regulating the norm, the legislator has concretely ruled that the solution of the complaint based on art. 339 by the chief prosecutor of the prosecutor's office, the general prosecutor of the prosecutor's office attached to the court of appeal or the chief prosecutor of the section or, as the case may be, by the hierarchically superior prosecutor constitutes only a mandatory prior procedure, provided by law for the exercise of the complaint under the conditions provided for by art. 340 para. (1) of the New Criminal Procedure Code.

In case of rejecting the complaint formulated against the case prosecutor's solution, the Judge of the Preliminary Chamber cannot rule on the act by which the head of the prosecutor's office or the hierarchically superior prosecutor solved the complaint formulated according to art. 339 of the New Criminal Procedure Code, even if the complaint made by the petitioner were made within these limits."[1]

Also, in the specialized literature in criminal matters it has been shown that:

„*only the solutions on the criminal trial, of non-prosecution ordered by the prosecutor who solved the case, and not other dispositions or procedural acts, are subject to judicial control. [...]*"[2]

In accordance with the doctrine the practice in criminal matters, by way of example, by Decision no. 406 of January 19, 2005, the HCCJ (crim. s.) ruled that the limits of the procedures for solving complaints before the courts are clear and concern exclusively the dismissal solution provided by the case prosecutor's act, and not the hierarchically superior prosecutor's act.

It is important to mention that, considering the provisions of art. 340 of the Criminal Procedure Code and taking into account the content of the complaint in which the solution of the hierarchically superior prosecutor is attacked, the dismissal solution submitted by the order of dismissal remains final, not being attacked within 20 days as required by the mandatory provisions of the Criminal Procedure Code.

As an example, it is worth mentioning the recent solution rendered by the Pitești County Court in case no. 10588/280/2021 which, by the FN Minutes of the proceedings pronounced on February 9, 2022, admitted, based on the provisions of art. 341 para. (6) letter a) of the Criminal Procedure Code except for the inadmissibility of the complaint filed against the order of the hierarchically superior prosecutor.

[1] In this respect, please see N. Volonciu, *The New Criminal Procedure Code commented*, Hamangiu Publishing House, Bucharest, 2014, p. 847.

[2] In this respect, please see I. Kuglay, comment in M. Udroiu (coord.), *The Criminal Procedure Code. Comment on Articles*, C.H. Beck Publishing House, Bucharest, 2015, p. 889.

Specifically, in the case mentioned above, the Judge of the Preliminary Chamber within the Pitesti County Court was invested by petitioning companies with a complaint formulated against the solution ordered by the hierarchically superior prosecutor within the procedure established by the provisions of art. 339 of the Criminal Procedure Code, respectively against Ordinance no. 136/II/2/2021 issued on May 14, 2021 by the Chief Prosecutor of the Prosecutor's Office attached to the Pitesti County Court.

Thus, by Ordinance no. 136/II/2/2021 issued within the file no. 9411 /P/2015, the Chief Prosecutor of the Prosecutor's Office attached to the Pitesti County Court rejected, as unfounded, the complaint formulated by the petitioning companies against the dismissal solution ordered against the respondent company, under the aspect of committing the alleged act of culpable destruction, the text of art. 255 para. (1) of the Criminal Code.

And, on July 6, 2021, the petitioners, through a conventional representative, sent to the court, by means of electronic ways of communication (e-mail), the complaint formulated against Ordinance no. 136/II/2/2021 issued by the hierarchically superior prosecutor by which the solution of classifying the case prosecutor was maintained as legal and thorough.

Thus, it results that the two companies understood to attack this procedural act, and not the dismissal solution ordered by the case prosecutor by Ordinance no. 9411/P/2015 issued on February 18, 2021, the respondent company invoked, *prima facie*, the exception of the inadmissibility of the action brought before the Pitesti County Court.

This aspect outcomes, unequivocally, from the content of the e-mail through which the action was sent to the court by which the conventional representative of the petitioning companies submitted the complaint to the Pitesti County Court, with the following description:

"*Attached, please find the complaint formulated by SC RS SRL and SC MRI SRL against the classification ordinance no. 136/II/2/2021 by which the complaint against Ordinance no. 9411/P/2015 was rejected. with the specification that the original of the complaint will also be sent by post.*"

Also, in the motivation of the exception, a systematic and literal interpretation of the complaint of the petitioning companies was made, from the very content and title of the complaint introduced before the Pitesti Court, resulting in expressly criticizing the Ordinance no. 136/II/2/2021 issued on May 14, 2021 by the Prosecutor's Office attached to the Pitesti County Court, being excluded the possibility of the existence of a material error, even if the reasons concerned the dismissal solution.

Thus, even in the expository part of the document submitted to the court, it is clearly specified by the petitioning companies which is the object of the complaint formulated in the procedure established by the provisions of art. 340 of the Criminal Procedure Code, namely:

"*Complaint against Ordinance no. 136/II/2/2021 of May 14, 2021, of the Prosecutor's Office attached to the Pitesti County Court, by which it was ordered the rejection as unfounded of the complaint formulated by the undersigned against the Ordinance of classification no. 9411/P/2015 dated February 18, 2021.*"

In addition, even within the content of the complaint it is unequivocally shown that its object is Ordinance no. 136/II/2/2021 issued by the Chief Prosecutor of the Prosecutor's Office attached to the Pitesti County Court, at tab no. 2, the petitioning companies stating that:

"*As a matter of priority, we invoke the fact that the Ordinance of 14 May 2021 no. 136/II/2/2021 is not motivated and will not include even a sum analysis of the criticisms and aspects of illegality that were invoked by us within the complaint, repeating a single sentence of the Classification Ordinance no. 9411/P/2015, namely that a causal link could not be established between the occurrence of the accident and the inaction or action of a legal person determined so as not to meet the elements of objective typicality of the crime provided by art. 255 para. (1) letter b) of the Criminal Code.*

In the situation of not motivating under any aspect of the Ordinance, we are forced to resume all the aspects invoked in the initial complaint, and the court will analyse them as follows."

Thus, it is important to mention that the Judge of the Preliminary Chamber of the Pitesti County Court admitted the exception even if the petitioning companies resumed the criticism against the dismissal solution ordered by the case prosecutor.

Or, as we correctly consider that the Preliminary Chamber Judge also deemed, within the procedural framework established by the text of art. 340 of the Criminal Procedure Code, the petitioning companies had to formulate criticisms by complaint exclusively against the Ordinance of dismissal of the case prosecutor issued on February 18, 2021 within the file no. 9411/P/2015, and not against Ordinance no. 136/II/2/2021 dated May 14, 2021 of the hierarchically superior prosecutor.

Moreover, it should be noted that, in the event that such an exception is arose, the existence of a material error cannot be invoked as an argument, in other words that the dismissal solution is in fact criticized and not the ordinance by which the complaint is examined within the procedure established by the provisions of art. 339 of the Criminal Procedure Code.

In support of this argument, it is worth mentioning that both regarding the prosecutor's order or even in the case of the indictment, the party is informed of his/her entitlement, in case of disagreement, to contest the dismissal solution, indicating the established legal basis set forth in the Criminal Procedure Code as well as of the term of 20 days in which the complaint can be filed.

Recently, a practice has been crystallized among the criminal investigation bodies in the sense of sending to interested persons also an address which expressly specifies the ordinance against which a complaint may be filed in the procedures established by the provisions of art. 339 and art. 340 of the Criminal Procedure Code, precisely in order to prevent the cases of invoking some material errors evoked by the litigants.

In the present case, the circumstance that the petitioning companies had to criticize the dismissal solution and not to criticize the ordinance by which their complaint was rejected by the hierarchically superior prosecutor also results from the content of Address no. 136/II/2/2021 issued by the Prosecutor's Office attached to the Pitesti County Court, mentioning that:

"Please find attached Ordinance no. 136/II/2/2021 of May 14, 2021 of this prosecutor's office unit, by which it was ordered the rejection as unfounded of the complaint filed by you against ordinance no. 9411/P/2015 of the Prosecutor's Office at the Pitesti Court.

According to the Ordinance, you were obliged to pay the legal expenses in the amount of 50.00 lei.

All legal expenses must be paid to the Public Finance Administration to which you belong in account no. […].

You can file a complaint against the non-submission solution under the conditions of Article 340 of the Criminal Procedure Code at the Pitesti County Court within 20 days from the date of receipt of the communication."

Therefore, it is clear that in the proceedings before the court where the legality and validity of the dismissal solution is verified, the procedural act that must be subject to the control of the Preliminary Chamber Judge is the one ordering the non-prosecution by the case prosecutor, regardless of whether we are in the presence of an ordinance or of the indictment.

3. Conclusions

Given the aforementioned, the procedural act that must be subject to the control of the Preliminary Chamber Judge is the one ordering the non-prosecution by the case prosecutor.

From another perspective, the same solution of inadmissibility is imposed in the hypothesis in which the report of the criminal investigation bodies is criticized, which proposes the dismissal of the case, a dismissal which is also ordered by the act of the prosecutor.

Then again, in this situation, the provisions of art. 315 para. (5) of the Criminal Procedure Code state that the mention of all factual and legal grounds will be mandatory within the ordinance only in the event that the case prosecutor does not assimilate the arguments contained in the report with proposed dismissal drafted by judicial police investigation bodies or if there was another suspect concerned in the case.

The risk that the party criticizes the report of the criminal investigation bodies by which only the dismissal solution is proposed is present because the ordinance of the case prosecutor could be considered unmotivated by the interested person.

We are in the presence of a false failure to state reasons because in the situation where the case prosecutor appropriates the argument of the criminal investigation bodies that have been delegated to carry out criminal activities, the prosecutor is no longer obliged to repeat the same arguments in the text of his ordinance.

However, also in this hypothesis the ordinance that will be subject to the procedures established by the provisions of art. 339-340 of the Criminal Procedure Code is the ordinance of the case prosecutor by which the case was dismissed.

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THE NOTION OF TERRORISM IN ROMANIAN CRIMINAL LAW

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Abstract

Terrorism is a complex phenomenon which describes some of the most serious criminal acts facing humanity, through the degree of social danger, the purpose and impact of its reprehensible consequences, both in terms of the territory affected and of the manner and means of its perpetration, as well as the significant number of potential/concrete victims.

The contradictorily nature of terrorism, as an antisocial activity that disrupts national security, public order and peace, including the rudimentary normal life of various human communities – as a precursor to organized, state-type society – has put the conception of this destructive human behavior at the forefront of research.

Thus, the difficulty of defining and conceptual boundary of terrorism from other prohibited acts is, in part, in various ideological interpretations, the current predisposition of political/state actors to give, when referred to, a diabolic connotation that increases the ambiguity and unclarity of this process.

Romania has not been a stranger to normative proposals or formal provisions that prohibit criminal offenses that are currently legally classified as acts of terrorism, in which sense such acts have been regulated and punished since the second half of the 19th century.

The purpose of this paper is to analyze the Romanian legal precursors of criminal rules banning and sanctioning terrorist offenses, to observe their beginnings, evolution, and any gaps or irregularities that may be corrected in the future.

Keywords: *terrorism, degree of social danger, definition, legislation, criminalization.*

1. Introduction

1.1. What matter does the paper cover?

The paper focuses on the notion of terrorism in Romanian criminal law, from the perspective of its historical evolution, from the first way of criminalizing these unlawful acts to the legislation currently in force in this matter.

1.2. Why is the studied matter important?

This study was developed for the purpose of making a thorough analysis in relation to one of the greatest threats the world had and still has to cope with, namely: terrorism.

Furthermore, the topic of the paper was chosen to make a foray into the way in which the regulations in this matter have evolved in Romanian criminal law, to analyze the provisions currently in force and, last but not least, in order to understand, as a whole, this phenomenon global.

1.3. How does the author intend to answer to this matter?

For the purpose of understanding terrorism as a global phenomenon, it is necessary to assess firstly the premises of the current legislation on terrorism in Romania.

In view of this approach, a historical perspective on the Romanian criminal legislation is presented by means of this study, which also illustrates the continuous evolution of the applicable law, given the overall evolution of the world, as well as the developing techniques and methods for preparing and carrying out terrorist acts

1.4. What is the relation between the paper and the already existent specialized literature?

This paper addresses specialist literature which has covered the various aspects considered in its contents by scrutinizing the conclusions of the authors referred to, by presenting the concepts defined and explained by the aforesaid, and finally presenting the point of view of the author of this work, either to give an opinion or to express a possible disagreement, not least by giving an opinion on the complex thematic spectrum addressed, in relation to the phenomenon of nowadays' terrorism.

2. Defining terrorism from a regulating perspective

2.1. Preliminary

Terrorism is a topical issue on which, unfortunately, humanity has been debating intensely and incessantly for at least the last two decades since the September 11, 2001 attacks in the United States. This event was heartwarming and, at the same time, terrified an entire world, given the unique and gloomy possibility offered to individuals to watch it in full

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swing, by broadcasting and redistributing it live by local and international press.

The atrocious contemporaneity of this international phenomenon is maintained and amplified by a number of factors, such as fanaticism, misinformation, migration and manipulation for political, pecuniary or other purposes, which contribute to the spread of intense collective fear, with unprecedented speed facilitated of the mass media and the progressive but undeniable digitization of human life[1].

An essential component of this form of manifestation is the notion of "*security*" which, as stated within the legal literature, exceeds any other specific threat, "*taking into account that in various areas, threats or vulnerabilities may occur, military or non-military, but in order to meet the condition of a significant fundamental security threat, they must be assessed as existential threats against a reference object*".

The difficulty in defining and conceptually delimiting terrorism from other normatively prohibited facts lies, in part, in the various ideological interpretations, the current predisposition of political/state factors to give, when referring to this term, a "*demonizing connotation*" [2], increasing the ambiguity and the difficulty of this process.

In addition, at the doctrinal level, the opinion was expressed that the term "*terrorism*" is currently used for discredit purposes rather than to "*describe a specific type of activity"* and is, as a rule, attributed to expressing social disapproval, while the concern to establish an unequivocal definition of terrorist behavior disappears[3]. Similarly, another author pointed out that "*terrorism is used as a synonym for rebellion, street fighting, civil strife, insurrection, rural guerrilla warfare, coups, and so on. The indiscriminate use of the term not only inflates statistics, but also hinders understanding of the specific nature of terrorism*"[4].

The doctrine which examined the manifestation of terrorism at the international level, emphasized that by provoking panic and fear, "*terrorists are trying to obtain concessions or weaken and discredit governments by proving that they are incapable of protecting their citizens, both in the country and in the country. apart from that, on the one hand, and that they are vulnerable no matter how strong their states are from a military and economic point of view, on the other hand*" [5].

Thus, it may be thought that terrorism is a phenomenon that essentially affects fundamental human rights, such as the right to life and bodily integrity, a criminal activity that "*undermines the importance of the law and democracy in general by imposing measures by states to restrict certain individual rights and freedoms. However, there must be a balance between restricting certain rights as a result of the particular danger posed by terrorism and respecting the individual rights and freedoms ensured by the relevant legal framework, as well as its application in a fair trial in criminal matters*" [6].

Precisely because of the major difficulty of investigating, prosecuting and sanctioning these acts, as well as in the light of the rapid evolution of the means and means of committing terrorist acts, it is not yet possible to form and accept, officially, a universal definition of terrorism.

2.2. First steps towards theorizing of terrorism

A first attempt to define the notion of terrorism was made in Roman law, in the "*Lex Apelia (103 BC), which criminalized Crimen Majestatis, i.e. any internal or external action directed against the integrity of the state*" [7].

The criminalization of terrorism from the perspective of a recent legal framework took place in 1856 in Belgium, given the widespread revolt of the peoples of Europe against their own monarchs, which manifested itself in unprecedented acts of violence, terrorist type, whose artisans could go unpunished by including these facts in the category of political crimes. Thus, through the newly introduced clause, an express and clear delimitation was made between acts of terrorism and political crimes, the former being subject to extradition procedures, "*this being the first measure to combat terrorism*"[8].

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[1] Grigore-Rădulescu, Maria-Irina, Popescu, Corina-Florența, *Some Observations regarding the notion of terrorism*, in the Journal of Criminal Law no. 2/2014, Universul Juridic Publishing House, Bucharest, 2014, p. 51.

[2] Chaliand, Gérard, Blin, Arnaud (coord.), *History of Terrorism from Antiquity to Daesh*, Polirom Publishing House, Bucharest, 2018, p. 14.

[3] In this respect, please see Merari, Ariel, *About terrorism as a strategy of insurrection*, comment in Chaliand, Gérard, Blin, Arnaud (coord.), *History of Terrorism from Antiquity to Daesh*, Polirom Publishing House, Bucharest, 2018, p. 23.

[4] Laqueur, W., *The Terrorism Reader: A Historical Anthology*, Meridian Publishing House, New York, 1978, p. 262, quoted in Dănilă, Olga Neagoe, Visarion, *Terrorism: a psychosociological approach*, Military Publishing House, Bucharest, 2011, p. 15.

[5] Mureșan, Mircea, *International terrorism. Some effects and evolutionary trends*, comment in Strategic Impact no. 2/2004 (11), p. 29.

[6] Popa, Rodica Aida, *Terrorism between reality and specialized justice*, April 19, 2013, p. 1, article published on: https://www.juridice.ro/255369/terorismul-intre-realitate-si-justitie-specializata.html.

[7] Grigore-Rădulescu, Maria-Irina, Popescu, Corina-Florența, *Some Observations regarding the notion of terrorism*, in the Journal of Criminal Law no. 2/2014, Universul Juridic Publishing House, Bucharest, 2014, p. 52.

[8] In this regard, please see Arădăvoaice, Ghe., Iliescu, D., Niță, L.D., *Terrorism, Antiterrorism*, Antet Publishing House, 1999, p. 304, quoted in Alexandru, Marian, *Regulation of terrorism by acts of domestic and international law*, Acta Universitatis George Bacovia. Juridica, vol. 5, no. 2/2016 - http://juridica.ugb.ro/, footnote no. 1.

One cannot speak of a proper normative definition, at the level of the international society, until the interwar period, marked by manifestations of an unprecedented aggression that were practiced by fascist organizations, which used terrorism as a political weapon. Thus, on November 20, 1926, Romania discussed within the League of Nations, through a project of the Romanian jurist, Vespasian C. Pella[9], the need to study and elaborate an International Convention for The Universalization of the Repression of Terrorism[10]. However, Romania's initiative was not particularly considered, given the need to clarify some fundamental issues in the International Conferences for the Unification of Criminal Law. This process has resulted in a regrettable failure caused by the inaccuracies created between the states participating in the process of defining political crime and/or what constitutes a terrorist act[11].

2.3. Terrorism as a criminal phenomenon: legislative evolution and current regulations in Romania

Romania was no stranger to normative proposals or official provisions that incriminate criminal acts that are currently legally qualified as acts of terrorism. In this sense, it is noteworthy the regulation of the attack against the king, as an "*act of great gravity*", in the Criminal Code of 1865, in the chapter "*Crimes against the internal security of the state*". Subsequently, this legal provision was maintained in the Criminal Code of 1885[12].

In 1936, through the provisions of art. 204[13] of the Criminal Code of Carol II[14], the incrimination of the attack against the king's person is maintained, but with the specification that this deed constitutes an "*act of great treason*", the punishment being forced labor for life. Further, art. 219[15], art. 220[16] and art. 221[17] of the same normative act, incriminates the attack or the offense brought on the Romanian territory to the head of a foreign state or to the representative of a foreign state.

As a result of the aggravation and frequency of acts of terrorist violence in the interwar period, the criminalization of these acts in the Criminal Code has intensified. Thus, as a result of the actions of the Iron Guard, Marshal Antonescu incriminated, for the first time, the instigation of rebellion, imposing the death penalty[18].

In Chapter II, entitled "*Application of criminal law in space*", Section IV - "*Crimes committed by aliens abroad*" – art. 11 expressly refers to acts of terrorism, but the language used is at least reprehensible, from the perspective of abstract expression and the lack of definition and delimitation of the notion of "*acts of terrorism*", which made possible the arbitrary application of this normative text[19].

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[9] Considered the artisan of the conventions adopted in 1937. In this regard, please see Alexandru, Marian, *Regulation of terrorism by acts of domestic and international law*, Acta Universitatis George Bacovia. Juridica, vol. 5, no. 2/2016 - http://juridica.ugb.ro/, p. 539.

[10] In this respect, please see, Bodulescu, Ion, *The Scourge of International Terrorism*, Military Publishing House, 1978, p. 117-119, quoted in Alexandru, Marian, *Regulation of terrorism by acts of domestic and international law*, Acta Universitatis George Bacovia. Juridica, vol. 5, no. 2/2016 - http://juridica.ugb.ro/, p. 538.

[11] Alexandru, Marian, *Regulation of terrorism by acts of domestic and international law*, Acta Universitatis George Bacovia. Juridica, vol. 5, no. 2/2016 - http://juridica.ugb.ro/, p. 539.

[12] In this respect, please see the Criminal Code of 1885, Guttenberg Publishing House, p. 90, quoted in Alexandru, Marian, *Regulation of terrorism by acts of domestic and international law*, Acta Universitatis George Bacovia. Juridica, vol. 5, no. 2/2016 - http://juridica.ugb.ro/, footnote no. 15, p. 546.

[13] Please see the provisions of art. 204 of the Criminal Code Carol II, according to which: "*Any attack on the life, bodily integrity or freedom of the King, constitutes a crime of high treason and is punishable by forced labor for life. Attempts of the same kind against the Queen, the Crown Prince or other members of the royal family are punishable by 10 to 25 years' hard labor, unless the offense is punishable by law with a greater penalty*", text available by accessing the following link: https://lege5.ro/App/Document/heztqnzu/art-261-rebeliunea-codul-penal.

[14] Named "*Carol II*" according to the law entitled: "*Name of the Unification Codes of Legislation*", decreed under no. 577/1936 and published in the Official Gazette, part I, no. 73 of March 27, 1936. In this version, the Criminal Code was in force from March 18, 1936 to February 1, 1948.

[15] Please see the provisions of art. 219 of the Criminal Code Carol II, according to which: "*The one who, on the territory of the Romanian State, commits, against the head of a foreign state, the attack provided by Article 204, shall be punished with severe imprisonment from 10 to 15 years of age, unless a more severe punishment is due, according to this code, and when the attack resulted in the death of the head of the foreign state, with forced labor for life*", text available by accessing the following link: https://lege5.ro/App/Document/heztqnzu/art-261-rebeliunea-codul-penal.

[16] Please see art. 220 of the Criminal Code Carol II, according to which: "*The one who, on the territory of the country, brings an offense against the person of the head of a foreign state, shall be punished with correctional imprisonment from 6 months to 3 years*", text available by accessing the following links: https://lege5.ro/App/Document/heztqnzu/art-261-rebeliunea-codul-penal.

[17] Please see art. 221 of the Carol II Criminal Code, according to which: "*Whoever commits a crime against the bodily integrity, liberty or honor of a foreign diplomatic agent, accredited to the Romanian government, or of a member of a foreign diplomatic mission, knowing their quality, shall be punished with the punishment provided by law for the act committed, whose maximum is increased by a quarter. Injury, slander and defamation can only be pursued if the injured party has expressed this wish*".

[18] Please see the Criminal Code "*King Mihai I*", R. Cioftec Publishing House, Bucharest, 1947, quoted in Alexandru, Marian, *op. cit.*, footnote no. 17, p. 546.

[19] See, in this respect, art. 11 of the Carol II Criminal Code, according to which: *"art. 11. - Any other crimes or offenses, apart from those provided in art. 10, committed by foreigners abroad, are punished, according to art. 8, if the criminal alien is in the country and if his extradition is not requested or if the extradition cannot be executed. Prosecutions for such offenses may be prosecuted only at the request of*

Also, the realities that the Romanian society was facing at that time, is reflected also by the facts incriminated in the content of Title VII ("*Crimes and crimes that produce public danger*"), Chapter I - entitled "*Crimes and crimes that produce public danger by the use of explosives and by destruction*"- art. 352. This text expressly provides, *inter alia*, for the guilt of direct intent qualified by purpose, where the purpose is similar to acts of terrorism in the contemporary sense (*i.e.* "*for the purpose of causing a public danger*")[20].

Following the amendment of the Criminal Code in 1948[21], severe punishments were also imposed for the "*crime of conspiracy against the social order*"[22], largely keeping the previous provisions of the Carol II Code. Moreover, in the latest version of this normative act.

The end of the communist regime marked a period of legislative vacuum in Romania, the legislation being, for the most part, anachronistic compared to the new social relations that appeared. In this sense, the first defining stage in the process of updating the Romanian legislation was the adoption of the Constitution on November 21, 1991[23]. The fundamental law establishes, in the content of Article 1, that Romania is a national state, sovereign and independent, unitary and indivisible, guaranteeing at the same time the dignity of man, the rights and freedoms of the citizens and the free development of the human personality.

Acts of terrorism infringe precisely on these fundamental social values and, therefore, it must be criminalized and severely punished by criminal law. The fight against terrorism has become the central concern of the international communities, a context in which Romania had, as a priority, to ensure a proper repression of acts of terrorism, in accordance with the rigors of international society[24].

In 1995, the Government submitted to the Romanian Senate the draft law on the punishment of acts of terrorism, requesting its adoption in the emergency procedure, but the Association for the Defense of Human Rights in Romania (A.P.A.D.O.R. - C.H.), considering the provisions of that bill as a

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the Ministry of Justice, except for the following offenses which are prosecuted and punished in accordance with the provisions of this Code, regardless of the criminal provisions in force at the place of the offense:

1. Counterfeiting of metallic currency, banknotes, public bills, banknotes, stamps or foreign marks;

2. Trafficking in women and children;

3. Acts of terrorism considered as offenses under this Code;

4. Drug trafficking;

5. Trafficking in obscene publications (pornography);

6. Abandonment of family;

7. Participation in acts committed in order to enslave a person;

8. Piracy;

9. Breaking or destroying submarine cables, as well as circulating false signals or false calls;

10. Any other offenses provided for in this Code, for which Romania has been obliged by international conventions to punish them".

[20] Please see the provisions of art. 352 of the Criminal Code of 1936, according to which: "*A person who, in order to cause a public danger, throws bombs or uses explosive substances, corrosive, asphyxiating or flammable gases or liquids, commits the crime of provoking a public danger and is punishable by correctional imprisonment from 3 to 7 years, a fine of at 5,000 to 10,000 lei and correctional ban from 2 to 5 years. One commits this crime and is punished with the same punishment as the one who demolishes, destroys, in whole or in part, buildings, buildings or any other construction, in order to cause a public danger. When the act was committed on a public building or intended for public use, monument, public statue, cemetery, factory, floating vessel or aircraft, the penalty is correctional imprisonment from 5 to 10 years, a fine from 10,000 to 20,000 lei and a correctional ban on every 3 to 5 years.*

This constitutes a crime of public danger and is punishable by:

1. with forced labor for life if a person has died;

2. with severe imprisonment from 5 to 10 years, a fine from 10,000 to 15,000 lei and civic degradation from 3 to 5 years, if a serious injury to one's health or bodily integrity has been caused";

[21] Published in the Official Gazette, Part I no. 48 of February 2, 1948, available online by accessing the following link: https://lege5.ro/App/Document/g42doobz/codul-penal-din-1936.

[22] Please see the provisions of art. 209 of the Criminal Code of 1947, according to which: "*It constitutes a crime of conspiracy against the social order and is punishable by correctional imprisonment:*

I. From 6 months to 3 years, a fine from 2,000 to 20,000 lei and a correctional ban from 1 to 3 years for preaching by word of mouth the change of the democratic form of government of the State.

II. From 3 to 7 years, a fine from 2,000 to 20,000 lei and a correctional ban from 3 to 5 years:

a) the fact of making propaganda for the violent overthrow of the existing social order in the State;

b) the fact of establishing or organizing secret associations for the purpose indicated in the previous paragraph, whether or not they have an international character;

c) the fact of working, by violent means, to produce terror, fear, or public disorder, in order to change the economic or social order in Romania;

d) the fact of contacting any person or association of an international character, from abroad or from the country, in order to receive instructions or aid of any kind for the preparation of a reversal of the democratic order of the State;

e) the fact of helping, in any way, an association from abroad or from the country, which would aim to fight against the economic or social order in Romania, by the means shown in letters a and c;

f) the fact of joining or becoming a member of any of the associations provided for in letters b and c.

III. Those who initiate, organize, activate or participate in fascist political, military or paramilitary organizations are punished with forced labor from 15 to 25 years and civic degradation from 5 to 10 years";

[23] Published in the Official Gazette of Romania, Part I no. 767 of October 31, 2003.

[24] See, in this regard, Alexandru, Marian, *op. cit.*, footnote no. 15, p. 548.

violation of Human Rights. Thus, it submitted to the Defense Committee and the Senate Judiciary Committee its own analysis of the bill[25].

However, after the attacks in 2001, in New York, the Romanian Government issued an emergency ordinance, which resumes the bill proposed to the Parliament in 1995, respectively the GEO no. 141/2001 for the sanctioning of acts of terrorism and acts of violation of public order (hereinafter referred to as "*GEO no. 141/2001*")[26].

This normative document defined acts of terrorism as "*the perpetration of the following offenses for the purpose of seriously disturbing public order by intimidation, terror or by creating a state of panic"*[27], by reference to the offenses of murder, bodily injury or grievous bodily harm, most often also the crimes of destruction, hijacking, nuclear terrorism, non-compliance with the arms and ammunition regime and threats to commit such acts.

The doctrine was praiseworthy for the language used in art. 1 of the GEO no. 141/2001, being "obvious the intention of the legislator to use in "*order to separate the acts of terrorism from other identical material acts, the special purpose of the agent. Thus, the phrase «when committed for the purpose of the disorder» provided in art. 1 para. (1) lit. d) does not leave room for interpretations*"[28]. However, given the insufficient regulation of this matter, as well as the need to adopt a separate normative act, the GEO no. 141/2001 was repealed and replaced by Law no. 535/2004 on preventing and combating terrorism, on December 10, 2004.

Law on the Criminal Code no. 301/2004 brought a series of essential amendments, in terms of criminalizing the acts of terrorism in the Criminal Code[29]. Thus, an entire title of the Special Part was devoted to acts of terrorism, namely: Title IV, entitled "*Crimes and offenses of terrorism*". In this title, six articles incriminated acts such as: acts of terrorism, association for committing acts of terrorism, financing of acts of terrorism, threat and alarm for terrorist purposes. At the same time, the legal persons were criminally liable for committing any of the aforementioned deeds.

However, with the increasing frequency and scope of terrorist acts, international and especially European regulatory trends have highlighted the need for a special legal framework for the prevention and repression of acts of terrorism, including internal level.

In this context, we reiterate the adoption of Framework Decision no. 2002/475/JHA on combating terrorism, as a consequence of the need to harmonize the laws of the Member States which at that time did not have special rules in this area, the only provisions under which acts of terrorism could be investigated and tried classic crimes such as: murder, destruction, arson, personal injury, etc[30].

At national level, on November 25, 2004, Law no. 535/2004 on preventing and combating terrorism[31] (hereinafter referred to as "*Law no. 535/2004*"), in order to transpose Framework Decision no. 2002/475/JHA. Law no. 535/2004 expressly defines, in its very first article, the notion of "*terrorism*". In this sense, it constitutes "*terrorism*"[32]:

"(...) those actions, inactions, and threats to them, which pose a public danger, affect the life, bodily integrity or health of persons, material factors, international relations of States, national or international security, are politically motivated, religious or ideological and are committed for one of the following purposes:

a) intimidation of the population or a segment of it, by producing a strong psychological impact;

b) the unlawful compulsion of a public authority or international organization to perform, not to perform or to refrain from performing a certain act;

c) serious destabilization or destruction of the fundamental political, constitutional, economic or social structures of a State or international organizations."[33].

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[25] See, in this regard, Drogoman, I., *International Humanitarian Law*, Andrei Şaguna Foundation Publishing House, 1999, p. 384, quoted in Alexandru, Marian, *op. cit.*, footnote no. 22, p. 549.

[26] Published in the Official Gazette of Romania, Part I no. 691 of 31 October 2001, available by accessing the following link: https://lege5.ro/App/Document/gmzdcojy/ordonanta-de-urgenta-nr-141-2001-pentru-sanctionarea-unor-acte-de-terorism-si-a-unor-fapte-de-incalcare-a-ordinii-publice.

[27] In accordance with the provisions of art. 1 para. (1) of the GEO no. 141/2001.

[28] See, in this regard, George Zlati, *Terrorism. Aggravated form or autonomous crime? Consequences. Conceptual analysis of Law No. 535/2004 on preventing and combating terrorism (I*), published on July 18, 2012 in the publication *Criminally relevant*, available by accessing the following link: https://www.penalmente.eu/2012/07/18/terorismul-forma-agravata-ori-infractiune-autonoma-consecinte-analiza-conceptuala-a-legii-nr-5352004-privind-prevenirea-si-combaterea-terorismului-i/.

[29] See, in this regard, the Law on the Criminal Code no. 301/2004, published in the Official Gazette of Romania, Part I no. 575 of June 29, 2004, as subsequently amended and supplemented. This version of the Criminal Code was in force from June 29, 2004, to July 28, 2009.

[30] See, in this respect, Ceapă, Ion, *An examination of compatibility between terrorist offenses under domestic law and existing regulations in the field at European level*, in the Criminal Law Book no. 1/2009 (January-March), C.H. Beck Publishing House, Bucharest, 2009, p. 54.

[31] Published in the Official Gazette of Romania, Part I no. 1161 of December 8, 2004, as subsequently amended and supplemented.

[32] In accordance with the amendments introduced by Law no. 58/2019 for the amendment and completion of Law no. 535/2004 on preventing and combating terrorism, published in the Official Gazette of Romania, Part I no. 271 of April 10, 2019.

[33] In its initial version, the text of art. 1 of Law no. 535/2004 was as follows:

"*Terrorism is a set of actions and / or threats that pose a public threat and affect national security, with the following characteristics:*

By reading the text of art. 1 of Law no. 535/2004, it can be easily ascertained that the characteristic elements and conditions of the acts of terrorism, as incriminated by the Romanian legislator, are strictly stated and enumerated, namely:

1. the acts may consist of actions and abstentions, the threats related to them being assimilated to the first two;
2. the documents must:

- presents a public danger;
- affect the life, bodily integrity or health of persons, material factors, international relations of States or national or international security;

3. the documents have an alternative motivation, political, religious or ideological.

By referring to the way of establishing the purpose, the unfortunate expression used in the content of para. (3) in art. 37^1 of Law no. 535/2004, which may be considered to be abstract. In this respect, the aforementioned text establishes as a way of identifying the purpose of an action or inaction specific to acts of terrorism the deduction from objective factual circumstances. However, It may be thought that such an ambiguous language cannot serve the purpose for which the legal norm was enacted, but, on the contrary, leaves wide open a door to an extensive interpretation - given that it is in the state of "*objective factual circumstances*" is not defined - with consequences of a wrongful application of the law.

At the level of judicial practice, the High Court of Cassation and Justice[34] ruled, in assessing the factual circumstances, in the sense that:

„Thus, the court of judicial control finds that the action of the defendant falls, under the aspect of the objective side, in the pattern of the norm of incriminating the deed for which he was sent to court, respectively art. 32 para. (4) of Law no. 535/2004 in conjunction with art. 32 para. (3) letter a) of Law no. 535/2004 reported to art. 1 letter a) of Law no. 535/2004, the evidence highlighting that the defendant sought to intimidate the population by producing a strong psychological impact, in the sense that, speaking on behalf of an international terrorist organization respectively, ISIS (DAESH), initially in English and then in Romanian, with Arabic accent, the defendant announced the placement of «three devices» in C., the threatening action being able to produce a serious fear and alarm several specialized state institutions.".

However, if the factual situation is not obvious, as in the case in which the Supreme Court ruled, how are the factual circumstances assessed? According to what criteria, how long are they not provided by law? Doesn't it go through a purely subjective evaluation register? Of course, these questions remain rhetorical for the time being.

Also from the perspective of identifying the features of acts of terrorism, if acts of terrorism are committed: a) on the territory of at least two states; b) in the territory of a State, but part of their planning, training, management or control takes place in the territory of another State; c) on the territory of a state, but involves a terrorist entity that carries out activities on the territory of another state; d) on the territory of one state, but have substantial effects on the territory of another state; they are qualified as transnational, as provided by art. 3 of Law no. 535/2004.

However, in the specialized literature there have been controversies about the way in which the Romanian legislator regulated terrorism crimes, even raising the question of whether the new normative act provides for an "*aggravated form or an autonomous crime?*"[35]. In the opinion of this author, the critique of the Romanian legislator's approach concerns a series of aspects, namely:

- restricting the special motive only in terms of political character - "unjustifiably limits the scope of the definition. The doctrine has highlighted the inadequacy of the political motive, since terrorism can be based on a multitude of factors, including ideological, religious, etc."[36]. Of course, the quoted criticism focused on the initial form of the text, an aspect that has already been corrected by the legislator, by including ideological and/or religious factors, along with the political factor;
- the aim was to sanction the criminal conduct, and not the person who committed it - by taking into account the principle of legality (*i.e. nulla poena sine lege*), in the sense that "the state must sanction the criminal conduct and not the criminal type. In other words, the principle in question concerns a person

a) are premeditatedly committed by terrorist entities, motivated by extremist conceptions and attitudes, hostile to other entities, against which they act in violent and / or destructive ways;

b) aim to achieve specific objectives of a political nature;

c) concerns human and / or material factors within the public authorities and institutions, the civilian population or any other segment belonging to them;

d) produce conditions with a strong psychological impact on the population, meant to draw attention to the pursued goals.".

[34] Please see, in this regard, HCCJ, crim. s., Panels of 5 judges, Decision no. 40/2021, rendered on February 1, 2021, available online by accessing the following link: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=175812.

[35] Please see Zlati, George, *op. cit.*

[36] In this regard, please see Cassese, A., *The Multifaced Criminal Notion of Terrorism in International Law*, Journal of International Criminal Justice, vol. 4, 2006, p. 939 and MacDonald, E., Williams, G., *Combating Terrorism: Australia's Criminal Code Since September 11, 2001*, Grifith Law Review, vol. 16, no. 1, 2007, p. 31, quoted in Zlati, George, *op. cit.*, footnote 33.

given as a criminal because of his conduct, regardless of who he is and what that person is"[37];

- conceptually, the author considers that terrorist acts should be seen as an aggravated form of traditional crimes already sanctioned internally, in line with the arguments listed below[38]:

a) including before the adoption of Law no. 535/2004, terrorism could be sanctioned, the simple fact that this prosecution was already possible proving the lack of a conceptual autonomy of the incriminations of the special law;

b) comparatively analyzing the traditional crimes and the incriminations from Law no. 535/2004, it is found that the difference lies in the existence of the special purpose/mobile. Consequently, the objective pursued by the legislator is an obvious one, namely: the desire to sanction more severely the material side present in the common law, when there is a certain subjective element;

c) the aggravated sanctioning treatment would not derive from guilt, but from the abstract danger of the deed, which springs from the superior motivation of the agent, essential motivation in order to qualify the whole deed as a terrorist act;

d) the aim is to provide a unitary and aggravated sanctioning framework - in line with the danger of the phenomenon in question, to allow special means of investigation and the development of international cooperation (procedural issues), not to "create new crimes", etc.

Law no. 535/2004 expressly defines, in the content of art. 4, the meaning of terms and expressions used/used in its content, such as: terrorist entity[39], terrorist[40], structured group[41], terrorist group[42], terrorist organization[43], terrorist actions[44], funds[45], propaganda[46], material factors, specific human factors, etc.

The definition given to terrorist acts subsumes acts of preparation[47] (*i.e.* preparation, planning, promotion), acts of execution (*i.e.* committing, leading, coordinating and controlling the terrorist act), as well as any other activities carried out after committing the terrorist act, if related. On the one hand, the abstract expression of this rule can be noted as all-encompassing - given that it allows the extension of the interpretation to any other situation not provided for in its text. On the other hand, however, I appreciate that the criminal norm must be clear, and formulations such as the one found in art. 4 point 4 of Law no. 535/2004 must be clarified, in the sense of no longer allowing extensive interpretations that could lead to an abusive application of the legal norm.

Regarding the notion of funds, it is notable that, although it seems all-encompassing, the enumeration of

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[37] Please see McSherry, B., *Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws*, New South Wales Law Journal, vol. 27, no. 2, 2004, p. 364, quoted in Zlati, George, *op. cit.*, footnote 38.

[38] Please see Zlati, George, *Terrorism. Aggravated form or autonomous crime? Consequences. Conceptual analysis of Law no. 535/2004 on preventing and combating terrorism (II)*, published on July 18, 2012 in the publication *Criminally relevant*, available by accessing the following link: https://www.penalmente.eu/2012/07/18/terorismul-forma-agravata-ori-infractiune-autonoma-consecinte-analiza-conceptuala-a-legii-nr-5352004-privind-prevenirea-si-combaterea-terorismului-ii/.

[39] Please see art. 4, point 1 of Law no. 535/2004, according to which: "*For the purposes of this law, the terms and expressions below have the following meanings: 1. terrorist entity - a person, group, structured group or organization which, by any means, directly or indirectly: a) commits or participates in acts of terrorism; b) prepares to commit acts of terrorism; c) promotes or encourages terrorism; d) supports terrorism in any form;*".

[40] Please see art. 4, point 2 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 2. terrorist - a person who has committed an offense under this law or intends to prepare, commit, facilitate or instigate acts of terrorism*;".

[41] Please see art. 4, point 3 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 3. structured group - the association of three or more persons, having their own hierarchy, set up for a certain period of time to act in a coordinated manner for the purpose of committing acts of terrorism*;".

[42] Please see art. 4, point 4 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 4. terrorist group - the association of two or more persons who, without necessarily having a formally established structure and hierarchy, were formed for the purpose of committing acts of terrorism*;".

[43] Please see art. 4, point 5 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 5 terrorist organization - a hierarchically constituted structure, with its own ideology of organization and action, having representation both at national and international level and which, for the achievement of specific goals, uses violent and / or destructive ways;*".

[44] Please see art. 4, point 7 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 7. terrorist acts - the preparation, planning, promotion, perpetration, conduct, coordination and control of the terrorist act, as well as any other activities carried out after its perpetration, if they are related to the terrorist act*;".

[45] Please see art. 4, point 8 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 8. funds - goods of any kind, tangible or intangible, movable or immovable, acquired by any means and legal documents or instruments in any form, including electronic or digital form, attesting to a right of ownership or interest in such goods, credits banknotes, traveler's checks, bank checks, money orders, shares, securities, bonds, special drawing rights and letters of credit, without limiting this enumeration;*".

[46] Please see art. 4, point 9 of Law no. 535/2004, according to which: „*For the purposes of this law, the terms and expressions below have the following meanings: 9. propaganda - the systematic spread or apology of ideas, concepts or doctrines, with the intention of convincing and attracting new followers;*".

[47] For details on the delimitation of the preparatory acts from the execution ones, please see Dobrinoiu, Vasile, commentary in Chiş, Ioan, Dima, Traian, Dobrinoiu, Maxim, Dobrinoiu, Vasile, Gorunescu, Mirela, Hotca, Mihai Adrian, Pascu, Ilie, Păun, Costică, *The New Criminal Code commented. General part*, 3rd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2016, pp. 245-247.

the different types of goods that are part of the category of funds, within the meaning of Law no. 535/2004, ends with the specification: "*without this enumeration being limiting*". Thus, the legislator managed to include any category of goods that can be used to finance acts of terrorism, even virtual currencies.

Terrorist financing consists in the collection or making available, directly or indirectly, of funds, lawful or unlawful, with the intention of being used or knowing that they are to be used, in whole or in part, for committing acts of terrorism or for supporting a terrorist entity and is punishable by imprisonment from 5 to 12 years and the prohibition of certain rights, according to the provisions of art. 36 para. (1) of Law no. 535/2004.

Moreover, the perpetration of an offense for the purpose of obtaining funds, with the intention of being used or knowing that they are to be used, in whole or in part, for committing acts of terrorism or for supporting a terrorist entity, shall be punished with the penalty provided by law for that offense, the maximum of which is increased by 3 years. If these funds have been made available to the terrorist entity, the rules on concurrence of offenses shall apply.

In addition, the provisions of the Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing some normative acts[48] (hereinafter referred to as "*Law no. 129/2019*"). This normative act repealed Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for setting forth of measures to prevent and combat the financing of terrorism[49], republished in the Official Gazette of Romania, Part I, no. 702 of October 12, 2012, as subsequently amended and supplemented[50].

According to art. 2 letter b) of Law no. 129/2019, by financing terrorism is meant the crime provided in art. 36 of Law no. 535/2004 on preventing and combating terrorism, as subsequently amended and supplemented. Therefore, the cited text of the law refers to art. 36, which is duly completed, meaning that it can be deduced that, insofar as the funds used to finance terrorism are illicit - resulting from the crime of money laundering[51]- money laundering is a prerequisite for the crime of terrorism.

In force legislation in the field of preventing and combating money laundering is particularly important, including from the perspective of combating terrorism, given that "*through this crime, the fuel necessary for the existence and functioning of organized crime and the financing of terrorist acts is produced*"[52].

From the perspective of the degree of social danger of the acts of terrorism, this is reflected also in the distinct incrimination of some preparatory acts, the Romanian legislator regulating, in the content of art. 33 para. (1), the following activities:

a) the procurement, possession, manufacture, manufacture, transport or supply of dual-use products or technologies or military products or explosive or flammable materials, for the purpose of producing destructive means, explosive devices of any kind, as well as chemicals, biological, radiological or nuclear, likely to endanger the life, health of humans, animals or the environment;

b) providing instructions on the manufacture or use of explosives, firearms or any other weapons, harmful or dangerous substances, or on specific techniques or methods of committing or supporting the perpetration of an act of terrorism, knowing that those powers offered are or may be used for this purpose.

c) receiving or acquiring instructions through self-documentation on the manufacture or use of explosives, firearms or any other weapons, harmful or dangerous substances, or on specific techniques or methods of committing or supporting the perpetration of an act of terrorism;

d) the qualified theft committed in order to commit the offenses provided in art. 32 para. (1) and (3) and in para. (1) and (2).

The following paragraph of the same provision of the law regulates the attenuated version of para. (1), for acts such as:

a) *facilitating the crossing of the border, hosting or facilitating the access* in the area of the targeted objectives of a person who is known to have participated or committed or is to participate or to commit an offense provided in para. (1) or to art. 32

[48] Published in the Official Gazette of Romania, Part I no. 589 of July 18, 2019.

[49] Republished in the Official Gazette of Romania, Part I, no. 702 of October 12, 2012, as subsequently amended and supplemented.

[50] Please see the provisions of art. 65 letter b) of Law no. 129/2019.

[51] Please see, in this regard, the provisions of art. 49 para. (1) of Law no. 129/2019, according to which: *„(1) It constitutes the crime of money laundering and shall be punished by imprisonment from 3 to 10 years:*

a) the exchange or transfer of goods, knowing that they come from the perpetration of crimes, in order to conceal or conceal the illicit origin of these goods or in order to help the person who committed the crime from which the goods come to evade prosecution, trial or execution of the sentence;

b) concealment or concealment of the true nature, provenance, location, disposition, movement or ownership of property or rights thereon, knowing that the property is the result of an offense;

c) the acquisition, possession, or use of goods by a person other than the active subject of the crime from which the goods come, knowing that they come from the perpetration of crimes";

[52] Hotca, Mihai Adrian, commentary in Hotca, Mihai Adrian, Hach, Elena, *Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing some normative acts. Comment on articles. Second edition, revised and added*, Universul Juridic Publishing House, Bucharest, 2021, p. 17.

para. (1) or (3);

b) *collecting or possessing*, for the purpose of transmission, or making available data and information on targets targeted by a terrorist entity;

c) *falsifying official documents or using them* for the purpose of facilitating the perpetration of an act of terrorism;

d) *blackmail* committed for the purpose of committing an act of terrorism.

e) Regarding the attempt, art. 37 para. (1) of Law no. 535/2004 states that, for the facts provided in art. 32, 33, 34[53], art. 35[54], art. 36 para. (1)[55], the attempt is punished, the notion of attempt including the following:

- production or procurement of means or instruments,
- taking action as well
- the agreement reached between at least two persons in order to commit an act of terrorism, respectively the unequivocal expression, regardless of the modality or context, of the intention to commit an act of terrorism.

Thus, the legislator chose to regulate the attempt so that it absorbs, in its content, certain preparatory acts. Including from this point of view, the gravity of the facts regulated in the content of Law no. 535/2004. On this occasion, it is worth reiterating the criticism of the ambiguity of the language used in the last paragraph of this article, which allows an extensive and unobjective interpretation of the text of the law, with the possible consequence of wrong legal classification and application of Law no. 535/2004 to situations not regulated by it.

3. Conclusions

The international community has been witnessing an exacerbation of the phenomenon of international terrorism for several decades.

Significant contributions to the realities of this century, from the perspective of security vulnerabilities, have factors such as: technological progress, destabilization of social, moral, confessional, ideological beliefs and, last but not least, distancing on all levels of the individual, which leads, slowly but surely to the dehumanization and brutalization of individuals.

Antiquity has known, for the first time, the phenomenon of terrorism, of course with a different motivation, purpose and other operational capabilities. Changes at the societal level have also been reflected in the manner and means of carrying out terrorist attacks.

Today, technology is part of the "*normality*" of society, so that any event, any information can be accessed or communicated / distributed in real time. Who would have thought that the beginning of the third millennium would present "*live"* a grotesque spectacle of death, terror and mass misinformation?

Terrorism has acquired new valences, which not even the doctrine can fully discern. Thus, there is still no accepted general definition of terrorism, and this difficult task falls on some states.

Of course, in recent years, at least within the Union framework, instruments have been adopted to harmonize the laws of the Member States which have proved their effectiveness, but apparently, no matter how much effort is made, terror and organized crime know no bounds. ingenuity.

By reference to the Romanian legislation, it can be concluded that the concern for conceptualizing the notion of terrorism has now taken a concrete but permanently perfectible form, in terms of international and national law, and judicial practice will facilitate the identification of possible regulatory deficiencies.

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[53] „*The act of requesting one or more persons, directly or indirectly, by any means, to commit or support the perpetration of an act of terrorism constitutes an offense and is punishable by the penalty provided by law for the offense which was the subject of the request.*".

[54] "*(1) The movement of a person from the territory of the State of which he is a national or from the territory of which he has his domicile or residence to or into the territory of a State other than that of which he is a national or resident for the purpose of committing, planning or preparing acts terrorism or to participate in them or to provide or receive training or preparation for committing an act of terrorism or to support, in any way, a terrorist entity, constitutes travel for terrorist purposes and shall be punished by imprisonment from 5 to 12 years, and prohibition of certain rights. (3) Any act of organization or facilitation by which assistance is offered to any person to travel abroad for terrorist purposes, knowing that the assistance thus provided is for this purpose, shall be punished by imprisonment from 2 to 7 years and the prohibition of certain rights.*".

[55] „*(1) It is an offense to finance terrorism by collecting or making available, directly or indirectly, funds, lawful or unlawful, with the intention of being used or knowing that they are to be used, in whole or in part, for the perpetration of acts of terrorism. terrorism or to support a terrorist entity and is punishable by imprisonment from 5 to 12 years and the prohibition of the exercise of certain rights*".

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- The Criminal Code;
- The Criminal Code Carol II;
- The International Convention for The Universalization of the Repression of Terrorism.

THE IMPORTANCE OF PRE-TRIAL CHAMBER IN CRIMINAL PROCEEDINGS. PROCEDURE AND CONTROVERSIAL ISSUES

Mirel Georgian PETRE *

Abstract

Following a legislative proposal to eliminate the pre-trial chamber phase from the criminal proceedings, I decided to study its properties and express my opinion on its importance.

Analyzing the pre-trial chamber and the trial procedure, I found that its delimitation from the trial phase by clear differences imposed by the code of criminal procedure is of particular importance.

Its nature is to carry out a complex legal control over the criminal investigation phase in order to give effectiveness to the fundamental principles of the criminal proceedings and to guarantee compliance with the legal provisions in force.

Through my study, I aim to delimit some notions that have a practical, but also theoretical importance, in order to identify and distinguish the procedures regulated in the new code of criminal procedure regarding the institution of the pre-trial chamber.

I intend to set out the procedure, but also the issues discussed in contradiction in the specialized practice, as well as in doctrine, in a technical manner in order to outline its essential features and to delimit the usual procedure from other derived procedures in which the legislator used the phrase "pre-trial chamber judge", although this is not found in the pre-trial chamber phase.

Also, the delimitation of these proceedings leads to a practical understanding of the functionality of the pre-trial chamber and to the elimination of the confusions of judicial proceedings conducted in a particular procedure.

Keywords: *pre-trial chamber, theoretical problems, procedure, remedies.*

1. Definition of pre-trial chamber, as provided in the New code of criminal procedure in relation to its subject matter

The pre-trial chamber is a phase of the criminal trial, in my opinion, and not a stage of the trial phase. Starting from the simplest reasoning, as positioned in the Code of Criminal Procedure, it is after "Chapter VII. Complaint against criminal prosecution measures and acts", but before the „ Title III. Judgment", which shows us that it is an independent phase, and not a stage embedded in the judgment phase.

The legislator also understood to regulate from the first part of the code of criminal procedure, namely in art. 3 para. (1) letter c) – the function of verifying the legality of sending or not sending to court, and in the same article letter d) – the judicial function, which denotes the fact that it understood to separate the judicial functions by positioning them in a natural order, this being found even in the chapters and titles of this code.

Indeed, the judge of the pre-trial chamber after disinvestment becomes a court, but this cannot lead us to the idea that this phase of the criminal trial is an integral part of the trial phase, but the judicial function it exercises is to control the legality of the execution of criminal prosecution acts (in a narrow sense), not that of judgment.

In my opinion, the legislator did not want this, basing my opinion on the old codes of criminal procedure, in the sense that in the code of criminal procedure of 1968 the pre-trial chamber did not exist, but its functions were, by absorption, taken over by institutions present in the trial phase.

As he could choose to integrate the institution of the pre-trial chamber in the trial phase, by extending the functional competence of the trial judge, we can see that it is completely delimited by its object which is distinct from that of judgment, and analyzing the provisions of art. 342-347 of the New Code of Criminal Procedure, we can see that the procedure, the solutions and the decisions it has do not lead to a conclusion of diminishing its properties, but to the consolidation of the idea of differentiation.

As object, the pre-trial chamber represents a complex control over the criminal investigation phase in terms of its legality as well as the verification of the jurisdiction of the court of which this pre-trial chamber judge is a part.

We can see that from the first article (art. 342 of the New Code of Criminal Procedure) which defines the object of the pre-trial chamber we find an atypical feature, namely the lack of analysis of the merits of the accusation brought against the defendant, which leads

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us to the conclusion that it is based exclusively on the legality of the prosecution.

In article 342 of the New Code of Criminal Procedure we find the object of the pre-trial chamber: „The object of the pre-trial chamber procedure is the verification, after the trial, of the competence and legality of the referral to the court, as well as the verification of the legality of the administration of evidence and the execution of acts by the criminal investigation bodies".

From this text we can notice the tendency of the legislator to subject the criminal investigation to a perfect analysis because this represents the first phase and the one without which there can be no legal criminal trial, a complex filter that offers the possibility for the representatives of the Public Ministry to discover by criminalizing as crimes the dangerous deeds directed against the society in order to endanger the values protected by the criminal law.

The criminal prosecution, among other things, concerns the discovery of criminal actions, their analysis and the possibility of prosecuting the perpetrators of crimes.

2. Delimitation of pre-trial chamber procedures and other institutions of the New Code of Criminal Procedure targeting the intervention of the pre-trial chamber judge

In certain cases, the code of criminal procedure imposes a certain control over certain institutions of criminal prosecution (*e.g.* confirmation of waiver of criminal prosecution; complaint against non-prosecution solutions) by a pre-trial chamber judge.

Given that the legislator did not emphasize the distinction between the pre-trial chamber and this control of a pre-trial chamber judge, confusion may arise in certain situations.

Starting from the fact that its object, as I have shown above, does not provide for the analysis of the validity of the solutions, we cannot say that we are in the presence of the pre-trial chamber regulated by 342-348, but in a pseudo pre-trial chamber with special procedures regarding the various regulations in which the phrase "pre-trial chamber judge" appears".

The subject of special proceedings concerning the intervention of the court through the judge of the pre-trial chamber are such as to control the solutions ordered by the prosecutor (in this case - confirmation of the waiver of the criminal investigation) in a new way that was introduced by the new code of criminal procedure after the amendment, because it is an act of disposition of the prosecutor in order to waive the application of the coercive force of the state in case of committing a crime with a low degree of danger within the parameters imposed by law. Although the ordinance to waive the criminal investigation is subject to confirmation by the hierarchically superior prosecutor of the one who ordered this solution, judicial control is required over it in order to avoid problems that could jeopardize the integrity of the justice.

In other words, the legislator artificially created a procedure to verify the solution ordered by the prosecutor during the criminal investigation (that of waiving the criminal investigation) by double "jurisdiction", which means that, in accordance with art. 318 – the hierarchically superior prosecutor of the one who ordered the solution expresses his point of view on the fulfillment of the conditions provided in order to be able to order this solution (legality and soundness), following that the last verification belongs to the judge of the pre-trial chamber in a special procedure provided by art. 318 para. (11)-(16).

We can notice another legislative difference in the fact that the solution ordered by the judge of the pre-trial chamber in this procedure is final, while any solution provided in art. 346 is subject to appeal.

I believe that this deprivation of appeal is appropriate because, as a specified earlier, the solution of the waiver is subject both to the verification by the hierarchically superior prosecutor of the one who ordered the solution, as well as to the judge of the pre-trial chamber.

The Romanian legislator decided to separate the verification of the legality of the criminal investigation actions from the trial phase (as regulated in the old code of criminal procedure) by introducing a new distinct institution which it raises to the rank of a separate phase of the criminal trial in order to have a complex analysis of the criminal prosecution in line with compliance with the European Convention on Human Rights and by aligning national legislation with European standards.

Inspired by both the German and Italian criminal procedure codes, the legislature has devised a special way of verifying the criminal investigation phase by externalizing the idea of security of justice and materializing the struggle of states against corruption of civil servants by regulating this procedure, as well as by the solutions that the judge of the pre-trial chamber has in the usual procedure of sanctioning the actions performed in violation of the law by the criminal prosecution bodies in a drastic way.

Through the special procedures in which we find the pre-trial chamber judge outside it, the legislator established in the task of the prosecutor a competence to rule on the criminal action through the solution of waiving the criminal prosecution under the law, which offers the opportunity for the prosecutor to end the criminal trial through a solution that does not aim at the

intervention of the court, but only at its confirmation by a judge.

As a first distinction between the pre-trial chamber procedure and a special procedure, we can notice that the solutions that the judge has in the two variants are diametrically opposed.

As opposed to the procedure set out in art. 342-348 of the New Code of Criminal Procedure, in the special complaint procedure against the closure order (the situation in which such an appeal may be exercised is clearly provided for in the code of criminal procedure and namely – the complaint may be referred to the judge of the pre-trial chamber of the court competent to adjudicate the case at first instance in the event that, previously, a complaint was filed with the hierarchically superior prosecutor than the one who ordered the solution, and he/she did not respond within 20 days or it was rejected) the judge of the pre-trial chamber may order the commencement of the trial in a single case, which entails certain consequences.

Art. 341 (7) (2) (c) of of the New Code of Criminal Procedure states that, in the context in which the judge of the pre-trial chamber is called upon to rule on the solution ordered by the prosecutor, the criminal action has been initiated beforehand, and the legally administered evidence is sufficient, he/she may order the commencement of the trial.

Atypical form of criminal trial (art. 341 (7) (2) (c) entails the incompatibility of the judge to exercise the function of judge because he enters into the analysis of the factual situation in order to find that it is not necessary to maintain a solution of non-trial or non-prosecution, but that of starting the trial. After the decision (sentence) to start the trial is pronounced, the text of the law expressly provides for the removal of the judge from the narrative thread of the criminal trial, the file reaching by random distribution to another judge of the respective court.

This procedure exceeds the scope of the pre-trial chamber, in that the judge examining the complaint against the closure solution also decides on the soundness of the accusation, considering that there is enough evidence in the case file (legally administered) to be able to pronounce a solution in the trial phase among those provided in art. 396 and art. 397 of the New Code of Criminal Procedure.

Given that the solution he/she pronounces is diametrically opposed to the original, and the judge used a procedure similar to the pre-trial chamber, the legislator makes available to the prosecutor, the petitioner and the respondents, within 3 days from the communication of the conclusion, the possibility to exercise the right of appeal, which is the only exception in which an appeal is accepted.

As a peculiarity, the unmotivated appeal against this solution is inadmissible according to art. 341 para. (9).

I admit that this remedy was naturally adopted in order to ensure dual jurisdiction, given the fact that the judge of the pre-trial chamber annuls the solution of non-trial or non-prosecution and orders the beginning of the trial.

3. Pre-trial Chamber Procedure

Starting from the object provided for in Article 342, we can notice as a first specificity the fact that the judge, after being sent to trial, analyzes the jurisdiction of the court in all aspects provided in the code of criminal procedure, as well as the legality of its referral.

By the analysis of the competence we understand the corroborated and unitary interpretation and application of the criminal procedural norms regarding the material, territorial competence and according to the quality of the person.

By the legality of the notification we have in view the act of notification of the court (the conditions imposed by law for the indictment provided in art. 327 and 328 of the New Code of Criminal Procedure) seen as a cumulative set of conditions in order to be effective.

The final thesis of art. 342 of the New Code of Criminal Procedure speaks about the object involving direct aspects to the reason of the legislator for which this procedural phase was instituted and without which it would be ineffective – „...the verification of the legality of the administration of evidence and the execution of acts by the criminal investigation bodies. – art. 342 of the New Code of Criminal Procedure final thesis.

In conjunction with the provisions of art. 343, where we find a procedural term for recommendation, the legislator's task was to increase the speed of difficult procedures, in order to limit the number of attempts by defendants to extend the reasonable length of criminal trial.

Established at the level of principle, the reasonable term of the criminal trial is an essential component for the good conduct of the trial. If a delicate situation is reached with a prolonged duration, the criminal trial is affected within the meaning that the discovery of the judicial truth and the restoration of the previous situation, as we find a definition of it in the specialized doctrine, are hindered or it may even reach to the situation where it would be impossible to obtain evidence.

The judge appointed for this procedure proceeds to verify the legality of the administration of evidence by examining whether all the conditions imposed by law for the evidentiary proceedings have been met

(example: compliance with the letter and spirit of the law in the event that the judge of rights and freedoms ordered a house search), as well as the steps in the proceedings performed during the criminal investigation by the criminal investigation bodies (the search warrant issued on the basis of the decision of the JDL, the minutes of the collection of documents based on the search, etc.) .

Although the prosecutor is the first pawn in the structure of the criminal trial (being the master of the criminal investigation phase - the first phase of the criminal trial without which there can be no legal criminal trial), he shall ensure that the necessary evidence is gathered as to the existence of the offenses. In other words, the prosecutor is investigating the case on which the trial will be judged, which is an overwhelming responsibility.

The pre-meeting measures from the pre-trial chamber are set out in art. 344, citing in para. (1) another argument for those mentioned above, namely ”After notifying the court through the indictment, the case is randomly distributed to the judge of the pre-trial chamber”.

Regarding this phrase, although we are shown that “after notifying the court ...”, we must understand the whole phase of the criminal trial of the pre-trial chamber, not the stage, because the indictment, although an act of referral to the court, did not enter directly into the trial procedure, the initial limit of the latter being the conclusion of the pre-trial chamber judge by which the commencement of the trial was ordered.

We understand that, beyond the multitude of controls, there is a random distribution that allows the defendant to form his own defenses based on the principles enacted in the field of criminal law, there are guarantees of fair proceedings.

In order to inform the participants of the procedure in the pre-trial chamber, the judge shall provide a certified copy of the indictment, as well as the rights and obligations they have.

Art. 344, para. (2), sentence 1 tells us about the one on whom the coercive force of the state is directed (the defendant), ensuring the defendant with the provision of the necessary information in order to build an effective defense (regarding the legal execution of measures and actions of criminal prosecution).

Emphasis is also placed on the fact that, regardless of its capacity in criminal trial, the court shall make known the subject-matter of the pre-trial ruling proceedings, the right to have a chosen defender, the right to formulate requests and exceptions, as well as the term in which they can fulfill, depending on the particularities of the case, the mentioned ones, the term not being allowed to be shorter than 20 days.

In this regard, the High Court of Cassation and Justice of Romania pronounced the decision no. 14/2018 by which it ruled: „The time limit within which the defendant, the injured party, and the other parties may make written requests and objections to the lawfulness of the referral to court, the legality of the administration of evidence and the execution of acts by the criminal investigation bodies is a term of recommendation”. By this we understand that the violation of the term does not entail a sanction.

The compulsoriness of the legal aid is not mandatory at the pre-trial chamber stage, unless:

- The penalty provided for by law for the crime committed is more than 5 years or life imprisonment;
- If the judicial body considers that the defendant could not defend himself;
- When the defendant is a minor, hospitalized in a detention center or in an educational center, when he is detained or arrested, even in another case, when the security measure of medical hospitalization was ordered against him, even in another case;
- In other cases provided by law.

Another important aspect, if within the term of formulating the requests granted by the judge, the participants submit the requests to him, the deadline for settlement is set with the summoning of the parties, the injured party and the prosecutor for settlement.

As a sanctioning treatment for procedural passivity, art. 346 (1) provides us with the possibility for the judge to order the commencement of the trial, if no requests and exceptions have been made or if they have not been raised ex officio, on the one hand, and on the other hand, if the participants consider that the criminal investigation is legally carried out, the judge orders this solution.

As a novelty, the judge of the pre-trial chamber may invoke *ex officio* any nullity provided in art. 280-282 of the New Code of Criminal Procedure, which was not one of the legal provisions of the February 2014 code of criminal procedure, being modified art. 346 by art. I point 11 of the GEO no. 82/2014, article amended by Law no. 75/2016.

If requests and exceptions have been made, the judge, in the council chamber, resolves them and listens to the conclusions of the parties and the injured person (participation is not mandatory, they can be tried in absentia), as well as the prosecutor, based on the criminal investigation material.

In the specialized doctrine there were opinions that showed the unconstitutionality of paragraph 1 of art. 345 – only the phrase “any new documents presented” – because it limits the judge of the pre-trial chamber only to the administration of certain documents and does not allow him to administer other means of proof which, perhaps, may benefit from an

increased "weight" of evidence in proving the claims of the participants.

In this regard, the Constitutional Court being notified in order to resolve this issue, showed that the phrase is unconstitutional, a solution that substantiated the CCR Decision no. 802/2017, resulting, therefore, that any means of proof can be administered in this procedure.

Before proceeding to the actual solutions made available to the judge of the pre-trial chamber, I would like to discuss para. (3) of art. 345 together with the possibility for the judge to return the case to the prosecutor.

In the event of finding irregularities in the act of notification, following the sanctioning of criminal prosecution acts or if the evidence is excluded (one or more), the judge asks the prosecutor to remedy the indictment within 5 days from the communication of the decision, informing the judge if he maintains the order to sue or requests the restitution of the case.

This possibility for the prosecutor to request the restitution of the case is based on the fact that there is a probability that following the sanction with absolute or relative nullity of the evidence (one or more), the accusation brought against the defendant will be weakened. In his efforts not to tip the scales, the legislator offers the prosecutor this option to complete the criminal investigation and to reach a decision on whether or not to maintain the solution after it has been completed.

I admit that it is an advantage that the legislator has established in favor of the representative of the public ministry, an advantage that can have a hard outcome for the defendant and that can be likely to change his legal situation, but we must keep in mind that finding out the truth takes precedence.

It should be noted that, in the event of the conclusion of a plea agreement by the prosecutor and the defendant, the law excludes the pre-trial chamber phase of the criminal proceedings.

In other words, the special procedure of the plea agreement provided by art. 478-488 provides that the case, together with the agreement, is submitted to the court for admission or rejection.

Starting from the fact that finding out the truth is one of the most important desideratum of the criminal procedural law, and coercive force directed against the defendant must be such as to correct the consequences of the offense, the legal provisions governing this issue tend towards a good and fair administration of justice.

Also, given that the need to ensure equality of arms offers the defendant the opportunity to draw conclusions about this solution (rejecting the prosecutor's request by claiming that he did not remedy in time the irregularities of the act of referral), I find this a balanced method and claim that its rights are not violated and do not offer a real advantage to one of the parties.

4. Pre-trial Chamber Judge's solutions

The legal basis for the solutions made available to the Pre-Trial Chamber Judge is contained in art. 346 of the New Code of Criminal Procedure. It provides the solutions, the arrangement, as well as the situations in which there are incidents.

As a first solution, the judge orders the start of the trial if no requests have been made (neither by the participants, nor ex officio) and no exceptions have been raised, after the expiration of the terms offered (as mentioned above), in the council chamber without summons.

We notice the attitude of the legislator in relation to the procedural passivity by the fact that he obliges the judge to order the beginning of the trial, not offering him the possibility to postpone the case. The speed of the procedure is the primary element in the reason for enacting these rules, and this can be deduced from the coding of the articles within the institution of the pre-trial chamber.

As a particular aspect, we note that art. 346 para. (1) the final sentence establishes a derogation from the mandatory participation of the prosecutor in that: „...The judge of the pre-trial chamber shall rule in the council chamber, without summoning the parties and the injured person and without the participation of the prosecutor, by conclusion, which shall be communicated to them immediately."

Nevertheless, in judicial practice, the Pre-Trial Chamber judge asks the participants if they have any requests or exceptions to be made within the time allowed for this purpose (being a procedural term of recommendation), these being able to take into account requests for recusal, etc., being within the legal term of formulation, the final provisions of art. 346 para. (1) being ineffective.

In this last assumption, the judge of the pre-trial chamber admits or rejects the requests made by the participants and orders one of the solutions provided in art. 346 of the New Code of Criminal Procedure.

The second solution provided by the code of criminal procedure is set out in the second paragraph, which is for the judge to order the commencement of the trial if he has rejected the requests and exceptions made under art. 344 (1) and (2).

Based on art. 346 (3), we find 3 reasons why the case should be returned to the prosecutor's office:

- The indictment is unlawfully drawn up and the irregularity has not been remedied by the prosecutor within the time-limit laid down in art. 345 (3) if the irregularity makes it impossible to establish the subject-matter and limits of the judgment;

- Excluded all evidence administered during the criminal investigation;
- The prosecutor requests that the case be returned, in accordance with art. 345 (3), or does not respond within the time limit set by the same provisions.

The text of the law brings into question certain particular situations and obliges the judge to dispose of them by strict methods.

„In all other cases in which it found irregularities in the act of referral, excluded one or more pieces of evidence administered or sanctioned in accordance with 280-282 the criminal prosecution acts carried out in violation of the law, the judge of the pre-trial chamber shall order the commencement of the trial "- art. 346 para. (4).

Following his disinvestment as a judge of the Pre-Trial Chamber, under art. 346 (7), he becomes a court and proceeds to examine the merits of the case.

Also, by being in the presence of the same judge who examined the legality of the prosecution and sanctioned the evidence (in the first instance), the legislator established in art. 346 (5) that "excluded evidence cannot be taken into account to the trial on the merits of the case".

5. Remedies

The remedy against the conclusion of the pre-trial chamber judge is the appeal. Art. 347 of the New Code of Criminal Procedure expressly provides for the possibility of the prosecutor, the parties and the injured person to challenge the conclusions of the judge of the pre-trial chamber that he pronounced based on art. 346 para. (1)-(4^2).

Also, the appeal provided in art. 347 of the New Code of Criminal Procedure is duly completed with the provisions of art. 425^1 of the New Code of Criminal Procedure, without altering the derogations from the general rule which the former establishes.

6. Procedure for appeal

After the communication of the decision ordering the solution (among those provided for in art. 346), within 3 days, the prosecutor, the parties and the injured party may exercise this appeal.

In the final thesis, art. 347 (1) states that the exercise of the right of appeal may also concern the manner in which claims and exceptions are to be settled.

The appeal is judged in full by 2 judges from the hierarchically superior court who proceeded according to art. 345-346 of the New Code of Criminal Procedure. When the notified court is the HCCJ, the appeal is judged by the HCCJ in full by 2 judges of the criminal section.

The presence of the prosecutor is mandatory throughout the procedure, both in the pre-trial chamber procedure and in the appeal.

At the end of art. 347, the legislator regulates that no other exceptions or requests may be made (other than those already made in the pre-trial chamber procedure), except in cases of absolute nullity.

In the special procedure regulating the atypical form of criminal proceedings [art. 341 (7) (2) (c), art. 341 (9)] informs us that it is possible to file an appeal against the judge's decision to start the trial, a particular aspect, because in other cases the decision is final.

7. Preventive measures in the pre-trial chamber

Given the fact that we are before a judge, after the end of the criminal investigation and before the start of the trial, he/she has the possibility, as well as the obligation in certain cases, as is natural, to rule on preventive measures against the defendant.

Art. 348 states in the first article that the judge shall rule on request or ex officio on the taking, maintenance, replacement, revocation or termination of preventive measures. The provisions on preventive measures will be applied directly.

8. Appeals against preventive measures in the pre-trial chamber

A confusion that arose from the study of specialized papers is that, when attacking the solution to start the trial (for example), the judges of the hierarchically superior court are able to rule on preventive measures.

As the Constitutional Court itself noted, the provisions that provide for this are unconstitutional, for which reason the power to adjudicate belongs to the judge of the pre-trial chamber from the court which would have jurisdiction to adjudicate the case at first instance. Apart from the fact that they are unconstitutional, those provisions also circumvent the application of art. 207 of the New Code of Criminal Procedure.

A second confusion followed by a well-founded question is that the decision ordering the commencement of the trial may contain a provision on preventive measures (example: the commencement of the trial is ordered, and the measure of pre-trial detention is maintained by the same decision).

Although named the same way, the two remedies are procedurally different.

1. An appeal against the order for commencement of the proceedings shall be lodged within three days of service of the judgment.

2. An appeal against the decision ordering preventive measures shall be lodged within 48 hours of its pronouncement.

The appeal against the order for the commencement of the trial may not also be regarded as brought against the provision in the operative part of the order in which the judge hearing the appeal rules on (the taking, maintenance, replacement, revocation or termination by operation of law of preventive measures) a preventive measure.

Such a combination and interpretation of the rules of criminal procedural law referring to the two types of appeal leads to an erroneous legal approach designed to circumvent both institutions.

In my opinion, if we find ourselves in such a situation (the order for the commencement of proceedings also contains a provision on a preventive measure), although, unlikely, the final provision relating to the precautionary measure will be challenged within 48 hours of the contested decision, at which point the provisions of art. 205 of the New Code of Criminal Procedure will apply. This objection will not be deemed to have been made against the judgment in its entirety.

It is preferable, in the case shown above, to have a conclusion concerning the preventive measures at an earlier period, as well as a second subsequent conclusion concerning the solution of the pre-trial chamber.

Such an approach can also be observed in the case in which the court rules on preventive measures by sentence, a provision which, in a sense, can be directly challenged by appeal.

9. Conclusions

The procedure of the pre-trial chamber is likely to streamline the narrative thread of the criminal trial, to relieve the court, in the process of finding out the truth, to verify the legality of all criminal prosecution acts and to bring the Romanian legislation into European alignment.

Also, the legislator intended to build a filter procedure that would allow the court to verify the validity of an accusation based on evidence already presumed to be legally administered, given that it is subsequent to the pre-trial chamber.

I have repeatedly shown its importance in the elaboration of this paper, and in my opinion, the legislative proposal to eliminate this institution is not one of the most effective.

The Pre-trial Chamber, as a phase of the criminal proceedings, is likely to bring to the attention of the judiciary a thorough analysis of the legality of the proceedings, respect for human rights and the strengthening of the fairness of justice.

I consider that I have not touched on all the aspects that could be proposed during the research and examination of this institution by presenting my opinions, in general, the topics that present an obvious problem.

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FREEDOM OF CONSCIENCE, OPINION AND FREEDOM OF RELIGION BELIEFS - A RIGHT OF PERSONS DEPRIVED OF THEIR LIBERTY

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Motto: „Man cannot be compelled to act against his conscience, especially on religious matters."
(Declaration of *Dignitatis Humanae* adopted by the Second Vatican Council on the 5th of December 1965)

Abstract

This article represents an analysis of the manner in which the freedom of conscience, freedom of opinions and freedom of religion of inmates are respected, with a particular analysis made on a Romanian prison. In this study I referred to the jurisprudence of the ECtHR in cases against Romania, the national legislation governing the rights of detainees, the collaboration between religious organizations and prisons in order to respect the right to religious freedom, the impact of respecting this right on behavior, the impact of re-educating inmates.

Keywords: *inmates, prisons, religious freedom, opinion, confessions, cult, freedom of conscience, faith.*

1. Introduction

Persons deprived of their liberty are those persons who serve a prison sentence applied by a final ruling or minors who serve an educational measure deprived of liberty or those who are in state custody under the power of a temporary measure with deprivation of liberty (pre-trial arrest, temporary medical hospitalisation).

During the communism period, the execution of freedom-deprived punishments was characterized by torture, humiliation, inhumane treatment, forced labour until exhaustion, and inmates' rights were violated. Occasionally they received a package, were able to have telephone conversations with their family members or they received visits. Freedom of conscience, opinion and religious beliefs were non-existent at that time, and even less so for those deprived of their liberty, some of whom were arrested precisely due to their intense Christian experiences, having practiced their Orthodox faith. From a conceptual point of view, faith (in whatever form it may be) enters in conflict with the principles of communism, because while the former wanted the man to be free, to do things out of love and devotion to fellow men, communism wanted the man to be subjugated, easy to manipulate, perverted. The result of this oppressive system was, contrary to religious belief, the opposite of what had been expected, hoped by the representatives of the communist political class, because most of the people who had been sent to communist prisons had a deep Christian morality, were secretly prayed and lived an intense spiritual life in squalid prison cells. Instead of extinguishing and exterminating the faith of people through lies and violence, the communists contributed to deepening the religious phenomenon, hope and faith in God being the only ones that brought the prisoners a little peace and which, eventually, led to a plenary victory of the Christian phenomenon against communism.

2. Content

After the Romanian Revolution in 1989 and to our present days, Romania has been constantly concerned with humanising detention conditions for people deprived of liberty, both from a legislative standpoint by adapting our legislation to the European one, as well as by adopting internal actions that ensure the fulfilment of rights and legitimate interests of inmates, rights that can only be restricted in expressly provided for situations.

The national legal framework that regulates the execution of sentences and custodial measures ordered by judicial bodies during criminal proceedings is provided by the Romanian Constitution and Law no. 254/2013 on the execution of sentences and custodial measures ordered by judicial bodies during criminal proceedings, published in the Official Gazette of Romania, Part I, as well as other laws, treaties, protocols, decrees on the rights of prisoners.

Among universal sources that regulate the principle of religious freedom we would like to mention the ECHR, the Recommendation of the Committee of Ministers to member states regarding rules in European prisons REC (2006)2, art. 18 of the Universal

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Declaration of Human Rights[1], art. 10 of the Charter of Fundamental Rights of the European Union[2], as well as other treaties, regulations, directives on the rights of prisoners.

We will begin with art. 9 of the ECHR which states "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief and freedom, either alone or in community with others, in public or private, to manifest his religion or belief in worship, teaching, practice and observance.

Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

I have identified two cases of the ECtHR in which the Court was notified by complainants who were in detention in various prisons in Romania, that they were not receiving kosher meals according to the precepts of their religion: Case of Erlich and Kastro v. Romania[3] ruled by the ECtHR – Fourth section, judgement dated 09.06.2020, which became final on 09.09.2020 or that they did not receive meals according to Muslim religious precepts, Case of Affaire Saran v. Romania[4] (text in French), ruled by the ECtHR – Fourth Section, on 10.11.2020, which became final on 10.02.2021.

In the case of Erlich and Kastro v. Romania, two Israeli citizens of Jewish religion complained to the ECtHR that during their imprisonment at the Rahova Prison in Bucharest they did not receive kosher meals according to the precepts of their religion, having previously addressed both the custodial judge and the court which had ruled: ["... complainants are allowed to receive daily (bearing the cost) kosher food, in the required quantity that would meet their personal needs (including foods that require heating, baking, boiling or other heat treatments in order to be eaten), to ensure distribution of food under the same conditions as those that are being provided to other prisoners and to ensure food storage facilities on days when these cannot be delivered). Detailing the provisions of domestic law, as well as of relevant international law, in particular the Recommendation Rec (2006)2 of the Committee of Ministers of the Council of Europe to member states on European Prison Rules (adopted on the 11th of January 2006) and the Comment to it, the Court of law observed that the requests of the two (connected) were admissible under the applicability principle of art. 9 of the Convention.

On the merits of this case, the ECtHR reminded that "as defended in art. 9 of the Convention, the freedom of thought, conscience and religion is one of the foundations of a democratic society according to the meaning set forth in the Convention. This freedom is, in its religious aspect, among the most essential elements of the believers' identity and of their conception on life ...." (para. 28). With regard to the right to religious freedom in Romania, the Court of law noted that "the Romanian state has expressly established the right to religious freedom, both at the level of the Constitution and at the legislative level, and the Jewish religion is among officially acknowledged religions" (para. 34 from the aforementioned judgement). Having analysed both the Government's and complainants' assertions, the Court of law found that the Rahova Prison, through its representatives, had set up a separate kitchen in which kosher food was prepared, who had been approved by a Jewish religious foundation whose representatives came regularly to the prison for religious holidays, and on this occasion they would deliver kosher food and, taking into account the extremely small number of prisoners of Jewish faith in Romanian prisons (at the time of these facts, in 2015, there were only 8), taking into account the margin of appreciation that the state benefits from, which must take into account keeping a balance between general interest and personal interest, the ECtHR ruled that art. 9 of the Convention had not been violated.

On the other side, in the case of Affaire Saran v. Romania, the Court of law found a violation of art. 9 of the Convention consisting in the authorities' refusal to provide to the complainant, in Iași Prison, meals in accordance with the complainant's religious precepts, who had declared to be a Muslim.

On the merits of this case, the Court of law stated that the complainant's request concerned the period during which he was imprisoned in the Iasi prison and consisted of two parts: one part was about the fact that he had not received food in accordance with the precepts of the Muslim religion, and the other was about the fact that he had not been provided with a suitable place for prayer. Referring to domestic law, the Court of law noted that it contained provisions which expressly established the right of prisoners to receive meals according to their religious precepts, and the problem raised in this case was that according to the

[1] The Universal Declaration of Human Rights was adopted on the 10th of December 1948 by Resolution 217 (III) of the UN General Assembly. The text of this declaration may be consulted in A. Năstase, B. Aurescu, *Contemporary International Law. Essential Texts*, R.A.M.O Publishing House, Bucharest, 2000, pp. 225 et seq.

[2] The Charter of Fundamental Rights of the European Union was adopted by the European Council on 07.12.2000 in Nice, integrated in Part II of the Treaty to organize a Constitution for Europe, adopted at the European Council in Athens in 2003 and published in the Official Gazette no. 465/01.06.2005.

[3] Case of Erlich and Kastro v. Romania, http://ier.gov.ro.

[4] Case of Saran v. Romania, https://hudoc.echr.coe.int.

Decree of the Minister of Justice no. 1072/2013 (currently repealed by the Decree of the Minister of Justice no. 4000/C/2016 of 10.11.2016 for the approval of Regulations on religious assistance of persons deprived of their liberty who are in the custody of the National Administration of Prisons) and which constituted the national law applicable on the matter, prisoners declared their religious affiliation at the time of their incarceration, on their own responsibility and if, during the execution of the sentence, they embraced another religion, a declaration on their own responsibility was not sufficient, but had to be accompanied by a document of "confirmation" issued by the new religion to which he had adhered.

The judge supervising the deprivation of liberty within the Iași Prison rejected, on the 8th of July 2016, the complainant's request to be provided with food under the Muslim religion on grounds that upon imprisonment the plaintiff had stated that he was a Christian Orthodox, an untruthful statement, because after verifying the complainant's file the Court noted that before his transfer to Iași he had been imprisoned at the Prison in Botoșani, and his record on religious assistance showed that he had been registered as belonging to the Islamic religion. Furthermore, the Romanian State was reprimanded that the complaint of plaintiff Affaire Saran formulated against the decision of the judge supervising the deprivation of liberty ruled on 08.07.2016 was settled on 28.03.2017 by the District Court of Iași, while the complainant was transferred to the Codlea Prison from the 6th of December 2016, where he received meals according to the precepts of Muslim religion.

The ECtHR noted that the District Court of Iași had ruled without verifying the documents in the prisoner's personal file, as well as a lack of organization and coordination between state authorities that should have ensured the flow of information to such an extent that there should not be a situation like this. Consequently, the European Contentious Court considered that in this case there was a violation of art. 9 of the Convention which consisted in the authorities' refusal to provide the complainant, at the Iași Prison, with meals in accordance with the complainants religious precepts as he had declared himself to be a Muslim, and there was no further need to rule on the authorities' refusal to provide the complainant, at the Iași Prison, with a suitable place for prayer.

In domestic law, as we have shown, the general legislative framework governing the freedom of conscience, opinion and freedom of religious belief is regulated by the Romanian Constitution (art. 29 "Freedom of thought and opinion, as well as the freedom of religious beliefs cannot be restricted. Nobody can be compelled to adopt an opinion or adhere to a religious belief that is contrary to his or her beliefs") which is supplemented by the provisions of art. 50, 56, 58 of Law no. 254/2013; with Law no. 489/28.12.2006 Rep. on religious freedom and the regime of religions, Decree no. 4000 C/2016 of 10.11.2016 for the approval of Regulation on religious assistance of persons deprived of liberty found in the custody of the National Administration of Prisons, the Protocol concluded on 26.03.2013 on the provision of Orthodox religious assistance within the System of National Administration of Prisons concluded between the National Administration of Prisons and the Romanian Patriarchate.

In order for this paper to not just be a theoretical analysis of mentioned legal texts, we have obtained actual information from a prison in Romania (Codlea Prison, Brașov county) about the mechanism of observing the right referred to in art. 58 of Law no. 254/2013:

"(1) Freedom of conscience and opinion, as well as the freedom of religious beliefs of convicts cannot be restricted.

(2) Convicts have the right to freedom of religious beliefs, without prejudice to the freedom of religious beliefs of other convicts.

(3) Convicts may attend, based on their free consent, religious services or meetings organised in prisons, may receive visits from representatives of said religion and may obtain and hold religious publications as well as objects of worship".

Regarding the first component of this right, *freedom of conscience and opinion*, at the Codlea Prison every morning, between 09:00 AM - 11:00 AM, a show created by an inmate is broadcast on TV (each detention room has a TV connected to cable network), and its topics are established by prison agents (as an example, below are the topics broadcast during a day: Information about vaccination; Good to know; Health; Did you know that...; General culture – European geographical curiosities; Entertainment), a show that, occasionally, features interviews with inmates whose behaviour is outstanding.

The Codlea Prison magazine is published quarterly and is entitled "Sheet for mind, heart and soul" in which inmates may express their thoughts, ideas, emotions, literary talents (in the form of interviews, poems, maxims, anecdotes), their artistic talents (drawings, cartoons) all published under their initials. From the prison staff in charge of the publication of this magazine we learned that inmates are interested in the content of this magazine, participate voluntarily in writing it, without being rewarded, as they feel the need to express their thoughts and opinions in various forms (writing, drawing).

As for the second component, *freedom of religion*, we observe that on 09.03.2022 out of the 462 inmates imprisoned at the Codlea Prison, 408 were

Orthodox, 1 belonged to the Seventh-day Adventist Church religion, 1 Christian according to the Gospel, 16 Greek Catholics, 5 Pentecostals, 20 Reformed, 25 Roman Catholics, 1 Unitarian and 2 atheists.

Priest Laurenţiu Nistor, an Orthodox chaplain at the Codlea Prison for 14 years, said that inmates are provided with religious services according to their faith (which they declare upon entering the prison). Based on collaboration protocols concluded between the representatives of religions acknowledged in Romania and prison management (according to art. 2 of the Regulation on religious assistance of persons deprived of liberty found in the custody of the National Administration of Prisons), prior to the outbreak of the pandemic caused by the Coronavirus infection (Covid-19), priests, pastors, preachers used to come regularly to the prison where they held religious ceremonies with special prayer rooms, except for Catholic priests who officiated in the Orthodox chapel (*e.g.* the Baptist pastor came weekly, the Catholic priest once a month). Inmates practising their Islamic faith have not been here recently, and some had stated to be Muslims only in order to receive a pork-free diet.

Before the Order of the Minister of Justice no. 1072/C/2013[5] for the approval of the Regulation on religious assistance of persons deprived of liberty found in the custody of the National Administration of Prisons had entered into force, currently repealed by the Order of the Minister of Justice no. 4000/C/2016 of 10.11.2016 (which includes the provisions regarding the conditions for the acceptance the change of confession in art. 4), persons deprived of liberty would, at a declarative level, "change their religion", meaning they would become Muslims or Adventists because, according to this religion, you cannot eat pork so they hoped they would get better food, the priest pointing out that this type of persons were not, in fact, believers.

The inmates' religious life, as told by the priest Laurenţiu Nistor, is, in general, like that of any other person, in the sense that some persons deprived of liberty, based on a request, attend services organized in the prison on Sundays and during church holidays, request individual conversations with the priest, but a small number of them confess (10% maximum), and on this occasion only a few of them prove real penance. The priest tries to enlighten them on the benefits of confession, tries to convince them about the liberation of their conscience from committing sins, saying that even if they do not receive the Sacrament of Holy Communion, he does not give them any canon, because he believes that their punishment is the canon itself, and before getting released from prison he shares Holy Communion with those who had an outstanding behaviour and had been in an open regime of execution.

In general, inmates do not practice the religion to which they claim to belong, but some of them actively attend religious activities inside the prison, doing so voluntarily and "for free," in the sense that they do not receive any rewards, such as: before the Covid 19 pandemic hit, in December, the priest would prepare a choir of carollers and they would go to the House of Culture in Codlea where concerts with several groups of carollers from Braşov as well as soloists from other counties used to be organized. One year they also went to the Students' House of Culture in Braşov (2010). In other years they went to some churches in Codlea where they would attend the service and sing carols at the end. The priest says that in when they went out in the community, the reward consisted in going out in the community and "the guys enjoyed it very much because they had the opportunity to leave the prison." At religious services, singing in the pew is also supported by inmates who are specially trained by the priest. Some of them even learned musical notation and continued to play a musical instrument after they were released from prison. We would like to highlight that these persons deprived of their liberty attend these activities voluntarily and without receiving any credits (credits are granted for attending moral and religious educational programs or thematic competitions).

Also, as an expression of the freedom of religious beliefs in the prison, the priest recalled that a prisoner was baptised in the Christian-Orthodox religion while he was serving a custodial sentence (he had not been baptised at all when he was a child because his father was an atheist). The fact that persons deprived of liberty ask the priest to officiate memorial services, they obtained, as a reward, permits to leave the prison in order to officiate their religious wedding, they attend the Sacrament of Anointing of the Sick, a service that the priest organizes together with colleagues from the community during the two major fasts (Easter and Christmas), they attend various conferences organized on Christian topics, they go on pilgrimages to monasteries, visits to memorial houses, museums and other outings on this topic organized by the priest Laurenţiu Nistor.

An aspect that should not be omitted is the fact that Christian inmates who hold long-term or one-day positions, on a weekly basis (an extremely small number, approx. 5%) receive food from home, at their own expense or extract from the food received in prison (Case of Erlich and Kastro v. Romania, cited above).

Having talked to five inmates, with ages between 22 and 47, including one Adventist, one Catholic, two

[5] Order 1072/C/2013 of the Minister of Justice provided that, during the execution of the custodial sentence, the persons in custody of the National Administration of Prisons may change their confession, which was to be proved by a declaration on their own responsibility and by a document of confirmation of belonging to said cult.

Orthodox and one Reformed, they said that while they were incarcerated at the Codlea Prison, in Braşov county, their religious freedom was observed. They have very good relationships with one another, regardless of the religion that they belong to and, in addition, regardless of the religion that these five inmates practice, they said that they feel the need to talk to a priest ("I feel great talking to my Orthodox priest, we have nice discussions, I appreciate it. He mentioned that he does not attend Orthodox services, but he watches shows of his religion broadcast on certain channels on TV", C.M.M. - Adventist; "This priest is helpful, he talks to us, tells us stories, makes himself useful to inmates. A lot of people come to church and talk to the priest" - H.A.I., Orthodox; "There is only one God, I attend Orthodox services, I was not denied to attend the religious ceremony organized by the Reformed pastor; the discussions that I have with the priest are very useful, and he keeps us close to God" - B.L.M., Reformed).

Last but not least, we would like to state that inmates receive religious-themed materials such as prayer books, the Bible, crosses provided by the Metropolitan Church of Transylvania, and they are not forbidden to receive such materials from any other religious cult.

Therefore, currently, the activity of religious denominations in prisons is one of the methods used to empower, re-educate, help convicts re-socialise, as mentioned by prof. Ioan Chiş: "Including religious assistance in treatment and re-socialisation programs also ensures the right of those who have minority religions, who can and must be protected so as not to change the attitude they have had since childhood or which they acquired as a result of conversion due to newer beliefs. It is very important that all those who attend religious re-socialisation projects are allowed and encouraged to work with convicts individually, in order to uproot violent conceptions, some even in the name of religious or mystical beliefs (Satanists). This would be the first step towards inoculating unanimously accepted moral values and therefore towards the observance of laws and leading a normal life."[6]

Freedom of conscience, opinion and freedom of religious belief is a fundamental right of any human being and, implicitly, of persons serving a custodial sentence but which is exercised under the conditions of legal provisions that ensure specific functioning of prisons and whose violation attracts the legal liability of those responsible for said actions. If the administration of a prison disregards or violates this right, convicts may lodge a complaint with the judge supervising the deprivation of liberty who will settle it after a mandatory hearing of the complainant, and if the complaint is not settled favourably, the inmate may address a court of law with an appeal within five days after the decision of the judge supervising the deprivation of liberty was ruled. The complaint is settled during a public hearing, with the summons of the appellant and administration of the prison, the inmate's presence is not mandatory, and with the participation of the prosecutor. The court of law rules a final sentence, in a public hearing, and the solution is then communicated.

3. Conclusions

Finally, we believe that the Romanian legislation and the way it is applied in places of detention comply with international standards on prison rules. Authorities are aware of the importance of the freedom of conscience, opinion and religion for the re-education of convicts, social reintegration, behaviour change, and finding as diverse solutions as possible in order to implement all of the inmates' rights will positively affect those who are in custody.

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- Case of Erlich and Kastro v. Romania, http://ier.gov.ro;
- Case of Saran v. Romania, https://hudoc.echr.coe.int;
- Order 1072/C/2013 of the Minister of Justice provided that, during the execution of the custodial sentence, the persons in custody of the National Administration of Prisons may change their confession, which was to be proved by a declaration on their own responsibility and by a document of confirmation of belonging to said cult;
- Ioan Chiş, Alexandru Bogdan Chiş, *Executing criminal sanctions*, Universul Juridic Publishing House, Bucharest, 2021.

[6] I. Chiş, Al.B. Chiş, *Executing criminal sanctions*, Universul Juridic Publishing House, Bucharest, 2021, p. 445.

STEPS TOWARDS HARMONISING AND IMPROVING CONSUMER INSOLVENCY RULES IN THE EUROPEAN UNION

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Abstract

At various stages of the development of human society, personal insolvency has been studied in depth and analyzed in relation to various jurisdictions. Looking at the overall picture in the European Union just ahead of the implementation date of the restructuring and insolvency Directive 2019/1023/EU, most Member States had some rules on consumer insolvency. Research and evidence from these areas indicate that recourse to personal insolvency proceedings not only makes economic sense, but is also necessary to protect the fundamental rights of human beings but also the rights of consumers. However, a fundamental problem that arises in the EU is related to the ability of the various legislative frameworks in Europe to address the problem of over-indebted citizens in a more uniform way, especially since personal debts can originate in various states and can generate cross-borders issues so that certain harmonization revisions were seen as necessary. The Covid-19 crisis has added urgency to an already delayed review of these frameworks. In their efforts to mitigate the economic effects of the COVID-19 pandemic on consumers, some measures introduced by Member States, although largely uncoordinated, reflect an upward trend towards harmonization and a convergence towards common approaches. This paper questions whether the personal insolvency frameworks in different Member States provide adequate answers to the personal bankruptcies induced by the COVID-19 pandemic in different European countries. Thus, the study reveals the current inadequacy of legal procedures for determining the insolvency of the debtor in various jurisdictions of the Union to the particular situations induced by the pandemic, the limitations of the current approach to the recovery of the debtor and the lack of harmonization in personal insolvency between Member States. Finally, the paper proposes steps to follow and key recommendations for an EU consumer insolvency directive.

Keywords: *personal insolvency, Directive 2019/1023/EU, consumer rights, harmonization, COVID-19 effects.*

1. Introduction

In modern times, credit is the basis of the economy, so that those who take out a loan may in some cases become overly indebted for reasons over which they do not always have control, personal business management being difficult and sometimes even impossible. The consumerist society has developed an economic model in which credit has become widely available to the vast majority of consumers. People access these financing products in the form of loans for personal needs, mortgages, overdrafts or credit cards. According to some studies, the primary causes of over-indebtedness include "life accidents"[1]: loss of employment or ability to work, health problems, divorce, reduced income so that the cost of living by using credit is inherently risky. If something does not work properly, the result is the consumer's over-indebtedness.

Personal insolvency has been studied and analyzed on a large scale and for long periods. It is to some extent available in most European countries and in many developed countries around the world. With regard to the categories of debtors against whom insolvency proceedings could be initiated, it is undeniable that most national regulations have taken into account the business sector, traders or individuals have long been ubiquitous in this category. As for insolvency, it has been and still is considered in those legal systems that refuse to regulate it extensively as a tool for consumers as a solution for professionals only and therefore unsuitable for individuals. These procedures, when recognized in law, generally have different purposes: if the insolvency proceedings of professionals are aimed at paying the debts of creditors, the insolvency proceedings of individuals seek to protect debtors against measures taken by creditors.

For instance, European Union law does not differentiate between traders and non-traders in the application of insolvency proceedings. Council Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings provides, in paragraph (9)[2], that there should be no differentiated regime between

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[1] https://londoneconomics.co.uk/blog/publication/study-on-means-to-protect-consumers-in-financial-difficulty-personal-bankruptcy-datio-in-solutum-of-mortgages-and-restrictions-on-debt-collection-abusive-practices/.

[2] (9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are

traders and non-traders on insolvency. The Regulation thus recommends that Member States establish identical treatment of debtors in insolvency proceedings, without distinction between natural or legal persons, traders or non-traders. Council Regulation (EC) no. 1346/2000 also applies to natural persons as consumers, provided that the national procedures are listed in its Annex A. The national procedures listed do not include the large number of national insolvency laws as they were adopted later by the Member States.

Therefore, the adoption of legislation regulating the insolvency of natural persons was not only necessary but also mandatory, given that the provisions of Regulation (EC) no. Council Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings requires Member States to extend insolvency proceedings to natural persons. The limits of Regulation (EC) no. 1346/2000, among other things, concerns only cross-border insolvency.

2. Brief presentation of the legal framework on insolvency of individuals in other Member States of the European Union

Research[3] and expert evidence[4] confirm that the introduction of consumer insolvency frameworks makes economic sense and is necessary to protect the fundamental and human rights of citizens.

Three major schools on how to resolve the conflicting interests of creditors and debtors, identified by Kilborn[5] in several studies. The general aim of these frameworks is to recover as much “value” as possible for creditors and also to provide debtors with a way out of debt to start over.

These are:

- The Nordic approach: the Nordic countries were the first to address the issue of the correctness of the concept of non-fulfillment of contractual obligations in order to get rid of over-indebtedness. They condition the exit from insolvency in the form of personal bankruptcy by the application of a "test of good faith". Individuals cannot access solutions for over-indebtedness if their behavior is considered to have been in bad faith such as taking out very large loans even before resorting to a path of financial recovery or if it is proven that they have not done enough efforts to repay loans.

- The German approach, initially implemented in Germany, Austria and Estonia. Unlike the Nordic model, it allows any individual access to a solution, but then requires compliance with a payment plan whose rationale is shaped by strict rules, whereby the debtor must honor as much of the debt as possible. The German model applies clear, standardized rules so that both debtors and creditors know exactly the consequences, whether they are or do not agree with a particular solution.

- The Latin model is characterized by greater freedom of action. This method is applied in the Benelux countries and in France and is an approach according to which voluntary agreements between debtor and creditor have been encouraged as much as possible, and the role of the courts is reduced to the control of the legality of the whole procedure. This is limited to the general rule that lawsuits are cumbersome, payment plans are lengthy, and the conditions for obtaining a debt relief are difficult, so that voluntary agreements are more advantageous.

With regard to the scope of the insolvency proceedings of the natural person, some jurisdictions limit the application of the law to natural persons whose debts are not incurred in connection with the conduct of business. In other jurisdictions, the scope is extended to include retailers.

Representatives of financiers (IMF) has pointed out that limiting the application of the procedure only to consumers raises the question, on the one hand, of the procedure applicable to natural persons engaged in commercial activities and, on the other hand, of the options available to such persons, in accordance with the general national insolvency framework[6].

Although there is no uniform approach in this regard, current areas of consumer insolvency can be broadly classified into three types: bankruptcy, debt settlement procedures or informal arrangements.

There are jurisdictions governing out-of-court procedures that apply in addition to court proceedings. It should be emphasized, however, that the opening of proceedings entails the limitation of the debtor's ability to dispose of his assets.

In recent years, Member States' jurisdictions have taken a much more active approach to insolvency. The recession following the 2008 credit crunch has brought this issue back to the attention of governments

subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000R1346.

[3] https://www.elibrary.imf.org/view/journals/001/2021/152/article-A001-en.xml.

[4] https://www.elibrary.imf.org/view/journals/001/2019/027/article-A001-en.xml.

[5] Kilborn, Jason J, *Two decades, three key questions, and evolving answers in European consumer insolvency law. Responsibility, discretion, and sacrifice*, în Johanna Niemi, Iain Ramsay, William C. Whitford, Consumer credit, debt and bankruptcy. Comparative and international perspectives, Oxford, Hart Publishing, 2009, pp. 307-329.

[6] Amira Rasekh and Anjum Rosha *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive*, https://www.elibrary.imf.org/view/journals/001/2021/152/article-A001-en.xml.

trying to address the problem of social hardship by creating consumer debt adjustment mechanisms.

Looking at the overall landscape in the European Union, prior to the implementation of Directive 2019/1023/EU on restructuring and insolvency, it is found that most Member States had some rules on consumer insolvency in place, each of them aiming to balance the interests of insolvent persons, those of creditors and society. Assessing current frameworks in terms of good practice and recurring shortcomings, problems with current regulatory frameworks fall into two main areas: the difficulty of individuals accessing the procedure and the failure to truly give them a fresh start or a second chance.

Best practices are identified as: a short process, which operates in accordance with clear and non-court-based rules, in which debt cancellation occurs during a short repayment plan.

It is also preferable for the procedure to allow the debtor's rehabilitation to take place after a sufficiently short period of time to be fully reintegrated into a social and economic life.

In principle, a natural person is considered to be insolvent when its assets do not have sufficient funds available for the payment of debts, as they become due. It should be emphasized, however, that the opening of proceedings entails the limitation of the debtor's ability to dispose of his assets.

With the efforts of lawmakers at Union and Member State level, personal bankruptcy has become more widespread in Europe[7].

3. Steps for harmonising and improving consumer insolvency rules in the European Union

When the financial crisis erupted in Europe in 2008, weaknesses in Member States' insolvency laws became apparent, leading EU authorities to consider a paradigm shift in the purpose of insolvency law. Primarily, in European jurisdictions based on Roman law, bankruptcy regulations had focused on the rights of creditors, the control that creditors have over the assets of debtors, and the satisfaction of creditors' claims. For more than a millennium, "the classical reaction to insolvency ('bankruptcy') was punishment of the debtor and comprehensive liquidation and distribution of the debtor's property among the creditors."

A change of vision in Europe happens only at the beginning of the 21st century, and even then only to a limited extent. At a time when economic instability is expected to affect households and the consumer credit market, emerged the need to rethink the European Union's legislative architecture in line with international standards and to harmonize national practices. At European level, protecting the debtor's dignity and ensuring his or her minimum living standards, regardless of the level of outstanding debts, tend to become the principles governing the legal treatment of over-indebtedness.

It was when the global crisis loomed on the horizon in June 2007 and Member States' governments came together to commit to addressing "debt issues" with legal solutions. They have made collective recommendations to the Council of Europe (CoE) to address debt and over-indebtedness issues by calling for legal action transposed by legislation in this area. The Council of Europe's recommendations also provided a clear way to address key issues in the debt of individuals and families. These recommendations formed the basis of a definition of over-indebtedness[8] and set crucial policy objectives for the various European governments to pursue in post-crisis reforms. Recommendation CM / Rec (2007)8[9] of the Committee of Ministers to Member States on legal solutions to debt problems which, although not binding on regulations, cannot be ignored in substantiating Directive 2019/1023 / EU. Thus, para. (32) states that a debt adjustment procedure leads to the adoption of a payment plan, which must contain the amount that the debtor is required to pay periodically to creditors, as well as a reasonable time frame within which such payments would be made must be completed.

Further on EU initiatives aimed to harmonise of insolvency rules and to establish a distinct regime for natural persons crystallised with the adoption of the European Commission Recommendation on a New Approach to Business Failure and Insolvency in 2014 (ECR 2014) [10] and the European Insolvency Regulation Recast 2015 (EIRR 2015)[11],

One more step into the course of a EU consumer insolvency regulation is the Preventive Restructuring Directive 2019 (PRD 2019)[12] on preventive

[7] For an exhaustive list of good practices, see: *From debtor prisons to being prisoners of debt. Making the case for harmonised EU consumer insolvency rules*: A Finance Watch report, January 2022, pp. 11-12.

[8] For a definition of over-indebtedness see Research note 4/2010 Over-indebtedness New evidence from the EU-SILC special module, p. 4*:"An over-indebted household is, accordingly, defined as one whose existing and foreseeable resources are insufficient to meet its financial commitments without lowering its living standards, which has both social and policy implications if this means reducing them below what is regarded as the minimum acceptable in the country concerned."*

[9] https://rm.coe.int/09000016807096bb.

[10] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014H0135.

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848.

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L1023.

restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Into the preamble of it is stated: (21) *Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. Furthermore, it is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures, with different access conditions and discharge periods, to discharge their business debts and other debts incurred outside their business. For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.* The directive aims to address business insolvency, but leaves an option for EU Member States to apply some of the rules to individual citizens.

Although the harmonisation of insolvency laws has been at the top of the European institutions' agenda over the last decade, the COVID-19 pandemic has revealed some of the limits of these EU's harmonisation efforts and the Covid-19 crisis has made the already delayed review of these insolvency frameworks an urgent one. Previously, the analysis of the existing framework had proved its inadequacy in addressing the issue of over-indebted citizens in situations of normal functioning of the economy.

It takes a long time for the EU legislature to adopt a completely new regulatory framework, as is the case with decisions, directives and regulations. On the other hand, recommendations and opinions can be adopted more quickly, but they are not binding on Member States. For the time being, the EU legislator has had to leave it to national governments to address the immediate effects of the crisis, and they have responded with financial support for Covid-19 or debt moratoria[13], which have mitigated the full impact of the crisis. Meanwhile the economic recovery of over-indebted European households may be hampered by the pandemic and also due to the war on the EU border.

The next steps towards harmonising and improving consumer insolvency rules in the European Union are provided by the Directive 2019/1023/EU[14].

Under recital (98), *"a study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions."*

In the Review Clause (art. 33) is stated that *„no later than 17 July 2026 and every five years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application and impact of this Directive, including on the application of the class formation and voting rules in respect of vulnerable creditors, such as workers. On the basis of that assessment, the Commission shall submit, if appropriate, a legislative proposal, considering additional measures to consolidate and harmonise the legal framework on restructuring, insolvency and discharge of debt."*

For the next course of the process of lawmaking:

- by 2022 the European Commission should conduct the study required under recital (98) of the Restructuring and Insolvency Directive 2019/1023/EU;
- also in 2022 European Commission to collect and review information on Member State transposition of art. 1 (4) of the Directive.

After analyzing the data, there are two options to move forward:

- in 2023 to compile the results and propose a new standalone consumer insolvency directive or
- according to art. 33, in 2026, to include a new chapter on consumer insolvency as part of a revision of the Restructuring and Insolvency Directive 2019/1023/EU.

4. Aspects regarding the good faith of the debtor

The insolvency procedure of the natural person, whether it takes the radical form of immediate liquidation of the traceable assets or is done on the basis of the financial recovery plan proving the efforts of the over-indebted consumer to pay, grants the debtor discharge of uncovered debts only conditionally by the debtor's good faith.

When it is in default, good faith is the intention of the honest debtor to use the insolvency proceedings to

[13] See, for example, Comparative Table of Insolvency Related Measures Adopted or Planned for Adoption in Member States (European Commission, Directorate-General Justice and Consumers 2020) (August 19, 2021), available at: https://e-justice.europa.eu/fileDownload.do?id=8c19af5d-3e73-4de9-994b-0b975101b5eb.

[14] https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkzpoa70klz4.

get a fresh start, getting rid of oppressive debts that have been incurred either because of circumstances beyond his control, such as those contracted for unexpected medical conditions, caused by the loss of a job, or due to a recession, or because the debtor did not manage his finances well, but without being seriously guilty. On the contrary, when bad faith intervenes, the subject may borrow money that he does not intend to return or is aware that he cannot return it. Because good faith is necessary to achieve the purpose of the bankruptcy proceedings, the court will punish the lack of good faith, either by rejecting the debtor's claim without releasing the debtor, or by lifting the suspension of foreclosures, which prevented creditors from confiscating the debtor's assets or income in order to pay the debts.

With regard to the good faith of the debtor in the case of the insolvency of natural persons, two main typologies are recognized internationally:

- the Anglo-American model, called "fresh start";
- the continental‑ European version, also known as the deserved fresh start.

According to the Anglo-American model, almost any individual debtor can benefit from the effects of the law, while the second procedure, adopted by most European states in the field of insolvency of individuals, can only benefit the debtor who has reached the situation of impossibility to payment of current debts due to causes beyond his control or due to unforeseen causes, provided that he was in good faith.

5. Barriers and limitations in access to personal insolvency for debtors

The debtor's access to insolvency proceedings may be subject to several eligibility conditions, including a certain minimum level of debt.

Difficulties also arise in setting the minimum amount to be recovered by creditors in insolvency proceedings. This is a key issue for many low-income, low-assets or no-income and no assets borrowers (the so called 'NINA' – no income, no asset consumers - or 'LILA' – little income, little asset consumers), which can rule them out from the procedure *ab initio*. For the poorest borrowers, the costs of the procedure itself can also be a hindrance. Other thresholds refer not only to the amount of outstanding debt a person has, but also to their seniority, and the result is that access to proceedings is restricted to those who, although sufficiently indebted, payment incidents are not long enough. Where unpaid debt thresholds reach relatively high levels, a large number of other insolvent debtors may also be excluded if they do not fall under the scale. The debtor should be able to request that the proceedings be opened when it is reasonably foreseeable that he will not be able to continue to pay the debts at maturity. In other words, when the state of insolvency become imminent and not when it is found that he/she cannot pay the debts at maturity. This would allow the borrower to apply for debt restructuring at an early stage, thus increasing the prospects for creditors to settle and recover debts.

In some states, the debtor must demonstrate that he or she has consulted with an authorized intermediary, obtained advice, or attempted a method of settlement by agreement with creditors before filing for insolvency. For example, in Germany, in some cases, the admissibility of the application also requires certification by a lawyer or a consulting agency that the debtor has tried to reach an out-of-court settlement with his creditors in the last six months, to no avail, as well as the reasons for not reaching such an agreement.

Although obviously extremely concise, this statement of the problems currently posed by the conceptualization and legal treatment of the over-indebtedness of the consumer of credit, it raises the need to harmonize at Community level the procedure of consumer insolvency through a tool that would complement the architecture of European Union legislation on the subject.

6. Personal insolvency in Romania

Due to the relaxed lending conditions for the population in the few years of economic boom before the mortgage crisis of 2008, Romanians became over-indebted to banks and sometimes the monthly instalment exceeded the income. But shortly after the crisis broke out, and with the austerity measures being taken, a significant number of Romanian consumers could no longer pay off their bank loans, and then the need for a debt discharge regulation for individual debtors began to be felt.

Despite the resistance, especially from financiers, a number of steps have been taken in Romania to help consumers, especially by reviewing and refreshing the regulations that apply to creditors who grant loans to individuals, aimed on preventing over-indebtedness[15]. However, Regulation no. 24 from 28.10.2011 on granting loans to individuals which laid down provisions on sound lending practices and stricter rules for banks when setting the maximum amount that the consumer can borrow, could only apply to future borrowers, not for previously contracted debts.

The beginning of 2018 marked the entry into force of the Insolvency Law for individuals, Law no. 151/2015 on bankruptcy of individuals ("Law no. 151/2015"), which entered into force on 1 January

[15] NBR Regulation no. 24 from 28.10.2011 on granting loans to individuals, https://legislatie.just.ro/Public/DetaliiDocumentAfis/132549.

2018. The law establishes a collective procedure for recovering the financial situation of debtors-individuals in good faith, covering their liabilities and discharging their debts. Prior to the entry into force of the Personal Bankruptcy Law, the Romanian legislation regulated only the insolvency of legal entities.

The Law regulates three separate procedures that pursue to safeguard debtors from discretionary enforcement procedures and on the other side to maximize the amounts recovered by creditors. These are:

- recovery plan procedure: a general insolvency procedure based on a debt recovery plan;
- liquidation procedure: insolvency procedure based on liquidation of assets;
- simplified procedure: simplified insolvency procedure.

Law no. 151/2015 has in its center the idea of protection of the debtor natural person who is in good faith, so that the provisions do not benefit the debtor in bad faith. As a result, the purpose of the Insolvency Law of individuals cannot be to impose a stigma on those who use the benefits of the law, its negative effects can only be felt in terms of access to credit and other financial instruments and does not limit access to the labor market or publicly discrediting the individual

According to Law no. 151/2015, the insolvency of a natural person debtor "is presumed when he, after a period of 90 days from the due date, has not paid his debt to one or more creditors". Therefore, only those who have debts of more than three months to at least one creditor can apply for the initiation of insolvency proceedings.

The provisions of Law no. 151/2015 applies to individual debtors who have their domicile, residence or habitual residence for at least six months prior to the submission of the application in Romania and who are in a state of insolvency and there is no reasonable probability of becoming able within one year to perform again their obligations as contracted, while maintaining a reasonable standard of living for themselves and their dependents.

6.1. Conditions and barriers to make use of Law no. 151/2015 by the debtors

The insolvency proceedings may not be applied to natural persons who have previously been the subject of such proceedings (completed with the elimination of residual debts) less than five years prior to the filing of a new application for insolvency proceedings or those already in such a procedure.

With regard to this instrument of treatment of the installed over-indebtedness of the individual, the scope of application of the Law no. 151/2015 distinguishes fairly and efficiently between excusable and non-excusable over-indebtedness. Nor can resort to insolvency proceedings those who have been definitively convicted of an offense of tax evasion, forgery or intentional infringement of property by disregard of trust, those who have been dismissed in the last two years for reasons which are attributable to them, those who, although fit for work, did not make an effort to engage in or unjustifiably refused a proposed job or any other activity that could bring them income, but also those who accumulate new debts while in a state of insolvency[16].

In the context of the Covid-19 pandemic, some criticisms could be brought against Law no. 151/2015.

Thus, according to art. 4 para. (4) letter c): the procedure does not apply to the debtor who has been dismissed in the last 2 years for reasons attributable to him.

We consider it appropriate to waive this provision, which limits access to proceedings for debtors who have had the misfortune to lose their jobs in the last two years, for reasons which are not always and entirely attributable to them, some of them being unpredictable, if we refer to the appearance of a pandemic.

Another debatable aspect of that provision is that, if the employee challenges the dismissal decision and goes through all the steps in court, including a reversal of the case with reference to retrial, only at the end of the trial which could exceed two years, in the event that the court issues a final judgment stating that the reasons are not attributable to him, the employee may make a request to initiate proceedings.

During all this time, the employee who has been dismissed for reasons considered imputable by the employer does not have the opportunity to address the territorial insolvency commission.

Moreover, if the text of the law were to apply strictly, neither the debtor who, after being dismissed for imputable reasons, had concluded a new employment contract could benefit from the effects of the procedure.

In art. 4, para. (4) letter d): provides that it cannot benefit the category of debtors natural persons who, although fit for work, have not made the reasonable diligence necessary to find a job.

By the above provisions, the legislator has restricted access to this procedure to individual debtors who have made no effort to find a job, in case they are

[16] Romanian Law no. 151/2015, in its turn, offers a definition of insolvency. According to point 12 of art. 3, Definitions, "insolvency is that state of the debtor's patrimony which is characterized by the insufficiency of funds available for the payment of debts, as they become due. The insolvency of the debtor is presumed when, after a period of 90 days from the due date, he has not paid his debt to one or more creditors. The presumption is relative."

in debt. The law does not determine what this "reasonable diligence" means, leaving it to the discretion of the insolvency commission or the court to assess whether or not the debtor has made the reasonable diligence to find a job. In the context in which millions of employees were in a situation of technical unemployment for certain periods of time in the last years of the pandemic, the submission of reasonable diligence could inevitably result in failure, even if it took steps to the employee, including proving that he is registered with the Employment Agency without being offered a job.

As a result, it would have been useful for the legislator to specify exactly what these "reasonable diligences" are, so that the text of the law gives rise to as few interpretations as possible.

If we consider the pandemic as an unpredictable event that has affected the whole society and the global economy, we consider that the legislator would take an important step in the event of an amendment to the Insolvency Law of natural persons, namely if, apart from good faith of individual debtors, the law could, under certain conditions, apply to individuals who have shown bad faith, but who could benefit from a "new chance" and the family of the bad faith debtor and/or the dependents of the debtor, could also take advantage of this chance.

Another[17] important deficiency of Law no. 151/2015 in the light of the coordinates drawn by this paper is the fact that the treatment of cross-border insolvency was omitted. A further revision of the act should take into account the issues of the recognition and enforcement of foreign insolvency judgments in matters of insolvency of individuals.

7. Conclusions

Although beneficial to the debtor in good faith, recourse to the procedure of personal bankruptcy should not become a habit for debtors. The legislator should prevent the abuse of this remedy, and the insolvency proceedings of the individual should be regulated so that the use of the personal bankruptcy procedure does not become recurrent and the individual does not repeatedly become insolvent. The legislator should also consider the causes that led to insolvency, assessing, as far as possible, good faith, without neglecting the preparation of a payment plan and proper supervision of compliance with it.

Regarding the rationale for regulating the insolvency of the natural person, this exists as long as the law establishes a framework that offers both the debtor and the creditor accessible and viable remedies. In order to achieve these goals, the balance between debtor and creditor must be ensured, but at the same time, an equilibrium must be ensured at the technical level, between the philosophy of regulation and the way it is transposed into law through the establishment of clear and well determined legal assumptions. Whatsoever option the legislator adopts, it is necessary to clearly define the scope of the law and the eligibility requirements for the debtor, as well as the explanation of the principles and logic that led to the solution, in order to determine whether the limits and requirements are adequate.

If the concern of the legislator is to provide a legal framework that provides solutions to the debtor to get out of default, this concern should target all debtors, providing them with viable and accessible solutions, as appropriate.

The main aim currently pursued at European level in private insolvency proceedings is, therefore, to rehabilitate the consumer, avoiding punitive measures against him as a result of the impossibility of paying debts.

The fact that debts are only partially recovered in the event of consumer bankruptcy should also encourage creditors to pay more attention to lending, helping to prevent over-indebtedness through responsible lending. However, the existence of a way to get out of debt through personal insolvency also creates a moral hazard problem in society, as consumers might be encouraged to engage in overly risky indebtedness. Therefore, the law should provide for bankruptcy relief only for those who are in real need, the truly insolvent debtors in whose case the inability to pay would generate social costs in the absence of debt write-down. In order to fully address over-indebtedness, Europe needs to address other variables, including cross-border insolvency.

In order to limit the risks of over-indebtedness of individuals, the macro-prudential policy should aim not only to improve the credit worthiness assessment, but also to limit the indebtedness of households.

The indebtedness is often reflected in the service capacity of household debt and the instantaneous probability of default.

The experience of the last decade after the 2008 financial crisis indicates that the macro-prudential framework in several countries could not prevent the further accumulation of household debt in the context of the liquidity of the market by central banks. Moreover, the easing of monetary policy in response to

[17] For an exhaustive critics of the Law no. 151/2015, see Carmen Pălăcean, *Insolvenţa persoanelor fizice prin prisma reglementărilor cuprinse în Legea nr. 151/2015: Scopul legii, principiile, domeniul de aplicare, formele procedurii şi iniţierea procedurii. Câteva aspecte cu privire la minusurile şi beneficiile aduse de lege*, https://www.universuljuridic.ro/insolventa-persoanelor-fizice-prin-prisma-reglementarilor-cuprinse-in-legea-nr-151-2015-scopul-legii-principiile-domeniul-de-aplicare-formele-procedurii-si-initierea-procedurii-cateva-aspecte-cu/.

the Covid-19 crisis has also boosted household indebtedness and house prices. At the same time, the long-term environment of saturated interest rates has further delayed debt adjustment and widening imbalances, pointing to the need to revise macro-prudential policy on the household sector.

This analysis shows that a well-designed insolvency directive for individuals would represent another step in the European legal context towards legislative harmonization in the Member States and would optimize mechanisms for judicial cooperation and cross-border insolvency.

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EU CROWDFUNDING REGULATION

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Abstract

Considering the recent application in all EU Member States of Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (the "Regulation"), this article aims to address the main aspects and concepts which are to be used by small-medium enterprises (SMEs) and start-ups, in order to improve access to this innovative form of finance.

The necessity of this legal analysis stems from the direct compulsoriness of the Regulation and from the increasing trend of innovative peer-to-peer economy, in which start-ups shall be able to efficiently support themselves by means of access to several investors whose purpose shall focalize on the potential financial growth of said start-up.

The objectives of this study are to determine the grounds which led to the adoption of this Regulation, to identify the entities to whom the Regulation is destined for and who are allowed to provide crowdfunding services and to establish the differences between the concepts of "crowdfunding service" and "loan". Additionally, this study shall address the obligation of crowdfunding service providers to perform annual reports to the competent authority that granted authorization and the conditions in which such authorizations may be withdrawn. Also, the article aims to clarify what the key investment information sheet must comprise.

Keywords: *crowdfunding services, SME financing, the key investment information sheet, transferable securities.*

1. Introduction

This paper covers the analysis of the main aspects and concepts which are to be used by small-medium enterprises (SMEs) and start-ups, as per the provisions of Regulation[1] (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937

The matter is of utter importance, since as of the date of effect, the provisions of the Regulation are mandatory for EU entities and in the context of the recent pandemic crisis which led to unfortunate economic effects, knowing how to address financing from a crowdfunding perspective is extremely relevant for smaller businesses, especially.

I intend to analyse the basic principles of the Regulation, and the grounds for its enactment, to provide a more in-depth approach to how its applicability could be tailored to Romanian business environment.

Up to present, there is little to no specialized literature on the future applicability of this Regulation, at least in Romania, which seems to be at least peculiar, considering that the Regulation provides an easy and accessible alternative to common financing for start-ups and small and medium-sized enterprises, typically relying on small investments.

2. The opinion of the European Economic and Social Committee with respect to the utility of a Crowdfunding regulation

The Opinion[2] of the European Economic and Social Committee (the "EESC") on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments — [COM(2018) 99 final — 2018/0047 (COD)] — Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business [COM(2018) 113 final — 2018/0048 (COD)] (the "**Opinion**") was published in the Official Journal C 367, 10.10.2018, p. 65.

The EESC's Opinion follows the 2014 Juncker Commission's 'investment plan for Europe' with a view to achieving its top priorities: growth, jobs and investment. One of the plan's main goals was the gradual pursuit of a capital markets union, alongside a digital single market and an energy union. The aim is to develop a well-functioning and integrated capital markets union, encompassing all Member States, which lead to more than 33 initiatives and actions at an European level. Further to the investment plan for Europe, in 2018 the EU Commission published a

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R1503.

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2018.367.01.0065.01.ENG&toc=OJ%3AC%3A2018%3A367%3ATOC#ntr1-C_2018367EN.01006501-E0001.

communication in which it made reference to the Action Plan on Financial Technology (FinTech) seeks to give voice to the ambition to turn Europe into a global FinTech hub, where businesses and investors in the EU are able to derive maximum benefit from the advantages of the single market in this fast-evolving sector.

The European Economic and Social Committee was designated to analyse the Proposal for a Crowdfunding Directive, and emphasized, even from the dawn of the Opinion, that it was a very positive fact that the financing of small, young and innovative enterprises has been taken into consideration.

The EESC ascertained that crowdfunding is an important part of the funding escalator of small, young and innovative enterprises, particularly when they move from a start-up to an expansion phase and traditional financing is not always available. Also, the EESC considered that more financing opportunities are being created for investors, so the world itself shall benefit from innovative products and solutions, supported by modern technology.

Even though the Opinion also expressed the concerns that there might be risks for crowdfunding operations and markets, the EESC mentioned that the focus should be on how to mitigate those risks, related especially to transparency and protection of investors, possible areas of tension in the status of providers and the services they offer, supervision.

At concerns supervision, the EESC specified that it would be of interest to have a better representation of national authorities and to focus on the cooperation between national and European level consultations, since national supervisors are closer to national markets and can assess local circumstances better than EU authorities, for example.

The EESC also mentioned that crowdfunding is underdeveloped in the EU as compared to other major economies, which entails a higher degree of preparation on behalf of the EU of measures allowing crowdfunding to be more accessible and for platforms to provide high-quality services.

One of the most relevant points raised by EESC was the fact that crowdfunding activities were to be implemented by means of a Regulation, which implies the importance of the project itself and the necessity to align national norms with EU standards.

The EESC also addressed the matter of the fight against money laundering and terrorism financing, which needs to be tackled with more active measures. On this subject, the EESC drew attention of the power given to the Commission to potentially subject crowdfunding service providers to the relevant rules and whether this decision should fall to the Commission. The Committee believes that crowdfunding service providers should be subject to these rules and that their obligation should not be the sole competence of the Commission. Moreover, the conditions and criteria under which it is possible should be made clear.

3. Crowdfunding rules in USA

Across the ocean, at the historical and initial promoter of crowdfunding legislation, it seems that things are already working well insofar as crowdfunding legislation is concerned. US Congress passed detailed rules specifically tailored to equity crowdfunding. On April 5, 2012, the JOBS Act was signed into law, so the existing exemptions for raising capital under Section 4(6) of the Securities Act were thoroughly amended. According to Title III of the JOBS Act (also referred to as CROWDFUND Act), issuers could raise an overall amount of up to $1,000,000 during a 12-month period without filing a registration statement with the SEC or at the state level. For clarity purposes, as a principal rule of the US securities law, securities that are offered to the general public must be registered with the SEC. So the US legislator tied this exemption related to crowdfunding, however, to three conditions: the usage of a broker-dealer or funding portal, limitations on the amount that can be sold to individual investors, and disclosure requirements for the issuers.

As per to Section 4(6)(C) of the Securities Act, issuers can now offer or sell securities without a registration statement if the transactions is conducted through a broker-dealer or funding portal as defined in Section 3(a)(4) and Section 3(a)(80) of the Securities Exchange Act. In this way, the JOBS Act actually set out a private gatekeeper for equity crowdfunding issues, which is supposed to ensure the correctness and completeness of the securities offered. However, the JOBS Act did not make explicit that funding portals would be liable for material misstatements or the omission of material facts by the issuer. While the JOBS Act explicitly states that equity crowdfunding issuers will be liable for such offenses, it could be argued that the liability of the funding portal can be derived from Rule 10b-5 of the Code of Federal Regulations (CFR) as well as the previous Supreme Court decisions (Knight et al. 2012).

In reference to these provisions, studies[3] showed that too strong investor protection may harm small firms and entrepreneurial initiatives, which contrasts

[3] Hornuf, L., Schwienbacher, A., *Should securities regulation promote equity crowdfunding*?, Small Bus Econ 49, pp. 579-593 (2017), https://doi.org/10.1007/s11187-017-9839-9.

with the traditional "law and finance" view that stronger investor protection is better.

4. The basic principles of the EU Crowdfunding Regulation

Until 10.11.2021, Romanian legislation required inventivity from investors and companies, as crowdfunding activities were concerned. Building on the a desire to create a more accessible market with a single EU regime, thereby removing diverging national rules with respect to crowdfunding service providers within the European Union, the EU adopted the EU Crowdfunding Regulation.

Starting from the application date of 10.11.2021, the fully-welcomed EU Crowdfunding Regulation introduced the crowdfunding services as a new category of regulated services at EU level and established the basic principles for crowdfunding activities, which will also be eligible for the European passporting regime.

As per art. 1 of the EU Crowdfunding Regulation, the "*Regulation lays down uniform requirements for the provision of crowdfunding services, for the organisation, authorisation and supervision of crowdfunding service providers, for the operation of crowdfunding platforms as well as for transparency and marketing communications in relation to the provision of crowdfunding services in the Union*".

A crowdfunding service, under the EU Crowdfunding Regulation, is defined as being the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities:

(i) the facilitation of granting of loans;

(ii) the placing without a firm commitment basis, as referred to in point (7) of Section A of Annex I to Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders, as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes.

The EU Crowdfunding Regulation established the necessity for crowdfunding services performed by legal persons that are based in the Union to be authorized and to be governed by the principles of honesty, fairness and professionalism.

The crowdfunding service provider must perform a due diligence in respect of the project owners that propose their projects to be funded through the crowdfunding platform of the crowdfunding service provider, as per art. 5 of the EU Crowdfunding Regulation, with the following minimum requirements:

- no criminal record of the project owner in respect of infringements of national rules in fields of commercial law, insolvency law, financial services law, anti-money laundering law, fraud law or professional liability obligations.

- no establishment of the project owner in a non-cooperative jurisdiction, as recognised by the relevant Union policy, or in a high-risk third country pursuant to art. 9(2) of Directive (EU) 2015/849.

The EU Crowdfunding Regulation establishes also a definition of the loan, to be applicable for cases when the crowdfunding service provider offers loans, in addition to crowdfunding services. For the purpose of the Regulation, 'loan' means an agreement whereby an investor makes available to a project owner an agreed amount of money for an agreed period of time and whereby the project owner assumes an unconditional obligation to repay that amount to the investor, together with the accrued interest, in accordance with the instalment payment schedule.

The Regulation requires robust internal processes and methodologies and appropriate data to be used by crowdfunding service providers who also offers individual portfolio management of loans, for which it is obliged to keep records of the mandate given and of every loan in an individual portfolio.

Since crowdfunding services are destined facilitate the access of project owners to alternative financing, the Regulation includes certain rules related to complaints against such services, which must be performed by means of effective and transparent procedures, free of charge, based on standard templates of complaints, and with a reasonable period of solving guaranteed by the service provider, as per art. 7 of the EU Crowdfunding Regulation.

Since crowdfunding service providers are under close scrutiny, the EU Crowdfunding Regulation stipulates particular conditions for their authorization, such as, for example:

- the submission of a detailed authorization request, accompanied by the description of the prospective crowdfunding service provider's systems, resources and procedures for the control and safeguarding of the data processing systems, a description of the prospective crowdfunding service provider's operational risks, a description of the prospective crowdfunding service provider's prudential safeguards, a description of the prospective crowdfunding service provider's business continuity plan which, taking into account the nature, scale and complexity of the crowdfunding services that the prospective crowdfunding service provider intends to provide, establishes measures and procedures that ensure, in the event of failure of the prospective

crowdfunding service provider, the continuity of the provision of critical services related to existing investments and sound administration of agreements between the prospective crowdfunding service provider and its clients,

- proof of absence of a criminal record in respect of infringements of national rules in the fields of commercial law, insolvency law, financial services law, anti-money laundering law, fraud law or professional liability obligations for all the natural persons involved in the management of the prospective crowdfunding service provider and for shareholders who hold 20 % or more of the share capital or voting rights;

- proof that the natural persons involved in the management of the prospective crowdfunding service provider collectively possess sufficient knowledge, skills and experience to manage the prospective crowdfunding service provider and that those natural persons are required to commit sufficient time to the performance of their duties.

As per art. 17 of the EU Regulation, the competent authorities which granted authorisation shall have the power to withdraw the authorisation in certain situations, including but not limited to when where the crowdfunding service provider is also a payment service provider in accordance with Directive (EU) 2015/2366 and it, or its managers, employees or third parties acting on its behalf, have infringed national law implementing Directive (EU) 2015/849 in respect of money laundering or terrorist financing; or where the crowdfunding service provider or a third party acting on its behalf has lost the authorisation allowing the provision of payment services in accordance with Directive (EU) 2015/2366 or investment services under Directive 2014/65/EU, and that crowdfunding service provider or third party has failed to remedy the situation within 40 calendar day.

Insofar as prospective investors are concerned, crowdfunding service providers shall supply a key investment information sheet drawn up by the project owner for each crowdfunding offer, which shall include a set of standard details, a disclaimer that the offer has not been verified or approved by the competent authorities or the European Securities and Markets Authority (ESMA) and a risk warning. Standard information refers to identity, legal form, ownership, management and contact details, a responsibility statement, the principal activities of the project owner; products or services offered by the project owner, a hyperlink to the most recent financial statements of the project owner, if available, Key annual financial figures and ratios for the project owner for the last three years, if available, description of the crowdfunding project, including its purpose and main features. Other mandatory sections of the key investment information sheet, as per Annex 1 to the EU Crowdfunding Regulation, refer to main features of the crowdfunding process and, as applicable, conditions for the capital raising or funds borrowing, risk factors, Information related to the offer of transferable securities and admitted instruments for crowdfunding purposes, information on special purpose vehicles (SPV), investor rights, disclosures related to loans, fees, information and legal redress and information on individual portfolio management of loans to be provided by crowdfunding service providers.

As per art. 22 of the EU Regulation, crowdfunding service providers shall provide for a pre-contractual reflection period, during which the prospective non-sophisticated investor may, at any time, revoke his or her offer to invest or expression of interest in the crowdfunding offer without giving a reason and without incurring a penalty. Such a reflection period is deemed to protect the potential investor, who can decide, in certain conditions, to revoke its offer, in full application of a sanction.

In compliance with art. 25 of the EU Regulation, crowdfunding service providers may operate a bulletin board on which they allow their clients to advertise interest in buying and selling loans, transferable securities or admitted instruments for crowdfunding purposes that were originally offered on their crowdfunding platforms.

Until 10 November 2023, the EU Crowdfunding regulation shall apply in Romania to crowdfunding offers with a consideration of up to EUR 1,000,000 computed over a period of 12 months. As of 10 November 2023, the threshold will increase up to EUR 5,000,000.

5. Conclusions

Although Romania elaborated[4] a draft crowdfunding law, which was under public consultations until 9 September 2021, such law was not yet adopted, which currently leads to an objective obstacle in implementing the EU Crowdfunding Regulation in Romania.

While Romania is still to clarify its priorities in adopting the implementing norms for the Regulation, other Member states are registering a high degree of expansion of the Regulation's applicability. For

[4] The Draft Crowdfunding Law was published on 10 August 2021, by the Romanian Ministry of Finance - http://e-consultare.gov.ro/w/proiect-lege-privind-stabilirea-unor-masuri-de-punere-in-aplicare-a-regulamentului-ue-2020-1503-al-parlamentului-european-si-al-consiliului-din-7-octombrie-2020-privind-furnizorii-europeni-de-servic/.

example, in Italy, a study[5] shows that equity crowdfunding represents a funding method that is rapidly increasing in Italy, despite rather rigid regulation. Among the various sectors involved, the study showed that real estate sector could benefit from the crowdfunding models and, specifically, from the equity one. The development of new real estate equity crowdfunding portals that allow diversification of investment (by reducing the typical entry barriers for real estate investment) could guarantee greater investment transparency and simplicity.

Considering that Romania is deemed to be one of the largest fintech hubs in Europe, focus should be on adopting the crowdfunding law as soon as possible, since it would allow crowdfunding service providers to be able to authorize before the relevant competent national authority, Financial Supervision Authority - ASF, and to commence supporting small and medium businesses and start-ups, for the purpose of obtaining financing for their daring projects.

Also, business environment representatives should lobby on the adoption of this law, in a form compatible with the provisions of the EU Regulation, in order to make financing more accessible and to create business opportunities for innovative project to come.

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[5] Battisti, E., Creta, F. and Miglietta, N., *Equity crowdfunding and regulation: implications for the real estate sector in Italy*, Journal of Financial Regulation and Compliance, vol. 28, no. 3, 2020, pp. 353-368, https://doi.org/10.1108/JFRC-08-2018-0109.

THE DOs AND DON'Ts OF FRANCHISING IN ROMANIA

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Abstract

The importance of the franchise agreement per se is one which cannot be denied, both by European investors and by Romanian ones, since each business strives to gain the market relevance which characterizes a franchise. Also, more prominent EU franchises are entering Romanian markets while initially obscure Romanian brands are bolding emerging from the minds of visionary entrepreneurs.

While The European Union lacks a common legal framework on franchising, each Member State has established its own rules, which are similar to a certain extent.

This article aims to point out the main rules applicable for franchises established under Romanian laws, which both franchisor and franchisees should be aware of when analysing the potential success of a franchise located in Romania.

The study shall address what is mandatory for the franchisee to perform before setting up a franchise is Romania and while the franchise network is carrying out is business as well as what are the obligations which each franchisee must undertake, both pursuant to contractual norms and stemming from the legally mandatory framework. Also, another of the study's objectives is to determine the most frequent misinterpretations of Romanian franchise legal framework and to propose adequate solutions in order for future investors to avoid them.

Keywords: *franchise, franchisee, same market, publicity, know how, brands, intellectual property, Romanian franchise laws.*

1. Introduction

This paper covers the analysis of the main legal and practical aspects and concepts which should be known and implemented by Romanian businessmen and novices working their way up to building a successful business.

At a mere Google search, there are more than 70,000 results, showcasing several franchises which have either been successful or still wait to be discovered and properly exploited by eager franchisees. This proves the high interest Romanian entrepreneurs have in franchises, which are popular success recipes, attractive due to the already established success on the local market. Doctrine[1] has reflected on the grounds for which franchises have recently seen such overwhelming success, considering that on the one hand, the franchisor has the possibility of creating a franchise network without needing a considerable investment, and, on the other hand, the franchisee enjoys the possibility of implementing a business model that has already been successful on the market, being accompanied in the process of starting a new business by the franchisor's experience.

But with great possibility for success comes great responsibility, which is why both franchisees and franchisers should be aware, from a more practical perspective, what should they expect from each other during the franchise agreement and after its duration expires or the contract is terminated, and which is why the studied matter is important.

Therefore, the franchise is of utter relevance for practitioners and businessmen, since recent amendments to the national legal framework, namely to GO no. 52/1997 regarding the legal regime of franchise (hereinafter "**GO no. 52/1997**") bring new and intricate regulatory aspects which should be firstly understood and then, properly applied.

This study aims to clarify the way in which Law no. 179/2019 should be approached so that it creates a meaningful tool for both the franchisee and the franchisor, and how several types of franchises are impacted, by means of analysing the practical impact of franchise agreements and their clauses.

The novelty of this study, apart from other existent specialised literature, resides in the perspective from which legal provisions are analysed, in the sense that its purpose it to be a practical guide for businessmen and legal scholars alike, in which the results from previous experience of court cases related to franchises are integrated, as good practices.

2. The parties involved in a franchise agreement

While it is easier to assume that the parties to the franchise are the franchisee and the franchisor, what GO no. 52/1997 tells us is that both parties must be

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[1] R.M. Chireac, *The franchise agreement and the exclusivity clause*, in Pandectele Române no. 5/2020.

professional, meaning that they should be registered in a form which allows them to perform commercial activities on a day to day basis.

As such, the franchisee must not fall in the trap of considering that the individual – sole shareholder of the limited liability company established for the purpose of joining the franchise is the franchisee and could benefit from the protection of the rules governing consumers in relation to their counterparts. Franchisees shall be considered to be only the legal entities established by those individuals, either legal entities or professional individuals, established either in compliance with Companies Law no. 31/1990 or with GO no. 44/2008 regarding carrying out economic activities by authorized individuals, individual enterprises and family enterprises.

Given the above, before considering to join a franchise, an individual should choose a proper form in which to perform its economic activities under Romanian legislation.

As far as the franchisor is concerned, GO no. 52/1997 set out its main obligations, which include the following:

a) the franchisor must be the owner of the rights over a registered trademark or over any other intellectual or industrial property right, for a duration at least equal to the duration of the franchise agreement. As such, the law does not impose that the franchisor must be the actual owner of the brands under franchise, since he can receive the right to use the intellectual property rights pertaining to said brand based on a license agreement with the rightful owner of the brand.

b) the franchisor must provide the right to exploit or to develop a business, a product, a technology, or a service.

This provides for a wide range of franchises from which the franchisee may choose the one more appropriate to its own capabilities.

c) the franchisor must ensure that the franchisee has an initial training for exploiting the trademark.

Such obligation stems from the franchisor's previous experience, which is actually one of the pillars of the franchise. The franchisor acts like a protective brother for the franchisee, initiating the latter in the business which the franchisor is already extremely accustomed to. Mention must be made that the franchisor's experience has been defined by his own work in the same franchise so once the franchisee join the franchise, it shall most likely, at a certain extent, split the same market and the same customers with the franchisor.

d) the franchisor must use personnel and financial means in order to promote its brand, to perform research and innovation, to ensure the development and viability of the product.

From this perspective, the franchisor's attributions are more extended than the ones of the franchisee, since the franchisor is the one who introduces the brand to the world and is responsible for the way the brand is received. All actions related to marketing and promotion of the product and the concept of how the business should develop are geared by the franchisor and should be observed by the franchisee, since the purpose of this control with which the franchisor is vested by the law is to create a network of businesses in which the customer cannot distinguish between the franchisor's business and the franchisee's business.

e) the franchisor must prove the specific application of the know-how he has, within a pilot-unit, whose main objectives are to test and to define the business formula.

This obligation to have a pilot – unit has been deemed as necessary by the legislator in order to facilitate the franchisee's understanding of how the business model works and if such business model could be successful if replicated. Additionally, once in this pilot – unit, the franchisee shall have a clearer picture of his own capabilities and limitations whereas growing the business is concerned.

3. The independence of the franchisee from the franchisor

A less thought about aspect regarding the relationship between the franchisee and the franchisor is the independence one has from the other. Although legal rules dispose that the franchisor must provide initial support in view of establishing the franchise and permanent commercial or technical assistance during the contractual relationship, this cannot be interpreted as creating further obligations on behalf of the franchisor, limiting the franchisee's business perspective.

As doctrine[2] has put it, the lack of independence between the franchisee and the franchisor would lead to transforming the franchisee into a mere branch and if the franchisee is an individual, into the franchisor's proxy.

The consequences of such independence are that the franchisee undertakes the risk of becoming insolvent or even the risk to lose the business, if his commercial aptitudes are not sufficiently developed. It is not the franchisor who shall bear such risks, since the franchisor does not undertake result obligations towards the franchisee or towards the success of the franchisee's business.

[2] V. Nemeș, *Commercial Law*, IVth ed., Hamangiu Publishing House, Bucharest, 2021, p. 387.

Likewise, the franchisor is independent from the franchisee, which means that the franchisor cannot become more involved in the franchisee's activity than the law allows. Moreover, the franchisor shall not be liable towards third parties for damages created by the franchisees, except if the franchisor bears a separate, individual fault in such damages, which must be proven.

Considering its independence, the franchisee should realistically analyse its actual possibility to carry out its obligations under a franchise agreement, prior to entering into such, since even though the franchisor shall provide guidance, the liability for the success of the business lies with the franchisee.

4. The pre-contractual phase of a franchise agreement

While it is common for contractual parties to be careful with respect to the way they are observing the contractual provisions, insofar as franchise agreements are concerned, the pre-contractual phase is just as important, since it gives the parties the opportunity to be better acquainted with the specifics of the business run by the franchisor and to confirm their decision to collaborate.

Law no. 179/2019 amending GO no. 52/1997 has stressed the importance for the franchisee to receive an information disclosure document, which must comprise specific data with reference to the history and experience of the franchisor, details of the identity of the management of the franchise, the franchisor's and franchisor's management bodies' litigation history, the initial amount which the franchisee must invest, the parties' mutual obligations, copies of the financial results of the franchisor from the past year and the information regarding the pilot-unit.

This means that withholding any information mentioned above triggers the liability of the franchisor towards the franchisee for any proven damages resulted from the breach of such pre-contractual obligations, even if such obligations are not included in the franchise agreement, so special attention should be drawn when negotiating the franchise agreement to these specific conducts which the franchisor should observe. However, if the franchisor proves it complied with these legal dispositions, the franchisee shall not be able to request court damages by arguing that the franchise failed to obtain certain material results or material results similar to the ones of the franchisor, for that matter, since the franchisor's obligations are and remain throughout the franchise relationship obligations of diligence and not obligations of result.

During this pre-contractual phase, the franchisee should request and the franchisor should provide access to the information disclosure document, and should verify if all information included in this document is compliant with the provisions of GO no. 52/1997. In order to protect its interest, the franchisor should include contractual clauses by which the parties agree that all information related to the franchise and its concept, as stipulated under Romanian laws, have been duly disclosed and understood within the pre-contractual phase.

5. The franchise network

The practical result of any franchise is the creation of a franchise network, which shall commence its existence after the franchisor shall have been able to efficiently operate a business concept for a period of at least one year in minimum one pilot-unit.

The establishment of the franchise network shall not lead to the creation of a new legal entity, as legal doctrine[3] has very well pointed out.

Pursuant to art. 1 point 4) of GO no. 52/1997, the franchise network comprises an ensemble of contractual relations between a franchisor and its franchisees, with the purpose of promoting a technology, a product or a service, as well as for the development of production and of distribution of a product or a service.

The franchisor's role in the franchise network is key for its proper functioning, since the franchisor must be able to maintain its common identity and its reputation and also, to protect the franchise network from unlawful acts of know-how disclosure and unfair competition.

The franchisor should therefore establish sound rules in the franchise contract, while emphasizing the importance of the homogeneity of the franchise network, which should be explained by the franchisor and fully understood by the franchisee from the pre-contractual phase of negotiations and discussions. No franchisee is allowed to perform any action or manifest any conduct which is likely to lead to a disruption in the homogeneity of the franchise network, as such is defined by the franchisor, since any such deed is likely to harm the brand itself. Any reduction in sales and business due to infringements committed by a franchisee are likely to affect the entire network of franchisees, given that at the centre of the business is the brand itself so if the latter loses its reputation before consumers, each franchisee is likely to suffer. Consequently, each franchisee is allowed to seek repair of damage from other franchisees who choose not to observe contractual provisions, based on failure to

[3] St.D. Cărpenaru, *Romanian Commercial Law Treaty*, VIth ed., updated, Universul Juridic Publishing House, Bucharest, 2019, p. 589.

adhere to the principle of homogeneity of the franchise network, established under GO no. 52/1997.

From a legal and practical perspective, the franchisor is also obliged to provide continuous commercial and/or technical assistance throughout the contract period, which does not mean in any way that the franchisor takes any responsibility for the results of the franchisee's business. The obligation to provide assistance remains a diligence obligation and should be viewed as a necessary step so that the franchisor continuously ensures that the franchisee could perform its activity at the franchise standard, which is also set by the franchisor. The trademark and the know – how of the franchisor represent the guarantee of the quality of the products and services provided to consumers, so the franchisor is entitled to perform controls within the franchise network to see if the products and services provided by the franchisees live up to the standards set through the franchise.

6. The franchisee's specific obligations

GO no. 52/1997 establishes that the franchisee is selected by the franchisor based on its competence, meaning managerial qualities and financial capacity to exploit the business, as per art. 15.

In order to accomplish the purpose of having a successful and trustworthy franchise network, the franchisor must include several requirements which the franchisee is obliged to observe. To this end, the franchisee must support the development of the franchise network and must maintain its common identity and its reputation. Therefore, the franchisee is not allowed to use materials or products outside of the ones allowed by the franchisor in the franchise network. The same applies to other brands which cannot be used since their usage could determine a confusion in the consumer's perception with respect to the brand the network promotes. Of course, the usage of other brands than the one the franchise network promotes may likely lead to decreases in the quality of products and of services.

Apart from that, the franchisee must provide to the franchisor any information useful to facilitate the disclosure and analysis of the performance and of the real financial status of the franchisee, in order for the franchisor to be able to have an efficient overview of the franchise. Since this type of obligation requires a special conduct from the franchisee and although it is provided under the law, it is useful to include it in the franchise agreement, as well, so that any potential misunderstandings are removed from the start.

One of the main obligations of the franchisees, as set out under art. 4 point 3) of GO no. 52/1997, is not to disclose the know-how obtained from the franchisor to third parties, for the duration of the franchise agreement and afterwards. The secrecy of the know-how must be kept by the franchisee since this know-how, along with the brand and its market awareness, are actually the elements based on which the franchise is based on. Any such disclosure shall likely generate damages both for the franchisor, who should be able to efficiently protect the network, as well as for the other franchisees, who gain their main profit from the success of the franchise network and from the reputation of the brand and only subsequently, from their own business skills.

In order for the franchisor to maintain the homogeneity of the franchise network and to protect the remaining franchisees, it can establish contractual non-competition and confidentiality clauses, which prevent the franchisee from spreading the know-how obtained from the franchisor and are aimed to protect such know-how from leaking in any way outside the franchise. Such clauses can operate for the duration of the franchise agreement and afterwards, taking into account that the majority of franchisees are inclined to use the knowledge gained in a certain field afterwards.

Court practice[4] has shown that non-competition clauses have been established considering the fact that the franchisee benefits from the knowledge and the advantages obtained during the franchise agreement and could afterwards decide to carry out a competitive business, which could prejudice the franchisor. Such an obligation to non-compete includes, as per the court's interpretation, the possibility of the former franchisee to carry out, in its own name, for a period of 3 years after the franchise contract is terminated, a similar activity to the one carried out by the franchisor and for which the franchising agreement had been concluded.

7. Conclusions

While this study focused on the main outcomes of a franchise, meaning the practical implications of establishing a franchise network, the pre-contractual phase, the independence of the parties and the franchisee's obligations, it also shows that in practice parties may encounter difficulties due to the general manner in which the legal norms have been drafted.

Although Law no. 179/2019 has amended key points of GO no. 52/1997, there are still several elements which need to be better regulated, such as the content of the non-competition and confidentiality clause, the way the exclusivity clause operates and the way parties could seek remedies for franchise infringements.

[4] Bucharest Tribunal, IInd civ. s., decision no. 233 2/A/17.11.2017, available at www.rolii.ro, published in Pandectele Române no. 6/2019.

Until the legislator intervenes, practitioners are obliged to create lawful and comprehensive contractual clauses, for safeguarding both the franchisee and the franchisor, as well as the consumer, who is the final beneficiary of the franchise network and the engine of its development.

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THEORETICAL AND PRACTICAL ASPECTS OF THE PRINCIPAL'S LIABILITY FOR THE ACT OF THE DEFENDANT

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Abstract

This paper aims to present some theoretical and practical aspects of the principal's liability for the act of the defendant.

Thus, we have proposed a brief review of the basic notions of the principal's liability for the acts of the defendant, the seat of the matter and a brief comparison between the old regulation and the provisions of the current Civil Code. We do not wish to summarise all the elements that make up this vast institution, but simply to focus on some practical elements whit importance in the economic resolution of legal problems involving the liability of the competent person for the act of the defendant.

The central elements in which we have recorded landmark decisions on the subject, handed down or validated by the supreme court, concern, on the one hand, the delimitation of the principal's liability for the act of the defendant from contractual liability and, on the other hand, the principal's right of recourse and the removal of this right through the concrete possibility for the defendant to prove the principal's own fault.

Finally, it should not be overlooked that this institution is also often applied in criminal proceedings, when the principal is called upon to respond as a civilly liable party, an aspect which also gives rise to a more or less apparent problem with regard to the application of res judicata in criminal matters in civil matters.

Keywords: *principal, tort liability, defendant, damage, work report.*

1. Introduction

Liability for the act of another person is a variety of tort liability, imposed on certain persons for wrongful acts causing damage committed by those under their supervision, guidance, education.

Legal literature[1] has classified the hypotheses expressly regulated by the Civil Code, based on the nature of the relationship between the perpetrator of the harmful act and the person responsible: liability arising from the supervision of another person's way of life and liability arising from association for the purpose of carrying out an activity of guidance or control.

The first classification is psychological, educational, affective or didactic in nature, while the second classification is economic and social in nature.

The current regulation maintains the rule of express regulation of the hypotheses of liability for the act of another person, which it has grouped into two categories, according to the criterion expressed above.

Thus, according to the current civil law regulations in Section 4 of Book V. On Obligations, Title II. Source of Obligations, Chapter IV. Civil Liability is regulated liability for the act of another. Specifically, the principal's liability for the act of the defendant (art. 1373 of the Civil Code) and the liability for the act of an underage or of a person placed under a restraining order (art. 1372 of the Civil Code).

2. Applicable law on the civil liability of principals for the acts of their servants

2.1. Regulation under the Old Civil Code

Art. 1000 para. (3) of the Old Civil Code contained provisions according to which the partners are liable for the *damage caused by (...) and their assistants in the functions entrusted to them*.

In the doctrine corresponding to the old regulation, it has been argued that the provisions of the first sentence of para. (1) of art. 1000 Old Civil Code - "*We are also liable for the damage caused by the act of persons for whom we are liable (...)*" could be interpreted as a "*principle of broad law*" of liability for the act of another person, favourable to the victims of wrongful acts. Although thoroughly argued, this view remained isolated.

Since the time of the Civil Code of 1864, the liability of principals for the acts of their defendants was intended to apply to both civil and criminal courts, since principals were called upon to answer, as a civilly liable party, for the criminal acts of their defendants which caused damage.

Thus, the concrete way of applying the liability of principals for the act of the defendant was also created by case law through the multitude of cases in civil or

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[1] G. Viney. P. Jurdain, in J. Ghestin (coord.), *Traité du droit civil,* 2nd ed., LGDJ, Paris 1998, p. 820, apud L.R. Boilă, *Răspunderea civilă obiectivă*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014, p. 346.

criminal matters which have been brought before the courts in which this type of liability is incurred.

2.2. Conception according to the current Civil Code

The current Civil Code extensively regulates the liability of principals for the acts of their defendant in art. 1373 of the Civil Code, which consists of three paragraphs: "*(1)The principal is obliged to make good the damage caused by his defendant whenever the act committed by them is related to the duties or purpose of the functions entrusted to him. (2) A principal is one who, by virtue of a contract or by law, exercises direction, supervision and control over one who performs certain functions or tasks in his own interest or in the interest of another. (3) The principal shall not be liable if he proves that the victim knew or, according to the circumstances, could have known, at the time the harmful act was committed, that the principal acted without any connection with the duties or purpose of the functions entrusted to him*".

2.2.1. Delimitation of contractual liability

This liability arises only in those situations where the defendant causes unjust damage to third parties through a tort. Where the wrongful act is committed in the performance of a contract concluded by the principal with a third party and thereby causes damage to the latter by failing to perform a contractual obligation assumed in the contract, the rules of contractual liability for the act of another, *i.e.* art. 1519 of the Civil Code, will apply.

For example, in a relatively recent decision, the HCCJ ruled that: "*In the case of a contract whose non-performance or defective performance has resulted in damage, it is not possible to have recourse to civil liability in tort, the only legal remedy for damages being that of contractual liability.*

Accordingly, the action in tort seeking compensation for the damage caused by the wrongful act committed by the employees of a banking establishment, consisting in the defective execution of a bank transfer, is inadmissible. The applicant, as a bank account holder (which presupposes the existence of a contract concluded between him and the banking establishment), had only one option, namely to seek compensation for the damage under contractual civil liability, since the source of the obligation to compensate for the damage is contractual and not tortious. "[2]

Specifically, in the above case, the Supreme Court was called upon to rule on the appeal brought by the applicant company (the injured party). Thus, by its application to the Bucharest Tribunal, the applicant company requested that the respondent (the bank) be ordered to pay the sum of 415 635 lei representing the damage suffered as a result of negligence on the part of bank employees in carrying out a banking operation, namely the execution of a payment order issued by the applicant which was to be transferred to the account of the Treasury of District 1 Bucharest by way of VAT payment. In law, the applicant based its claim on the provisions of art. 998 and 1000(3) of the Old Civil Code and art. 1349, 1373, 1385 and 1386 of the current Civil Code.

Among other things, the respondent pleaded the inadmissibility of the application, arguing that there were commercial relations between the parties consisting of specific banking transactions, on the basis of the agreement concluded when the applicant's bank account was opened. Thus, since the tort is subsidiary to the contract, the application must be dismissed as inadmissible. Analysing this objection first, the Tribunal rejected it, holding, in principle, that: (i) the respondent did not submit the agreements to which it refers, and is therefore unable to analyse their content, and (ii) "*the defendant's obligations regarding the execution of the payment order derive from a regulatory act, namely the BNR Regulation no. 2 of 23. Feb. 2005, regarding the payment order used in credit transfer operations, so that the defendant's obligation was legal (and not contractual*)"[3] .

Finally, the First Instance granted the application in part and ordered the respondent to pay the sum of 273 342 lei.

Subsequently, at the appeal stage, the Bucharest Court of Appeal admitted the respondent's (the bank's) appeal and dismissed the claim as inadmissible. The Court of Appeal held that: "*By opening a bank account by any person (natural or legal), a banking services contract is concluded between the professional (bank) and the customer for the performance of all banking operations through that account (payments, collections), a contract with specific and implicit rights and obligations (mandate, good faith, etc.). There is therefore no doubt that a legal contractual relationship existed between the two parties.*

Both the old Civil Code and the present Civil Code have adopted the concept that the legal regime of tort liability is the common law regime, while the legal regime of contractual liability is special, derogatory."[4]

Thus, by opening a bank account, a banking services contract for collections and payments is concluded, under which the bank executes the payment orders of the contract holder, under the conditions laid

[2] See Decision no. 1134 of 5 June 2019 of the HCCJ, civ. s. I.
[3] See Civil Judgment no. 2032 of 24.05.2017 delivered by the Bucharest Court, civ. s. VI.
[4] See Civil Decision no 246 of 08.02.2018 of the Bucharest Court of Appeal, civ. s. VI.

down in the specific banking regulations. In the present case, the unlawful act is the defective performance of banking operations and the nature of the transfer order given by the account holder is a mandate, by which the customer authorises the bank to debit a certain amount from his account and to credit that amount to another account.

Therefore, as trustee, the bank has the obligation to check the payment orders for apparent non-conformities, to execute the order within a short period of time and to account for the execution of the order in the sense that the beneficiary's account (in this case, ANAF) has been credited.

According to the reappeal, which was decided by the HCCJ, the appellant pleaded infringement of art. 22 para. (4) of the Code of Civil Procedure, on the ground that the court of appeal, in its appeal proceedings, dealt with an issue relating to the legal classification of the claim and did not play an active role in that regard, which led to an infringement of the appellant's right to a fair trial and made it impossible for the appellant to assert its claims on account of an alleged error in the legal classification of the claim. Furthermore, the company submitted that it was not apparent from the documents on file that there were any contractual relations between the parties governing the factual situation at issue.

In the light of those aspects, the Supreme Court rightly held that: *'Having regard to the specific content of the claim, the High Court finds, as the Court of Appeal rightly held, that the appellant brought an action for civil liability in tort, the purpose of which was to obtain compensation from the defendant for the damage caused by the wrongful act of its employees in making a bank transfer.*

In view of this, although under the provisions of art. 22 para. (4) of the Code of Civil Procedure, the court shall give or restore the legal classification of the acts and facts in issue, even if the parties have given them a different name, in the present case it was neither necessary nor possible for the court of appeal to intervene of that nature in order to classify the action brought by the plaintiff-appellant, since its claims were unequivocally set out in the application in the sense that they were based on the manner in which the obligations arising from the bank account contract were fulfilled, and it was in those terms that the case was also tried at first instance. "[5]

However, the active role of the judge must not affect the parties' right of availability, but must be in harmony with their initiative in order to establish the truth.

Therefore, the HCCJ validated the arguments of the Bucharest Court of Appeal and dismissed the reappeal as unfounded.

2.2.2. The notion of principal and defendant

In the corresponding regulation of the Old Civil Code there was no definition of the notion of principal and defendant, so it was up to judicial practice and literature to establish the content of these two notions.

In the doctrine[6] it has been concluded that what defines the notions of principal and defendant is "the *existence of a relationship of subordination based on the fact that, by agreement between them, a natural or legal person has entrusted a natural person with a particular task. This entrustment enables the first person - called the principal - to give instructions, to direct, guide and control the activity of the other person - called the principal - who is obliged to follow the instructions and directions given*".

Currently, according to art. 1373 para. (2) of the Civil Code, a principal is a person who, by virtue of a contract or by virtue of the law, exercises direction, supervision and control over a person who performs certain functions or tasks in his own interest or in the interest of another.

In a recent criminal law case[7] it was rightly held, in accordance with the provisions of the current Civil Code, that the essential element for defining the relationship of prepuce is not so much the subordination of the defendant, but the fact that he acted under the authority and in the interest of the principal, for his benefit and with the means provided by him.

In conclusion, the principal is the person who has the power of direction, control and supervision over the principal by virtue of a contract or statutory provisions, and the defendant is the person who performs certain functions or responsibilities in the interest of the principal or another person, being under the principal's power of direction, supervision and control.

It should also be pointed out that for the relationship between principal and defendant to exist, it does not have to be direct and immediate or permanent, and the principal's right to give orders and to supervise and control the defendant does not necessarily require that it be exercised in fact.

Finally, one last clarification is necessary, *i.e.* the principal can be either a natural person or a legal person, but the defendant can only be a natural person.

[5] See Decision no. 1134 of 5 June 2019 of the HCCJ, civ. s. I.

[6] C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligations*, 3rd ed., revised and added, All Beck Publishing House, Bucharest, 2000, p. 236.

[7] See Criminal Decision no. 219/A of 28.02.2022 of the Ploieşti Court of Appeal, crim. s. for juvenile and family cases.

2.2.3. Grounds for the relationship between principal and defendant

Most often the legal relationship between principal and defendant arises from a contract concluded between them. First, there may be an individual employment contract.

Secondly, this type of relationship may also arise from non-contractual acts, such as: the acceptance of a position by a person as a member of a cooperative organisation or the performance of voluntary work for a trade union or an association or foundation; the hypothesis of a child carrying out an activity in the interests of his or her parties.

At the same time, we can state that, in principle, there is no relationship of subordination within the framework of the mandate contract, the contract of entrepreneurship or the lease contract.

2.2.4. Conditions and basis for the liability of the principal for the act of the defendant

From the provisions of art. 1373 of the Civil Code it can be seen that three of the general conditions of liability must be proven, namely: damage, wrongful act and causal link.

The text of the Civil Code does not provide for the condition of guilt of the defendant who committed the wrongful and harmful act, which is why we can say that the liability is principal and autonomous and which puts an end to the debates corresponding to the old regulation on the basis of liability and the need to prove the fault of the defendant.

2.2.5. The principal's regress action

The principal is objectively liable for the damage caused by the perpetrator, so that, after making reparation, in whole or in part, the principal has the right, under certain conditions, to claim from the perpetrator the value of the reparation granted to the victim.

The legal basis giving the principal the right of recourse is art. 1384 para. (1) of the Civil Code, according to which: "*the person who is liable for the act of another may take recourse against the one who caused the damage, unless the latter is not liable for the damage caused*. ". The principal's recourse against the defendant is therefore admissible only if the conditions of the defendant's liability for his own act are met, and it is therefore necessary to prove the defendant's guilt or personal fault.

This conclusion is also accepted by the courts. In a case concerning the regress of the principal (Ministry of National Defence) for the unlawful acts of the defendants established by a final criminal judgment, the HCCJ held that: "*Against the action for regress of the principal, the defendants cannot defend themselves by invoking the presumption of liability established by art. 1000 para. (3) of the Civil Code, but they may possibly invoke and prove the principal's own act, an act which would have caused all or part of the damage. However, if a criminal judgment of conviction has expressly held that the principal was not at fault in causing the damage, this aspect can no longer be raised in the action for regress, and the defendants may not plead that they committed the acts causing the damage as a result of the orders* received"[8].

Specifically, in the above-mentioned case, the first court found that, on the basis of criminal judgment no. 329/2005 delivered by the HCCJ, crim. s., final by Decision no. 121/2006 delivered by the HCCJ, 9-judge panel, the Ministry of National Defence was ordered, jointly and severally with the defendants, to pay the sum of 3,778,530.00 lei, representing material and non-material damages and court costs to the 83 civil parties in the criminal case. The Ministry of National Defence has provided proof of the payment of damages to the civil parties, so that the claim for recovery of those sums from the defendants is legitimate. The court did not accept the defendants' arguments that they had carried out an order, given that those defences were considered by the courts when they definitively established guilt and criminal and civil liability, so that no such analysis was required.

Moreover, the HCCJ held in the recitals of the criminal judgment that the Ministry of National Defence, the perpetrator, is not guilty, but is only a guarantor, which gives it the right, after compensating the victim, to ask the perpetrator to pay the amount he paid to the injured party. Lastly, the Court also held that it *is the defendant and not the principal who pays the damages, which he, the principal, guarantees. In other words, the principal who pays the damages in full has a regress action*.

In the light of the foregoing, the Court of Appeal found that a civil action had been brought in the criminal case and that reparation for the damage had been ordered to be made in accordance with the provisions of civil law. Since the criminal court did not determine the specific payment obligations of each defendant, but clarified the relationship between the parties, it was held that, in the present case, the rules applicable to joint and several liability should be determined.

The Supreme Court dismissed the reappeal and concluded that: „*the defendants are tending to reassess their guilt (repeating in this dispute a defence which they have consistently upheld before the criminal court, namely the fulfilment of military orders given to them and their lack of responsibility as executors), which*

[8] See Decision no. 290 of 20 January 2012 of the HCCJ, civ. s. I.

would be contrary to the principle of res judicata of the final criminal judgment establishing the facts, the persons who committed them and their guilt."[9]

On the other hand, in a recent case of the HCCJ, the principal's reappeal was dismissed because the defendant was able to prove that the principal was involved in causing the damage.

As a general rule, the Supreme Court held that: "*it is necessary to distinguish between the defendant's own fault and his official fault, the defendant will be liable for the damage caused only if his guilt or fault is proven, when he has committed the harmful act by acting beyond the duties of his office, by deviating from them or by abusing his functions. In so far as the act was committed by the principal acting strictly within the limits of his office or in order to carry out the orders, instructions and directions of the principal and in his interest, the fault is circumscribed by the concept of official misconduct, which is attributable to the principal.*"[10]

Specifically, in the above-mentioned case, the Court of Vâlcea registered a claim on 7 November 2017, by which the "MARIE SKLODOWSKA CURIE" Children's Emergency Hospital requested that the defendant be ordered to pay the sum of RON 910 394.

By court ruling no. 1212 of 26.10.2018 delivered by the Court of Vâlcea, civ. s. I, the court admitted the claim. Against the judgment, the defendant filed an appeal. By court ruling no. 4048 of 24.10.2019, the Pitești Court of Appeal, civ. s. I admitted the appeal and dismissed the claim in its entirety, finding that the conditions regarding the existence of the principal's own fault in organising the activity of his defendant were met.

The Court of Appeal held that, in the present case, the defendant had proved that the unlawful activity for which he was held responsible was the consequence of orders and instructions received from the principal, namely the way in which he organised and carried out all the activity relating to the performance of on-call duty during the period in which he was working as a resident at the principal hospital.

By its reappeal, the hospital has raised the issue that the judgment on appeal infringes the res judicata nature of the criminal judgment, which finds that the principal was not at fault in causing the damage.

From the considerations of the Supreme Court: "*it is true that neither of the two criminal judgments found the hospital to be at fault, but it participated in the trial as a civilly liable party.*

The criminal court examined the criminal liability of the defendant and ordered the liability of the principal, which is a case of civil liability for the act of another person, to increase the guarantees for the payment of damages in favour of the civil parties.

It cannot, however, be argued that the criminal court ruled that the hospital was not at fault in the occurrence of the harmful event, given that the limits of the criminal proceedings did not give rise to an analysis of the hospital's liability for its own act.

In fact, as the Court of Appeal correctly held, the criminal proceedings analysed the liability of the defendant and the legal relationship between the parties to the present proceedings, and the present judicial proceedings must analyse the effects of the principal's liability in relation to the defendant."[11].

Thus, the Court of Appeal did not violate the authority of *res judicata* of the criminal judgment and did not set out contradictory considerations in its reasoning; in fact, starting from the statements in the criminal judgments concerning the defendant's guilt and having regard to the provisions of art. 28 para. (1) of the new Code of Criminal Procedure, the civil court analysed the defendant's defences concerning the existence of the principal's own fault.

Therefore, the Supreme Court validated the arguments of the Court of Appeal, according to which the criminal proceedings did not analyse the aspects related to the organisation of the hospital's activity in the assignment of residents to the emergency unit and in the planning of the on-call activity, aspects which reveal the exclusive own fault of the principal in committing the harmful act.

The Court of Appeal found that there were no criteria contained in the hospital's duty roster, protocols or instructions to guide the resident or to lead the resident to make the decision to call the senior doctor on call. It was held that the obligation to draw up such criteria governing the work of residents sent to the first line of the emergency unit was incumbent on the commissioning doctor and that failure to comply with that obligation, in the light of the way in which the work was organised, entailed the exclusive fault of the commissioning doctor. In particular, the Court of Appeal held that the fact that the work had been carried out on the basis of custom and practice over a long period of time created an appearance of legality and gave the impression that the orders and instructions of the commissioner in that regard were lawful, since it was clear from the evidence that even the experienced doctors (head of the hospital department) in the hospital did not question the legality of the organisation of the residents' work, since the custom in the hospital was for them to work unsupervised.

[9] *Ibidem.*
[10] See Decision no. 2142 of 21 October 2020 of the HCCJ, civ. s. I.
[11] *Ibidem.*

3. Conclusions

Therefore, the liability of the principal for the act of the defendant is a constantly developing institution which, from a practical point of view, has a wide variety of solutions depending on the specific elements of the case.

Thus, for example, in relation to the delimitation of this type of civil liability from contractual liability, it should be borne in mind that the former is the rule and the latter the exception, which applies with priority.

At the same time, practical solutions are of particular importance as regards the right of recourse, especially when this liability derives from an unlawful act established by a final criminal judgment.

Therefore, if the criminal court does not find that the principal is not at fault, the defendant may, in the action for regress, prove the principal's fault in organising the activity of his defendant.

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THE PROCEDURE OF REIMBURSEMENT OF THE COSTS INCURRED IN A TRIAL, IN A SUBSEQUENT TRIAL

Georgiana COMAN*

Abstract

Costs incurred in a dispute may be claimed in that dispute or the parties may choose to claim them separately, in another trial. Although, apparently, the claim for costs after the trial in which they were incurred is not difficult, in fact, the initiation of a new litigation determines the initiation of the entire procedural mechanism related to any trial. Thus, like any other litigation, the one having as object the obligation of the defendant to pay the court expenses incurred in another case, will start by introducing the petition. The petition will have to comply with all the conditions set out in the Code of Civil Procedure, including those relating to the payment of fees. Although many issues related to the claim for costs in another case have been clarified in case law or doctrine, further practice shows us that a legal issue can never be definitively clarified. From a logistical point of view, it would clearly be preferable for the parties to claim costs in the dispute in which they were incurred, given that the judge of the case knew all aspects of the dispute directly, but also for to avoid the agglomeration of the courts with other litigations. On the other hand, given that certain costs can be determined only after the end of the proceedings, the request for costs in another litigation may be an appropriate solution.

Keywords: *costs, trial, jurisprudence, procedural, reimbursement.*

1. Introduction

Given the fact that court costs have become very important in a lawsuit, being a real claim, this article seeks to clarify certain controversial issues related to the claim for costs in another trial, by presenting the jurisprudence or opinion of the doctrine in this matter. Also, even at the level of the European courts, there have been decisions that are relevant on the subject addressed by this article.

One aspect that is relevant to the claim for costs is that if the claim is made in the very litigation which gave rise to the costs, it is an accessory request, and if the costs are claimed in another trial, the claim is a main one, the procedural effects being significant.

Another aspect that should be mentioned is that, sometimes, court fees have a higher amount than the value of the summons. In these cases, it is necessary for the court to analyze the proportionality and reasonableness of the costs.

In doctrine and case law, it is unanimously accepted that the costs of a dispute may be claimed in a new trial. However, A controversial situation is the one in which, although the party initially requested costs in the process in which they were made, later, it changes its opinion and wants to request them in another process. Is this a waiver of this request? Or, according to art. 406 para. 4 of the Code of Civil Procedure[1], the consent of the opposing party would be required in order for a waiver to be taken. Also, if the party is represented in the process, it would be necessary to have a special mandate, according to art. 406, second paragraph, of the Code of Civil Procedure, in order to make this act of disposition. In practice, however, the courts are not overly strict in this regard, being rather permissive and merely taking note of the party's request for costs separately.

Another problem that arises in practice is that some parties require certain categories of court costs in the litigation that gave rise to them (such as judicial fees) and other costs separately (such as attorney's fees). Since there is no legal rule prohibiting this practice, and civil liability for tort is based on the principle of full reparation of the damage, I consider that there is no impediment to proceeding in such a manner.

2. Legal regulation

The award of costs is governed by the provisions of art. 451-454 of the Code of Civil Procedure. According to art. 451, the court costs consist of the judicial fees, the fees of the lawyers, of the experts and of the specialists appointed under the conditions of art. 330 para. (3), the amounts due to witnesses for travel and losses caused by the need to be present at the trial, the costs of transport and, where applicable,

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[1] Art. 406 para. (4) Code of Civil Procedure: If the plaintiff waives the trial within the first term at which the parties are legally summoned or after this moment, the waiver can be made only with the express or tacit consent of the other party. If the defendant is not present at the time when the plaintiff declares that he is giving up the trial, the court will give the defendant a period within which to express his position on the request for waiver. Failure to respond by the deadline is considered a tacit agreement to waive the judgment.

accommodation, as well as any other expenses necessary for the proper conduct of the proceedings. From the very definition of costs, it can be seen that some of them, such as lawyers' final fees, transport and accommodation costs, could be known to the parties only after the dispute has been settled, so that at least those costs are justified to be requested in another trial.

2.1. Court costs consisting of lawyers' fees

According to art. 30 para. 1 of Law no. 51/1995 which regulates the organization and exercise of the profession of lawyer, for his professional activity the lawyer has the right to a fee and to cover all expenses incurred in the procedural interest of his client. Several legal provisions regarding lawyers' fees are provided in the Statute of the legal profession. Thus, according to art. 130 of the Statute, the lawyer is prohibited from fixing his fees on the basis of a *quota litis* agreement. The *quota litis* pact is an agreement concluded between the lawyer and his client before the final settlement of a case, an agreement which fixes exclusively the lawyer's total fees according to the judicial outcome of the case, regardless of whether these fees consist of a sum of money, a good or any other value. Therefore, a legal aid contract is valid, which provides for both a success fee and a fixed, pre-established fee, a conclusion also upheld by the HCCJ in resolving an appeal[2]. On that basis, if the parties provided for both a fixed fee and a success fee, the latter could be determined only at the end of the dispute, depending on the solution in question. Also, in case the parties of the legal aid contract would provide an hourly fee, per working hour, in accordance with the provisions of art. 129 of the Statute of the legal profession[3], the party has no way to prove, at the latest at the close of the debates, as required by art. 452 Code of Civil Procedure[4], of the costs, because, practically even at the last trial session, the lawyer would represent the party, so he would owe a fee for this activity as well. Moreover, if the ruling is postponed and the lawyer draws written conclusions, it is clear that the party cannot claim these costs in this first dispute. Even the provisions of art. 451 (2) of the Code of Civil Procedure[5] could not be applicable because the court did not know the total amount of the costs represented by the lawyer's fee. Regarding the provisions of art. 451 para. 2 of the Civil Code, the Constitutional Court, being notified with the exception of unconstitutionality of this provision, decided that, in connection with the obligation to pay court costs, including the lawyer's fee, by the losing party, by Decision no. 401 of 14 July 2005, the Court held that the prerogative of the court to censure, in determining the costs, the amount of the agreed legal fee, in view of its proportionality to the breadth and complexity of the activity submitted, is all the more necessary as that fee, converted in order to pay the costs, he is to be borne by the opposing party if he has fallen into claims, which necessarily presupposes that he is opposable to him. However, its opposability to the opposing party, which is a third party in relation to the agreement to provide legal services, it is the consequence of its acquisition by the court decision by the effect of which the claim acquires a certain, liquid and due character"[6].

In other decisions of the Constitutional Court, concerning the same legal provisions, it held that the lawyer, by exercising his profession, carries out an economic activity, which consists in offering goods or services on a free market (Judgment of the Court of Justice of the European Union of 19 February 2002, in Wouters and Others, para. 49), but any economic activity is carried on "in accordance with the law". Consequently, the legislature considered that the amount of the fee must be proportionate to the service provided, thus establishing the possibility of limiting it

[2] Decision no. 2131/2013, File no. 10873/63/2011.

[3] Art. 129 of the Statute of the legal profession:

(1) The fees may be set as follows:

a) hourly fees;

b) fixed fees (flat rate);

c) successful fees;

d) the fees formed by the combination of the criteria provided in letters a) -c).

(2) The hourly fee is established per working hour, respectively a fixed amount of monetary units due to the lawyer for each hour of professional services he provides to the client.

(3) The fixed fee (flat rate) consists of a fixed amount due to the lawyer for a professional service or for categories of such professional services that he provides or, as the case may be, he provides to the client.

(4) The hourly and fixed fee (flat rate) is due to the lawyer regardless of the result obtained by providing professional services.

(5) The lawyer may receive from a client periodic fee, including in the form of a flat rate.

(6) The lawyer has the right to request and obtain a successful fee in addition to the fixed fee, as a supplement, depending on the result or the service provided. The success fee consists of a fixed or variable amount set for the attorney to achieve a certain result. The success fee can be agreed with the hourly or fixed fee.

(7) In criminal cases, the success fee may be applied only in connection with the civil side of the case.

[4] The party claiming costs must prove, in accordance with the law, their existence and extent, at the latest at the end of the closing of the debate on the merits of the case.

[5] The court may, even of its own motion, reasonably reduce the part of the court costs representing lawyers' fees, when this is clearly disproportionate to the value or complexity of the case or to the work carried out by the lawyer, taking into account the circumstances of the case. The action taken by the court will have no effect on the relationship between the lawyer and his client.

[6] Decision no. 165 of March 27, 2018.

if there is no fair balance between the lawyer's service and the fee charged[7].

On the other hand, it is the court which settles the main action which is the best able to examine the merits, proportionality and reasonableness of the costs, since it is the court which, at least in the case of the fees of the lawyers, is directly aware of the work of the lawyers. However, regarding the reduction of lawyers 'fees recently, the ECtHR ruled that art. 1 of Protocol 1 to the ECHR had been violated, by the fact that the court ordered the reduction of *ex officio* lawyers' fees[8]. There are, therefore, benefits to claiming costs in the very litigation in which they were incurred, but the reality is that in many cases this is impossible. If the party is to be ordered to pay the costs of the proceedings in a new litigation, certain procedural issues need to be clarified.

3. Procedural aspects

3.1. The court fees for the claim

In the first place, if the parties request the fees from another trial, in a subsequent trial, then they have to pay another judicial fees for this second claim[9].

Obviously, the procedure chosen by the applicant is also important, as we will see below, as court fees are also determined by this choice. The HCCJ has ruled in a decision in an appeal in the interest of the law[10] that claims requiring the award of costs separately are the main claims subject to court fees, which are calculated on the basis of the amount of the claims brought before the court, even if the claims which were the subject of the dispute from which those costs came were exempted from paying fees. Thus, even if, in the situation in which the costs are required in the process which gave rise to them, it is not necessary to pay the court fee for this claim, always, if these costs are claimed separately, it is necessary to pay the fees on the grounds that the legal basis for the application for recovery of costs is distinct from that of the process were the costs incurred. As an exception, however, we mention the situation in which it is requested to award the costs separately by a public institution, among those provided in art. 30 para. 1 of the GEO no. 80/2013[11]. In this case, no legal fees will be paid in any case, regardless of the procedure followed.

The exemption from the payment of judicial fees for the accessory claim having as object the court costs, is based, mainly, on the provisions of art. 35, second paragraph of GEO no. 80/2013 which stipulate that unless the law provides otherwise, the applications submitted during the trial and which do not change the taxable value of the application or the character of the initial application shall not be taxed. Also, the HCCJ, the panel for resolving the appeal in the interest of the law, decided that in the unitary interpretation and application of the provisions of art. 28 referred to in art. 35 para. (2), art. 9 and art. 34 para. (3) of the GEO no. 80/2013 on court fees, with subsequent amendments and completions, appeals are not subject to court costs when they concern the decisions of the previous courts on the accessory request made in the process by the parties, which have as object the award of court costs[12].

3.2. The competent court

Secondly, the court which will be competent to solve the claim having as an object the fees from another trial, it is determined in accordance with the ordinary rules of jurisdiction. Thus, it is not relevant which of the courts judged the litigation that generated the court costs, but it is necessary to determine the competent court according to art. 94 et seq. of the Code of Civil Procedure. Moreover, it may even be the case that the court which will decide the case for the award of costs in another dispute is of a different degree from the one which settled the dispute where the costs incurred.

3.3. Legal basis

With regard to the legal basis of the claim, as stated in case law and doctrine, the claim for costs separately is based on civil liability for tort, being necessary to determine exactly the damage caused, compared to the principle of full reparation of damage[13].

It should also be noted that the procedure before the court may be different depending on how the plaintiff chooses to apply for costs in accordance with the common law procedure, the small claims procedure (art. 1026 et seq. of the Code of Civil Procedure) or the payment order procedure (art. 1016 et seq. of the Code of Civil Procedure). Regardless of the procedure chosen, I consider that the only useful and relevant

[7] Decision no. 471 of June 27, 2017.
[8] Case 54780/15 (Dănoiu and Others v. Romania).
[9] Art. 3 of the GEO no. 80/2013.
[10] Decision no. 19 of November 18, 2013 regarding the appeal in the interest of the law, regarding the interpretation and application of the provisions of art. 1, art. 2 para. (1) and art. 15 letter p) of Law no. 146/1997, with subsequent amendments and completions.
[11] Art. 30 para. 1 of the GEO no. 80/2013 Actions and requests are exempted from the judicial fee, including appeals formulated, according to the law, by the Senate, the Chamber of Deputies, the Romanian Presidency, the Romanian Government, the Constitutional Court, the Court of Accounts, the Legislative Council, the People's Advocate, the Ministry Public and by the Ministry of Public Finance, regardless of their object, as well as those formulated by other public institutions, regardless of their procedural quality, when they have as object public revenues.
[12] Decision no. 2 of January 20, 2020.
[13] Art. 1385 para. (1) of the Civil Code.

evidence is that of the documents, so the duration of the trial should be limited to a single session, unless other procedural incidents occur.

3.4. Costs

With regard to the costs incurred in the litigation concerning the award of costs, the HCCJ ruled that in the cases having as object the obligation of the defendant to bear the claim consisting in the court costs generated by another definitively settled litigation, the provisions of art. 453 para. (1) of the Code of Civil Procedure remain applicable[14].

In the same decision it was held that the plaintiff cannot be at fault when he exercises his right, and the defendant, who loses the lawsuit and who does not manifest himself within the limits of art. 454 of the Code of Civil Procedure, cannot be considered innocent in connection with the litigation having as object the payment of the costs related to a previous litigation. On the other hand, the costs incurred in the context of this second dispute should no longer be required in the course of a new dispute, precisely in order to interrupt an unjustified series of disputes and to prevent any abuse of procedural law. As the complexity of the case is somewhat predictable, all costs could be determined before the close of the proceedings on the merits.

Although rare, it would not be out of the question that in the main proceedings the claim was upheld in part and both parties applied for costs separately, in the dispute concerning the award of costs, the defendant may file a counterclaim claiming the costs incurred in the first proceedings.

3.5. Limitation periods

Being a main claim having as object claims based on civil liability for tort, the legal provisions regarding the limitation periods become incidental. Thus, according to art. 2528, para. 1 of the Civil Code, the limitation period for reparation for a damage caused by an unlawful act begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it. In view of these provisions, we need to determine when the limitation period starts to run. However, the party is aware of the damage and the person responsible for it, from the moment of communication of the final decision by which the dispute that generated the court costs was settled. On the other hand, if certain costs are known to him later because, for example, the lawyer issues the invoice with the total amount of the fee, after the communication of the final decision, from that moment the limitation period begins to run.

4. Conclusions

Lately, judicial costs have become increasingly important as a result of the development of the legal professions, so there are few cases in which the parties are not represented by lawyers or legal advisers. Also, there are many cases where the parties try to prove their claims through the expert test.

Due to the multitude of situations in which the parties wished to obtain through another trial the costs of a first trial, it was necessary to intervene in the doctrine and case-law in order to clarify the incidents which had arisen and which were not yet settled. Although in practice there will always be problems with claiming the costs of a trial, at this time many questions have been answered, and the parties can make an informed choice as to what is most advantageous to them.

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[14] Decision no. 59/2017.

THE SAFEGUARD PROCEEDING IN THE FRENCH LEGAL SYSTEM – A SUCCESSFUL TOOL IN INSOLVENCY PREVENTION

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Abstract

From a historical point of view, the French Commercial Code from 1807 had been known for its punitive regulation regarding debtors who had become insolvent. However, nowadays, the French legal system has transformed into one of the most „debtor-friendly" legislations across Europe. The French Commercial Code provides four mechanisms destined to prevent insolvency – the ad-hoc mandate, the conciliation proceeding, the safeguard proceeding, the accelerated safeguard proceeding – and a formal judicial proceeding destined to prevent bankruptcy, known as the judicial recovery proceeding. This paper will analyze the safeguard proceeding since it is the most successful tool in the French legal system regarding insolvency prevention, according to statistics. We aim at identifying the incentives leading debtors to resort to this mechanism and the best practices which may consist of a source of inspiration for other Member States' legislations in matters of insolvency prevention. Moreover, France is one of the few countries having already implemented the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications and on the measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1123 (Directive on restructuring and insolvency). Thus, the French safeguard proceeding may be considered as one of the most modern tools offered by a Member States' legislation in matters of insolvency prevention.

Keywords: *safeguard proceeding, preventive restructuring, insolvency, insolvency prevention, the French Commercial Code.*

1. Introduction

This paper aims at analyzing the French safeguard proceeding, since it has been known to be a successful tool in insolvency prevention. At a European level, the legislator has quantified the effects of bankruptcies, which have led to the conclusion that insolvency prevention has become a necessity. Not only insolvency prevention could limit the negative outcome of bankruptcies, but it also passes the test of "the best interest of creditors", an American concept regulated by the US Bankruptcy Code[1] [Section 1129 (a) (7)], known in the Romanian insolvency Law no. 85/2014[2] as "the correct and equitable treatment of creditors". From a historical point of view, in the U.S.A., the concept of best interest of creditors had been firstly regulated by the Law regarding bankruptcy from the 1st of July 1898[3], more than a century ago, and the legislator's source of inspiration was England's law from 1883 regarding the preventive composition (concordat). The test of creditors' best interest translates into a higher recovery rate of claims in a formal judicial reorganization proceeding of an enterprise in comparison to a hypothetical Chapter 7 liquidation and is one of the conditions required by the US Bankruptcy Code in matters of a restructuring plan confirmation. "The American philosophy and techniques have attracted many countries, especially because statistics show that the American Law seems to be more efficient than other countries' laws in managing enterprises' insolvency. Thus, for decades and especially in the last decade, the European laws regarding insolvency have been inspired by American law and Chapter 11 thereof."[4] This is the case of the Directive (UE) 2019/1023 of the European Parliament and of the council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132[5] (thereby referred to as the Directive in matters of restructuring), which was inspired by the famous Chapter 11 of the US Bankruptcy Code. The Directive has entered into force on the 16th of July 2019 and had been implemented in

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[1] https://uscode.house.gov/browse/prelim@title11/chapter11/subchapter2&edition=prelim <Accessed 02.05.2022>.

[2] Law no. 85/2014 regarding insolvency prevention proceedings and insolvency proceedings, published in the Official Gazette of Romania no. 466/25.06.2014.

[3] https://en.wikipedia.org/wiki/Bankruptcy_Act_of_1898 <Accessed on 02.05.2022>.

[4] Diana Maria Ilie, *Efectele insolvenței asupra mediului economic și social din România,* Universul Juridic Publishing House, Bucharest, 2021, p. 231.

[5] Published in The European Union Official Journal, L 172/18, 26.06.2019: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN <Accessed on the 30th of April 2022>.

all Member States' national legislation at the latest of 17th July 2021. However, because of the COVID-19 pandemic, most of the Member States had requested and were granted a delay of maximum 1 year, meaning that the deadline is set at 17th of July 2022. On 21st of April 2021, The Europe Direct Contact Center has confirmed us[6] that the only countries which hadn't requested an extension of the deadline were Austria, France, Greece and Portugal. The French safeguard proceeding therefore complies with the European standards. The French Commercial Code[7] has been amended by the Ordonnance no. 2021-1193 of the 15th of September 2021 amending Book VI of the Commercial Code[8], which has entered into force of the 1st of October 2021. This is one of the reasons unveiling the importance of the studied matter, since many Member States are approaching the deadline of the implementation of the Directive's provisions. We intend to analyze the French law's view upon insolvency prevention through the safeguard proceeding, since the Directive in matters of preventive restructuring offers a high degree of flexibility regarding **how** Member States should achieve the Directive's objectives. It is important to underline that the Directive has settled three key objectives: (1) the regulation in insolvency prevention tools; (2) measures to increase the efficiency of insolvency prevention and insolvency proceedings; (3) regulation of debt discharge proceedings. Since the transposition of the Directive in matters of restructuring was implemented in the French law less than a year ago, The French doctrine isn't yet updated and very few published studies analyze the French pre-insolvency and insolvency proceedings after the Commercial Code's amendments, most of them being short articles.

2. A brief history of the French law in matters of financially distressed enterprises

At the European level, the legislator's vision in matters of the judicial treatment of financially distressed enterprises began changing in the last decade. Before this time, bankruptcy laws across European countries had been known to be characterized by a rather punitive treatment applied to both debtors and the natural persons who were the debtors' legal representatives. From a historical point of view[9], France had been known to organize fairs for traders and merchants starting from the 13th century. These fairs once benefited from the participation of Italian traders and merchants, hence the reason why France, especially Lyon city, had implemented Italian rules and customs regarding bankruptcy. A couple centuries later, these rules and customs had become even more punitive, until the point that bankrupt traders could face the risk of being sentenced to death, because bankruptcy was not considered to be a potential result of circumstantial causes, but only a result of fraud committed by bad-faith debtors. Because most large European fairs were organized in Lyon city, their local rules, regulations and customs were to be implemented across all cities in France. "Then Colbert, Louis XIV's reformist Minister of finance (1661-1683), used these customs as the main basis for the 1673 *Ordonnance du Commerce*"[10], which was considered to be the first complete regulation regarding bankruptcy, but which included the death penalty for bankruptcy. However, the death penalty was considered excessive and had never been applied in practice, which led to encouraging bad-faith debtors to commit fraud.[11] One of the most important reforms regarding bankruptcy law in France had taken place through the famous Commercial Code from 1807, also known as "Napoleon's Code". "At that time, the Code didn't regulate but a single proceeding, the bankruptcy proceeding, which ended with the sale of the debtor's assets in order to pay the liabilities according to a collective proceeding."[12] Only merchants could had been subject to a bankruptcy proceeding. Regarding the natural persons, as the legal representatives of the bankrupt debtors, the Code regulated, until 1838, that they would be arrested, no matter if they were of good-faith or of bad-faith. The merchants had a chance to prove that they were of good-faith and would then be released. Because of this reform, merchants who went bankrupt feared being arrested and would run away or would avoid being declared bankrupt, therefore deepening their financial difficulty and their liabilities. The first alternative to bankruptcy in the French law was regulated starting with 1856, when it had been admitted that not all debtors are of bad-faith and not all bankruptcies are caused by fraud. Therefore, starting with March 1889, good-faith debtors had the chance to be *liquidated*, and the natural persons who were the

[6] An e-mail received at our address office@insolpedia.ro, from EuropeDirectContactCentre@edcc.ec.europa.eu on the 21st of April 2021, 03:30 p.m.

[7] https://codes.droit.org/PDF/Code%20de%20commerce.pdf <Accessed on the 2nd of May 2022>.

[8] Published in the Official Journal of the French Republic no. 0126 of the 16th of September 2021.

[9] See M.A. Dumitrescu, *Codul de comerciu comentat*, vol. VI, art. 695-727, Ed. Librăriei Leon Alcalay, Bucharest, 1905, pp. 4-5.

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[11] See M.A. Dumitrescu, *Codul de comerciu comentat*, vol. VI, art. 695-727, Ed. Librăriei Leon Alcalay, Bucharest, 1905, p. 5.

[12] Corinne Saint-Alary Houin, *Droit des entreprises en difficulté*, 10th ed., LGDJ, 2016, p. 23.

debtors' legal representatives could be rehabilitated in order to gain back their civil, administrative, professional and political rights. It is important to underline that the French law of 4th of March 1889 had been a source of inspiration for the Romanian legislator regarding the regulation of an alternative to bankruptcy, known as *the judicial liquidation of commercial **debts***. An essential difference however consist of the fact that the Romanian legislator created a rather unique proceeding, unknown to be regulated in any other country, which allowed the debtor to pursue its commercial activity while being subject of such a proceeding.[13] The political and economic context of the early 1900s, consisting in the First World War and its effects upon the global economy, bankruptcy had started to become more and more frequent. Because legislators across Europe had realized that even good-faith debtors were a victim of economic circumstances, they had started taking different measures aiming at regulating alternatives to bankruptcy and allowing financially distressed debtors to pursue their activity. Therefore, the French legislator had introduced a version of preventive composition (concordat), regulated by the Law of the 2nd of July 1919 which was repealed on the 11th of January 1923. Under this law, good-faith merchants who were in a critical financial distress because of the war's consequences could had reduce or reschedule their debts.[14] In our opinion, the economic consequences of the First World War had led to the conclusion that good-faith debtors could had become victims of unfavorable circumstances, therefore becoming bankrupt without committing fraud. Because of the devastating economic consequences, all European legislators began regulating temporary measures aiming at the safeguard of viable enterprises. However, in some countries, these temporary measures, alternatives to bankruptcy, had continued to be regulated even after the amelioration of the consequences of the war. It is important to underline that while alternatives to bankruptcy had emerged, the consequences of bankruptcy proceedings had been mitigated. The concept of "the law of financially distresses enterprises" has been marked by a reform in matters of bankruptcy, when the French Commercial Code from 1807 was repealed by the Law no. 67-563 of the 13th of July 1967.[15] The same year has marked the adoption of several other decrees and ordonnances, which introduced an innovative proceeding: the stay of individual enforcements initiated against a financially distressed debtor, but whose financial state was not completely irreparable. Starting from 1967, the French law has continuously evolved until it met the balance between both debtors' and creditors' interests. Today, it is known as one of the most debtor-friendly laws across European countries.

3. The safeguard proceeding

The first regulation of the safeguard proceeding had taken place in 2005. This insolvency prevention tool was introduced by the Law of safeguard on the 26th of July 2005[16] (entered into force on the 1st of January 2006) and was inspired by the Chapter 11 of the US Bankruptcy Code.[17] This tool's success was noticed by statistics, since "(…) the number of proceedings had exploded in 2009 (+ 99,7%) before decreasing by 11% in 2010."[18] "The use of this preventive proceeding was highly increased by micro-enterprises without workers (+ 23%) and the ones employing 1 or 2 workers (+17,7%)."[19] A part of the law's provisions had been reported of being unconstitutional; however, the French Constitutional Council has rejected the complains of unconstitutionality.[20] The purpose of the safeguard proceeding is, according to article L. 620-1 of the French Commercial Code, "to facilitate the reorganizations of the enterprise in order to allow the pursuit of the economic activity, the maintenance of employment and the clearance of liabilities." It is extremely important to highlight the fact that both the safeguard proceeding and the formal judicial reorganization proceeding have the same objective.[21] Moreover, the French Commercial Code's provisions specified below (in the next section) apply to both proceedings, with very few exceptions. This is one of the reasons that the French doctrine considers the safeguard proceeding to be "an anticipated judicial

[13] See Vasile V. Longhin, Ovidiu Sachelarie, *Legea pentru lichidarea judiciară a datoriilor comerciale. Comentarii, doctrină, jurisprudență*, Institutul de Arte Grafice „Eminescu" Publishing House, Bucharest, 1932, p. 43.

[14] See Paul Demetrescu, Marco Barasch, *Lege asupra concordatului preventiv din 10 iulie 1929, cu modificările aduse prin legea din 10 iulie 1930 și legea din 20 octombrie 1932*, Ed. Librăriei Universale Alcalay, Bucharest, 1932, p. 28.

[15] See Corinne Saint Alary Houin, *op. cit.*, p. 28.

[16] Published in the Official Journal of the French Republic no. 173 of the 27th of July 2005.

[17] See Alain Lienhard, *Procédures collectives. Prévention et Conciliation. Sauvegarde. Sauvegarde accélérée. Redressement judiciaire. Liquidation judiciaire. Rétablissement professionnel. Sanctions. Procédure*, 9th ed., Delmas, 2020-2021, p. 126.

[18] *Idem*, p. 127.

[19] *Ibidem.*

[20] The French Constitutional Council, Decision no. 2005-522 of the 22nd of July 2005, published in the Official Journal of the French Republic of the 27th of July 2005, p. 12225, text n8, ECLI: FR: CC: 2005: 2005.522.DC https://www.conseil-constitutionnel.fr/decision/2005/2005522DC.htm <Accessed on the 2nd of May 2022>.

[21] See André Jacquemont, Thomas Mastrullo, Régis Vabres, *Droit des entreprises en difficulté*, 10th ed., LexisNexis, 2017, p. 193.

reorganization proceeding."[22] Basically, the safeguard proceeding aims at preventing insolvency (known in the French legal system as "cessation of payments"), which is grounds to opening a judicial reorganization proceeding, or at increasing the chances of a judicial proceeding's success by accomplishing several formalities, including the assets' and liabilities' establishing and, most importantly, initiating negotiations with creditors. Another important aspect that doesn't apply to the formal judicial reorganization is the fact that the safeguard proceeding can only be initiated at debtors' request. Creditors may only request the opening of formal collective proceedings, after the debtor has ceased payments. Another important aspect is the fact that the French safeguard proceeding is characterized by *confidentiality*.

3.1. Debtors who may access the safeguard proceeding

The French safeguard proceeding is regulated by art. L. 620-1 – L. 627-4, R. 621-1 – R. 627-1 of the French Commercial Code, as it was amended by the Ordonnance no. 2021-1193 of the 15th of September 2021. The categories of debtors which may access the safeguard proceeding are debtors who are carrying out a commercial, an artisanal or an agricultural activity, and any other natural persons who are exercising an independent professional activity (including a liberal profession), as well as to any other juridical person of private law which is confronting with "insurmountable difficulties", but which isn't in a state of payment cessation. The French law, as well as many other European countries' law, is based on the principle of the uniqueness of the collective proceedings, which implies that one debtor cannot be simultaneously subject of more than one collective proceeding. The principle of the uniqueness of the collective proceeding is based on the principle of the uniqueness of the patrimony. However, there is only one exception to this rule that consists of separate patrimonies of the individual entrepreneur with limited liability, and it implies the possibility of a judicial person and a natural person to be subject of two separate collective proceedings. This exception is regulated by the Directive in matters of restructuring, which states that, in such a case, Member States may regulate a unique collective proceeding, or two separate collective proceedings, in function of Member States' national laws, the latter case having to respect the collective proceedings' coordination. It is important to highlight that the Romanian law doesn't yet provide the possibility of liberal activities and professions, regulated by specific laws, to be subject of collective proceedings. This shortcoming is about to be eliminated, since the Project of Law[23] regarding the implementation of the Directive's provisions is matters of restructuring aims at including this category of debtors in the law's sphere of application.

3.2. The bodies authorized to apply and to participate to the safeguard proceeding

The bodies that are legally authorized to apply the safeguard proceeding are the following: (1) the Court (at least one judge-commissioner); (2) the Public Ministry (in some cases); (3) the judicial administrator (in some cases); (4) the workers' representative, designated by the Social and Economic Committee; (5) at least one representative of the debtor; (6) one to maximum 5 creditors requesting to have supervisory attributions (if the debtor carries out a liberal activity, the control attributions will automatically be exercised by the professional body to which the debtor belongs) (7) other experts (evaluators, auditors, notaries, lawyers etc.). One important aspect we need to highlight is the fact that the Court's competence in judging the opening of the safeguard proceeding depends on the type of activity the debtor is carrying out. If the debtor unfolds a commercial or an artisanal (crafting) activity, the competent Court is the commercial Court, while in every other cases, the Competent Court is the judicial Court. In matters of territorial competence, the competent Court to judge the opening of the safeguard proceeding, the judicial reorganization proceeding, and the liquidation proceeding is: (1) either the Court in which jurisdiction the judicial person has registered its headquarters or (2) the Court in which jurisdiction the natural person has declared the address of its enterprise or it's activity.[24] "In judging the opening of the proceeding, the Court designates one judge-commissioner and, if necessary, several (Commercial Code, art. L 621-4)."[25] The judge-commissioner needs to be periodically informed about the progress of the proceeding by the debtor's legal representative, the judicial administrator and the Public Ministry, including the communication of any documents. The judge-commissioner may be replaced by the president of the Court, in specific cases. The Public Ministry has an active role in a safeguard proceeding and even may

[22] See Alain Lienhard, *Procédures collectives. Prévention et Conciliation. Sauvegarde. Sauvegarde accélérée. Redressement judiciaire. Liquidation judiciaire. Rétablissement professionnel. Sanctions. Procédure*, 9th ed., Delmas, 2020-2021, p. 126.

[23] http://www.cdep.ro/proiecte/2022/100/90/4/se242.pdf <Accessed on the 2nd of May 2022>. The Project of law implementing the Directive's provisions in matters of restructuring has been adopted by the Romanian Senate on the 11th of April 2022 and is set to be debated by the Romanian Chamber of Deputies.

[24] See Alain Lienhard, *Procédures collectives. Prévention et Conciliation. Sauvegarde. Sauvegarde accélérée. Redressement judiciaire. Liquidation judiciaire. Rétablissement professionnel. Sanctions. Procédure*, 9th ed., Delmas, 2020-2021, p. 160.

[25] Dominique Legeais, *Droit commercial et des affaires*, 27th ed., Sirey, 2021, p. 621.

propose the designation of one or more judicial administrators. Moreover, if the debtor has accessed an ad-hoc mandate or a conciliation proceeding in the 18 months prior to the safeguard proceeding, the Public Ministry may oppose to the designation of the judicial administrator having already been designated as the debtor's representative in those other insolvency prevention proceedings. If the judge-commissioner rejects the Public Ministry's request, the rejection must be motivated. These provisions don't apply to the rejection of the debtor's request. In regard to the Public Ministry's role in a safeguard proceeding, the French doctrine states that its participation has become a guarantee of the morality of operations.[26] Regarding the judicial administrator, art. R. 621-11-1 of the French Commercial Code states that its designation is required only in cases in which debtors' turnover surpasses 20 million euros, according to the last financial statements. "The mission and the powers of the judicial administrator include a fixed, intangible part, governed by the law, and a variable part, defined from case to case by the Court."[27] The judicial administrator's mandate may be modified at any time during the proceeding, at the request of the debtor's legal representative, the Public Ministry's or at its own request. Two judicial administrators need to be designated in the following cases: (1) the debtor has at least three secondary establishments located within the jurisdiction of a court where it is not registered; (2) the debtor either owns or controls at least two companies, one of which is subject to a collective proceeding; (3) is being owned or controlled by a company which is subject to a collective proceeding. The workers' representative must be at least eighteen years old to be able to be designated. If the Social and Economic Committee doesn't appoint a representative, the workers themselves may do so. If no representative has been elected, the debtor needs to draw up a report showing that no workers' representative could be appointed. "The controllers assist the judicial representative in his functions and judge-commissioner in its mission to surveil the enterprise's administration."[28]

4. The opening of the safeguard proceeding

4.1. The conditions for initiating the safeguard proceeding

The French Commercial Code imposes four major conditions upon the opening of a safeguard proceeding: (1) the opening of the proceeding must be requested by the debtor, since it is a voluntary proceeding; (2) the debtor must be part of the proceeding's champ of application; (3) the debtor must justify insurmountable difficulties of any nature; (4) the debtor needs not to have ceased payments. As the French doctrine[29] stated, the safeguard proceeding has an anticipated and a voluntary characteristic. The Directive in matters of restructuring recommended that insolvency prevention proceedings may be request by creditors, under the condition of having the debtor's authorization in this purpose. However, France has not implemented this recommendation, mostly because the safeguard proceeding is confidential, on one hand, and on the other hand, the debtor has not ceased payments, which translates into the fact that creditors are not yet experiencing the debtor's "insurmountable difficulties". Only the legal representative of the debtor or its director have the right to request the opening of the safeguard proceeding. In its request, the debtor's legal representative or its director needs to indicate the nature of the difficulties, as well as the reasons they are insurmountable. If the Court appreciates that the difficulties are not insurmountable, the debtor's request of opening a safeguard proceeding shall be denied. The second condition refers to the fact that the debtor must be a part of the proceedings' champ of application. In a contrary case, the Court could not have grounds for admitting the debtor's request. The third condition consists of the fact that the debtor needs to justify insurmountable difficulties. This condition needs to be proved in the light of two aspects: firstly, the debtor needs to invoke the difficulties it's facing and their nature and, secondly, the debtor needs to prove that it is not able to surpass these difficulties. Regarding the nature of the difficulties, it needs to be highlighted that France is one of the few European countries which regulates the possibility of opening an insolvency prevention proceeding based on difficulties *of any nature*. Most European countries, including Romania at the time, regulate the need of these difficulties to be of financial nature. The French doctrine stated that the Commercial Code voluntarily doesn't specify the nature of difficulties which may be grounds to opening a safeguard proceeding, since it aims to include all types of difficulty: "(…) *financial*: debts coming to due date, fragile cashflow; *economic:* the loss of a market, aggressive competition, increase of raw materials' prices…; *social*: strikes, staff underqualification, overstaffed; *judicial:* the difficulty of claims' recovery,

[26] Dominique Legeais, *Droit commercial et des affaires*, 27th ed., Sirey, 2021, p. 622.
[27] Françoise Pérochon, *Entreprises en difficulté*, 10th ed., LGDJ, 2014, p. 307.
[28] Dominique Legeais, *Droit commercial et des affaires*, 27th ed., Sirey, 2021, p. 621.
[29] Françoise Pérochon, *Entreprises en difficulté*, 10th ed., LGDJ, 2014, p. 257.

litigations etc."[30] In this matter, it is important to be noted that the Directive in matters of restructuring recommends, through Recital (28), that Member States should extend the scope of insolvency prevention proceedings as to include difficulties of other nature than financial, provided that those difficulties may be quantified in a foreseeable insolvency risk. As we see, the French law imposes that difficulties need to be not only determined from the perspective of their nature, but also from the perspective of their intensity, the latter meaning that the debtor needs to prove that it cannot surpass them on its own. The reasoning behind this legal condition is the fact that the French legislator considers that the debtor doesn't need the Court's protection unless it cannot surpass the difficulties on its own. If the Court determines that difficulties are not insurmountable, the debtor will be advised to request to the President of the Court the opening of a conciliation proceeding, an alternative proceeding aiming at avoiding insolvency through a settlement with the creditors. The last condition required by the French Commercial Code in matters of opening a safeguard proceeding is the absence of payment cessation. This is because, in this situation, the debtor needs to request the opening of a formal judicial reorganization proceeding, if there are safeguard chances or, if not, the opening of a liquidation proceeding. The French jurisprudence established that the analysis of the conditions imposed by the law to opening a safeguard proceeding needs to refer to the day when this opening takes place.[31] Of course, to have its request admitted, the debtor needs to file several documents listed by art. R. 621-1 of the French Commercial Code. The Court's decision regarding the opening of the safeguard proceeding may be appealed by third parties, as stated by art. R. 661-2 of the French Commercial Code. Except cases of fraud, the debtor cannot be refused the opening of a safeguard proceeding on grounds that it would thus seek to escape its contractual obligations, since it justified difficulties that it is not able to overcome, and which are likely to lead to payment cessation.[32]

4.2. The observation period

The observation period debutes once the safeguard proceeding has been opened by the Court. During the observation period, the debtor remains in possession, meaning that he is able to pursue the activity of his business. The judicial administrator may only supervise the debtor's activity, but may not intervene whatsoever in management operations. "If one difficulty occurs, the administrator cannot attack the acts concluded, he can only request the Court to empower him with another mission that would allow him to intervene in the enterprise's management."[33] The rule of "debtor in possession" implies the fact that the debtor is allowed to dispose of his patrimony and has the right to exercise all day-to-day management acts which are not included in the judicial administrator's mission. "The surveillance of management operations imply that the judicial administrator only controls *a posteriori* the acts concluded by the debtor who remains in management."[34] "The observation period is a phase of the proceeding in which the activity of the enterprise is continued as of right and the causes of difficulty are identified and, as far as possible, treated."[35] The French Commercial Code instituates a maximum duration of the period of observation, which is limited to 6 months and which may be extended only one time, for another 6 months, upon the debtor's, the judicial administrator's or the Public Ministry's request, meaning that the maximum period is set at 12 months. Before the entry in force of the Ordonnance transposing the dispositions of the Directive (UE) 2019/1023, the French Commercial Code provided that the Public Ministry could have requested another extension of the observation period for another 6 months, the total duration adding up to maximum 18 months. However, the French legislator limited the observation period at 12 months, having in consideration the urgency characterized by the safeguard proceeding. One of the proceeding's opening effects consist of the debtor's obligation to draw up its inventory. The inventory needs to sum up all of the debtor's assets, as well as information regarding instituated privileges. "In order to limit the proceeding's expenses, the debtor himself may do the inventory within a period fixed by the judge-commissioner (...)"[36] Along the inventory, the debtor needs to present the judicial administrator a list of creditors, summing up all debts coming to due date, as well as his ongoing contracts. If the information is incomplete or unclear, the judicial administrator has the right to obtain any needed information from any public or private institution, in order to clarify the debtor's current financial situation. If the debtor exercises a

[30] Corinne Saint-Alary Houin, *Droit des entreprises en difficulté*, 10th ed., LGDJ, 2016, p. 254.
[31] Cass. Com., 26.06.2007, n 06-20.820, https://www.legifrance.gouv.fr/juri/id/JURITEXT000017897831 <Accessed on the 2nd of May 2022>.
[32] Cass. Com., 08.03.2011, n 10-13.988, 10-13.989, 10-13.990, https://www.legifrance.gouv.fr/juri/id/JURITEXT000023694421/ <Accessed on the 2nd of May 2022>.
[33] Corinne Saint-Alary Houin (coord.), *Code des entreprises en difficulté*, 7th ed., LexisNexis, 2018, p. 146.
[34] André Jacquemont, Thomas Mastrullo, Régis Vabres, *op. cit*., p. 212.
[35] Dominique Vidal, Giulio Cesare Giorgini, *Cours de droit des entreprises en difficulté*, 2nd ed., Gualino, 2016-2017, p. 153.
[36] André Jacquemont, Thomas Mastrullo, Régis Vabres, *op. cit.*, p. 204.

liberal profession, the law requires that the professional body the debtor is part of to be present at the inventory. The inventory needs to commence within 8 days of the opening of the proceeding and, if the debtor doesn't proceed to do so, the Court may appoint a third party (broker, notary etc.) to proceed to the commencement of the inventory. The period of 8 days from the opening of the proceeding may be extended by the judge-commissioner. Another effect of the opening of the safeguard proceeding consist of the debtor's interdiction to paying historical claims, meaning the claims arised before the proceeding's opening, except if an operation of claims' compensation intervenes, under the sanction of the payment's annulment. These provisions are justified by the fact that the French law instituates a certain order of claims' payment. If the debtor pays the creditors' claims contrary to the order instituated by the law, any interested thrid-party or the prosecutor, as a representative of the Public Ministry, may request to the Court the annulment of the payment, within a period of 3 years from the payment's date. During the period of observation, the debtor needs to carefully manage his liquidities because the safeguard proceeding can be converted by the Court in a formal judicial reorganization proceeding, which carries the permanent risk of liquidation, or even in a liquidation proceeding, if the judicial reorganization is not possible. The proceeding's convertion is conditioned by the occurance of payment cessation. This means that the debtor needs to pay his debts once they become due, in the order imposed by the Commercial Code, and needs to avoid taking unnecessary risks which would increase the chances of cessation of payments. The French Commercial Code states that the opening of a safeguard proceeding cannot be grouns for the termination of ongoing contracts. All parties must still fulfill their obligations resulting from ongoing contracts. The claims arising after the opening of the safeguard proceedings shall be paid as they fall due. As well as the case in the Romanian legislation, the French Commercial Code offers a priority regime to the payment of claims arising in the observation period. Regarding the creditor' historical claims, meaning the ones that arised before the opening of the proceeding, the French law imposes their obligation to declare their claims, calculated until the day of the opening of the proceeding (art. L. 622-26 French Commercial Code). Only the debtor's workers are excepted of this obligation. If creditors don't proceed to declare their claims, they will not be able to initiate enforcements upon the debtor. However, the debtor himself may declare creditors' claims and, by doing so, the French law instituates a presumption that the debtor has acted in the creditor' name. In such cases, the creditors' claims shall be taken into consideration when establishing the debtor's liabilities and they will be able to participate at the proceeding. In the Romanian preventive composition proceeding, at the time, creditors are not required to declare their claims, because the debtor has the obligation of drawing up a list of all its creditors. According to art. L. 622-17, the order of claims' payment is the following: (1) workers' claims; (2) claims resulting from a cashflow injection in order to ensure the continuation of the debtor's activity during the proceeding (new financing); (3) claims resulting from the execution of ongoing contracts; (4) other claims. It is important to highlight that a superpriority regime of new and interim financing of a debtor that is subject to either a preventive restructuring proceeding or a formal reorganization proceeding is one of the Directive's in matters of restructuring objectives. Of course, one of the most important effects of the opening of the safeguard proceeding consists of the stay of individual eforcements initiated against the debtor and of the interdiction of initiating other individual enforcements. These provisions also apply to co-debtors having affected a personal property as collateral. This effect is, at the moment, regulated by the Romanian law as well. Co-debtors may benefit from any measures established in the preventive concordat, according to art. 33 para. (2) of the Law no. 85/2014. However, the stay of individual enforcements may not be considered by the Court as a measure established in the preventive composition, but as a legal effect of the composition's approval, hence why the debtor who draws up a restructuring plan needs to negotiate with creditors the possibility of introducing such a measure in the restructuring plan. Creditors whose claims are not declared either by them, either by the debtor, are deprived of the right to initiate any legal action against the debtor. Any litigation a debtor is part of in order to establish a claim may continue, but the debtor is required to inform the creditor about the opening of the proceeding, in maximum 10 days. Another important effect consist of the fact that the opening of the safeguard proceeding stops the course of all legal and conventional interest related to the claims, with very few exceptions. In the period of observation, the debtor, along with the judicial administrator, need to draw up an economic and social statement, which will report the origin, the nature and the intensity of the enterprise's difficulties. It is important to highlight the fact that the Romanian legislator plans to regulate the necessity of a similar statement which will be drawn up by an insolvency practitioner and which will be used by the debtor to justify to the Court its request of opening a pre-insolvency proceeding. This statement shall also justify the nature and the intensity of the difficulties faced by the debtor but, more importantly, it will be an extremely helpful instrument for both the debtor, who shall be spared of the obligation to prove the fulfillment

of the condition of admissibility for the opening of the proceeding, and the creditors, which will have a better understanding of the debtor's need to restructure its activity. The period of observation ends when the Court confirms the safeguard plan or, by case, when the safeguard proceeding is converted to a judicial reorganization or liquidation proceeding.

5. The safeguard plan

5.1. The preparation of the safeguard plan

"In the legislation issued by the laws of the 25th of January 1985 and of the 10th of June 1994, two restructuring techniques were provided, which translate into two types of restructuring plan: the plan of business ongoing, or the plan of cessation of the enterprise."[37] It is however important to highlight the fact that this is one of the few differences between the safeguard proceeding and the judicial reorganization proceeding, meaning that only the latter may imply a total cession of the enterprise. The safeguard proceeding however may only propose a partial cessation of the debtor's enterprise. According to art. L. 626-1 of the French Commercial Code, if the debtors are likely to be safeguarded, the Court confirms the safeguard plan. However, the debtors still needs to be able to pay its debts as they fall due, because the cessation of payments represents grounds for converting the safeguard proceeding into a judicial reorganization proceeding or even a liquidation proceeding. Based on the social and economic statement, the debtor, with the assistance of the judicial administrator, shall draw up a project of plan which will be submitted to creditor' vote. The project of the safeguard plan is a rather complex instrument that needs to precisely determine the prospects of the debtor's recovery, by relating to the possibilities of the debtor's activity, the state of the market and the available means of obtaining new financing. Most importantly, the project of the safeguard plan needs to expose the way that the liabilities will be paid and, by case, the guarantees that the debtor shall submit for ensuring the execution of the plan. The safeguard plan elaborated by the debtor needs to be approved by the extraordinary general meeting of shareholders in case it proposes of the capital's structure. The conditions regarding summoning, quorum and decision adoption are regulated by Decree of the Council of State. If no decision may be adopted at the first meeting, the common law provisions regarding quorum and majority will be applied. If shareholders' equity is established at less than half of the value of the social capital, the Court may rule to replenish the capital with an amount proposed by the debtor's legal representative, but not less than half of the social capital. This possibility has been regulated by the Law no. 2015-990 of the 6th of August 2015[38] (named by the French doctrine "Macron Law"), which facilitates the adoption of a safeguard or judicial reorganization plan proposing the modification of the structure of social capital in favor of a person who commits to executing the plan. The safeguard plan may also propose delays in debt payments, remissions and even debt conversions into securities, the latter being known as an operation of *debt-to-equity swap.* After the project is completed, the safeguard plan shall be proposed to all creditors who have declared their claims or whose claims have been declared by the debtor. The legal representative of the debtor is in charge of collecting creditors' votes upon the safeguard plan. One very interesting particularity of the French legislation consist of the fact that the lack of the vote's communication within 30 days of receiving the project of the safeguard plan *instituates a presumption of the acceptance of the plan. De lege ferenda,* this presumption would need to be reintroduced in the Romanian legislation, at least in matters of pre-insolvency proceedings. It is important to mention that a presumption of the plan's acceptance had been regulated by the Law no. 381/2009 regarding the introduction of the preventive composition and of the ad-hoc mandate[39], currently revoked, but the presumption only applied to the budgetary creditor. The Law no. 381/2009 had been revoked by the entry in force of the Law no. 85/2014, which didn't maintain these provisions. The presumption of the plan's acceptance in the French legislation only operates if the plan proposes delays of payment. *Per a contrario*, if the plan proposes debt remission or debt-to-equity swap operations giving creditors access to capital, the lack of voting is considered to be a rejection of the plan. One important aspect is the fact that only affected creditors shall be given the right to vote the safeguard plan. The French Commercial Code considers to be unaffected those creditors for whom the plan does not propose a modification of the terms of payment, or creditors which will receive full payment upon the plan's approval or, by case, upon admission of their claims. The Directive (UE) 2019/1023 states, in recital (43), that affected creditors should be given the right to vote a restructuring plan, while unaffected creditors have no interest in this matter. The duration of a safeguard plan is established by the Court, from case to case, and it is limited to a maximum period of 10 years, with the exception of agricultors, in which case the maximum period is set at 15 years. In our opinion, a long-term

[37] Alain Lienhard, *op. cit*., p. 204.
[38] Published in the Official Journal of the French Republic n 0181 of the 7th of August 2015.
[39] Published in the Official Gazette of Romania no. 870/14.12.2009.

safeguard plan increases the chances of the debtor's recovery. In the Romanian law, the preventive composition is limited to a period of 24 months, with the possibility of the extension of this duration with maximum 12 months, in some cases, while the judicial reorganization proceeding is limited to a period of 3 years, with the possibility of the extension of this duration with maximum one year.

5.2. The safeguard's plan adoption

One first important observation is the fact that before the transposition of the Directive's (UE) 2019/1023 provisions in the French law, creditors would be constituted in committees and the plan was submitted to their voting. However, in the present, the creditors' committee has been replaced with the classes of affected creditors. According to art. L. 626-30 from the French Commercial Code, the affected creditors are considered to be the following: (1) the creditors whose rights are directly affected by the project of the safeguard plan; (2) the members of the general extraordinary meeting of the debtor, only if their participation at the structure of the social capital would be affected by the plan. The conditions of the summoning of the classes of creditors, as well as the conditions of several mandatory elements of the safeguard plan are regulated by decree of the Council of State. Creditors need to cast their votes within a period of 20-30 days from the date on which they received the plan. The safeguard plan may be modified within this period of time. A class of claims shall be deemed to approve the plan if the votes cast represent either two thirds of the value of claims registered in that class, or two thirds of the votes cast by the members of that class of claims. In other words, the plan may be adopted by gathering two thirds of claim's value, or two thirds of the votes cast by the number of creditors registered in that class of claims. In our opinion, the possibility of gathering either the majority of claims' value or the majority of creditors' votes is a measure aiming at facilitating he plan's adoption and increases the chances of its success. To be adopted by creditors, the safeguard plan needs to be favorably voted by each class of claims. However, if this condition is not fulfilled, the Court may still confirm the plan, if the other conditions are being fulfilled, the most important of them being the following: (1) a majority of classes of creditor have voted the safeguard plan; (2) the best interest of creditors' test is passed. In order for the safeguard plan to be confirmed by the Court, the fulfillment of the following conditions shall be analyzed, according to art. L. 626-31 of the French Commercial Code: (1) the plan has been adopted by creditors accordingly; (2) the best interest of creditors' test has been passed; (3) no party will obtain more than the value of their declared claim; (3) the formalities of the notification and communication of the safeguard plan have been fulfilled; (4) no dissenting class of creditors shall be treated unfavourably, meaning that they would not be paid less than they would be in a hypothetical judicial reorganization or liquidation proceeding; (5) if applicable, new financing that is necessary for the plan's implementation does not excessively harm the interests of affected creditors. However, even if the plan fulfills the above-mentioned conditions, the Court may still reject the plan if it doesn't offer a reasonable perspective regarding the prevention of the debtor's cessation of payments, or if the interest of affected creditors are not sufficiently protected. In the Romanian law, the confirmation of a recovery plan by the Court, in a preventive composition proceeding, only requires an analysis of few conditions of legality, meaning that the syndic-judge doesn't have power of appreciation in means of the recovery plan's opportunity aspects. The French Commercial Code provides the confirmation of the safeguard plan in a second hypothesis, the one in which the safeguard plan hasn't been adopted accordingly by the creditors, meaning that some classes of creditors have not voted or have voted against the safeguard plan. In this scenario, in order for the plan to be confirmed, the Court needs to apply the cross-class cram-down mechanism, meaning that the Court will impose the plan to the minority of classes of dissenting affected creditors. The conditions for the confirmation of the plan in this scenario are regulated by art. L. 626-32 of the French Commercial Code. Once the safeguard plan has been confirmed by the Court, the judicial administrator's mission comes to an end, and the debtor shall execute the plan accordingly. The debtor's activity will be supervised by a commissioner appointed by the Court, which may be either by the debtor's legal representative, either by the judicial administrator. The commissioner may initiate any action which in in creditor' interest, may obtain any necessary documents and information needed and shall report the inexecution of the plan. The confirmation of the safeguard plan by the Court is conditioned by several formalities. Firstly, the Court will subpoena the debtor, its legal representative, the judicial administrator, the commissioner and the workers representative. For the Court to be able to confirm a safeguard plan, it shall previously request the Public Ministry's opinion. If more than one safeguard plans have been drafted, the Court has a full power of appreciation upon which plan should be confirmed.[40] If no safeguard plan has been proposed, the Court will convert the safeguard proceeding into a judicial

[40] Alain Lienhard, *op. cit.*, p. 305.

reorganization proceeding, or even into a liquidation proceeding, according to art. L. 631-1 and L. 640-1 of the French Commercial Code. However, if the debtor hasn't ceased payments, the Court will only close the safeguard proceeding and will not convert the safeguard proceeding into another collective proceeding. The safeguard plan needs to be confirmed ahead of time, before the period of observation expires. This is because the maximum period of the observation period is regulated imperatively, and no plan may be confirmed and implemented after this date.

5.3. The execution of the safeguard plan

If the Court confirms the safeguard plan adopted by the creditors, the period of observation comes to an end. Also, if the Court considers that some assets are essential for the debtor's activity, it may rule that these assets to not be alienated, for a duration which cannot surpass the plan's duration. The Court will also take into consideration the delays and debt remissions settled by the debtor with its creditors and will also approve debt-to-equity swap operations. The French Commercial Law instituates minimal annuities that must be met by the debtor for the good execution of the plan. The annuities are set at 5% starting with the third year of the plan, and 10% starting with the sixth year of the plan. Of course, the annuities are set in regard to the maximum duration of the safeguard plan provided by the French law – 10 years – but the Court has the prerogative of fixing the proceeding's duration from case to case. Therefore, the annuities shall be fixed from case to case, depending on the proceeding's duration. An interesting provision of the French law consist of the fact that the plan may provide a choice for creditors implying payments within shorter periods of time but conditioned by a proportional debt remission. The discharge of the debtor with the reduced amount shall be effective only after the full payment of the reduced claim. If the Court notices that all claims established in the safeguard plan have been paid, it will rule that the execution of the plan is completed. The persons who may seize the Court in this matter are the commissioner for the execution of the plan, the debtor and any other interested party.

5.4. The inexecution of the safeguard plan

"The causes of the failure of the safeguard plan are enumerated by art. L. 626-27 of the Commercial Code, and they are two in number: the breach of commitments made under the plan and the cessation of payments occurance during the execution of the plan."[41] However, the cause of the failure of the safeguard plan will determine how will the proceeding come to an end. When the safeguard plan fails because the inexecution of the assumed commitments, the proceeding shall end facultatively, but when the plan fails because of cessation of payments, the proceeding shall end *ope legis*. When the cessation of payments is being observed during the plan's execution, the Court shall consult with the public prosecutor and shall convert the safeguard proceeding into a judicial reorganization proceeding or, if the reorganization is not likely to succeed, into a liquidation proceeding. However, even if the proceeding is being converted, the safeguard plan shall be resolved. The court may be seized by a creditor, by the commissioner for the execution of the plan or the public prosecutor. Creditors whose claims have been registered in the safeguard proceeding are excepted from another declaration of claims. The remaining claims established in the safeguard plan will automatically be accepted in the new proceeding, after deducting the payments already made by the debtor. No matter the cause of the safeguard's plan failure, it will be resolved by the Court, a sanction "borrowed" from the French civil law.

6. Conclusions

As we saw from the historical perspective of the French law of distressed enterprises, debtors had faced a rather punitive system during the last centuries. However, the French legislator had realized that the effects weren't as expected and as efficient. Having inspired from the famous Chapter 11 from the US Bankruptcy Code, the French legislator began regulation alternative solution to bankruptcy, I order to increase the proceedings' efficiency. Furthermore, in many cases, the creditors' interest would have been more efficiently protected if also the debtors' interests would have been protected as well. In an attempt to find the best balance between these interests, the French legislator started regulating alternative proceedings, delimitated from bankruptcy, starting with 1985. Nowadays, the Directive's (UE) 2019/1023 provisions, which were also inspired by Chapter 11, had already been implemented in France's legislation, making the French collective proceedings one of the most debtor-friendly legal frameworks across Europe. However, even before the transposition of the Directive's provisions, the French law already complied with European standards. One of the best measures adopted by France is, in our opinion, the fact that their legislation had also kept the ad-hoc mandate proceeding and the conciliation proceeding, both being alternatives to formal collective proceedings, but which do not fully comply to the Directive's provisions. This is encouraged by the Directive itself because recital (16) provides that "(…) Member States should be able

[41] Sémia Saaied, *L'échec du plan de sauvegarde de l'éntreprise en difficulté*, LGDJ, 2015, p. 13.

to maintain or introduce in their national legal system preventive restructuring frameworks other than those provided by this Directive". This is justified by the fact that the more alternatives a debtors disposes of to avoid insolvency and / or bankruptcy, the more chances a recovery or restructuring plan would have to succeed. The main conclusion of this article consists of the fact that the French legislation in matters of distressed enterprises is one of the most modern ones across Europe. It may also constitute a model for the development of other European countries' legislation in this matter, especially since the deadline for transposing the Directive's provisions is approaching. As stated in this article, both the French legislation on matters of distressed companies and the Directive (UE) 2019/1023 were inspired by the famous Chapter 11 from the US Code. The success of the proceeding regulated by the latter had been proven by statistics. In the US, companies are filing to undergo the Chapter 11 reorganization proceeding not only when it is in distress, but also as a measure to prevent financial difficulty in cases such as a rapid expansion of activity which would carry the risk of bankruptcy. It is to be noted that no pre-insolvency proceeding is being regulated by the US Code, but only formal, collective proceedings. Still, companies use the judicial reorganization proceeding as a tool of prevention, even if it was not designed for this purpose. Because of the reasons above-mentioned, in our opinion, further research would need to be conducted to analyzing the Chapter 11 judicial reorganization proceeding, in order to identify the main elements that make it such a successful tool. Furthermore, since the Directive (UE) 2019/1023 itself has been inspired by the Chapter 11 proceeding, further research should be conducted in means of identifying the way that Member States have understood to implement its provision, given the fact that it offers a high degree of flexibility regarding the accomplishment of its objectives. Such research would conduct to a better understanding of the recorded success of the Chapter 11, which would help Member States to improve their legal framework in matters of distressed companies in the future. However, it needs to be highlighted that, in our opinion, the success of Chapter 11 is given by one key factor – its tradition. Considering the fact that the first judicial reorganization proceeding in the US had taken place in 1898, and the cross-class cram-down mechanism has been used since 1944[42], the US judicial reorganization proceeding has more than a century of tradition, which is not the case in Europe. From a social perspective, in the US, insolvency and bankruptcy are not stigmatized nowadays but considered as a natural effect of competition. Moreover, creditors are more open to participate to a Chapter 11 proceeding because they already know it's in their best interest, hence why most reorganization plans succeed. This tradition lacks in Europe, and this is the main reason why most pre-insolvency proceedings fail. Also, insolvency and bankruptcy are still highly stigmatized, and creditors are not as willing to participate to a safeguard proceeding, considering that they would sacrifice their claims. Still, the entry into force of the Directive (UE) 2019/1023 is the most important step taken in the process of safeguard proceedings' modernization. In time, when these proceedings will gain tradition, their chances of success will increase accordingly.

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[42] https://en.wikipedia.org/wiki/Cram_down <Accessed on 05.05.2022>.

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DIGITAL TOOLS FOR JUDICIAL COOPERATION ACROSS THE EU - THE BENEFITS OF DIGITAL TECHNOLOGIES IN JUDICIAL PROCEEDINGS

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Abstract

Digital technologies have great potential to improve efficiency and access to justice, with the European Commission and the EU Council collaborating on a number of cross-border digital justice initiatives as a result of the political commitment to make national and European e-Justice more accessible. The COVID-19 crisis posed a serious challenge to the smooth functioning of justice systems, confirming that digital technologies are essential to ensure seamless and timely access to justice for citizens and businesses, thus contributing to building resilient national systems. The Joint Roadmap for Recovery[I]*, endorsed by the European Council on 23 April 2020, recognises digital transformation, alongside the green transition, as having a central and priority role in re-launching and modernising the EU economy. As underlined in the Council Conclusions „Access to Justice – Seizing the Opportunities of Digitalisation"*[II] *adopted in 2020, access to justice is a fundamental right and a central element of the rule of law, which is one of the core values on which the European Union is founded under art. 2 of the Treaty on European Union and which are common to the Member States. The document also reaffirms that the digital development of the justice sector should be human-centred and should always be guided by the fundamental principles of judicial systems concerning the independence and impartiality of the courts, the guarantee of effective judicial protection and the right to a fair and public trial within a reasonable time.*

Keywords: *cross-border justice initiatives, access to justice, digitalisation of judicial cooperation, digital by default, fundamental rights.*

1. Introduction

The topic of digitalisation of the area of justice is a priority at EU level, with the European Commission Communication of 27 May 2020 "Europe's moment: Repair and Prepare for the Next Generation"[1] highlighting that digitalisation of justice systems can improve access to justice and the functioning of the business environment. The European Commission's 2021 Rule of Law Report of 20.07.2021[2] also underlined that strengthening the resilience of judicial systems through structural reforms and digitalisation is a priority under the Recovery and Resilience Mechanism, and a number of Member States have included this in their national recovery and resilience plans.

It should be noted that efforts on accessibility of justice systems are not a recent development. A first result of the political commitment to make access to national and European e-Justice easier and more accessible was the adoption of the first multi-annual e-Justice Action Plan 2009-2013. This first instrument identified a series of priority actions for joint activities. Following its finalisation, an e-Justice Strategy and Action Plan for 2014-2018 was adopted. These ended in 2018 and were in turn replaced by the e-Justice Strategy[3] and Action Plan 2019-2023[4]. One of the most tangible results towards digitalisation of justice so far is the European e-Justice Portal, a one-stop-shop for all aspects of justice in the Member States of the Union, including a number of online tools. The EU Council conclusions "Access to justice - seizing the opportunities of digitalisation" set out ambitious directions inviting the European Commission to assess possible actions in the area of judicial cooperation in civil and commercial matters, building on the progress already made towards modernising cross-border exchanges between authorities through digitalisation and the use of information technology, as in the context of the regulations on service of documents and taking of evidence[5], and going on to examine the potential for

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[5] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) and Regulation (EU) 2020/1783 of the

modernisation in line with the "digital by default" principle. In criminal matters, the focus should have been on the analysis of judicial cooperation tools to which the electronic digital exchange of evidence system (eEDES), which already supports procedures relating to European investigation orders and mutual legal assistance between Member States, could be extended. For both strands of reflection, e-CODEX (e-Justice communication via online data exchange) is the preferred tool whose use was encouraged.

A crucial aspect for the success of these policies will also be determined by the approach to user panels. Promoting digital competences in the justice sector is of paramount importance. Also, initiatives to raise awareness and increase digital literacy among citizens will provide the opening to use the benefits of implementing these strategies. The use of digital technologies in justice systems will not diminish procedural safeguards for those who do not have access to such technologies.

As pointed in one of the studies[6] dedicated to different aspects related to the digitalisation of communication between courts/competent authorities of Member States and between those authorities and the parties to the proceedings in the areas of EU civil, commercial and criminal law, including the possibility for using videoconferencing systems in cross-border proceedings, individuals and legal entities can easily find themselves in litigation before a court in another EU country. Access to justice across borders is also particularly problematic for victims of crimes and defendants. Victims may be discouraged to file a complaint in another country by the fact that they do not know the legal system of that country. Access to justice across borders is challenging also for defendants who are unfamiliar with the legal system of another Member State. It is known that the threshold of accessing a court by individuals and legal entities is high, due to complexity and costs.

2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Digitalisation of justice in the European Union. A toolbox of opportunities

A first response from the European Commission has been provided in the text of its Communication **Digitalisation of justice in the European Union A toolbox of opportunities**[7], launched on 2.12.2020, in which it carried out an in-depth analysis and mapping of the digitalisation of justice in all Member States. Of interest for the proposed presentation are the intentions to promote legislative initiatives requiring Member States to implicitly use digital channels for cross-border communication and data exchange between competent national authorities; the application of the principle that an electronic document is not denied legal effect and the possibility to be accepted as evidence in legal proceedings solely on the grounds that it is in electronic format; the exploitation of the possibilities offered by electronic identification and electronic signatures / stamps. In addition, the modernisation of digital tools for judicial cooperation and information exchange in criminal investigations and proceedings within the EU was also indicated as essential in view of security threats and technological developments. In non-legislative matters, one of the most important initiatives foreshadowed by the European Commission's Communication (to be completed by 2023) is the posting on the eJustice Portal of a collection of links aimed at facilitating access to available electronic services provided by the judiciary and relevant public authorities, through an access point entitled "My eJustice Space". This should also facilitate access to justice in EU cross-border proceedings, in particular the European Small Claims Procedure[8] and the European order for payment procedure.[9]

3. Legislative initiatives launched by the European Commission in the field of judicial cooperation in criminal matters

In anticipation of the legislative intervention in the text of the Communication on the digitalisation of justice (2020), the European Commission launched on 1st of December 2021 a legislative package whose

European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

[6] European Commission, Directorate-General for Justice and Consumers, *Study on the digitalisation of cross-border judicial cooperation in the EU: final report*, 2022, https://data.europa.eu/doi/10.2838/174474.

[7] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN.

[8] Regulation (EC) no. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing an European Small Claims Procedure (OJ L 199, 31.07.2007, p. 1).

[9] Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating an European order for payment procedure (OJ L 399, 30.12.2006, p. 1).

components dealing with judicial cooperation in criminal matters will be briefly presented in this section.

3.1. Proposal for a Regulation of the European Parliament and of the Council establishing a collaboration platform to support the functioning of Joint Investigation Teams and amending Regulation (EU) 2018/1726[10]

Joint Investigation Teams (JITs) are teams set up for specific criminal investigations and for a limited period of time, established by the competent authorities of two or more Member States and possibly non-EU countries (third countries). The legal basis for setting up a JIT is art. 13 of the European Union (EU) Convention on Mutual Assistance in Criminal Matters[11] and Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams[12].The main difficulties faced by these structures relate to the secure electronic exchange of information and evidence (including large files), the secure electronic communication with other members of the joint investigation team and with the competent bodies, offices and agencies of the Union, such as Eurojust, Europol and the European Anti-Fraud Office (OLAF), and the joint day-to-day management of such a team. The overall objective of the proposal is to provide technological support to those involved in joint investigation teams in order to increase the efficiency and effectiveness of their cross-border investigations and prosecutions. The legal basis for the proposal is art. 82(1)(d) of the Treaty on the Functioning of the European Union (TFEU), which gives the EU the power to adopt measures to facilitate cooperation between judicial or equivalent authorities of the Member States in criminal matters. In order to achieve these objectives, a dedicated IT platform is proposed, consisting of both centralised and decentralised components, accessible to all actors involved in JIT proceedings. The platform would be composed of a centralised IT system, which would allow for the central temporary storage of data, and communication software, a mobile application, which would facilitate communication and storage of data from local communications.

Although the platform would operate over the internet to provide flexible means of access, the emphasis would be on ensuring confidentiality from the moment of design, it would use encryption algorithms to encrypt data in transit or at rest.

3.2. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 of the European Parliament and the Council and Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases[13]

Since 2005, the importance of exchanging information between Member States as well as with Europol and Eurojust has become imperative. Directive (EU) 2017/541[14] on combating terrorism amended Council Decision 2005/671/JHA[15] , to ensure that information is shared between Member States in an effective and timely manner, taking into account the serious threat posed by terrorist offences. One of the key aspects of Eurojust's work in this area is the European Counter-Terrorism Judicial Register (CTR) launched in September 2019, based on Council Decision 2005/671/JHA. For the CTR, Member States provide information on judicial proceedings relating to terrorist offences under their jurisdiction, with the data being stored and cross-checked in the Eurojust Case Management System (CMS) in the same way as operational data on ongoing judicial cooperation cases supported by Eurojust. Based on the findings of the Digital Criminal Justice Study[16], improving the functioning of the CTR has been indicated as a priority for European criminal law. The proposal aims to facilitate Eurojust's more efficient identification of links between parallel cross-border investigations and prosecutions of terrorist offences and to provide proactive feedback on these links to the Member States concerned by making the exchange of data between Member States, Eurojust and third countries more efficient and secure. The legislative instrument will ensure legal certainty on the scope of the obligation to exchange information in terrorism cases and the relationship with Council Decision 2005/671/JHA.

[10] https://ec.europa.eu/info/sites/default/files/3_1_178497_regul_jit_en.pdf.pdf.
[11] OJ C 197, 12.7.2000, p. 3.
[12] OJ L 162, 20.6.2002, p. 1.
[13] https://ec.europa.eu/info/sites/default/files/2_2_178485_regul_counter_terr_en.pdf.pdf.
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[15] Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences (OJ L 253, 29.09.2005, p. 22).
[16] European Commission, Directorate-General for Justice and Consumers, *Cross-border digital criminal justice: final report*, Publications Office, 2020, https://data.europa.eu/doi/10.2838/118529.

4. Horizontal legislative initiative launched by the European Commission in the area of digitalisation of judicial cooperation and access to justice

Building on the objectives set out in the Communication on the digitalisation of judicial cooperation, the European Commission has included in the legislative package launched on 1 December 2022 also a horizontal instrument aimed at improving access to justice and increasing the efficiency and resilience of communication flows inherent in cooperation between judicial and other competent authorities in cross-border cases in the EU, namely the *Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border procedures in civil, commercial and criminal matters and amending certain acts in the field of judicial cooperation*[17].

The proposal establishes a dedicated and secure decentralised IT system, composed of the IT systems of the Member States and of Justice and Home Affairs agencies and bodies, which will be interconnected through interoperable access points (based on the e-CODEX system). Where Member States do not have existing national IT systems, they could use, free of charge, a Commission-developed reference implementation solution. The Commission will develop a European access point, free of charge, hosted on the e-Justice Portal and each person will be able to create an account and file all types of submissions both to national judicial authorities and to those of other Member States. Where national IT portals, platforms or other electronic channels for electronic communication in EU civil law matters exist, they can continue to be used

One of the most important provisions of the proposal (art. 2) establishes the obligation of electronic communication between courts and competent authorities, through a secure and reliable decentralised computer system consisting of interoperable IT systems and access points operating under the individual responsibility and management of each Member State, each JHA agency and each EU body. In addition, art. 5 requires the courts and competent authorities of the Member States to accept electronic communication from natural and legal persons in judicial proceedings, but the choice of electronic means of communication is left to the discretion of natural and legal persons. We note in this context, translating the reasoning in the interest of this study, the opinion of the Constitutional Court[18] called to rule on the constitutionality of the Law to supplement GO no. 2/2001 on the legal regime of contraventions. The Court notes that the assessment which the court must make when granting the requested measure (*i.e.* the holding of court hearings by audiovisual telecommunications) essentially concerns two categories of issues: technical and legal. The technical assessment does not require any special rules, since it involves examining clearly defined objective conditions - the existence or otherwise of the infrastructure necessary for the conduct of court hearings by audiovisual telecommunications means. However, given the scope of the law, the legal assessment is highly complex and requires a precise regulatory framework. However, the law at issue does not lay down any criteria for the court to decide whether or not to grant the offender's request to hold court hearings exclusively by audiovisual telecommunications systems. Accordingly, in accordance with the criticisms made, the Court holds that the admissibility of requests for the hearing of cases in matters relating to administrative offences by means of audiovisual telecommunications must be determined by clear and precise rules, in the light of the requirements laid down by art. 20 of the Constitution, with reference to art. 6 - Right to a fair trial - of the Convention on Human Rights.

Art. 6 of the proposed regulation also requires the competent authorities to accept electronic communication from natural and legal persons by making electronic transmissions equivalent to paper transmissions. With regard to the value of applications submitted to the civil court by electronic means, the case law of the HCCJ[19], faced with a hypothetical situation in which it was necessary to clarify the legal value of the electronic signature, held that an electronic signature is data in electronic form which is attached to or logically associated with other data in electronic form and which serves as a method of identification. Accordingly, where a party intends to submit applications to the court in electronic form, the existence of a scanned signature of the signatory is not sufficient, in view of the special provisions laid down by Law no. 455/2001, which lays down the legal regime governing electronic signatures and electronic documents and the conditions for the provision of electronic signature certification services. In such cases, where applications are submitted to the courts in electronic form, the digital signature links the electronic identity of the signatory to the digital document and cannot be copied from one digital document to another, which gives the document authenticity (it attests that the document belongs to the signatory and the author of the document cannot claim

[17] https://ec.europa.eu/info/sites/default/files/law/cross-border_cases/documents/1_1_178479_regul_dig_coop_en.pdf.pdf.

[18] CCR Decision no. 19/2022 [A] on the objection of unconstitutionality of the Law supplementing GO no. 2/2001 on the legal regime of contraventions (Official Gazette of Romania no. 183/2022).

[19] HCCJ Decision no. 520/2019 of March 2019.

responsibility for the content of the document with a valid electronic signature). In practice, the valid electronic (digital) signature provides the court with a guarantee that the message or digital document is created by the person who signed it and that the content of the message or digital document has not been altered since its issuance.

In conclusion, the use of the digital channel will be voluntary for natural and legal persons. The Regulation also lays down rules on the use and recognition of electronic trust services, on the legal effects of electronic documents, on the use of videoconferencing or other means of distance communication for the hearing of persons in civil, commercial and criminal matters (art. 7 and 8).

As regards electronic payment of fees, art. 11 of the proposal provides that Member States shall provide for the possibility of electronic payment of fees, including from Member States other than where the competent authority is situated. Member States shall provide for technical means allowing the payment of the fees also through the European electronic access point.

5. e-CODEX (e-Justice Communication via Online Data Exchange)

e-CODEX (e-Justice Communication via On-line Data Exchange) was launched under the multiannual e-Justice action plan 2009-2013, to promote the digitalisation of cross-border judicial proceedings facilitating the communication between Member States' judicial authorities. The long-term sustainability, the increased use and operational management of e-CODEX were a priority for the Union. The e-CODEX system was managed by a consortium of Member States and other organisations, financed by an EU grant but using further action grants to manage the system was not a sustainable solution that could allow e-CODEX to become the default system for cross-border civil and criminal proceedings in the future. The Commission launched a proposal for a Regulation as the proposed legal instrument to establish the e-CODEX system at EU level, and is entrusting the eu-LISA Agency with the system's operational management. To this effect, the proposal amended Regulation (EU) 2018/1726 establishing eu-LISA[20].

The Council presidency and the European Parliament reached a provisional agreement on the proposal for a regulation on the e-CODEX system on the 8th of December 2021.

6. Conclusions

The possibility for natural and legal persons to lodge applications and communicate digitally with the courts and competent authorities and the possibility to participate in hearings by videoconferencing or other means of remote communication technology will ensure improved access to justice in cross-border proceedings. Furthermore, the package of legislative initiatives prepared on the basis of the consultation with Eurojust would, if adopted, have an enormous impact on how Eurojust can support cross-border judicial cooperation. On the other hand, the role of general principles of EU law in regulating the operation of new technologies may also require the emergence of new ones that correspond to new market conditions. Thus, today, the principles structuring the EU's digital single market have the potential not only to bring about further integration of the internal market, but also to remove barriers to the movement of factors of production within the digital spaces of Member States, societies and economies.[21]At the same time, it is necessary to balance the need to implement innovative technologies in the area of justice with the protection of fundamental rights, given that, as noted in the literature, in the face of the expansion of the use of IT in most areas of social life, a number of fundamental rights (the right to privacy, family and private life, freedom of expression, secrecy of correspondence) have been exposed to risks, some inherent (related to cyber security, for example), others determined by the intrusive action of the state.[22]

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[20] Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) no. 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) no. 1077/2011 (OJ L 295, 21.11.2018, p. 99).

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EUROPEAN VENTURE CAPITAL FUNDS (EUVECA)

Cristian GHEORGHE*

Abstract

European law lays down a diversity of rules for undertakings for collective investment which operate on the principle of risk-spreading. First tier of legislation regards undertakings for collective investment in transferable securities (UCITS) which are tailored for low-risk appetite (Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities).

Such undertakings provide a way of investing money alongside other investors in transferable securities or in other liquid financial assets. UCITS distributes units or shares which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Such UCITSs may be constituted in accordance with contract law (as common funds managed by management companies) or statute (as investment companies).

Second tier of legislation regarding collective investment comprises alternative investment funds (AIFs), with a large rage of juridical forms and repurchasing options. A specific type of AIF is European venture capital fund (EuVECA). European law reserves designation 'EuVECA' in relation to the marketing of venture capital funds in the Union. Qualifying venture capital fund with qualifying investments are established for the delimitation of these entities (EuVECA). [Regulation (EU) no. 345/2013 of the European Parliament and of the Council on European venture capital funds].

Keywords: *capital market, investment funds, undertakings for collective investment in transferable securities (UCITS), alternative investment funds (AIFs), European venture capital funds (EuVECA).*

1. Introduction

Undertakings for collective investment. First tier of legislation regards undertakings for collective investment covers undertakings for collective investment in transferable securities (UCITS) which are tailored for low-risk appetite. (Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities)[1].

The essential characteristics of the UCITS are underlined by the law: the purpose of the entities (sole purpose pursued is conducting "collective investment", investing of fund money collected in financial instruments under conditions prescribed by law, including the principles of risk diversification and prudential management) and financial instruments issued (units are redeemable continuously to a value determined by reference to net assets value, at the request of holders)[2].

These undertakings provide a way of investing money alongside other investors in transferable securities or in other liquid financial assets. UCITS distributes units or shares which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Such UCITSs may be constituted in accordance with contract law (as common funds managed by management companies) or statute (as investment companies).

Redeemable character (continuous) of units issued by UCITS is a "registered trademark", the essential element of the definition of these entities. This feature explains the open-ended approach of the UCITS. Issuance and redemption of units, in a continuous manner, is the main mechanism of these investment vehicles.

Beyond open funds. Alternative investment funds. Second tier of legislation regarding collective investment comprises alternative investment funds (AIFs), with a large rage of juridical forms and characteristics.

Alternative investment funds (AIFs) are defined complementary to UCITS. AIFs means collective investment undertakings which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors and do not require authorisation as UCITS[3] .

European legislator appreciates that it would be disproportionate to regulate the portfolios of AIFs (managed by AIFMs) at Union level and it would be problematic to provide for any harmonisation due to the very diverse types of AIFs. AIFs should therefore be

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[1] GEO no. 32/2012.

[2] GEO no. 32/2012, art. 2, para. 2.

[3] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFMD), art. 4 para. 1 a.

regulated and supervised at national level[4]. Although national requirements additional to those applicable in other states on AIFs may exist, this fact should not prevent the exercise of rights of AIFMs authorised in accordance with this European Directive[5] in other Member States to market to professional investors in the Union.

2. Paper content

2.1. Alternative investment funds managers (AIFMs)

European legislator lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage or market alternative investment funds (AIFs) in the European Union. If investment funds are subject to national regulation only, their managers are regulated uniformly at European level.

Disclosure to investors is a specific obligation for investment funds administrators. AIFM, as a particular administrator, shall (for each of the AIFs that they manage and for each of the AIFs that they market in the Union) make available to AIF investors a description of the investment strategy and objectives of the AIF, a description of the kinds of assets in which the AIF may invest, the techniques it may employ and risks, any applicable investment restrictions including the use leverage (the types of leverage accepted and the maximum level of leverage which the AIFM are entitled to employ on behalf of the AIF)[6].

2.2. Types of alternative investment fund (AIF)

FIA open ended and closed ended. The concept of AIF is very broad (as opposed to UCITS) and contains several species. In the case of the AIF, European regulation states that this notion includes open-ended or closed-ended entities. On the other hand, AIFs are clearly outside the notion of UCITS. In this context, we must admit that there are open-ended investment funds (AIF), which are not open-ended investment funds of the UCITS type.

The disambiguation was made by a European regulation of the European Commission (delegated act) which explained the notions of opened and closed AIF. An open-ended AIF is understood to be an AIF whose shares or units are, at the request of any holders, repurchased or redeemed (before the liquidation or any termination procedure), directly or indirectly, from the assets of the AIF and in accordance with the procedure laid down in its rules or articles of association, prospectus or tender documents[7]. These redemption requests must be read in the context of the redemption procedures and frequency established by the statutory acts. In conclusion, there is no typical UCITS continuous redemption, but only one with a previously imposed rhythmicity, with a plan included in the AIF documents. This clarifies the distinction between open-ended AIF and open-end investment funds (UCITS).

Complementary, a closed-ended AIF shall be an AIF other than of the type described above (open ended AIF).

1. *AIFs of a contractual and corporate type.* Alternative investment funds (AIF) are a generic notion, the UCITSs pair. The AIFs species are symmetrically with the UCITS species, the contractual type AIF, the investment funds (AIF in the contractual fund version is essentially also a closed-ended investment fund from the perspective of the lack of a continuous issue and repurchase periodically only) and corporate type AIF, (closed) investment companies. National regulation, following the European archetype, no longer operates with the respective species, closed fund and closed companies but remains at the level of the higher notion of AIF, contractual and corporate type[8]. This general approach cannot hide the fact that the specific entities remain in fact the funds - based on the civil contract - and the companies with legal personality, the closed-end investment companies.

2. AIFs intended for retail investors (AIFRI) and AIF intended for professional investors (AIFPI).

AIF intended for retail investors may be established either as AIF of contractual type, whether AIF of corporate type (investment companies). Several types of such funds are regulated, depending on the particulars of the investments made: AIFs specialized in investments in shares, bonds or equity securities of the UCITS or other AIFs intended for retail investors, but also AIFs in real estate investments or government securities (issued by the Ministry of Finance). To these funds are added diversified portfolios AIFs, also monetary funds and long-term funds[9].

AIFRI cannot be transformed into an AIF intended for professional investors and the modification of the investment policy requires the authorization of the ASF (Romanian authority) in order

[4] Law no. 243/2019 on Alternative Investment Funds (AIFs).
[5] Directive 2011/61/EU (AIFMD).
[6] Art. 32 Directive 2011/61/EU.
[7] Art. 1 para. 2 Commission delegated Regulation (EU) no. 694/2014 of 17 December 2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers.
[8] Art. 6, 17 Law no. 243/2019.
[9] Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.

to be included in another category of investments, with the corresponding modification of the incorporation documents.

AIFRI involves certain restrictions: cannot make short sales and cannot invest in financial instruments issued by the AIFM who administers it[10].

AIF intended for professional investors (AIFPI) know several normatively defined species[11]: AIFs with private capital, speculative AIFs, AIFs specialized in investment in goods and commodities, AIFs specialized in real estate investing, venture capital AIFs (EuVECA)[12], AIFs of social entrepreneurship (EuSEF)[13]. AIFPI, after incorporation, may amend its statutory documents so as to fall into one of the categories of AIFRI (retail investors) so that its investment policy complies with the investment requirements allowed for the such funds.

2.3. Venture capital AIFs (EuVECA)

A specific type of AIF is European venture capital fund (EuVECA). European law reserves designation 'EuVECA' in relation to the marketing of venture capital funds in the European Union. Qualifying venture capital fund with qualifying investments are established for the delimitation of these entities (EuVECA)[14].

European Regulation provides for a common EU framework for the managers of EuVECA that are registered with the competent authorities, so that they can benefit from the EU passport in order to manage and market funds in the Union with the specific EuVECA (and EuSEF) labels.

European legislator lays down a common framework of rules regarding the use of the designation 'EuVECA' for qualifying venture capital funds. Those rules aim the composition of the portfolio of funds that operate under that designation, eligible investment, the investment tools they may employ and the categories of investors that are eligible to invest in them.

A qualifying venture capital fund should, as a first step, be established in the Union in order to be entitled to use the designation 'EuVECA'.

Second, managers of collective investment undertakings (EuVECA kind) are subject to registration with the competent authorities of their home state (in the Union)[15] and they manage portfolios of qualifying venture capital funds[16].

2.4. Qualifying portfolio undertaking and qualifying investments

Venture capital funds provides support and finance to undertakings usually small, that are in the initial stages of their corporate existence but with a strong potential for growth and expansion. To this end European regulation defines 'qualifying portfolio undertaking' means an undertaking whose equity are permitted for EuVECA managers.

'Qualifying portfolio undertaking' means an undertaking that is not admitted to trading on a regulated market or on a multilateral trading facility (MTF)[17], employs no more than 250 persons, and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million[18]. Further, such undertakings are not itself a collective investment undertaking or a credit institution[19], an investment firm[20], an insurance undertaking[21], a financial holding company[22] or a mixed-activity holding company.[23]

'Qualifying investments' for EuVECA managers mean equity that are issued by a qualifying portfolio undertaking (acquired directly from undertaking or from existing shareholders of that undertaking), secured or unsecured loans granted by the venture capital fund to a qualifying portfolio undertaking or other means of financing qualifying portfolio undertaking.[24]

Managers of venture capital funds that comply with the requirements set out in European regulation shall be entitled to use the designation 'EuVECA' in relation to the marketing of qualifying venture capital funds in the Union.

Managers of qualifying venture capital funds shall market the units and shares of EuVECA venture capital funds exclusively to investors which are

[10] Art. 33 para. 2 Law no. 243/2019.
[11] Art. 46 Law no. 243/2019.
[12] Regulation (EU) no. 345/2013 of the European Parliament and of the Council on European venture capital funds (EuVECA).
[13] Regulation (EU) no. 346/2013 on European social entrepreneurship funds (EuSEF).
[14] Regulation (EU) no. 345/2013 on European venture capital funds.
[15] Art. 3(3) point (a) of Directive 2011/61/EU.
[16] The assets under management, in total, do not exceed the threshold referred to in point (b) of art. 3(2) of Directive 2011/61/EU.
[17] Defined in art. 4(1) points (14) and (15) of Directive 2004/39/EC and Directive 65/2014/UE (MiFID II) today.
[18] Art. 3 (d), of Regulation (EU) no. 345/2013 of the European Parliament and of the Council on European venture capital funds.
[19] Art. 4 point (1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.
[20] Art. 4 (1) point (1) of Directive 2004/39/EC and Directive 65/2014/UE (MiFID II) today.
[21] Art. 13 point (1) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).
[22] Art. 4 point (19) of Directive 2006/48/EC.
[23] Art. 4 point (20) of Directive 2006/48/EC.
[24] Art. 3 (e) of Regulation (EU) no. 345/2013 of the European Parliament and of the Council on European venture capital funds.

considered to be professional clients[25], or to other investors who invest at least 100 000 euro and consent to be treated as a professional investor. These investors state (in a separate document from the contract to be concluded for the commitment to invest) that they are aware of the risks associated with the expected investments[26].

2.5. Authorisation

Managers of alternative funds that intend to use 'EuVECA' title for the marketing of their qualifying venture capital funds shall inform the competent authority of their home Member State (ASF in Romania) of their intention and shall provide compulsory documents: the identity of the persons who effectively conduct the business of EuVECA managers with the identity of the EuVECA venture capital funds, the units or shares of which are to be marketed and their investment strategies and a list of states where the manager of the fund intends to market each qualifying venture capital fund[27].

Where managers of EuVECA are external managers and are registered in accordance with EuVECA regulation, they may, additionally, manage undertakings for collective investment in transferable securities (UCITS) (subject to authorisation under Directive 2009/65/EC, AIFMD).

EuVECA managers have to register with the competent authority of their home state twice, once in accordance with the AIFMD, and once in accordance with the EuVECA Regulations. However, taking into account that the purpose of the EuVECA Regulations is to create a light regime that facilitates the cross-border activity of these managers, the double registration could take place simultaneously and would be simplified by national competent authority in order to avoid unnecessary repetition in the registration process[28].

3. Conclusions

European secondary law on Alternative Investment Fund (AIF) continues a modernization process with a view to approximating the conditions of competition between those undertakings at Union level, while at the same time ensuring more effective rules for share or unit holders protection.

Venture capital funds that wish to operate across the Union would be subject to different rules in different jurisdiction, creating obstacles to the proper functioning of the internal European market. Moreover, diverging requirements on portfolio composition, investment targets and eligible investors could lead to different levels of investor protection and generate misperception as to the investment proposition associated with venture capital funds.

The Regulation no. 345/2013 on European venture capital funds (EuVECA) entered into force on 22 July 2013. This Regulation provides for a common EU framework for the managers of EuVECA that are registered with the competent authorities, so that they can benefit from the EU passport in order to manage and market funds in the Union with the specific EuVECA designation

A common framework of rules regarding the use of the designation 'EuVECA' for qualifying venture capital funds comprises rules for the composition of the portfolio of funds that operate under that designation, the investment tools they may employ and the categories of investors that are eligible to invest in them by uniform rules in the Union.

Investors should, furthermore, be able to compare the investment propositions of different venture capital funds (with EuVECA label). In this way significant obstacles to cross-border fundraising are removed. Moreover, distortions of competition between those funds are avoided, and any further likely obstacles to trade are prevented in the future.

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[25] Section I of Annex II to Directive 2004/39/EC (Directive 65/2014/UE (MiFID II) today) or which may, on request, be treated as professional clients in accordance with Section II of Annex II to Directive 2004/39/EC.

[26] Art. 6 Regulation (EU) no 345/2013 of the European Parliament and of the Council on European venture capital funds.

[27] Art. 14 Regulation (EU) no 345/2013 of the European Parliament and of the Council on European venture capital funds.

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SHORT STUDY ON THE ESSENTIAL ELEMENTS OF THE BILATERAL SALES PROMISE

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Abstract

As the bilateral contract promise is a civil convention, it must meet all the general conditions of validity of the contracts provided by art. 1179 of the Civil Code. Given the role of the preparatory contract that promises play in the formation of the final will to conclude another contract, they must also meet a number of specific conditions. Thus, there is a close relationship between the content of the promise and that of the foreshadowed final contract, the conditions of validity of the latter being found in the conditions of validity of the promise, or in other words the validity of the promised contract depends on the validity of the contract promise.

Given that the fulfillment of the conditions of validity of the promised contract is directly dependent on the fulfillment of the conditions of validity by the promise, it is important to establish those conditions, called essential elements, which must be found in the pre-contract for it to be considered valid by reference to the foreshadowed contract. There are also a number of elements related to the validity of the sales contract but they do not have to be fulfilled at the time of conclusion, and their existence sometimes justifies the very existence of the promise of sale.

Keywords: *art. 1182 alin. (2), art. 1279, art. 1669, promise of sale, conditions of validity, capacity, consent, cause, object, form.*

1. Introduction

The bilateral promise of sale must meet, first of all, all the general conditions of validity of the contract provided by art. 1179 of the Civil Code (consent, capacity, object and cause, and where the parties have provided, the form). We will deal with these issues in this paper only insofar as they have particular characteristics in relation to the bilateral promise of sale. In addition to these general conditions, the promise of sale must also meet a number of special conditions, which are closely linked to the role of preparatory contract with regard to the final will of the parties to conclude a contract of sale.

Therefore, there is an indissoluble relationship between the content of the promise and that of the foreshadowed contract, so that the validity of the final sale is conditioned by the validity of the concluded promise.[1]

However, it is precisely from this close connection between two conventions that the conditions for the validity of the contract must be found in the pre-contract in order to be considered valid from the perspective of the final foreshadowed contract. In the legal literature, these conditions have been called essential elements. For example, if the parties conclude an agreement by which they only agree to negotiate in the future the essential elements of a contract, then the concluded act has the nature of a negotiation agreement. The difference between this and a promise is particularly important because only the promise of sale can be enforced [art. 1669 para. (1) and art. 1279 para. (3) Civil Code].

These essential elements that the promise must fulfill, find their legal basis in general in the sufficient agreement regulated by art. 1182 para. (2) of the Civil Code, which stipulates that "it is sufficient for the parties to agree on the essential elements of the contract, even if they leave some secondary elements to be agreed later or entrust their determination to another person". Also, the difference between essential and non-essential elements[2] derives from the content of art. 1279 para. (1) of the Civil Code which refers to all those elements of the promised contract in the absence of which the promise could not be fulfilled. It follows from the cited text that the terms of the pre-contract must be sufficient for the performance of the promised contract, and it is no longer necessary for the parties to conclude a new agreement of wills on the essential elements of the contract. Although the law refers to the execution of the promise, we appreciate that it clearly refers to the conclusion of the promised contract, which is the very purpose of the execution of the obligations arising from the promise.

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[1] I.F. Popa, *Promisiunile unilaterale şi bilaterale de contract. Promisiunile unilaterale şi sinalagmatice de înstrăinare imobiliară*, in Revista română de drept privat no. 5/2013, pp. 114 et seq.

[2] Since only the essential conditions must be fulfilled by promise, while the non-essential elements may be missing, we will refer throughout the paper to both categories as elements, essential and non-essential, given that the non-essential ones would be inappropriate to meet. we call conditions.

In addition to those conditions of validity which are essential elements, certain clauses may be inserted in the promise of sale to establish the agreement of the parties on additional matters.[3] We will name these in the following non-essential elements and by way of example we mention that being represented by the *penalty clause, the waiver clause, the arvuna, the inalienability clause, the formalities for exercising the preemption, the condition that the property is in the civil circuit, the possible authorization[4], obtaining a condition document for concluding the promised contract[5], obtaining a loan by the promising-buyer, the existence of numerous conditions imposed for the notarial completion of the sale even under the sanction of absolute nullity[6], obtaining the consent of the holder of the voluntary temporary inalienability[7]*, formalities for the exercise of preemption[8].

Therefore, in addition to the conditions of validity of the contract, which are essential elements, the parties may also agree on clauses to sanctify their agreement on additional matters. We include them in two categories: accessory clauses (inalienability clause, revocation clause, termination clause, penalty clause, arvuna) and anticipatory clauses (advance payment clause, advance deployment and use clause promised, the anticipatory clause to allow the promising buyer to build on the land subject to the bilateral promise of sale)[9].

Thus, the parties to the bilateral promise of sale may stipulate, by their agreement of will, a series of clauses that are anticipatory in nature, because by these the parties to the contract establish, even by the promise of sale, that they will execute a series of future sales. of sales-specific services. Of course, with such a clause inserted in the promise of sale, there will not be even the transfer effect of ownership that will take place only at the conclusion of the contract of sale. Thus, by handing over the real estate that is the object of the promise, the property itself is not transferred, but only a right of use.

Given that these anticipatory clauses do not have an independent existence, but exist only in the context of concluding a pre-contract between the parties, they will cease to apply when the promise of sale is revoked either by agreement of the parties or by the forms provided by law. Consequently, the services performed will no longer have a legal basis, so they will have to be reimbursed. Therefore, until the conclusion of the promised contract, the services performed on the basis of the anticipatory clauses are temporary and reversible, and will be finalized only at the time of the conclusion of the final contract of sale promised.

2. Content

As the promise of sale is a civil agreement, it is subject, as we have shown, to the rules and principles of common law governing the conclusion of contracts.

The conditions of validity, substance, or essential elements of the bilateral promise of sale are those provided by art. 1179 of the Civil Code with application to the specific pattern of the sale promise are the following: the capacity to contract, lawful and moral cause, the consent on the essential elements of the sale, the special conditions that the object must meet, in terms of determining the price and the good sold.

2.1. Capacity

The general rules on the ability to contract are also applicable to the conclusion of contract promises, but the rules are adapted to the nature of the promised contract[10]. If it is in the sphere of acts of conservation/administration that do not harm it or of acts of disposition of low value, for its conclusion it is necessary the restricted exercise capacity [art. 41 para. (3) Civil Code]. However, if the conclusion of an agreement that falls into the category of acts of disposition is foreseen, for the conclusion of the promise the conditions regarding the approval/ authorization provided by law must be fulfilled (art. 41-42 Civil Code).

Although by the synallagmatic promise of sale the parties do not arise real rights, but only obligations to make, in terms of capacity, this contract must be assimilated to the acts of disposition, especially due to the patrimonial importance it has for the promiser. It can lead to the loss of property through the forced

[3] D. Chirică, *Tratat de drept civil. Contracte speciale*, vol. I, *Vânzarea şi schimbul*, C.H. Beck Publishing House, Bucharest 2008, pp. 182 et seq.

[4] In the case of the sale of goods owned by the Romanian Orthodox Church, the approval of the bishop is required, according to the Statute on the organization and functioning of the Romanian Orthodox Church.

[5] For example, obtaining the urbanism certificate or the building permit, under the conditions of art. 6 of Law no. 50/1991 regarding the authorization of the execution of construction works and art. 28-34 of Law no. 350/2001 on spatial planning and urbanism.

[6] For example, obtaining the certificate issued by the owners association, the tax certificate or the energy performance certificate.

[7] I.F. Popa, *op. cit.*, p. 123.

[8] Examples are: the general norms of the Civil Code regarding the procedure applicable to the exercise of the right of preemption, to the right of preemption of a conventional nature (art. 1730-1740); the right of pre-emption of the co-owners and neighbors for the sale of forest lands (art. 1746 Civil Code); the right of preemption for the sale of real estate that are qualified as historical monuments [art. 4 para. (4)-(9) of Law no. 422/2001 on the protection of historical monuments]; the right of preemption in case of public sale of privately owned goods, classified in the treasury (art. 36 of Law no. 182/2000 on the protection of the national mobile cultural heritage).

[9] I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p. 277.

[10] I.F. Popa, *op. cit.*, p. 124.

execution of the promise of alienation or it can generate the obligation to damages (see art. 1669 of the Civil Code, for the promise of sale).

In the case of a bilateral promise to sell, the disposition must be fulfilled in the case of the promising-seller reported both at the time of the conclusion of the promise, but also at the time of the conclusion of the promised contract. As for the promising buyer from a synallagmatic promise of sale, he must have full capacity to contract, because the acquisition for consideration must be assimilated to the dispositions. Thus, the bilateral promise of sale is, also from the perspective of the promisor-acquirer, an act of disposition, since it does not fall within the scope of conservation/administration acts or small acts that the minor can conclude alone [according to art. 41 para. (3) and art. 42 para. (1) Civil Code][11].

As regards the condition of capacity, a distinction must be made according to the date on which the promise is concluded. If this is prior to the entry into force of the Civil Code of 2009, October 1, 2012, then the previous regulations become applicable[12].

Thus, prior to the Civil Code of 2009, the sale-purchase promise could be validly concluded only by persons with full capacity to exercise, *i.e.* by adults (except for prohibitions). Minors aged 14-18, with a limited capacity to exercise, could not validly conclude a pre-contract unless they were assisted by their legal guardians (parents or guardians). Minors under 14 years of age, as well as adults placed under interdiction, being deprived of the capacity to exercise, could conclude such an act only by their representation by the legal guardian.

If the pre-contract promised to conclude in the future a sale-purchase contract regarding the alienation of a building belonging to an incapable person, in the doctrine there were contrary opinions regarding the necessity of the existence of the prior approval of the guardianship authority.

According to an author[13], the provisions of art. 129 para. (2) Family Code they did not apply and, consequently, the prior consent of the guardianship authority was not required for the conclusion of the pre-contract. In support of this opinion, the author pointed out that the pre-contract is not an act of alienation and does not produce any translational effect of ownership, but only generates obligations to do, for which the law does not require any prior consent. Also, the acts of firm real estate alienation, concluded without obtaining the approval of the tutelary authority, were sanctioned according to art. 129 para. (3) Family Code only with relative nullity, so that the convention could meet the conditions of validity by subsequently obtaining the consent required by law or confirming the act by the alienating minor, after acquiring the full capacity to exercise it. Therefore, it would be redundant to sanction a promise of a contract with absolute nullity, while the conclusion of the contract itself, a real act of disposition, would be a relative nullity in the absence of the consent of the guardianship authority.

In support of the opposite view[14], it was argued that the need for prior consent of the guardianship authority is a measure to protect the minor or prohibited from acts that could harm his interests. Thus, the approval is provided both for the protection of the incapable person in his relations with third parties and for those he has with his legal guardians. [art. 105 para. (3) in conjunction with art. 129 para. (2) Family Code].

The same author considers that, although the pre-contract does not have a transfer of ownership effect, it may ultimately lead to this effect, so the incapable person will be obliged to fulfill the promise, otherwise his contractual liability may be incurred and if the maturity of the obligation to the contract would have been temporarily placed after the acquisition of full capacity, the protection of the guardianship authority could no longer be exercised, so that an obligation assumed during the minority could be enforced.

In the light of the new Civil Code, the situation regarding the issue described above is similar, with the difference that it is now necessary the approval, endorsement and authorization of legal acts of the minor by several institutions designated by law.

Thus, the property of a minor who has not reached the age of 14 is administered in good faith by his guardian. On the other hand, the goods acquired by the minor free of charge are not subject to administration unless the testator or donor has stipulated otherwise, these goods being administered by the curator or by the person designated by the act of disposition or, as the case may be, appointed by the court of guardianship (art. 142 Civil Code).

The guardian concludes on behalf of the minor his acts, except those of preservation or disposition of small value and which are executed on the day they were concluded. Also, if the minor has reached the age of 14, he has a limited capacity to exercise and can conclude legal acts, personally, but with the prior consent of the guardian, and in some cases the law requires a double or even triple approval, requiring the opinion Council and court authorization.

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[11] However, as regards the unilateral promise of alienation, it is not a condition that the beneficiary has the capacity to exercise at the time of the conclusion of the promise, his capacity must be fulfilled at the time of the conclusion of the promised contract.

[12] I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu, Publishing House, Bucharest, 2012, p. 238.

[13] M. Mureşan, *Condiţiile validităţii antecontractului*, in Studia Universitatis Babeş Bolyai, Jurisprudentia 1/1988, p. 64.

[14] D. Chirică, *Antecontractul în teoria şi practica dreptului civil*, Centrul de ştiinţe sociale, Cluj-Napoca, pp. 83-87.

There are acts that can be concluded by the guardian without any prior consent, as follows: conservation acts, as they are always beneficial to the one who concludes them, the prerogative to harvest the fruits, collection of receivables resulting from movable values, acts of disposition of degraded goods, depositing and extracting income that does not exceed the simple care of the minor, and ordinary gifts taking into account the material condition of the child. The approval of the Family Council is necessary for the guardian for issues related to the person of the minor, except those of a current nature, the participation in a meeting with the parents at school. In addition to the Council's opinion, the guardian also needs the authorization of the guardianship court, in case of concluding an act of mortgage, encumbrance, division, if the minor would renounce the patrimonial rights, when acts beyond simple administration are to be concluded[15]. Violation of these legal provisions entails the express relative nullity [art. 144 para. (2) and (3) Civil Code].

Also affected by relative nullity are legal acts concluded between the guardian or the spouse, a direct relative or the guardian's siblings, on the one hand, and the minor, on the other hand, except for the sale of the minor's property to an auction of these persons who have a real guarantee on these goods or who have the quality of co-owner together with the minor (art. 147 Civil Code).

In conclusion, the completion of a promise of sale, although not a transfer of ownership effect, falls outside the scope of the administrative acts, precisely because it is a preparatory act for the final sale, so the agreement on the good sold and the price must be given by the parties with full capacity to exercise or who meet all the conditions required for the guardian to represent the minor or regarding the consent of the guardian, as well as those relating to the authorization of the guardianship court and the approval of the family council.

2.2. Consent

The general conditions of validity of the consent are provided by art. 1204 et seq. of the Civil Code and must be respected even at the conclusion of the bilateral promise of sale. Thus, the consent must come from a person of discernment, be expressed with the intention of producing legal effects, be externalized and not be altered by any defect in consent.

In addition to the general conditions of validity of the consent, in the framework of the promises of the contract, the agreement of will of the parties concerns the future conclusion of a contract. Specifically, when the parties agree to the conclusion of the promise, they do not undertake to conclude the pre-contract, but only agree to reiterate this agreement at the time of the conclusion of the final contract. Therefore, the consent of the parties to the conclusion of the contract, which is the subject of the promise, will have to be given at a future time, and at the stage of the promise the parties only agree that in the future they will reiterate this agreement.

As for the content of the consent in the case of the promise of sale, it must refer to the good sold and the agreed price, two elements that we will analyze in the subsection dedicated to the object of the promise of sale.

A discussion can be made about the defect in the consent of the lesion. The party whose consent has been vitiated by the lesion may, at his choice, request the cancellation of the contract or the reduction of his obligations with the amount of damages to which he would be entitled [art. 1221 para. (1)]. Also, the action for annulment is admissible, only if the lesion exceeds half of the value it had, at the time of concluding the contract, the service promised or performed by the injured party, and the disproportion must persist until the date of the request for cancellation [art. 1221 para. (2)].

The question arises as to whether the defect in the consent of the lesion in this context also applies to the promise or only to the final contract. At first sight, art. 1222 of the Civil Code would also cover the promise, not only the final contract, because it expressly refers to "the service promised or performed by the injured party". However, we are of the opinion that the text refers to certain services which have not yet been performed, but which arise from the final contract and not from a promise. The regulation provided by the Civil Code for lesion does not expressly or implicitly exclude the application of the provisions regarding this defect of consent regarding the promise of a contract.

If the conclusion of the bilateral promise of sale takes place by legal or conventional representation, the validity of the consent at the conclusion of the pre-contract will be analyzed in the person of the representative, and not of the represented person who either expressed his consent at the conclusion of the mandate contract or is legally represented at the conclusion of the promise. The mandate contract, by which the agent is empowered to conclude a bilateral promise of sale, in the name and on behalf of the principal, may be concluded by a privately signed document in all cases, including when the promise concerns a sale for which validity is required authentic form[16].

[15] E. Sârghi, *A fi sau a nu fi tutore? Aceasta este întrebarea*, www.juridice.ro, accessed at 19 March 2022.

[16] By Decision no. 23/2017 regarding the examination of the formulated notification, regarding the pronouncing of a preliminary decision, HCCJ ordered that “in the interpretation and application of the provisions of art. 1279 para. (3) first sentence and art. 1669 para. (1) of the Civil

A particular situation regarding the consent is the hypothesis of the contract of sale of a real estate struck by absolute nullity, for the lack of the authentic form, which based on the principle of conversion of the legal act, regulated by art. 1260 of the Civil Code, is valid as a synallagmatic promise for sale. According to art. 1260 para. (1) of the Civil Code "a contract struck by absolute nullity will nevertheless produce the effects of the legal act for which the substantive and formal conditions provided by law are fulfilled". However, the conversion does not operate according to para. (1) if the intention to exclude the application of the conversion is stipulated in the contract annulled or arises, unequivocally, from the purposes pursued by the parties at the date of conclusion of the contract. In this scenario, the consent of the parties was expressly given for a sale, but by virtue of the principle of conversion of the legal act, the agreement of the parties is valid for a bilateral promise of sale. For this purpose, it is necessary that the act struck by nullity include the constitutive elements of the legal act in which it is to be converted, respectively the promise of sale. On the other hand, according to art. 1260 para. (2) of the Civil Code, it is necessary that the parties have not expressly excluded the application of the conversion, which must result from the null sales contract, or that it must unequivocally result from the purposes pursued by the parties at the date of conclusion of the contract, that they excluded, this time indirectly, the application of the principle of conversion of the legal act.

The new Civil Code provides, as a measure to safeguard the effects of the legal act in art. 1213 of the Civil Code, in case of vitiation of the consent of one of the parties by mistake, the possibility of adapting the contract. This new institution assumes that the party who was not in error, in order to avoid the annulment by the other party of the act, has the possibility to execute the contract or to declare himself ready to execute it, in the manner in which it was understood by to the erroneous party.

With regard to the defect of consent of fraud, the basis for sanctioning malicious reluctance is the obligation to inform that exists in the preparatory phase of signing the contract, and this is based on the obligation of good faith. Because the grief through reluctance provided by art. 1214 of the Civil Code, to represent a defect of consent, it must emanate from the other party, or from the representative, agent or manager of the affairs of the other party and bear on a determining element for the conclusion of the contract.

The hypothesis of omitting some essential information for concluding the contract appeared in the legal practice when, for example, a promising seller who knew that under the land he intends to alienate there is a natural gas distribution network, water, etc., a circumstance that made impossible to pour a foundation (without diversion works that require, in addition to large investments, a lot of opinions and approvals), he failed to inform the potential buyer about it, knowing that he wants to build a house on this terrain. In a similar situation, if at the signing of the sale promise, the promising buyer informs the promising seller that he wants to build a boarding house or hotel on the land that is the subject of the promise, but he hides the fact that a project is already started on a neighboring parcel for opening a slaughterhouse or livestock farm, etc. In these cases, the promising buyer may request the annulment of the promise of sale under fraud by reluctance, proving that the seller did not inform him of these matters, which he could not have known as a result of normal diligence and which if they had been known he would no longer be contracted[17].

A question that arises, in the case of fraud, predominantly in the situation of fraud by reluctance is whether the error must be excusable. This problem usually occurs in situations where with certain diligence the promising buyer could have known the topographic positioning of the building and the fact that under it passes a natural gas distribution network. In this analysis, the importance of the bad faith of the perpetrator must also be weighed, who can achieve malicious reluctance through direct actions. Thus, although the promising buyer explained very clearly, even insistently, that he wanted to build a construction with a foundation on the land that is the subject of the promise, the promising seller totally denied the existence of impediments such as a natural gas network that crosses the land. Furthermore, a clause was included in the promise by which the promising seller guarantees that the land is not encumbered by natural gas networks, water networks or electrical cables. In other words, it is debatable whether the error does not become excusable, precisely in the context of the deliberate exercise of malicious maneuvers against the contractual partner, manifested, among other things, by the contractual assumption of the absence of encumbrance of high voltage lines, natural gas networks or water networks.

It follows from the situation described above that the parties included in both the pre-contract a clause according to which the promising seller guaranteed that the building in question did not contain high voltage lines, natural gas networks or water networks to prevent construction. Consequently, by this provision the parties attributed to the sold good an essential quality, that of being buildable, in the absence of which the

Code, the authentic form is not obligatory at the conclusion of the promise of sale of a real estate, in order to pronounce a decision to take the place of an authentic deed".

[17] I. Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p. 245.

contract would not have been concluded, as provided by art. 1207 para. (2) point 2 of the Civil Code, the error thus having a determining character.

However, the question arises whether the cancellation of the contract can be requested by the party whose consent was vitiated by fraud and when the error in which it was found was not essential [art. 1214 para. (2) Civil Code]. The text can be read in the sense that the cancellation of the contract for fraud can also take place when the error concerns other elements of the contract than those considered essential [provided by art. 1207 para. (2) Civil Code], but only if it has a determining character (the contract would not have been concluded in the absence of fraud). In other words, art. 1214 para. (2) Civil Code it has no other purpose than to extend the sphere of the elements on which the error may be induced, without, however, establishing any derogation from the decisive character which the deceit must have in the volitional process leading to the conclusion of the contract.

There was also the opinion that the text should be interpreted in the sense that the fraud can lead to the cancellation of the contract even when the error caused was not decisive for the conclusion of the legal act, hence it can aspects indifferent to the consent formation process. We cannot agree with such an approach, because the conditions of the error of consent must be met even if it is caused by fraud. In other words, the fact that the error is a caused one does not change its content in order to represent a defect of consent, especially in the absence of an express provision of the legislator.

Another provision that may be incidental in case of vitiation of the consent at the conclusion of a promise of sale is the one provided in art. 1217 of the Civil Code, according to which it is assimilated to violence and the threat of a contracting party with the exercise of a right, if the fear was instilled in it in order to obtain unfair advantages. Thus, the adult, with full capacity to exercise, is recognized the possibility of promoting the action for annulment for lesion of a civil legal act, provided that the lesion exceeds half the value of the service to which he was obliged or executed. In this case, as in the case of the error, the possibility of adapting the contract was established, the court notified with the annulment being able to maintain it if the other party agrees to a reduction of its claim or to an increase of its obligation. to the injured. For the action for annulment for lesion, the legislator has established a special limitation period of one year, which begins to run from the conclusion of the contract.

In the event of a bilateral promise of sale, the lesion will be analyzed at the time of concluding the final contract of sale, at which time the balance of the parties' performance is relevant, even if they have been previously established by signing the promise. The justification for this solution lies in the fact that the contractual imbalance and the possible damage to the patrimony of one of the parties, actually occurs at the moment of the transfer of the property right over the good and of the payment of the price, and not at the conclusion of the promise.

2.3. The object of the promise

The object of the promise, in the sense of the object of the contract, is the conclusion of the future contract [see art. 1225 para. (1) Civil Code]. Furthermore, the object of the promisor's obligation (as defined by art. 1226 of the Civil Code) is represented by the promisor's commitment to reiterate his consent on the occasion of concluding the promised contract.

The general conditions of the object of the contract are provided by art. 1226-1234 of the Civil Code, and the object of the pre-contract consists in the conduct or performance to which the active subject is entitled and to which the passive subject of the established legal relationship between the parties is held, respectively the future conclusion of the promised sales contract. As in the case of any convention, its object must be determined or determinable, be possible, be in the civil circuit, be lawful and moral, and be a personal act of the debtor.

The promise must be aimed primarily at concluding a specific agreement in the future, and the parties must identify from this preparatory point the essential elements of the foreshadowed contract, from the point of view of the validity of the object. These essential elements are represented by the derivative object of the promised contract of sale, respectively the good to be the object of the sale, and the price agreed by the parties for concluding the agreement. If these elements are not individualized by the parties, the promise will be affected by absolute nullity as it does not provide for specific or at least determinable object.[18]. Therefore, in the promise of sale, the object of the obligation is represented by the promised good and price. There are a number of questions about these two elements that have generated discussion over time, so we'll look at them in turn below.

The existence of the good at the time of the conclusion of the promise. Although it is imperative that the parties establish the object of the contract by promise, it does not have to exist at the time of the conclusion of the promise. For example, the promise may include the conclusion of a future contract that is not possible at the time the pre-contract is concluded,

[18] M. Mureşan, *Clauzele esenţiale şi indispensabile ale antecontractului şi clauzele sale accesorii în dinamica relaţiilor sociale reglementate de lege, oglindită în teoria şi practica dreptului*, Center of social sciences, Cluj-Napoca University, 1988, pp. 102-103.

and it is only necessary that it be able to take place at the time of the pre-contract. This is one of the practical advantages of concluding a contract promise, the fact that the parties may agree to conclude agreements on factual and legal situations that have not yet been born, such as concluding a promise to sell a building that has not yet been built (art. 1227 of the Civil Code) or on a real estate that is subject to temporary inalienability, and the parties agree that the completion of the sale will take place after the expiration of the interdiction on alienation.

When should the good be in the civil circuit? A first question is whether the promised good must be in the civil circuit at the time of the conclusion of the promise. This dilemma arises from reading art. 1229 of the Civil Code stipulates that "only the goods that are in the civil circuit can be the object of a contractual service". Any contractual performance in connection with a good that is not in the civil circuit would be prohibited, including the conclusion of a promise to sell.

With regard to the contract of sale, there is no doubt that the prohibition provided by art. 1229 of the Civil Code is applicable to him. Thus, at the moment of completing the promised sale, the good that is the object of the sale must be in the civil circuit, under the sanction of the absolute nullity of the contract aspect regulated by art. 1657 of the Civil Code, which provides that "any property may be sold freely, unless the sale is prohibited or restricted by law or by convention or will."

We believe that such a ban cannot exist in the case of the promise because we can imagine hypotheses in which a good is not yet in the civil circuit, but will enter the future, so this is the very purpose of delaying the final contract, the reason for concluding the promise. The situation is similar to that of future assets which, in the absence of a contrary legal provision, may be the subject of a convention. (art. 1228 Civil Code). The same is true of the example given above, when the parties enter into a bilateral promise of sale in respect of an asset over which there is a prohibition on legal or conventional alienation. If the time for which the parties foresaw the conclusion of the contract of sale is subsequent to the expiry of the prohibition on alienation, then the promise is perfectly valid from this point of view.

In conclusion, we appreciate that the prohibition provided by art. 1229 of the Civil Code, regarding the promises of sale, must be in the sense that the service agreed by the parties, consisting of the obligation to give or transfer the ownership of the property, is a future benefit, so that its character illicit from the perspective of art. 1229 of the Civil Code, must be established in relation to the time established by the parties for the conclusion of the final sale.

It should be noted that the object, respectively the promised good, must be in the civil circuit on the effective date of the transfer of ownership, which is usually the date of conclusion of the contract[19], being applicable the law in force at the time of concluding the contract of sale, as an application of the principle *tempus regit actum*, solution legally imposed by art. 6 para. (5) of the Civil Code according to which the provisions of the new law apply to all acts concluded after its entry into force. This solution is also in accordance with the Constitutional Court`s opinion in the content of Decision no. 755/2014[20].

The doctrine also expressed the opinion that the law in force at the time of concluding the pre-contract must be taken into account[21], so it is important that the good is in the civil circuit at the date of its completion, even if at the time of sale it was declared inalienable. The author states that the effects of legal acts concluded under the rule of a law can only produce the effects provided by the law in force at the date of their conclusion [art. 6 para. (2) Civil Code and art. 3-5 L.P.A.]. On the other hand, since the parties have entered into sales promises, it is natural for them to be granted that right, even if the law has changed in that regard, and the recognition of that right is a matter of legal predictability and the principle of legal certainty.

The above opinion is based on legally correct arguments, but which lead to the exact opposite conclusion. Thus, the fact that the law in force at the date of its conclusion is applicable to the pre-contract, [art. 6 para. (2) Civil Code] only means that the new law will not be retroactive to it. Instead, for the sales

[19] According to art. 1674 Civil Code: "The transfer of the property, except for the cases provided by law or if the will of the parties does not result otherwise, the property is transferred by right to the buyer from the moment of concluding the contract, even if the good has not been handed over or the price has not been paid yet."

[20] Published in the Official Gazette of Romania no. 101 of February 9, 2015. In paragraph no. 29 of the said decision, the Constitutional Court held that "(...) it is in principle that the legislator may derogate from the principle of immediate application of the new law, given that, as the Constitutional Court has consistently held, the principle of application and the principle of survival of the old law are of legal origin, not constitutional, the legislator having the possibility to derogate from them, in certain particular situations (see, in this sense, Decision no. 90 of 1 June 1999, published in the Official Gazette of Romania, Part I, no. 489 of 11 October 1999, Decision no. 228 of 13 March 2007, published in the Official Gazette of Romania, Part I, no. 283 of 27 April 2007, Decision no. 1671 of December 15, 2009, published in the Official Gazette of Romania, Part I, no. 118 of February 23, 2010, or Decision no. 192 of April 3, 2014, published in the Official Gazette of Romania, Part I, no. 492 of July 2, 2014), but the derogating norm must not contradict the constitutional provisions, in this case the principle of equal rights, because otherwise it will give rise to unfair situations whose legal qualification may be limited to privileges or discrimination expressly prohibited even by art. 16 para. (1) of the Constitution.

[21] I.F. Popa, *Promisiunile unilaterale și sinalagmatice de înstrăinare imobiliară*, in Revista Română de Drept Privat no. 5/2013, pp. 157-158.

contract concluded after the entry into force of the new law, it will be applied [art. 6 para. (5) Civil Code]. However, the law in force at the date of concluding the pre-contract cannot be applied to the projected sales contract, if at the time of its completion a new law is in force. This reasoning also seems to us applicable in the case of the good in the civil circuit at the date of signing the promise of sale, which at the date set for the conclusion of the sale is no longer in the civil circuit.

The solution proposed by the above-mentioned author in the sense that if the good was in the civil circuit at the time of concluding the promise of sale and subsequently, by the effect of a legal provision, was taken out of the civil circuit, the right acquired by the promisor must be in accordance with the law in force at the conclusion of the promise, it is difficult to accept. This argument of the need to recognize the right acquired by the promisor-buyer by pre-contract, in the context discussed, may constitute a desideratum at most or possibly a proposal of *lege ferenda*. In reality, by promise the promisor-buyer acquires only a right of claim, consisting in the commitment given by the promisor seller that he will reiterate his consent at the time set for the conclusion of the final sale.

The loss of the good after the end of the promise. In the event of the loss of the good between the moment of concluding the promise and the moment of concluding the prefigured contract, then the promise of sale will expire, and will be applicable the rules of common law in the matter of contractual remedies. Thus, as a result of the loss of the good, the obligation assumed by the promisor-seller will become impossible to execute, and since this impossibility is final and absolute, the contract will be terminated by law, being applicable the rules on contract risk [art. 1557 para. (2) Civil Code].

Ownership of the good at the conclusion of the promise and completion of the sale. It is not a condition that the promisor-seller be the owner of the good that is the object of the promise at the time of the conclusion of the promise. It is sufficient for the property to be acquired by the date of the conclusion of the promised contract. I lead to this solution several legal provisions of the Civil Code.

According to art. 1227 of the Civil Code, "the contract is valid even if, at the time of its conclusion, one of the parties is unable to perform its obligation, unless otherwise provided by law." Also, in the absence of a contrary legal provision, the contracts may apply to future assets (art. 1228 correlated with art. 1658 Civil Code).

Furthermore, according to art. 1230 Civil Code, ”Unless otherwise provided by law, the goods of a third party may be the subject of a benefit, the debtor being obliged to procure and transmit them to the creditor or, as the case may be, to obtain the consent of the third party. In the event of default, the debtor shall be liable for any damage caused." This text must be correlated with the provisions of art. 1683 of the Civil Code which regulates the sale of another's property[22]. If the good that is the object of the promise of sale is not in the patrimony of the promisor-seller he must acquire it until the moment established by the parties for the completion of the contract of sale.

With regard to the conclusion of the final contract of sale, at that time the promisor-seller must be the owner of the good which is the subject of the promise. Otherwise, the promising buyer will be able to resort to the remedies provided by art. 1516 para. (2) Civil Code at the disposal of the creditor. Thus, he will be able either to request enforcement by equivalent, in the form of compensatory damages, or to request the resolution of the promise, with possible damages.

A particular discussion concerns the possibility of the parties to conclude a sale of another's property (art. 1683 Civil Code). In this case, the parties entered into a valid promise regarding a good that did not belong to the promisor-seller at that time, nor on the date set for the conclusion of the contract of sale. If the promisor-seller wanted to forcefully execute the concluded promise, by obtaining a decision to take the place of the sale, he would run into an impediment. In order to obtain the forced execution of the promise in this form (see art. 1669 referred to in art. 1279 of the Civil Code), one of the conditions that must be met is that the promising seller be the owner of the good that is the object of the promise[23]. Therefore, the promise is valid, as we have shown before, but it cannot be enforced in

[22] D. Chirică, *Vânzarea bunului altuia, între vechea şi noua reglementare a Codului civil*, in In honorem Ion Deleanu. Culegere de studii, Universul Juridic Publishing House, Bucharest, 2013, pp. 70 et seq.; R. Dincă, *Contractele speciale în noul Cod civil. Note de curs*, Universul Juridic Publishing House, Bucharest, 2013, pp. 104 and so on; G. Gheorghiu, the comment below art. 1683 Civil Code, in Fl.A Baias, E. Chelaru, R. Constatinovici, I Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2664*, C.H. Beck Publishing House, Bucharest, 2012, pp. 1757 et seq.

[23] This aspect, which was the subject of a non-unitary judicial practice, was definitively resolved by Decision no. 12/2015 regarding the examination of the appeal in the interest of the law formulated by the Board of the Suceava Court of Appeal regarding the admissibility of the action regarding the validation of the sale-purchase promise of a determined real estate, in case the promising-seller has only an ideal share from the property right over it. By this decision, HCCJ established that “In the interpretation and application of the provisions of art. 1073 and art. 1077 of the Civil Code of 1864, art. 5 para. (2) of title X of Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures, with the subsequent modifications and completions, art. 1279 para. (3) thesis I and art. 1669 para. (1) of the Civil Code, in case the promisor-seller has promised to sell the entire building, although he does not have the quality of its sole owner, the promise of sale cannot be executed in kind in the form of a court decision to take the place of contract of sale for the whole property, without the agreement of the other co-owners.”

kind. The alternative would be for the parties to conclude a contract for the sale of the property of another, which will have all the consequences arising from its regulation, and we believe it will be impossible in real estate, given all the consequences of concluding a contract the ownership that will be acquired by the buyer at a future time that coincides with the acquisition by the seller. A crucial impediment to concluding such a contract, regarding a real estate, is even its registration in the land register, because it is difficult to conceive since the buyer has not actually acquired the property right, so the very object of registration is missing. The alternative would again presuppose an unprecedented fact, that a person who is not the owner of the property right should be registered in the land book of the building.

The price. Another obligatory element to be determined by the promise of sale is the price that must be established in money, honestly and seriously, and to be determined or determinable [art. 1660 para. (1) and (2) of the Civil Code and art. 1665 Civil Code].

Thus, first of all, the price must be set in money, this requirement being the essence of the sale. Otherwise, the contract that the parties have foreseen will no longer be a sale, but possibly an exchange, a payment, a maintenance contract, a life annuity or another contract.

In order to be serious, the price must be set with the intention of being paid, not fictitiously. The price is serious when, in relation to the value of the promised good, it is obviously not too low, derisory, so that it cannot be a sufficient cause of the obligation assumed by the promising seller to transfer ownership of the good in the future. Thus, the sale is voidable when the price is so disproportionate to the value of the good that it is obvious that the parties did not want to consent to a sale (art. 1665 para. (2) Civil Code). These provisions, relating to the contract of sale, are also applicable to the promise of sale, and the sanction for non-compliance with them is relative nullity, as in the case of the promise of sale.

The price is fictitious when the parties do not intend to demand or pay it, respectively, from a secret act resulting in not being due. If the price is simulated or fictitious, the promise made by the parties will be void as a promise of sale, and may be valid as a promise of donation.

It is considered to have determined the price which is expressed in figures and without the possibility of being subsequently modified, if the promising buyer was able to actually know the amount he will have to pay for this title. Instead, it is an indeterminate price that has several elements of unknown or indeterminate value, such as when referring to a reasonable price, the market price, the price of the day. If the price determined or determinable is not a fixed price, but the parties agree that it may be subject to change, the criteria according to which it may be changed must be set out in the promise (see art. 1661 of the Civil Code).

In the absence of a price, the sale is struck by absolute nullity, because the obligation of the buyer has no object, and the obligation of the seller is void. However, the Civil Code establishes a number of ways to remedy a possible problem in connection with the determination of the price. Being applicable in the case of the sales contract, we appreciate that they are all the more valid for the pre-contract. Among these remedies we identify the situation in which the court may substitute the third party designated by the parties if he does not do his duty in order to establish the price, and the expert appointed by the court will indicate the price applicable to the sale [art. 1232 para. (2) and art. 1662 alin. (2) Civil Code]. In this case, if the price has not been determined within one year of the conclusion of the contract, the sale is void, unless the parties have agreed to another way of determining the price. We note that the text expressly refers to the sale, and not to the promise of sale, so that it could not be applied in the case of the pre-contract which will not be affected by nullity in this situation for lack of price determination[24].

Another remedy is the one related to determining the price between professionals. In this respect, if a contract concluded between professionals does not set the price or indicate a way to determine it, it is assumed that the parties have taken into account the price normally charged in that field for the same services performed under comparable conditions or, in the absence such a price, a reasonable price (art. 1233 Civil Code). Also, when, according to the contract, the price is determined by reference to a reference factor, and this factor does not exist, has ceased to exist or is no longer accessible, it is replaced, in the absence of a contrary agreement, by the nearest reference (art. 1234 Civil Code).

The application of the remedies regarding the determination of the price between professionals (art. 1233 Civil Code) and the establishment of the price by reference to a reference factor (art. 1234 Civil Code) must be done by correlating with the provisions of the regulation offered by the Civil Code. sale, referring to the lack of express determination of the price (art. 1664 of the Civil Code). According to the text of the law, the sale price is sufficiently determined if it can be determined according to the circumstances, and if the object of the contract is goods which the seller normally

[24] It was stated from this point of view that, compared to the existence of the analyzed remedies, the failure to determine the price will almost never lead to the nullity of the contract (see I.F. Popa, *op. cit.*, p. 126).

sells, it is presumed that the parties have taken into account the usual price. of the seller. The last paragraph of the rule provides that, unless otherwise stipulated, the sale of goods whose price is fixed on organized markets is presumed to have been concluded for the average price applied on the day of the contract on the market closest to the place of conclusion of the contract. this day was non-working, the last working day is taken into account.

2.4. The cause of the promise

Regarding this element of the contract, in the specialized literature or judicial practice, no specific problems of the contract promise have been identified so that the common law provisions of the Civil Code are applicable. However, we propose a brief analysis of the components of the cause from the perspective of the evolution of this condition in doctrine and jurisprudence and the punctuation of its conditions of validity in general and in relation to the promise of sale.

The cause (purpose) of the civil legal act is that general, substantive, necessary and valid condition which consists in the objective pursued by the conclusion of the civil legal act.[25] The cause together with the consent forms the legal will. The difference between the cause and the consent is that, while the consent refers to the decision to conclude the legal act, made public, the cause or purpose designates the reason for which the decision was taken[26].

In the system of the Civil Code from 1864, art. 966 which regulated the cause, referred only to the "cause of obligation", but in the doctrine and judicial practice, the existence of two components in the structure of the cause of the legal act was recognized: the immediate purpose and the mediated purpose.

The immediate purpose, bearing the name and purpose of the obligation, designates, in the case of bilateral synallagmatic acts, the mental representation or foreshadowing by each party of the other party's consideration. Thus, in this situation, "one party commits itself knowing that the other party commits itself, in turn"[27], which makes the reciprocity of benefits correspond to a reciprocity of causes. The immediate purpose is an abstract (objective) and invariable (uniform) element within a certain category of legal acts and, further, each species of legal acts subsumable to that category. The immediate goal is an abstract element because it is the result of a process of generalization and it is an invariable element because it does not change from one legal act to another.

The mediated purpose of the obligation, also called the purpose of the legal act, is that element of the cause which constitutes the determining reason for concluding the civil legal act[28], that is, in the so-called impulsive and decisive cause for which the act was effectively concluded and refers either to the characteristics of a benefit or to the qualities of a person. The difference between the immediate and the mediated purpose is given by the fact that the latter is concrete and variable from one species to another of civil legal acts, but also within the same species of civil acts, from one act to another. The mediated purpose is concrete, because each party seeks to obtain something else through the legal act (e.g. in case of concluding a sale, the buyer may aim to resell, rent, donate the purchased good, and the seller may pursue purposes as diverse as possible with the amount of money received as a price) and is variable precisely because it differs from one act to another given the individual and subjective purposes of its authors.

From the analysis of art. 966 and 968 of the Civil Code of 1864, we deduce that, although they do not expressly concern the mediated purpose of the contractual civil obligation, these texts do not exclude it, so that the judicial practice and the doctrine gradually incorporated in the notion of mediated, in particular in order to be able to control the lawful and moral character of civil conventions, in particular liberalities and unnamed contracts.[29]

In the New Civil Code, the cause has only one component, the mediated purpose. Thus, according to art. 1235 of the Civil Code, the cause is the reason that determines each party to conclude the contract. Therefore, in the New Civil Code we no longer find a bivalent character to the cause of the legal act, and the immediate purpose is confused in the new regulation with the very consent or object of the legal act.

In the pre-contract of sale, the immediate purpose, given its abstract and invariable nature, is always to foreshadow by each co-contractor the fact that the other party will perform the obligations assumed by the promise, respectively to make every effort to meet the necessary legal conditions. future conclusion of the sales contract.

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[25] M. Nicolae, *Drept civil. Teoria generală. Vol. II. Teoria drepturilor subiective civile*, Solomon Publishing House, Bucharest, 2018, p. 422; The cause or purpose has also been defined in civil law as "that element of the civil legal act which consists in the objective pursued at the conclusion of such an act" (Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 9th ed., revised and added by M. Nicolae and P. Truşcă, Universul Juridic Publishing House, Bucharest, 2007, p. 167) or "the reason, the concrete purpose for which a legal act is concluded" (O. Ungureanu, C. Munteanu, *Drept civil. Partea generală în reglementarea noului Cod civil*, Universul Juridic Publishing House, Bucharest, 2013, p. 249).

[26] M. Nicolae, *op. cit.*, p. 426.

[27] Gh. Beleiu, *op. cit.*, p. 168.

[28] *Idem*, p. 169.

[29] M. Nicolae, *op. cit.*, p. 429.

As for the mediated purpose, the determining reason for concluding the promise, it coincides with that of the contract of sale, each of the promisors having a specific reason why they want to acquire ownership of the good, respectively the acquisition of the price, as shown in the general analysis of mediated purpose.

This identity between the mediated purpose of the promise and that of the final contract of sale is due to the legal nature of the pre-contract, which is a preparatory contract, a step in forming the legal will to conclude the final contract, by reference to which and only in relation to which, the determining motive of each of the co-contractors is appreciated. None of them seeks to conclude a mediated purpose of the legal act. The reasons why the parties delay the conclusion of the final contract are never an end in themselves for any of them, but only the means necessary to obtain the conclusion of the final act.

Therefore, in the structure of the legal will, made up, as we have shown, of consent and the cause of the legal act, during the formation of the final contract only the consent is that which varies in such a way as to lead to the progressive formation of the final contract. Thus, the parties begin by giving their consent to the conclusion of one or more preparatory contracts, each of which presupposes a separate consent depending on the nature of the preparatory act. However, throughout the negotiations and the preparatory contracts, the mediated cause remains the same, consisting for the buyer in the concrete destination he foreshadows for the use of the amount he will receive as a price, and for the seller, the actual destination of the good.

In order for the cause to be valid, it must be lawful and moral, and the sanction differs depending on which of these features is not met. For example, the absence of the cause entails the annulment of the civil legal act, unless the lack of cause arises from an error in the qualification of the legal act, in which case it will be reclassified and will produce the effects of another legal act [art. 1236 and art. 1238 para. (1) Civil Code]. We are of the opinion that, if there is an error on the cause from the perspective of one of the parties to the civil legal act, this error, materialized in a falsity of the cause, is only an actual absence of the cause. In other words, if one of the contractors is wrong about the cause, it is based on a cause that does not actually exist.

Instead, the existence of an immoral or unlawful cause results in the absolute nullity of the contract, provided that this purpose has been pursued by both parties or at least that the other party has known it or, as the case may be, should have known it. [art. 1238 para. (2) Civil Code][30].

The parties must not prove the cause and also they must not expressly provide it in the document proving the promise of sale, its existence and validity being relatively presumed (art. 1239 Civil Code).

2.5. The form of the bilateral promise to sell

In this respect, the most important aspect to emphasize is the prevalence of the principle of consensualism, so that the form *ad validitatem* is an exception to this rule (see art. 1240 of the Civil Code), being, as such, strictly interpreted (art. 10 Civil Code).

Therefore, the rule is that the authentic form is not necessary for the valid conclusion of the bilateral promise of sale, being sufficient the conclusion in written form, by document under private signature. There is only one exception to this rule, for the promises concluded between May 2 and July 19, 2013, when the pre-contracts for the sale of real estate were subject to the authentic form, under the sanction of absolute nullity of the act[31].

Apart from the form necessary for the promise of sale, there was in practice the problem of the need for the authentic form of the promise for the pronouncement of a decision that takes the place of the contract, when the respective contract must respect the authentic form, *ad validitatem*. This issue has generated a non-unitary judicial practice and started from the content of art. 1279 para. (3) Civil Code which allows the court to issue a decision to take the place of a contract, when the requirements of the law for its validity are met. Starting from this text, some courts have appreciated that whenever the application of art. 1279 Civil Code, which requires the fulfillment of all the conditions of validity of the promised contract, the action in pronouncing a decision that takes the place of a contract of sale for real estate subject to registration in the land register, can be admitted only if the pre-contract was concluded in authentic form. Other courts have held that the form of the authentic deed of promise to conclude the contract for the sale of a building is not necessary, the principle of consensualism being applicable.

In this regard, especially since during that period they published numerous studies that proposed arguments for one or the other of the two jurisprudential guidelines, we are content to specify that it is now

[30] M. Nicolae, *op. cit.*, p. 433.

[31] This rule was established by art. VII[5] point 3 of Law no. 127/2013 on the approval of the GEO no. 121/2011 for the modification and completion of some normative acts, published in the Official Gazette of Romania, no. 246 of 29 April 2013, which provided that the promise to conclude a contract having as object the right of ownership over the building or another real right in connection with it and the deeds of attachment and detachment of the buildings registered in the land book shall be concluded in authentic form, under the sanction of absolute nullity. Shortly afterwards, this provision was expressly repealed by art. II of Law no. 221/2013 on the approval of the GEO no. 12/2013 for the regulation of some financial-fiscal measures and the extension of some terms and of modification and completion of some normative acts, published in the Official Gazette of Romania, no. 434 of July 17, 2013.

definitively established that the form does not fall into the category of essential conditions. In view of the legislator, [see art. 1279 para. (1) Civil Code] being established at present that a promise can be enforced in kind without the need for a certain form (namely the form of the promised contract). This aspect was clarified by Decision no. 23/03.04.2017 pronounced in the file no. 3996/1/2016, HCCJ– The panel for resolving some legal issues in civil matters, which established that: "in the interpretation and application of the provisions of art. 1279 para. (3) first sentence and art. 1669 para. (1) of the Civil Code, the authentic form is not obligatory at the conclusion of the promise of sale of a real estate, in order to pronounce a decision to take the place of an authentic act". In view of this decision, HCCJ noted that "the pre-contract is a non-transferable legal operation of property, which generates a contractual obligation to make, namely to conclude the intended contract, subject to enforcement in kind under the conditions of art. 1279 para. (3) first sentence. As a result, this legal act does not require an authentic form. Also, being two separate legal acts, the authentic form of the pre-contract does not ensure the authenticity of the contract of sale, the provisions enunciated above conditioning the pronouncement of a judgment in lieu of an authentic contract of sale fulfilling the requirements of validity, substantive and formal, of the final contract. On the other hand, if the legislature had intended, for preventive purposes, to provide the authentic form for the promise of sale, would have expressly established this condition of form, as in the case of the promise of donation, regulated by art. 1014 para. (1) of the Civil Code. According to this text of the law, «Under the sanction of absolute nullity, the promise of donation is subject to the authentic form»."

The issue of the form of the bilateral sales promise requires a complex analysis, but without consequences taking in consideration the content of the HCCJ Decision no. 23/03.04.2017, so we will not detail in this regard.

The considerations of the HCCJ Decision no. 23/03.04.2017 also deserve a detailed analysis, which exceeds the object of this study, which strictly refers to the conditions of validity of the bilateral promise of sale, an aspect that has never been the subject of controversy.

The dilemma arose only as to the possibility of forced execution in kind of the promise of a contract. However, even the authors who argued that in order for a judgment to take the place of a contract it was necessary for the promise of the contract to be concluded in authentic form, agreed that that form was only enforceable, the promise being validly concluded, but executed only voluntarily, and not through the mechanism provided by law for its forced execution in kind [art. 1279 correlated with art. 1669 of the Civil Code in case of sale].

3. Conclusions

The general conditions of validity of the contract provided by art. 1179 of the Civil Code (consent, capacity, object and cause and, where the parties have provided, the form) must also be fulfilled by the bilateral promise of sale.

Therefore, there is an indissoluble relationship between the content of the promise and that of the foreshadowed contract, so that the validity of the final sale is conditioned by the validity of the concluded promise.

In the case of a bilateral promise to sell, the disposition must be fulfilled in the case of the promising-seller reported both at the time of the conclusion of the promise, but also at the time of the conclusion of the promised contract. As for the promising buyer from a synallagmatic promise of sale, he must have full capacity to contract, because the acquisition for consideration must be assimilated to the dispositions. Thus, the bilateral promise of sale is, also from the perspective of the promisor-acquirer, an act of disposition, since it does not fall within the scope of conservation/administration acts or small acts that the minor can conclude alone.

In addition to the general conditions of validity of the consent, in the framework of the promises of the contract, the agreement of will of the parties concerns the future conclusion of a contract. Specifically, when the parties agree to the conclusion of the promise, they do not undertake to conclude the pre-contract, but only agree to reiterate this agreement at the time of the conclusion of the final contract. Therefore, the consent of the parties to the conclusion of the contract, which is the subject of the promise, will have to be given at a future time, and at the stage of the promise the parties only agree that in the future they will reiterate this agreement.

As to the content of the consent in the case of the promise of sale, it must relate to the good sold and the agreed price.

The general conditions of the object of the contract are provided by art. 1226-1234 of the Civil Code, and the object of the pre-contract consists in the conduct or performance to which the active subject is entitled and to which the passive subject of the established legal relationship between the parties is held, respectively the future conclusion of the promised sales contract. As in the case of any convention, its object must be determined or determinable, be possible, be in the civil circuit, be lawful and moral, and be a personal act of the debtor.

The promise must be aimed primarily at concluding a specific agreement in the future, and the parties must identify from this preparatory point the essential elements of the foreshadowed contract, from the point of view of the validity of the object. These essential elements are represented by the derivative object of the promised contract of sale, respectively the good to be the object of the sale, and the price agreed by the parties for concluding the agreement. If these elements are not individualized by the parties, the promise will be affected by absolute nullity as it does not provide for a specific or at least determinable object.

Regarding the cause of the promise, in the structure of the legal will, consisting of the consent and the cause of the legal act, during the formation of the final contract only the consent varies, so as to lead to the progressive formation of the final contract. Thus, the parties begin by giving their consent to the conclusion of one or more preparatory contracts, each of which presupposes a separate consent depending on the nature of the preparatory act. However, throughout the preparatory negotiations and contracts, the mediated cause remains the same, consisting, for the buyer, in the concrete destination he foreshadows for the use of the amount he will receive as a price, and for the seller, the actual destination of the good.

In order for the cause to be valid, it must be lawful and moral, and the sanction differs depending on which of these features is not met. For example, the absence of the cause entails the annulment of the civil legal act, unless the lack of cause arises from an error of qualification of the legal act, in which case it will be reclassified and will produce the effects of another legal act.

We are of the opinion that the absence of the cause, in the above hypothesis, is equivalent to its non-existence, because if there is an error on the cause from the perspective of one of the parties of the civil legal act, this error, materialized in a falsity of the cause, is only an absence of the cause. In other words, if one of the contractors is wrong about the cause, it is based on a cause that does not actually exist.

On the other hand, the existence of an immoral or unlawful cause results in the absolute nullity of the contract, provided that this purpose is intended to have been pursued by both parties or at least that the other party should have known him or, as the case may be, should have known him [art. 1238 para. (2) Civil Code].

The parties must not prove the cause nor expressly provide for it in the probative document of the promise of sale, its existence and its validity being relatively presumed (art. 1239 Civil Code).

Concerning the form of the promise of sale, we have shown that the authentic form is not necessary for its valid conclusion, being sufficient the conclusion in written form, by document under private signature. There is only one exception to this rule, for the promises concluded between May 2 and July 19, 2013, when the pre-contracts for the sale of real estate were subject to the authentic form, under the sanction of absolute nullity of the act.

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CONSIDERATIONS REGARDING WHETHER ATTESTATION OF THE DATE OF A DOCUMENT BY A LAWYER REPRESENTS CERTIFIED DATE

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Abstract

Present article focuses on dealing with the aspect of preliminary ruling of the HCCJ of Romania regarding documents certified by a lawyer provided that the register of legal acts certified by a lawyer was according to the law a public register or not and if the institution of attestation/certification of the date of a document by the lawyer is equivalent to the institution of the certified date, respectively if the lawyer can give a certain date to a document.

Article follows also the aspect of the exception of unconstitutionally of the text of art. 3, para. (1), letter c) of Law no. 51/1995 in the sense that the lawyer can give certain data to the documents would constitute a lack of predictability of the legal provision, insofar as it is interpreted in the sense that the lawyer gives a certain date to the documents, considering that such an interpretation violates the provisions of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution, respectively of the security of legal relations and of the right to a fair trial.

Keywords: *certified date, attestation, lawyer, unconstitutional, preliminary ruling.*

1. Introduction

By the request for summons submitted to the Court of Appel, the plaintiff requested the admission, as it was formulated, of one main head of application, regarding the annulment of the sentence from 2017, pronounced by the Lower Court, by which the forced execution of the Loan Agreement no. 17/13.12.2012 attested by a certain Lawyer, under no. x/13.12.2012, now subject to the forced execution file, at the public executor, as the document does not constitute an enforceable title.

This brings into discussion two possible questions for the party. The first one is regarding referring the matter to the HCCJ for a preliminary ruling on the following questions of law:

a) if previously dated 29.05.2018 according to the Decision of the Romanian National Barr Association Council no. 325/17.02.2018 for the commissioning of the National Register of documents certified by a lawyer provided by art. 3 para. (3) of Law no. 51/1995 on the organization and exercise of the profession of lawyer, The register of legal acts certified by a lawyer was according to the law a public register[1];

b) if the institution of attestation/certification of the date of a document by the lawyer [art. 3 para. (1) letter c) of Law no. 51/1995], is equivalent to the institution of the certified date that falls within the competence of notaries public [art. 12, letter f) of Law no. 36/1995][2], respectively if the lawyer can give a certain date to a document.

The second aspect in question is regarding the unconstitutionality of the provisions of art. 3, para. (1), letter c) of Law no. 51/1995, in the form in force on 13.12.2012, insofar as it is interpreted in the sense that the lawyer gives a certain date to the documents, considering that such an interpretation violates the provisions of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution, respectively of the security of legal relations and of the right to a fair trial.

Having these two aspects in mind, the party went forward to ask the HCCJ, in one preliminary question and separately the Constitutional Court of Romania, on the aspect of unconstitutionality. We will present the arguments, considered by this author as relevant, on both aspects, as follows.

2. Content

1. With regard to the notification for a preliminary question, that should give birth to a preliminary ruling of the HCCJ, the procedural conditions for the acceptance of such claims shall not be the subject of the present article, but instead we shall refer to the reasons for admissibility retained by the holder of the notification.

1.1. The party notification is admissible in accordance with the provisions of art. 519 Code of Civil Procedure of Romania, motivated by the fact that:

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[1] Law no. 51/1995 for the organization and exercise of the legal profession of lawyers, effective from June 9, 1995, republishing in the Official Gazette of Romania, Part I no. 440 of May 24, 2018.

[2] Law no. 36 of May 12, 1995 regarding public notaries and notarial activity, republished in the Official Gazette of Romania no. 237 of March 19, 2018.

a) the litigation, in connection with which the notification was formulated, is being sued before a fully invested legal Court;

b) the Court invested with the settlement of the appeal is to settle the case in the last instance;

c) the solution that will be pronounced on the merits of the case depends directly on the legal issues whose clarification is required, in the sense that the settlement of the challenge and, implicitly, of the appeal is inextricably linked to (i) the interpretation of the notion of public registry of legal acts attested by the lawyer (ii) the interpretation of the notions of attestation of the date by the lawyers and of granting certified date by the notaries;

d) the issue of law stated is new, because, in consultation with the jurisprudence, the undersigned did not identify that the HCCJ had ruled on them, either by a case decision or by a decision in the interest of the law;

e) the party did not identify that the legal issues would be the subject of an appeal in the interest of the law being resolved, according to the records of the HCCJ, moreover, the given release may prevent the appearance of a non-unitary practice, caused by the amendments brought to Law no. 51/1995.

1.2. The point of view of the undersigned regarding the settlement of legal issues, are as follows.

With regard to the "public register", according to art. 641 Code of Civil Procedure of Romania, we quote "*documents under private signature are enforceable titles only if they are registered in the public registers in the cases and conditions provided by law. Any clause or agreement to the contrary shall be null and void.*". An emphasis is needed to be pointed out, that through art. 4 of Law no. 17/2017 the text has undergone an amendment[3], in the previous wording it only stipulates that "*documents under private signature are enforceable titles only in the cases and conditions provided by law*." The change is essential, as we will show in hereinafter.

The only public register provided by Law no. 51/1995, prior to the amendments brought by Law no. 25/2017, art. I.2. and art. I.3.[4], was the Register of legal aid [art. 80 para. (2) of Law no. 51/1995], while the Register of registration of legal acts certified by a lawyer was not a public register.

For the purpose of explanations, it must be reminded that the electronic register of the documents drawn up by the lawyers and the electronic register of the evidence of the patrimony of affectation of the lawyers were established by the Decision of the Permanent Commission of the Romanian National Barr Association no. 212/30.03.2017 for the implementation of the provisions of art. I.2 and art. I.3 of Law no. 25/2017 on amending and supplementing Law no. 51/1995 for the organization and exercise of the legal profession, republished, with subsequent amendments and completions, in order to urgently finalize the material and electronic support necessary for carrying out the activities of registration, evidence and information on the documents prepared by lawyers, according to Law no. 51/1995, as completed, in accordance with the provisions of art. 68 para. (3) of Law no. 51/1995, for the fulfilment of the Decision of the Romanian National Barr Association Council no. 852/2013, observing the provisions of art. I.2 and art.I.3 of Law no. 25/2017, published in the Official Gazette of Romania, Part I, no. 210/28.III.2017.

Also, by the Decision of the Romanian National Barr Association Council no. 271/26.08.2017, the National Registers of Romanian Lawyers were approved, being approved by annex the Regulation on the organization and functioning of the National Registers provided by art. 3 para. (3) and art. 5 para. (10) of Law no. 51/1995, art. 26 of the Annex stipulating that on the date on which, by the Decision of the Standing Committee of the Romanian National Barr Association, it is found that the Registers have become functional, Decision no. 212/30 March 2017 of the Permanent Commission of Romanian National Barr Association.

Non the less, by the Decision of the Romanian National Barr Association Council no. 271/26.08.2017, the rules of procedure and their annexes were approved, related to the Regulation on the organization and functioning of the National Registers of Romanian Lawyers and it was established that the National Registers of Romanian Lawyers are put into operation after 90 days from the date of publication of the judgment and will operate in parallel with those held, in paper format, by each form of exercising the legal profession. Thus, only on 05/29/2018, according to the Romanian National Barr Association Council Decision no. 325/17 February 2018, the National Register of documents certified by a lawyer provided by art. 3 para. (3) of Law no. 51/1995 on the organization and exercise of the legal profession.

1.3. In addition to the express provisions indicated above, from which we consider that expressly that the National Register of attested attorneys' acts was not a public register before 29.05.2018, this results from several rules of interpretation of normative acts:

a) by using literal interpretation - art. 92 para. (2) of the Statute of the legal profession of lawyers shows

[3] Law no. 17 of March 17, 2017 on the approval of the GEO no. 1/2016 for the amendment of Law no. 134/2010 on the Code of Civil Procedure, as well as related normative acts, published in the Official Gazette of Romania no. 196 of March 21, 2017.

[4] Law no. 25 of March 24, 2017 on amending and supplementing Law no. 51/1995 for the organization and exercise of the legal profession of lawyers, published in the Official Gazette of Romania no. 210 of March 28, 2017.

that “the lawyer is obliged to keep records of the documents drawn up according to art. 3 para. (1) lit. c) of the Law [s.n. 51/1995] and to keep them in his professional archive ”. As we have shown above, the only public register of lawyers, before the amendments, was the Register of Legal Aid [art. 80 para. (2) of Law no. 51/1995]. The article continues with the specification that “under the sanction of inapplicability towards third parties, the lawyer is obliged to register the operation in the Electronic Register of the documents drawn up by the lawyers according to art. 3 para. (1) letter c) of the Law in accordance with the procedure provided in the Regulation on the organization and functioning of the register, approved by the Romanian National Barr Association.”, but as we showed above, the operation regulation was approved by the Decision of the Romanian National Barr Association Council no. 271/26.08.2017, and the commissioning of the National Register of documents certified by a lawyer was carried out by Romanian National Barr Association Council Decision no. 271/26.08.2017 with effect from 29.05.2018;

b) by using systematic interpretation - analysing the provisions of Law no. 51/1995 in comparison with those of Law no. 36/1995 we will observe that while the lawyer performs activities in the interest of natural and legal persons, the notarial activity is the one that has a public service character;

c) by using historical-teleological interpretation - as we showed above, the amendment brought by Law no. 17/2017, art. 641 of the Code of Civil Procedure of Romania is essential and clarified the issue of the enforceability of documents concluded under private signature.

1.4. Regarding the 'certified date', some interpretation is needed to understand that not all dates on documents are as such attested or certified.

a) art. 3 para. (1) letter c) of Law no. 51/1995 lists among the activities of the lawyer also "*the attestation of the identity of the parties, of the content and of the date of the documents presented for authentication.*" In addition, art. 92 para. (1) letter c) of the Statute of Lawyers (2011) states that “*a legal act signed before the lawyer, which carries a conclusion, a resolution, a stamp or another verifiable means of attesting the identity of the parties, the consent and the date of the act, may be presented notary for authentication.*";

b) art. 12 of Law no. 36/1995 lists among the notarial deeds and procedures the giving of a certified date of the documents [art. 12 lit. f)], which is made by a conclusion issued by the notary public in accordance with the law [art. 83 letter f), art. 147 et seq. of Law no. 36/1995];

c) Law no. 51/1995 stipulates in a single situation in which a document drafted by a lawyer acquires a certified date, respectively the situation of the registration of the legal aid contract in the official register of records [art. 29 para. (1) [art. 31 para. (3) of Law no. 51/1995].

1.5. Similar to the above statement, we show that the lawyer, in his activity does not give a "certified date" to the documents, by reference to several rules of interpretation:

a) by using literal interpretation - we show that where the legislator wanted to talk about the "certified date" that a lawyer's document acquires, he did so expressly [for example see art. 29 para. (1) of Law no. 51/1995]. Analysing the terms literary, it is contrary to this rule of interpretation, as well as to the provisions of art. 37 para. (1) of Law no. 24/2000 [which indicates: “*In the normative language the same notions are expressed only by the same terms*”], that in the content of the same law, the legislator should use two different notions, if it were about the same notion - art. 3 para. (1) letter c) of Law no. 51/1995 "attestation given" vs. art. 29 para. (1) of Law no. 51/1995 "certified date";

b) by using grammatical interpretation - art. 3 para. (1) letter c) of Law no. 51/1995 lists among the activities of the lawyer “*attestation of the date of the documents*”, while art. 29 para. (1) of Law no. 51/1995 specifies that a legal aid contract “acquires” a certain date by entering it in the official register of records. Analysing the texts morphologically and syntactically, it is observed that the acquisition of the certified date is not a result of an activity performed by the lawyer, but is a unique situation expressly provided by the legislator for a single document, namely the legal aid contract, standardized document issued by the bar exercise of the profession, which have a series and a unique number, which the lawyer only completes, does not issue. Moreover, this provision is corroborated with the provisions of art. 31 para. (3) of Law no. 51/1995 which gives character of executory title to the legal aid contract;

c) by using systematic interpretation and method of analogy - according to the provisions of Law no. 36/1995, we consider that if the legislator established the procedure of granting a certified date (i) both by a distinct enumeration within the attributions of the notary [art. 12 letter f)], (ii) as well as by establishing an express procedure in this respect [art. 147 et seq.]. Similarly, should have done the same in the case of lawyers;

d) by using logical interpretation - as we showed above, art. 92 para. (1) letter c) of the Statute of Lawyers (2011) states that “*a legal act signed before the lawyer, bearing a conclusion, a resolution, a stamp or another verifiable means of attesting the identity of the parties, the consent and the date of the act, may be presented notary for authentication.* " Or, related to the effects of the authentication procedure [art. 89 et seq. of Law no. 36/1995], it would not have any logic that

in the situation in which the document to which the lawyer drafted the content and attested the identity, the content and the date to be sent, once again to the notary to perform exactly the same operations.

It is for this reasons that the HCCJ shall issue a preliminary decision on these aspects. As shown above, it this authors opinion that the notion of" certified date" is not subject to a lawyer's attributions, not does it find appliance in the powers granted by law, with limited exceptions, and such power is by interpretation of the law, solely a public notary competence.

2. With regard to the same matter, the party decided to submit to the Romanian Constitutional Courts the judgment for the exception of unconstitutionality of the provisions of art. 3, para. (1), letter c) of Law no. 51/1995, in the form in force on 13.12.2012, to be interpreted in the sense that the lawyer gives a certain date to the documents, considering that such an interpretation violates the provisions of art. 1, para. (5) of the Constitution and of art. 21, para. (3) of the Constitution, respectively of the security of legal relations and of the right to a fair trial.

2.1. It is not subject to the present article whether the procedural conditions of presentation to the Constitutional Court of such a question, but the analysis of the main articles of law and why they must be rendered unconstitutionally. However, in short, such a claim is admissible on a procedural point of view, because it is in correspondence with art. 146 letter d) of the Constitution od Romania and art. 29-33 of Law no. 47/1992[5] motivated by the fact that:

a) the object of the exception concerns a law or government ordinance or a provision of a law or an ordinance - in this case, art. 3, para. (1), letter c) of Law no. 51/1995, in the form in force on 12/13/2012. We specify that by Decision no. 349/19.12.2001 and Decision no. 536/08.04.2011 of the Constitutional Court it was found that certain interpretations that may be given to a text of law may be subject to constitutional review;

b) the law or the government ordinance or the criticized disposition to be in force - by Decision no. 766/2011 of the Constitutional Court, it was found that the phrase "in force" is constitutional insofar as it is interpreted in the sense that it is subject to constitutional review and laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur even after their coming out of force;

c) the criticized law or ordinance or provision must be related to the settlement of the case at any stage of the dispute and whatever its object - in this case, the settlement of the exception is directly related to the settlement of the dispute, in the sense that the settlement of the appeal and, implicitly, the appeal it is inextricably linked to the interpretation of the notions of attestation of the date by the lawyers;

d) the criticized disposition has not been found to be unconstitutional by a previous decision of the Constitutional Court - the criticized disposition has not been the subject of any other notification of the Constitutional Court.

2.2. Keeping in mind the legal texts and their interpretations, using various forms of interpretation, all mentioned at part 1 of the content of this article, we now speak on the violation of art. 1, para. (5) of the Constitution and of art. art. 21, para. (3) of the Constitution. The constitutional principle that guarantees and protects the supremacy of the Constitution and the laws in the Romanian legal system is based in the provisions of art. 1, para. (5) of the Constitution. The obligation of the legislature is to legislate within the limits and in accordance with the Constitution and to ensure the quality of the legislation. In order to obey the law, it must be known and understood, and in order to be understood it must be sufficiently precise and predictable. The jurisprudence thus outlined the principle of legal certainty.

The Court of Justice of the European Communities has ruled that the principle of legal certainty is part of the Community legal order and must be respected by both the Community institutions and the Member States when exercising their prerogatives under Community directives. [Case C-381/97, Belgocodex][6].

Likewise, the ECtHR pointed out in its jurisprudence [ex. Marckx v. Belgium, 1979][7] the importance of respecting the principle of legal certainty, which is considered to be necessarily inherent in both Convention law and Community law.

The accessibility and predictability of the law presupposes that the legal norm is clear, intelligible, so that those to whom it is addressed are not only informed in advance about the consequences of their acts and deeds, but also understand their legal consequences.

Non the less, the same ECtHR, in a rich jurisprudence, has emphasized the importance of ensuring the accessibility and predictability of the law, establishing also a series of benchmarks that the legislator must take into account to ensure these requirements. Thus, in cases such as the Sunday Times

[5] Law no. 47 of May 18, 1992 on the organization and functioning of the Constitutional Court, republished in the Official Gazette of Romania no. 807 of December 3, 2010.

[6] Judgment of the Court (Fifth Chamber) of 3 December 1998 - Belgocodex SA v. Belgian State. Case C-381/97, European Court Reports 1998 I-08153, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A61997CJ0381.

[7] *Marckx v. Belgium*, Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979, available at: https://www.refworld.org/cases,ECHR,3ae6b7014.html.

v. The United Kingdom of Great Britain and Northern Ireland (1979)[8], Rekveny v. Hungary (1999)[9], Rotaru v. Romania (2000)[10], Damman v. Switzerland (2005)[11], European Court of Human Rights he stressed that only a rule set out with sufficient precision to enable the individual to regulate his conduct can be considered law. The individual must be able to foresee the consequences that may arise from a given act; a rule is foreseeable when it offers a certain guarantee against arbitrary infringements. We also show that under art. 3 and 4 of the Code of Civil Procedure of Romania, the legislator expressly enshrined in the civil procedural legislation the obligation to apply with priority the provisions of European Union law and the obligation of the courts to interpret the legislation in accordance with them.

3. Conclusions

Consequently, taking into account the above, the interpretation of the text of art. art. 3, para. (1), letter c) of Law no. 51/1995 in the sense that the lawyer can give certain data to the documents would constitute a lack of predictability of the legal provision and would put the party in the impossibility to properly regulate his conduct and infringes the constitutional right to a fair trial provided in art. 21, para. (3) of the Constitution.

This idea is both backed and justified by the fact that, whit the exception of the Register of legal aid [art. 80 para. (2) of Law no. 51/1995], a lawyer may not issue certification power on a document, regarding the time period of the law cited in present article.

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- Law no. 47 of May 18, 1992 on the organization and functioning of the Constitutional Court;
- Belgocodex SA v. Belgian State;
- Marckx v. Belgium;
- Rekvényi v. Hungary;
- Dammann v. Switzerland.

[8] Sunday Times v. The United Kingdom, 6538/74 , Council of Europe: ECtHR, 29 March 1979, available at: https://www.refworld.org/cases,ECHR,3ae6b7240.html.

[9] Rekvényi v. Hungary, Merits, App no 25390/94, ECtHR 1999-III, [1999] ECtHR 31, (2000) 30 EHRR 519, IHRL 2879 (ECHR 1999), 20th May 1999, European Court of Human Rights [ECHR]; Grand Chamber [ECHR].

[10] Case of Rotaru v. Romania, Application no. 28341/95, ECtHR Judgment Strasbourg, 4 May 2000.

[11] Dammann v. Switzerland, Application no. 77551/01, ECtHR, 25 April 2006, Summary: Human rights - Freedom of expression – art. 10 ECHR, available at: https://www.5rb.com/case/dammann-v-switzerland/.

REFLECTIONS ON THE CONDITION PROVIDED BY ART. 2 (1) GDPR: PERSONAL DATA TO BE PART OF A FILING SYSTEM

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Abstract

While the processing of personal data which are carried out in whole or in part by automated means are included in the material scope of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, the latter applies to manual processing only in so far as personal data are part of or intended to be part of a filing system.

Consultation, disclosure by transmission, dissemination or making available in any other way constitutes processing within the meaning of the General Data Protection Regulation (GDPR). If such processing is carried out by processing other than by automated means, in order to be covered by Regulation (EU) 2016/679 the data must be part of a filing system or be intended to be part of such a system. Thus, a question arises: to what extent making available by manual processing falls within the material scope of the General Data Protection Regulation?

The fulfilment of the condition to form part of a filing system or to be intended to form part of a filing system depends on the specific situation and must be established on a case-by-case basis. On the other hand, the interpretation of the Court of Justice of the European Union, which has ruled that the concept of a 'filing system' covers data that are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use, without being necessary to include any search methods, must be taken into account in all cases. Nevertheless, if personal data processed manually falls outside the material scope of the General Data Protection Regulation because the data is not easily retrievable, it is still protected under the right to privacy as long as the data belongs to the sphere of private life.

Keywords: *GDPR, material scope, processing other than by automated means, filing system, paper records.*

1. Preliminary considerations

Both art. 8 (1) of the Charter of Fundamental Rights of the European Union[1] and art. 16 (1) of the Treaty on the Functioning of the European Union[2] provide that everyone has the right to the protection of their personal data and, as Recital (4) of the General Data Protection Regulation (GDPR)[3] states, "(t)he processing of personal data should be designed to serve mankind".

Captivated by fast-evolving technologies that more or less really serve mankind, we are tempted to be currently concerned only with the processing of personal data by automatic means, somehow overlooking *manual processing* executed by humans without using tools or machines (processing other than by automated means). However, the latter is not less relevant for the rights of data subjects, since information technology and digitization have not completely wiped out *paper records*.

On the other hand, the protection of individuals in relation to the processing of their personal data under Regulation (EU) 2016/679 exists only as long as the data processing falls within its *material scope*. While the processing of personal data by automated means is covered by the General Data Protection Regulation, regardless of the technology used[4], according to Recital (15), "(t)he protection of natural persons should apply […] to manual processing, [only] if the personal data are contained or are intended to be contained in a *filing system*".

Thus it becomes obvious that, in order to qualify a *processing other than by automated means* as falling within the material scope of Regulation (EU) 2016/679, we need to have a clear view of the condition laid down in art. 2 (1) GDPR: "personal data which form part of a filing system or are intended to form part of a filing system", as only manual data processing that meets this condition falls under the General Data Protection Regulation.

In order to determine the limits of this so important condition for manual processing, the letter of the law, the relevant jurisprudence, as well as the doctrinal guidelines need to be analysed for a full view on the matter.

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[1] Published in the Official Journal of the European Union C 326 from 26 October 2012.

[2] *Ibidem.*

[3] *Regulation (EU) 2016/679* of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, published in the Official Journal of the European Union L 119 from 4 May 2016.

[4] See Recital 15 GDPR: "In order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral and should not depend on the techniques used".

2. 'Filing system' as per Regulation (EU) 2016/679

Recital (15) tells us that "(i)n order to prevent creating a *serious risk of circumvention*, the protection of natural persons should be *technologically neutral* and should not depend on the techniques used. The protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a *filing system*. Files or sets of files, as well as their cover pages, which are not *structured according to specific criteria* should not fall within the scope of this Regulation".

The recital sets out the reasons for the content of art. 2 (1) GDPR according to which "(t)his Regulation applies to the *processing of personal data wholly or partly by automated means* and to the processing *other than by automated means* of personal data which form part of a filing system or are intended to form part of a filing system". As well as for the art. 4 (6) GDPR which defines the 'filing system' as "any *structured set* of personal data which are accessible according to *specific criteria*, whether centralised, decentralised or dispersed on a functional or geographical basis".

These provisions have taken over the content of art. 2 (c) and art. 3 (1) from Directive 95/46/EC[5] which has been superseded by the General Data Protection Regulation.

3. Interpretation of 'filing system' concept

The CJEU had the opportunity to interpret the notion of 'filing system' under Directive 95/46/EC in case C-25/17 - Jehovan todistajat. Since Regulation (EU) 2016/679 has taken over the provisions of the directive, the Court's interpretation is still relevant today.

On the one hand, the referring court argued that the lack of specific lists or data sheets or other comparable search method makes it impossible to classify as a 'filing system' the data processed manually under the Finnish law. On the other hand, it raised the issue of the effect on that classification of the fact that the data can be easily searched for later use and without excessive cost. [6]

The Advocate General considered that the criterion of data accessibility is fulfilled when a structure, even if not particularly sophisticated, allows easy access to the data collected[7]. In the same vein, the Court ruled that "(a)s is clear from recitals 15[8] and 27[9] of Directive 95/46, the content of a filing system must be structured in order to allow easy access to personal data. Furthermore, although art. 2 (c) of that directive does not set out the criteria according to which that filing system must be structured, it is clear from those recitals that those criteria must be 'relat[ed] to individuals'. Therefore, it appears that the requirement that the set of personal data must be 'structured according to specific criteria' is simply intended to enable personal data to be easily retrieved.

Apart from that requirement, art. 2 (c) of Directive 95/46 does not lay down the practical means by which a filing system is [to] be structured or the form in which it is to be presented. In particular, it does not follow from that provision, or from any other provision of that directive, that the personal data at issue must be contained in data sheets or specific lists or in another search method, in order to establish the existence of a filing system within the meaning of that directive" [10].

Even under the General Data Protection Regulation the requirement that the set of personal data must be '*structured according to specific criteria*' is simply intended to enable personal data to be easily retrieved. Consequently, as the CJEU ruled, in order for a set of data to fall within the concept of a 'filing system', it is not necessary that they include data sheets, specific lists or other search methods.

For this reason, natural persons acting under the authority of the controller or the processor might not even realize that the way they centralize certain data has created a data filing system for the purpose of the definition provided by art. 4 (6) GDPR[11]. On the other

[5] *Directive 95/46/EC* of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal of the European Communities L 281 from 23 November 1995.

[6] CJEU, *Opinion of Advocate General Mengozzi*, delivered on 1 February 2018, C-25/17 - *Jehovan todistajat*, ECLI:EU:C:2018:57, para. 53.

[7] *Idem*, para. 57.

[8] Recital (15) of Directive 95/46/EC: "(w)hereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question".

[9] Recital (27) of Directive 95/46/EC: "[…] whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data […]".

[10] CJEU, *Judgment of 10 July 2018*, C-25/17 - *Jehovan todistajat*, ECLI:EU:C:2018:551, published in the electronic Reports of Cases (Court Reports - general), para. 57 and 58.

[11] Daniela Simionovici, Daniela Irina Cireașă, Cătălina Lungu, Marius Florian Dan, *GDPR aplicat: instrument de lucru pentru implementarea Regulamentului UE 679/2016* [Applied GDPR: Working Tool for the Implementation of Regulation (EU) 2016/679] (Iași, Lumen, 2019), p. 60.

hand, certain records, as most employment records kept on paper, are likely to fall within this definition[12].

As the scope of the protection conferred on data subjects by Regulation (EU) 2016/679 does not depend on the techniques used, since the protection of natural persons should be technologically neutral, the concept of 'filing system' was broadly defined precisely to avoid the risk of that protection being circumvented. Since there are no strict or restrictive rules on how to structure the filing system, the criteria by which the data are structured may differ from case to case, depending on the nature of the data, the nature of the activity or the purpose for which it is processed[13].

Thus, when analysing a filing system created by manual processing, the structuring according to specific criteria has to be viewed in terms of data accessibility. As one author said, "(t)he touchtone is that the processing of personal data other than by automated means will be subject to the GDPR if the data is structured in such way that information about particular individuals can be readily located"[14]. Evidently, the data can be structured according to *any* specific criteria.

For this reason the files or sets of files, as well as their cover pages, which are not structured according to specific criteria are excluded from the material scope of the General Data Protection Regulation as such sets of personal data are not easily retrievable for subsequent use. That is why we can speak of an absolute presumption of accessibility in the case of processing of personal data by automated means.

It has been stated in the literature that "manual processing only falls within the definition of 'processing' under the GDPR if *two conditions* are met: said data must be contained or be intended to be contained in a filing system […] [and] those files must be structured according to specific criteria"[15].

In reality we are dealing with only one condition: *data to be structured according to specific criteria*. As soon as the sets of personal data are structured according to specific criteria, they become accessible and constitute a filing system. Or, put more simply, structured sets of data make a filing system, considering that paper files can be structured in a way which makes finding information quick and easy[16]. As one author observed, "l'ordre et la méthode conduisent inévitablement à l'application de la loi"[17] (order and method unavoidably lead to the application of the law).

Although another author considers that the data of a specific person should be found "without the need to perform a time consuming search through all entries in the set"[18], it is obvious that data accessibility exists even if the data of that specific person is the last entry in the set, as we find what we are looking for in the last place we look.

Also, "personal data are subject to legal protection even if they merely may be included in a personal data filing system, irrespective of whether they are eventually included in such a filing system"[19], so the fact that the data collected have not yet been included in a record system does not preclude the application of the Regulation[20].

In view of the above, it can happen that personal data processed manually falls outside the material scope of the General Data Protection Regulation because the data doesn't meet the condition to form part of a filing system or to be intended to form part of such a system, or better said for the data is not structured according to specific criteria and consequently it is not easily retrievable.

However this doesn't mean that such data is unprotected under the law, as long as they belong to the sphere of private life protected by art. 7 of the Charter of Fundamental Rights of the European Union, art. 8 (1) of the European Convention On Human Rights[21], and last but not least by art. 26 (1) of the Romanian Constitution[22] and art. 71 of the Civil Code[23]. Thus, even the personal data contained in files or sets of files,

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[12] Article 29 - Data Protection Working Party, *Opinion 8/2001 on the processing of personal data in the employment context* (5062/01/EN/Final WP 48, adopted on 13 September 2001), 13, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp48_en.pdf.

[13] Flavia Barbur, *Protecția datelor cu caracter personal: ghid practic* [Protection of Personal Data: A Practical Guide], C.H. Beck Publishing House, Bucharest, 2020, p. 18.

[14] Philip Coppel, *Information Rights: A Practitioner's Guide to Data Protection, Freedom of Information and other Information Rights*, fifth edition (Oxford: Hart Publishing, 2020), p. 184, Google Books.

[15] Paul Voigt, Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Cham: Springer Nature, 2017), 10, Google Books. See also Luca Tosoni in Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Laura Drechsler (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford: Oxford University Press, 2020), p. 142.

[16] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European data protection law* (Luxembourg: Publications Office of the European Union, 2018), p. 100.

[17] Cécile de Terwangne, "La difficile application de la législation de protection des données à caractère personnel: observations sous Cass. (2e ch.), 22/02/2017", *Journal des Tribunaux* 38, no. 6708 (2017): p. 753.

[18] Mariusz Krzysztofek, *GDPR: Personal Data Protection in the European Union* (Alphen aan den Rijn: Kluwer Law International, 2021), §3.06 Key Definitions [C] Filing System, Google Books.

[19] *Idem*, §3.02 Material Scope.

[20] Flavia Barbur, *Protecția datelor cu caracter personal: ghid practic* [Protection of Personal Data: A Practical Guide], p. 15.

[21] Ratified by Law no. 30 of 18 May 1994, published in the Official Gazette of Romania, Part I, no. 135 from 31 May 1994.

[22] Republished in the Official Gazette of Romania, Part I, no. 767 from 31 October 2003.

[23] *Law no. 287 of 17 July 2009* on the Civil code, republished in the Official Gazette of Romania, Part I, no. 505 from 15 July 2011.

as well as in their cover pages, which are not structured according to specific criteria, are protected under the law, albeit not by Regulation (EU) 2016/679.

Another hypothesis is that of personal *data processed partly by automated means*, in which case the General Data Protection Regulation applies without any other distinction. Actually, most processing today is in part automated considering a typical life cycle of data that starts with the collection and ends with its erasure. Somewhere along the way we are bound to find some degree of automation, such as scanning a document submitted on paper, entering the data from paper documents to computerised systems or parallel archiving of paper and digitalised documents[24].

As already mentioned, information technology and digitization have not completely wiped out paper records, but in most cases these records are tainted by some automated processing which ensures their entry into the material scope of Regulation (EU) 2016/679, irrespective of the fact that the personal data are contained or are intended to be contained in a filing system. Thus, an absolute presumption of accessibility exists even in the case of processing done in part by automated means.

However, "taking of notes on sheets, the consultation of isolated paper documents or the sending by ordinary mail of photocopies of paper documents which are not extracted from a «structured set of personal data which are accessible according to specific criteria» are, as for them, outside the scope of the GDPR"[25], personal data contained therein being protected under the right to privacy.

4. Correlations between making data available and the 'filing system'

The concept of 'processing' defined in art. 4 (2) GDPR covers all the life cycle of data from collection to erasure or destruction. In between the two moments there are operations that stand alone as processing, such as consultation, disclosure by transmission, dissemination or otherwise making available, operations not without impact on fundamental rights and freedoms.

If such processing is carried out manually, in order to be covered by Regulation (EU) 2016/679, the data must be part of a filing system or be intended to be part of such a system. Thus, a question arises: to what extent does the consultation, disclosure by transmission, dissemination or making available by manual means fall within the material scope of the General Data Protection Regulation?

Returning to CJEU's interpretation in case C-25/17 - Jehovan todistajat, we have to remember that "the requirement for the set of personal data to be 'structured according to specific criteria' is simply intended to enable personal data to be easily retrieved"[26].

So, as soon as the sets of personal data are structured according to specific criteria, they become accessible and constitute a filing system, the information being quick and easy to find. Also, the fact that data can be structured according to *any* specific criteria must not be overlooked.

The core of the 'filing system' concept is the easy access to the data collected. Data accessibility favours consultation, disclosure by transmission and dissemination of personal data. In short, it makes the personal data available. This is the reason why the material scope of Regulation (EU) 2016/679 covers even manual processing, although "this works much slower and less data can be processed"[27].

The ease of access explains the need for technical and organisational measures for protecting personal data against unauthorised access, accidental or unlawful disclosure, transfer or other unlawful processing. That is why art. 31 (4) is particularly relevant for manual processing, which provides that "(t)he controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller". Also, offering adequate data security training and education to staff members is an important element of effective security precautions, but without overlooking verification procedures to ensure that appropriate measures not only exist on paper but are implemented and work in practice[28].

As mentioned, if personal data processed manually falls outside the material scope of the General Data Protection Regulation because the data is not easily retrievable, it is still protected under the right to privacy as long as the data belongs to the sphere of private life. Therefore, the disclosure of such data to an unauthorised person it's not without consequences.

[24] Mariusz Krzysztofek, *GDPR: Personal Data Protection in the European Union*, §3.02 Material Scope.

[25] "La prise de notes sur des feuillets, la consultation de documents papier isolés ou l'envoi par courrier ordinaire de photocopies de documents papier qui ne sont pas extraits d'un «ensemble structuré de données à caractère personnel accessibles selon des critères déterminés» sont, quant à eux, hors champ du RGPD" – Cécile de Terwangne in C. de Terwangne, K. Rosier (eds.), *Le Règlement général sur la protection des données (RGPD / GDPR)*. Analyse approfondie (Bruxelles: Éditions Larcier, 2018), p. 70.

[26] CJEU, *Judgment of 10 July 2018*, C-25/17 - *Jehovan todistajat*, ECLI:EU:C:2018:551, published in the electronic Reports of Cases (Court Reports - general), para. 57.

[27] Paul Voigt, Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide*, p. 10.

[28] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European data protection law*, p. 167.

5. Conclusions

Since information technology and digitization have not completely wiped out paper records, manual processing of personal data is not less relevant for the rights of data subjects. However, the fulfilment of the condition to form part of a filing system or to be intended to form part of a filing system depends on the specific processing situation and must be established on a case-by-case basis.

In all cases must be taken into account the interpretation of the Court of Justice of the European Union, which has ruled that the concept of a 'filing system' covers data that are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use, without being necessary to include any search methods.

Consequently, when assessing a filing system created by manual processing, the structuring according to specific criteria has to be viewed in terms of data accessibility, without overlooking the fact that data can be structured according to any specific criteria and that in most cases these records are tainted by some automated processing which ensures their entry into the material scope of Regulation (EU) 2016/679.

A key point is that manual processing falls within the material scope of the General Data Protection Regulation as soon as the personal data is structured according to specific criteria. Once the sets of personal data are structured according to specific criteria, they become accessible and constitute a filing system, the order and method unavoidably leading to the application of Regulation (EU) 2016/679, even if natural persons acting under the authority of the controller or the processor don't realize that the way they centralize certain data has created a data filing system for the purpose of the definition provided by art. 4 (6) GDPR

The core of the 'filing system' concept being the easy access to the data collected, files or sets of files, as well as their cover pages, which are not structured according to specific criteria do not fall within the scope of Regulation (EU) 2016/679, since they are not accessible / retrievable according to specific criteria.

Nonetheless, their consultation, disclosure by transmission or dissemination is protected under the right to privacy, as long as the personal data belong to the sphere of private life.

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CONSIDERATIONS ON A RECENT INTERPRETATION OF THE OBLIGATION TO INFORM AND ADVISE THE BANK'S CLIENT

Dan VELICU[*]

Abstract

As we know in all legal systems, contracts generate rights and obligations. In the civil law system the obligations that the parties assume are joined to the obligations that appear under the law while in the common law system the parties usually have more autonomy in contract negotiation.

Bank contracts recognized as a special category by the current Romanian Civil Code create legal mechanisms with specific features. In this framework we find pre-contractual and contractual obligations that are not generated by the effect of the law or the will of the parties. Although the obligation to inform and advise the bank's client is not imposed by law, it is recognized in the doctrine and in the sphere of banking usages.

Romania's High Court of Justice recently issued a judgement which aimed to harmonize the judicial practice in this field. In short, it was noted that the value of these savings books has decreased as a result of the denomination of the national currency or that the purchasing power has decreased significantly as a result of the inflationary process. beyond the contractual and legal obligations arising from the conclusion of the deposit contract. In our opinion, this conclusion is not well founded, considering that the bank must inform and advise its client in order to choose the best investment path.

Keywords: *bank contract, obligation to inform, obligation to advise, loyality, High Court of Justice.*

1. Introduction

Undoubtedly, the rights and obligations arising from the conclusion of a bank loan agreement condemn the contract for a heated and possible debate, as it is a long-term contract and a series of economic, social or even political events, sometimes unpredictable at the time of concluding the agreement, turn the parties that have the status of trading partners into irremediable opponents.

Moreover, the lack of adequate legislation or practices to protect the party who bears the burden of obligations often leads to conflicts that can only be settled through justice.

2. The outline of the case

A few years ago, the General Prosecutor of the Public Prosecutor's Office attached to the HCCJ under art. 514 of the Code of Civil Procedure notified the HCCJ on March 26tth, 2019 about the resolution of the appeal on points of law regarding the existence and extension of the right of the holders of savings passbooks with interest at C.E.C. (*Romanian Savings Bank*) and earnings in cars to obtain compensations from C.E.C. Bank - S.A. and the Romanian State for the amounts deposited on these means of savings, compensations consisting in the refund of the deposited amounts and of the related interest, updated in relation to the inflation index, following that the unitary law interpretation and enforcement be ensured by admitting the appeal and pronouncing a judgement.

The contents of such appeal show that the Romanian Courts do not have a common point of view regarding the actions in claims of the holders of savings passbooks *with interest* at C.E.C. and *earnings in cars*, formulated in contradiction with C.E.C. Bank - S.A. and the Romanian State through the Ministry of Public Finance.

We point out that the banking institution offered several types of C.E.C. passbooks. Some of these, the largest part, were the simple standard C.E.C. passbooks. These did not entail accidental earnings, but represented only deposit contracts by paying the depositor an interest throughout the duration of the deposit.

In addition, *passbooks* have been launched for *the purchase of cars* and *passbooks with interest and earnings in cars*, the latter categories being the subject of this discussion.

Therefore, referencing and synthesizing the analyzed case laws, the natural persons holders of savings passbooks with interest at C.E.C. and earnings in cars, have supported their claims either on the Norms of the Civil Code of 1864, which regulates the Deposit Contract, or on the Provisions of the GEO no. 156/2007 regarding the compensation of natural persons who created deposits at the *Romanian Savings Bank* C.E.C. – S.A. in order to purchase cars, approved with amendments and completions by Law no. 232/2008,

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with subsequent completions (GEO no. 156/2007). All the requests submitted to the Court pursued coercing C.E.C. Bank - S.A. and the Romanian State, represented by the Ministry of Public Finance, to repay the amounts deposited and the related interest, the entire amount being updated in relation to the inflation index.

In support of the claims, the following rules of law have been indicated:

- Article 969 of the Civil Code of 1864: 'Legally binding conventions shall have the force of law between the Contracting Parties. They may be revoked by mutual consent or for reasons authorized by law',

- Article 1604 of the Civil Code of 1864: 'The depositary shall return all that they have received. Where the depositary has used the money deposit, in accordance with Article 1602, they shall return those currencies in which the deposit was made, both in the event of an increase and a decrease in their value';

- Article 1618 of the Civil Code of 1864: 'The depositor is obliged to return to the depositary all expenses incurred for the storage of the deposited work and to indemnify them for all losses incurred by them on account of the deposit'.

- Law no. 348/2004 on the denomination of the national currency, with subsequent amendments and completions;

GEO no. 156/2007 on the compensation of natural persons who created deposits at the Romanian Savings Bank C.E.C. – S.A. for the purchase of cars, approved with amendments and completions by Law no. 232/2008, with subsequent completions.

According to art. 1, para. 1, 'The natural persons who until February 15th, 1992 made deposits to the *Romanian Savings Bank* C.E.C. – S.A., as well as those who transferred these amounts after December 22nd, 1989 into the accounts of the *Romanian Development Bank* - B.R.D. - S.A., in order to purchase cars, have the right to obtain monetary compensation if the deposits thus created, existing in the active accounts of the *Romanian Savings Bank* C.E.C. – S.A., respectively of the *Romanian Development Bank* - B.R.D. - S.A., meet the condition that the initial balance has not been affected'.

According to art. 1, para. 2 'for the purposes of this Emergency Ordinance, the existing deposits in the active accounts which meet the condition that the initial balance has not been affected, in accordance with paragraph 1, shall be those deposits made up of amounts representing advance payments or full deposits in order to purchase cars, existing in the balance, excluding the interest thereon and from which no withdrawals have been made'.

Thereby, the General Prosecutor points out that in the legal practice there is no unitary point of view on the question of law regarding 'the existence and extent of the right of holders of savings passbooks with interest and earnings in cars to get compensations from C.E.C. and the Romanian State for the amounts deposited on these savings, compensations consisting in the refund of the deposited amounts and the related interests, updated with the inflation index'[1].

Thus, two guidelines have been identified in the case-law:

1. A first guideline of the Courts - considered majority – for the rejection of applications was briefly based on the following arguments[2]:

1.1. An Irregular Deposit Agreement has been concluded between the Credit Institution and the plaintiffs, agreement to which the Provisions of the Common Law, namely of the Civil Code of 1864, apply;

1.2. In the period between the date of the deposit and the date of the denomination (July 1st, 2005), the Bank calculated and added to the original balance the amounts corresponding to the interest applicable to these Savings Instruments;

1.3. The Depositary - the credit institution in question - is not responsible for the decrease in the purchasing power of the deposited amounts, decrease which was determined by the inflation during that period. To support this, the Principle of Monetary Nominalism laid down in the Provisions of art. 1604 of the Civil Code 1864 shall apply. As such, C.E.C. Bank did not have any indexation or update obligation, but only upon the request of its customers had to return exactly the amount of currency regardless of the increase or decrease in value.

1.4. The lack of due diligence of the plaintiffs, which allegedly would have known the effects of inflation or those of denomination on July 1st, 2005, cannot be attributed to C.E.C. Bank in the absence of any legal norms requiring an update with the inflation index.

1.5. The provisions of GEO no. 156/2007 cannot be applied, as they are 'banking products other than deposits made for the purchase of a car'.

2. A second minority guideline for the admission of applications was briefly based on the following arguments[3]:

2.1. C.E.C. Bank has to pay the plaintiffs the amounts deposited updated with the inflation index,

[1] Decision no. 5/2020 on the examination of the appeal on points of law declared by the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, subject of Case no. 885/1/2019, published in the Official Gazette of Romania, Part I, no. 131 of February 19th, 2020, pp. 8 et seq.

[2] *Idem*, pp. 9 et seq.

[3] *Idem*, pp. 10 et seq.

since upon each deposit, legal deposit and mandate relationships have been created between the plaintiff and C.E.C.; these contracts represent the will of the parties and must be executed in good faith.

2.2. It was also noted by the Courts that 'the plaintiff had fulfilled their essential obligations, by complying with the specific conditions of this type of contract, namely that they had not made any balance movements on these accounts throughout the whole period and the amounts deposited remain at the disposal of the defendant who, under that contract, used them throughout the entire period'.

3. Finally, a third minority guideline for the admission of applications was briefly based on the following arguments:

3.1. The plaintiff is entitled to receive the same kind of compensation from C.E.C Bank jointly with the Romanian State as the persons making deposits for the purchase of cars, compensated under art. 1 of GEO no. 156/2007.

3.2. The legal basis is art. 16 para. 1 of the Romanian Constitution 'citizens are equal before the law and the public authorities, without privileges and without discrimination.' The principle of equality does not mean legal uniformity, so in similar factual situations equal legal treatment must correspond, in different factual situations, the treatment may be different. Violation of the principle of equality occurs when differentiated legal treatment is applied to similar factual situations, without reasonable objective justification or if there is a clear disproportion between the aim pursued and the unequal treatment and the means employed.

3. The main considerations of the judgement

On January 20th, 2020, the HCCJ allowed the appeal by issuing the above-mentioned operative part.

The examination of the considerations of Decision no. 5/2020 highlights a number of issues for discussion at least at academic level.

According to Decision no. 5/2020[4],

'46. However, it is noted that the object of the present appeal on points of law, as formulated and specified (within the limits of the initial notification), ***does not capture the real source of non-unitary practice*** *in litigations in which holders of savings passbooks with interest at C.E.C. and earnings in cars, based on the provisions of the Civil Code of 1864 on the deposit contract, but also on the provisions of the GEO no. 156/2007, have requested in Court, in contradiction with C.E.C. Bank - S.A. and with the Romanian State, represented by the Ministry of Public Finance, the refund of the deposited amounts and the related interest, updated with the inflation index.*

48. The existence or non-existence of the plaintiffs' right to compensation or, where appropriate, the extent of such compensation is merely a consequence of the application of the relevant rule or rules of law and is the result of the direct jurisdictional activity of Courts in enforcing the law, namely the administration of justice.

49. It is established, however, that such a ruling does not entail the resolution of a legal issue (the valid subject-matter of an appeal on points of law), but represents the resolution of the case itself, which falls within the exclusive jurisdiction of the Courts involved in resolving cases with such a subject-matter.

52. Consequently, it is observed that the non-unitary judicial practice was generated by the rules of law applied or by the identification by the Courts of the legal basis in these cases, in the exercise of the Judge's prerogative regulated by art. 22 para. (4) of the Code of Civil Procedure, according to which: 'The Judge gives or restores the legal qualification of the acts and facts deduced to the Court, even if the parties have given them another name. In this case, the Judge is obliged to question the exact legal qualification of the parties.'

53. Under these circumstances, the HCCJ - Panel for resolving the appeal on points of law ***finds that it is necessary to reclassify the object of the appeal on points of law, in order to determine whether or not the provisions of the GEO no. 156/2007 in solving the actions formulated by the holders of savings passbooks with interest at C.E.C. and earnings in cars are incident, having as object the obligation of C.E.C. Bank - S.A. and of the Romanian State to the payment of compensations consisting in the refund of the deposited amounts and of the related interest, updated with the inflation index***[5].

1. Thus, a first preliminary aspect of the debate - as it inherently affects the operative part - is, in our view, the reclassification of the Prosecutor General's subject-matter. It is perfectly true that art. 22 para. 4 of the Civil Procedure Code orders that the Judge give or re-establish the legal qualification *of the acts and facts* brought before the Court, even if the parties have given them a different name.

However, in our opinion art. 22 para. 4 of the Civil Procedure Code is intended to assist the Court in clarifying the claim of the plaintiff or the defendant, tacitly assuming that one or both may have misqualified the legal act referred to, leading to the choice of a

[4] *Idem*, pp. 14 et seq.
[5] *Idem*, p. 15.

procedural course of action which may prove to be erroneous.

In the present case, without entering into a debate on the application of the text of law evoked in an appeal on points of law, we consider that the Prosecutor General's request is as clear as possible, with the aim of resolving the issue of the extent to which holders of savings passbooks with interest at C.E.C. and earnings in cars have the right to demand the application of the inflation coefficient on the deposited amounts. The fact that some Courts used as arguments various analogies with the other category which received satisfaction by issuing the GEO no. 156/2007 does not change the substance of the appeal.

The reclassification of the appeal led, as is easy to see, to a decision which not only does not definitely resolve this issue, but is limited to finding that the provisions of the GEO no. 156/2007 will only apply to those who had those types of passbooks, an aspect that obviously emerged from the very title of the normative act.

2. With regard to the fundamental issue, the Decision is limited to a number of Supreme Court judgments, namely:

60. At the same time, based on the provisions of art. 1604 para. (2) of the Civil Code of 1864, which established the Principle of Monetary Nominalism, C.E.C. was required to return the amount they received in the same currency, regardless of the increase or decrease of its value.

61. By applying the provisions of Law no. 348/2004, starting with July 1st, 2005, the amounts not withdrawn from such instruments were converted into the new monetary unit, according to the proportion of 10,000 old lei (ROL) for 1 new leu (RON). As a result of this denomination, intervened through legislation and intensely publicized in the previous period, the value in RON of the amounts deposited on these C.E.C. passsbooks, whose initial value was 5,000 ROL, decreased considerably, becoming even derisory.

(.....)

71. The fact that the nominal value of these passbooks has decreased as a result of the denomination of the national currency or that the purchasing power has decreased significantly, as a result of the inflationary process, are not circumstances attributable to the depositary and cannot be held liable beyond contractual and legal obligations arising from the conclusion of the deposit contract, which means these limits extend to the alleged state guarantee.

Finally, *the provisions of the GEO no. 156/2007 regarding the compensation of natural persons who created deposits at C.E.C. - S.A. in order to purchase cars, approved with amendments and completions by Law no. 232/2008, with subsequent completions are not applicable in resolving the requests made by the holders of savings passbooks with interest at C.E.C. and earnings in cars, which have as object the obligation of C.E.C. Bank - S.A. and of the Romanian State to refund the deposited amounts and the related interest, updated with the inflation index.*

4. Conclusions

1. As we have already anticipated, the Operative Part of the Decision merely states that a normative act intended for a clearly defined social category will apply to that category of subjects. In addition, the analogies made by the lower Courts will be blocked by this Decision.

And yet, the issue of holders of savings passbooks with interest at C.E.C. and earnings in cars remains unresolved, despite the appeal on points of law.

It is true that the Supreme Court evokes the Principle of Monetary Nominalism, but can this evocation still be mandatory in the context in which the Supreme Court itself has reclassified the appeal, practically taking other issues such as the issue of indexation out of the question?

With the natural reservations with which we are constrained by the non-unitary judicial practice at court and even section level, we thereby consider that, based on the above arguments, by way of elementary logic, the Operative Part obviously still allows the claims of holders of savings passbooks with interest at C.E.C. and earnings in cars, without being able to evoke analogies with the satisfaction of the claims of the other category.

2. The appeal on points of law was, unfortunately, a wasted opportunity not only because it did not resolve the issue of holders of savings passbooks with interest at C.E.C., but also because it avoided a discussion necessary to clarify the relationship between the credit institution and the customer.

It is obvious that, as the doctrine of authority has pointed out, the savings passbook is a variety of the irregular deposit agreement[6].

However, we argue that the interpretation of the entire report cannot be made in a reductionist manner by resorting exclusively to the provisions of common law, namely the Civil Code of 1864, and especially to art. 1604, para. (2) of the Civil Code of 1864, which established the Principle of Monetary Nominalism.

This principle was valid at a time when the Civil Code was enacted, when inflation was extremely limited and European central banks issued currency covered in gold or silver, and Romania did not make an exception to this principle until 1918. Therefore, not

[6] See Francisc Deak, *Contracte speciale*, Actami Publishing House, Bucharest, 1998, p. 339.

only has the Principle of Monetary Nominalism been enclosed in a marginal application rule but, moreover, the situation has completely changed from the moment when even the Federal Reserve gave up the gold coating of the American currency.

But beyond these facts, which would suggest a possible obsolescence of the rule, the characterization of the agreement between the credit institution and the customer remains in place, especially when the latter is a natural person.

Thus, in the doctrine of authority and in French jurisprudence, the existence of two obligations has emerged over decades, as these obligations are incumbent on the commercial bank, namely the *obligation of information*[7] and the *obligation of vigilance*[8], with the obligation of vigilance implying the warning of the customer on the financial context and the results their decision can determine. Obviously, as the doctrine points out, this did not mean that the bank would make decisions on behalf of the customer, but the bank had to be loyal to them and draw attention to their own decisions. In other words, loyalty and vigilance required the bank, based on its knowledge as a professional operator, to draw their attention to the consequences of keeping the savings passbook and by virtue of its advisory obligation to offer other products that would allow keeping the value of the deposited amounts.

'The issue of the bank's liability, as it is stated in the Romanian authority doctrine[9], can be discussed only where the loss would have been avoidable, if the bank had had the initiative to inform and advise the customer. The lack of such an initiative can result in the bank being held liable only if it were a reckless fault'.

The aforementioned, for the lack of any evidence to that effect, allows us to state that the credit institution did not comply, obviously breaching those obligations because, just as obviously, the customer's passivity allowed the use of money in financing, clearly with other interest rates, for its own benefit.

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[7] Christian Gavalda and Jean Stoufflet, *Droit bancaire*, Lex Nexis, Paris, 2008, pp. 143 et seq. See also *Cour de cassation, Chambre commerciale*, December 14th 1965.

[8] Christian Gavalda and Jean Stoufflet, *op. cit.*, pp. 144 et seq.

[9] Ion Turcu, *Drept bancar*, Lumina Lex Publishing House, Bucharest, 1999, vol. II, p. 50.

EXERCISE OF THE RIGHT OF PRE-EMPTION OVER THE GOODS

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Abstract

As a method of application, the *"protimisis" has known two variants:*

***Pre-purchase** (original version, of Byzantine origin), in the hypothesis that the person who wanted to sell an asset was obliged to make the privileged an offer of pre-emption (denuntiatio); if the privileged person refused this invitation to pre-purchase or did not exercise his/her option within 30 days, the seller became free to sell to anyone.*

***Repurchase (withdrawal)** – hypothesis in which the seller had the obligation to sell to the pre-emptor, but could also sell freely to a foreigner, with the risk that the privileged person may exercise the right to repurchase the good at the real price within ten years. In terms of the seller's breach of its obligation to make the pre-purchase offer to the pre-emptor, the sanction (withdrawal) was identical, regardless of the method of exercising the protimisis.*

Regarding the right of pre-emption in the light of the provisions conferred by the Civil Code, one can notice the legislator's desire to provide the protection and the value corresponding to the right of ownership over the goods, making available to the holders of the right of pre-emption the possibility to benefit from an adequate means to give this right effectiveness and efficiency.

Keywords: *pre-emption right, pre-emptor, purchase priority.*

1. Introductive notions

It should be noted that on the territory of our country since ancient times under the name of "protimisis", the right of pre-emption[1] appeared in two distinct forms: the first - that of re-purchase, "actual protimisis" and the second - in the form of redemption, "withdrawal".

Since the regulatory framework in this area is extensive, the right of pre-emption is currently provided for both by the provisions of the Civil Code, and by numerous provisions of special laws (Law no. 31/1990 on companies, Law no. 137/2002 on measures to speed up privatisation, Law no. 10/2001 on the legal status of properties wrongfully taken over between 6 March 1945 and 22 December 1989, Law no. 422/2001 on the protection of historical monuments, Law no. 238/2004 on oil, are just a few examples), we refer mainly to the provisions of the Civil Code, which regulate the scope of the right of pre-emption.

The current Civil Code now combines the regulation of the agreement of preference and the right of pre-emption into a single legal institution in art. 1730-1740. Whenever the Civil Code establishes a right of pre-emption in relation to a contract of sale, it uses the concept of pre-emption: the right of pre-emption for the sale of forest land established in favour of co-owners or neighbours (art. 1746), the right of pre-emption for the sale of agricultural property established in favour of the lessee (art. 1849).

2. Notion

Here are some definitions offered to this legal institution in law and in literature: "under the conditions established by law or contract, the holder of the pre-emption right, named pre-emptor, may purchase as a priority an asset"[2]; the right of pre-emption is the faculty recognized by a person or administrative entity, by virtue of a contract or a legal provision, to acquire the ownership of an asset, in case of its sale, with preference to any other buyer ; "that civil subjective right, recognized by law to certain holders, by virtue of which they enjoy priority when buying an agricultural land outside the built-up area, in the order and other conditions provided by law'[3]' Regarding the right of pre-emption regulated by the Forest Code, „civil, legal, patrimonial, inaccessible and temporary subjective right, recognized to the State as a legal person, on the basis of which it may acquire the ownership of the lands that constitute enclaves of the public forest fund or are adjacent to this fund, as well as the lands covered with forest vegetation, in case of their sale, with preference to any buyer, at equal price and under equal conditions"[4]; "the faculty recognized to a person or an administrative entity, by virtue of a contract or a legal provision, to acquire the ownership

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[1] Legal right of pre-emption – Bulletin of Notaries Public, page accessed on 18/03/2022 11:22.

[2] See section 4.4. art. 1730 (1) Civil Code.

[3] Gh. Beleiu, *Romanian Civil Law*, 10th ed., Universul Juridic Publishing House, Bucharest, 2011, p. 34.

[4] E. Chelaru, *Civil Law. The main real rights*, C.H. Beck Publishing House, Bucharest, 2012, p. 28.

of an asset, in case of its sale, with priority over any other buyer".

The right of pre-emption confers preference on a person, called a pre-emptor, when buying a good at an equal price when its owner sells it.

3. Modalities of the right of pre-emption

The right of pre-emption, depending on its source, is contractual or legal. The legal right of pre-emption is a priority right when buying a good, being expressly provided by law in favour of certain natural or legal persons or even of the State[5], which satisfies a general interest.

In the doctrine prior to the entry into force of the current Civil Code, it was considered that "unlike the pact of preference– which has a contractual nature because the priority right to purchase of the beneficiary of the pact is born on the basis of the consent between the parties, the right of pre-emption has a legal nature, being established by an imperative rule".

The conventional right of pre-emption results from an agreement by which the owner of a good undertakes to another person, called the pre-emptor, that, if it is decided to sell the good, he/she will prefer it as a buyer, at equal price and conditions. In this situation, we specify that the owner of the good does not undertake to sell the good, but only to give preference, in case of sale, to the person with whom it has concluded the agreement. The conventional right of pre-emption concerns only a particular interest[6]. For the right of conventional pre-emption, the provisions of the Civil Code are supplementary rules, from which the parties may derogate, establishing other conditions of exercise.

Regarding the legal pre-emption right, obviously, the regulation of this Civil Code regarding the pre-emption right being the common law, the special rule, insofar as it contains different provisions, derogates from these provisions.

4. Exercise of the right of pre-emption in the case of sale of the good to a third party

The offer of sale must be accepted by the holder of the right of pre-emption in within a maximum 10 days of its communication, in the case of the sale of movable property, or not later than 30 days in the case of the sale of immovable property, otherwise the offer shall be deemed to be rejected.

The holder of the right of pre-emption who has rejected an offer for sale may no longer exercise that right in respect of the contract proposed to him/her. When the owner sells the property in respect of which there is a right of pre-emption to a third party, the legislator presumes that this sale was made under the condition precedent of the non-exercise of the right of pre-emption.

The seller is obliged to immediately notify the pre-emptor of the content of the contract concluded with the third party, the latter having only a faculty in this regard.

Thus, the pre-emptor can exercise his/her right by communicating to the seller his/her agreement to conclude the sale contract accompanied by the recording of the price available to the seller. By exercising pre-emption in this way, the contract of sale shall be deemed to have been concluded between the pre-emptor and the seller under the terms of the contract concluded with the third party, the latter contract being cancelled retroactively[7]. This exercise procedure is applicable when the seller or the third party immediately notifies the pre-emptor of the content of the contract concluded with the third party, in accordance with art. 1732 of the Civil Code.

If the notification is not made and the third party is aware of the existence of the right of pre-emption, the right acquired by him/her will remain a conditional one, even when the contract of sale contains clauses that would aim to prevent the exercise of the right of pre-emption. In the view of the legislator, such clauses do not produce effects towards the pre-emptor, being in the presence of a partial absolute nullity. If the notification is not made, but the third-party buyer does not know the existence of the right of pre-emption (third party in good faith), we believe that the legislator admits the possibility of exercising the pre-emption right, given the provision according to which "the seller is liable to the third party in good faith for the eviction resulting from the exercise of the pre-emption". We are in the presence of this hypothesis when the right of pre-emption is conventional and concerns a movable asset or when the right of pre-emption is conventional and concerns a building, but it is not noted in the land book, as well as when the right of pre-emption is legal and the conditions for invoking the error of law are met.

Another related issue is that of the term within which the pre-emptor can address the court in order for it to compel the seller to make the notification. In the absence of a special limitation period, the general term of 3 years shall apply, a term that starts to run from the

[5] F. Deak, *Treaty of Civil Law. Special contracts*, Universul Juridic Publishing House, Bucharest, 2011, p. 28.

[6] In case of competition of pre-emptors, priority shall be given to the holder of the pre-emption right arising from the law before conventional pre-emption rights.

[7] F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Civil code comments by articles*, 3rd ed., C. H. Beck Publishing House, Bucharest, 2021, p. 2074.

date when the pre-emptor knew or should have known the birth of the right to action, *i.e.* the fact that the seller alienated the good to a third party.

Failure to bring the action in due time does not mean the achievement of the negative suspensive condition (of the non-exercise of the right of pre-emption by the pre-emptor), as one of the conditions for the exercise or not of the right of pre-emption, respectively the condition of notifying the holder of the right of pre-emption has not been fulfilled. Therefore, the right of the third party is not consolidated with retroactive effect at the expiry of the limitation period.

If the seller voluntarily exercises the legal obligation to "do" (the pre-emptor's notification), the latter has the possibility to exercise its right, the third-party buyer in bad faith may oppose in defence of the real right purchased only the usucaption.

Eviction of the acquiring third-party by exercising the right of pre-emption. If the right of first refusal concerns a movable asset and the third-party buyer is in good faith, the possibility of eviction will be circumstance by the fact of the actual possession of the asset by the third-party.

Thus, from the provisions of art. 937 (1) Civil Code, according to which "the person who, in good faith, concludes with a non-owner a translative act of ownership for valuable consideration having as object a movable property, becomes the owner of that property from the moment of its taking into effective possession", it is obvious that even when the act is concluded with an owner (as it happens in the hypothesis we are considering) the acquirer must be recognized an unconditional property right, the essential condition of the recognition of this right is that the third party enters into the "effective possession" of the property.

Also, the fact that the property remains in the custody of the seller until the exercise of the pre-emption is likely to lead to the eviction. If the buyer has not obtained possession of the good, the right of first refusal may be exercised against this, even if it is in good faith[8].

If the property is immovable and the right of pre-emption is not recorded in the land book, the third-party buyer becomes the owner of that property from the moment of registration of his/her right in the land book. The possibility of eviction in such a case is excluded.

5. Entry in the land book of the right of pre-emption over a building

The conventional right of pre-emption in relation to a building is recorded in the land book - art. 1737 Civil Code. If the right of pre-emption has been noted, the pre-emptor's consent is not necessary for the person who bought under suspensive conditions to enter his/her right in the land book, under the contract of sale concluded with the owner.

The registration of the right of the third party is made under the suspensive condition that, within 30 days from the communication of the conclusion by which the registration was ordered, the pre-emptor does not notify to the land book office the proof of recording the price at the available to the seller.

The notification made within the term of the land book office replaces the communication provided for in art. 1732 (3) of the Civil Code, having identical effects. On the basis of this notification, the pre-emptor may request the deletion from the land book of the right of the third-party and the recording of his/her right. If the pre-emptor has not made the notification in due time, the right of pre-emption shall be extinguished and deregistered *ex officio* from the land book.

6. Competition between the pre-emptors and the multiple goods sold

Where multiple holders have exercised their pre-emption in respect of the same property, the contract of sale shall be deemed to have been concluded:

a) with the holder of the legal pre-emption right, when competing with the holders of conventional pre-emption rights;

b) with the holder of the legal pre-emption right chosen by the seller, when in competition with other holders of legal pre-emption rights;

c) if the property is immovable, with the holder of the conventional pre-emption right that was first entered in the land book, when it is in competition with other holders of conventional pre-emption rights;

d) if the property is movable, with the holder of the conventional right of first refusal having the earliest common date when competing with other holders of conventional pre-emptive rights.

Any clause contrary to the provisions of para. (1) is considered unwritten.

Under the assumption of the multiple goods sold30, where the pre-emption is exercised in respect of a good purchased by the third-party together with other goods for a single price, the seller may claim from the pre-emptor only a proportionate part of that price.

If goods other than those subject to the pre-emption have been sold, but which could not be separated from it without having damaged the seller, the exercise of the right of pre-emption can be done only if the pre-emptor records the price established for all the goods sold.

[8] F. Moțiu, *Special Contracts in the New Civil Code*, university course, 4th ed., Universul Juridic Publishing House, Bucharest, 2013.

7. Right of pre-emption of the lessee

The new Civil Code provides for a right of pre-emption of the lessee (art. 1849 Civil Code) – he/she has a priority right to the sale of agricultural goods subject to the lease contract, the exercise of which follows the rules established by the provisions of art. 1730-1739 Civil Code, as is the case in the exercise of the tenant's preference right.

The lessee's right of pre-emption applies to the sale of any leased agricultural property, but not to its disposal under other property transfer contracts, such as exchange, annuity or donation contracts. The seller is obliged to notify the lessee-pre-emptor of the contract concluded with a third-party, and the pre-emptor may exercise his/her right of pre-emption within 10 days of the date of notification in the case of the sale of movable agricultural property and 30 days in the case of the sale of immovable agricultural property. By exercising pre-emption, the contract of sale shall be deemed to have been concluded between the seller and the pre-emptor under the terms of the contract concluded with the third-party and the latter contract shall be cancelled retroactively.

8. Termination of the conventional right of pre-emption

As a rule, the conventional right of pre-emption is extinguished by the death of the pre-emptor, unless it was established for a certain term[9].

Thus, where the death of the pre-emptor occurred before the expiry of the period on which it was established, the right of pre-emption shall continue to apply after the death of the holder.

For its part, the conventional right of pre-emption may be established for a definite period of or during the life of the pre-emptor. If it was established for a definite period, the right shall expire either at the end of the term or before the end of the term, in case of the death of the pre-emptor, being thus during life, resulting that the right of conventional pre-emption produces effects only between the owner and the pre-emptor, not towards the heirs of the pre-emptor, not transferring to them upon the death of the pre-emptor.

There is also the hypothesis of a conventional pre-emption right established, for example, in considering the neighbour of a fund and, which obviously does not concern the person of the pre-emptor, but her/her quality, which could also subsist in the person of his/her heirs. Then, having regard to the alternate provisions in the matter of the conventional right of pre-emption, nothing can prevent the owner and the pre-emptor from agreeing that the right of pre-emption be passed on to the heirs of the pre-emptor.

9. Conclusions

Analysing the right of pre-emption under all the provisions conferred by the Civil Code, one can notice the determination of the legislator to provide the appropriate protection and value the right of ownership of the goods, by making available to the holders of the right of pre-emption the possibility of having an appropriate means of giving that right its effectiveness and efficiency.

The manner of exercising the right of pre-emption differs if the exercise takes place before or after the conclusion of the contract of sale: before the conclusion of the contract of sale, by accepting the sale offer by the holder of the right of pre-emption; after the conclusion of the contract of sale with a third-party, by communicating to the seller the agreement of the pre-emptor to conclude the contract of sale together with the recording of the price available to the seller.

In principle, in case of non-compliance with the legal provisions regarding the right of pre-emption, which makes it impossible to exercise the right of pre-emption, its holder may obtain the ineffectiveness of the legal act concluded with the third-party, by invoking the relative nullity.

Regarding the characters of the right of pre-emption, regardless of its nature, the Civil Code imperatively enshrines the indivisible character, meaning that the pre-emptor exercises it unitarily, without the possibility of dividing it, and its inaccessible character.

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SOCIAL AND LEGAL NORMATIVISM. TRADITION AND PRESENT

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Abstract

The most striking expression of the social fact is the social norm. Man's social existence cannot be conceived without norms, mainly moral, religious and legal, that regulate and even determine the behavior of the human person in the social environment. The existence of any individual as a social being presupposes a series of obligations exercised throughout his life cycle, materialized in a series of norms, some of which complement each other, others appear contradictory to others, being specific to different interest groups.

This system of rules is a condition for the existence of society's life, a mechanism that requires good management of human relations and removes the imminent danger of chaos. Social norms are imposed, promoted and perpetuated by several methods that we will analyze in our study Regardless of the field they regulate, social norms contain rules addressed to individuals, describing and detailing the ways in which values must be translated into legitimate behaviors and accepted by society.

As social relations are extremely varied, a diversity of social norms that regulate these relations is also outlined. Thus, the system of social norms consists of the following groups: ethical norms, ordinary norms (customs), corporate norms, religious norms and legal norms.

There are also technical norms that are not part of social determinism because they do not regulate social relations.

Regarding the complex relationship between the normative legal system and, on the other hand, society, it can be seen that currently the legal system tends to have its own functional autonomy, apart from the objective or subjective determinations that society transmits. The autonomy of the judiciary tries to transform itself from a secondary, phenomenological and ideational structure, into one with its own reality, with the power to impose its order on the social and natural order.

In this study we also analyze aspects of the work of normative codification.

Keywords: *social fact and social norms, evolution and classification, legal norms, norms, principles and values, social order and legal order.*

1. Introduction

Man is a social being because his own living environment, as opposed to the natural environment is society, the community. Isolation, a state that is not to be confused with loneliness and loneliness, is contrary to human nature because it involves removing the human person from his natural environment, the social one. Therefore, isolation applied as a criminal sanction, or more recently for an alleged prevention of the contagious disease that has haunted the world for two years can only be temporary and cannot destroy the social dimension of human existence.

The doctrine of social determinism, endorsed by both Marxists and the current politicians and rulers of capitalist democracy, supports the hypothesis of the primacy of society over individual behavior. Determinists say that social interactions determine individual human behavior. As a result, the individual does not choose his own action, but is forced to do so under the pressure of society; he is not really free to act as he wishes. Emile Durkheim, considered the father of modern sociology, uses the concept of social fact to explain the primacy of society over the human person. The social fact is characterized, among other things, by its exteriority and especially by its coercive power, *i.e.*, it is imposed on individuals. In this capacity, it is the paradigm that justifies the primacy of society over individual behavior and thus validates social determinism.

The most striking expression of the social fact is the social norm. Man's social existence cannot be conceived without norms, mainly moral, religious and legal, which regulate and even determine the behavior of the human person in the social environment. Moreover, social norms represent the structure of the social system, orienting its dynamics, change and becoming.

The determinism and social normativism are at least in contradiction in a relationship contrary to human freedom. Freedom is constitutive for the human person. Man was created by God as a free being and aware of his freedom.

The essence of social determinism and social normativism is formed by the causal necessity and the

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normative imperative. Human social freedom can thus be conditioned, restricted or sometimes even abolished.

The relationship between determinism, social normativism and on the other hand the person's freedom in the social environment is particularly complex, requires a broad analysis and involves establishing the priority between social and human as well as between the social normative system and freedom.

2. Content

There are philosophical theories or conceptions that support the primacy of determinism over freedom and even deny the possibility of man being free. The theory of causality is based on the theory of natural and causal determinism. According to causality, no act or event in the universe, taken as an effect, can arise and exist, by itself, but only motivated by one or more causes. Since all acts and choices of a man are generated by a cause, it means that they are not free choices, but the result of a causal constraint. In turn, the effect automatically becomes the cause for another effect and so on.

Some ancient philosophers, followers of Stoicism, such as Marcus Aurelius and especially Epictetus, sought to discern human realities quite boldly by dividing them into those that are in the power of man and those that are not in his power. Those that are in our power, said Epictetus, are desire, impulses, aversion, opinion, soul, etc., and those that are not in our power are body, death, fame, poverty, and so on. In order to be free, Epictetus believed, we must only maneuver with the realities over which we have power, for if we try to remove death, fame, or oppose the laws of the body, we will plunge into misery. "Being free, said Marcus Aurelius, does not mean being able to get everything you want, but not wanting what you can't get, aspiring to what is achievable. The secret of freedom lies not in the domination of necessity, but in the domination of one's own desires and aspirations" (Marcus Aurelius, Meditations).

Another important term for the determinism-freedom relationship is that of free will. The concept of this term presupposes the freedom of man to choose, to arbitrate all things according to his will, unconstrained by anyone. Saint Augustine wrote about free will, but also the French philosopher Voltaire, who argues in favor of determinism and contradicts the Stoics. The French thinker rhetorically wonders at one point how it is possible that in nature there are effects that have a cause and effects that do not have a cause? According to Voltaire, there is absolutely no effect without a cause. Moreover, he states that man can never be free, because he is not born when he wants and does not die when he wants (although a Dostoevsky character defies this second principle and, constantly carrying on him a revolver, declares that he is an absolutely free man, because he can die whenever he wants and no one else!).

Voltaire adds that man is not even the master of his own ideas, because no one, he said, can guarantee that in an hour or five minutes he will not radically change his ideas.

These conceptions that support the primacy of determinism in all its forms over freedom, or even deny the freedom of man.

Free will was also criticized by the German philosopher Friedrich Nietzsche, who finds other weaknesses: "Today we have no mercy for the concept of *free will*; we know all too well what it really is — the most wicked of all the theologians' artifices, meant to make mankind "responsible" in their sense, that is, dependent on them. […] Wherever responsibilities are sought, what usually works is the instinct to want to judge and punish. […] The doctrine of free will was essentially invented for the purpose of punishment, that is, because it was intended to impute guilt. The whole ancient psychology, the psychology of the will, was conditioned by the fact that its initiators, priests, and leaders of the old communities, wanted to create their right to punish — or wanted to create that right for God. People were considered "free" so that they could be judged and punished; […] Therefore, every act was to be regarded as intentional, and the origin of every act was to be regarded as a matter of conscience (Friedrich Nietzsche, Twilight of the Idols).

A Romanian thinker who studied and wrote about "human freedom" is Vasile Conta; he uses another term specific to our topic in question, namely fatalism. "[…]The causal link between the environment and man is so close that all its manifestations of life reflect the former. Thus, he cannot feel, nor think, nor believe, nor you, nor work other than as commanded by the environment".

Any attempt in the field of humanities to characterize and explain man in his individuality or in social relations, also refers to the problem of freedom. It is natural for this to happen, because freedom is essentially linked to the human being but also to the existential phenomenality of man. The existence of man does not make sense without considering the freedom through which man becomes from the individual a person and creator of meanings and meanings. The importance of this existential reality also lies in the fact that man is the only created being whose fundamental ontological dimension is freedom. By this he is not only a natural being, but also a spiritual being. Freedom, as an ontological determination, makes the difference between an individual and a person. Only man, as a person, is a free being, not the individual. Constantin Noica said in this sense that

"where there is no freedom is number", because the number is the conceptual expression of the abstract and indeterminate generality that characterizes any human existential structure, based only on the existential phenomenality of the "I", not on the deep "self" of the human being.

Undoubtedly, philosophy, first of all, but also other sciences, make an important contribution to the conceptual understanding of human freedom, an understanding that remains in the sphere of rationality of abstract concepts be they moral or utilitarian and less existentially engages the human being. Freedom is thought of by philosophy as a dimension of ethics, which is obviously correct because indisputably freedom is both a principle and a value of human ethics. Kant remains of course one of the main thinkers who made an essential contribution to the phenomenology of human freedom, in its moral dimension.

The philosopher concluded his Critique of Pure Reason summing up his entire thought and work: "Two things fill the soul with ever new admiration and increasing veneration, the more often and perseveringly the reflection deals with them: the starry sky above me and the moral law in me".

The Kantian perspective on freedom, in our opinion, forms a distinct note in relation to all other metaphysical systems that address this issue of freedom because it is related to the practical transforming reason of man, the vocation and ability of the human being to manifest creatively in existence natural, to create and impart meanings and values.

Realistic and materialistic philosophical thinking and pragmatism conceive of freedom in relation to necessity. Freedom is understood not so much as an essential, defining aspect, completely different from current and temporary determinism, but especially as a consequence of this determinism. In other words, in ontological realism and materialism, freedom is only a form of necessity, of determinism, which it can overcome, but cannot transform or transfigure spiritually. The consequence is the subordination of freedom and, implicitly, of man to natural determinism. The materialist conception of freedom as "understood necessity" is famous in this sense.

This understanding of freedom as being determined by value, spiritual or legal order is also found in more refined forms of theological or philosophical thinking and indisputably proper to legal thinking.

"Order", whatever its nature, expresses necessity, limit and even coercion, but which cannot be contrary to human freedom as existential data.

The relationship between freedom and necessity, between freedom and law, moral or legal, is recessive. Necessity as order, regardless of its nature and configuration, is the dominant term and freedom the recessive one. Of course, freedom does not flow from necessity, be it spiritual order, it is not determined by such a necessity as in the materialist conception. As existing, freedom is different from necessity, but in relation to the order whose expression is necessary, freedom is always recessive and unfulfilled.

In relation to the need for an existential order, as a recessive term, freedom is never complete, it is not fulfilled, but it is always in precariousness.

The approach to the issue of freedom that we encounter in the legal sciences has multiple conceptual features and, we would say, many times more important than philosophical conceptions of freedom, because the legal is a state of human existence, a characteristic of social status, distinct from the state natural, material. It is a contemporary state of human existence, respectively the "legal state", which includes an existential order based on two realities: the legal norm and freedom.

Law cannot be conceived outside the idea of freedom. The normative system, the most important aspect of law, has its meanings and legitimacy in human existence, the latter being based on freedom.

But what kind of freedom can we talk about in legal norms and in the categories and concepts of law? Inevitably, it is a freedom of the legal norm, a constructed freedom, and not an existential fact. We must emphasize that the legal norm also involves coercion, as well as any existential order applied to human phenomenology. There is an important paradox pointed out by some authors in the field of Christian metaphysics, namely the coexistence of legal constraints, and on the other hand of human freedom, both being essential for the specific order of the legal state in which contemporary man is.

Another aspect is interesting, namely that the legal norm does not show what freedom is, does not define it, does not show its meanings, but only the situations in which freedom is guaranteed or restricted. Moreover, it is good to note that, unlike metaphysics and ethics, the legal norm does not express or conceptualizes freedom as such, but only freedoms or rights, *i.e.*, the phenomenal aspects of human manifestations in the social environment, by its nature a relational environment. It is obvious that the legal normative system could not even define freedom as such, because it remains only with the phenomenological and social aspect of existence. Likewise, legal doctrine postulates human freedom and highlights the content of legal freedoms, but does not define freedom as a reality, as an essential feature of man as a person, including in the social environment.

The most important expression of social determinism is the social normative system. The standardization of social life is necessary and has an

imperative character, but it is also a restriction of the exercise of man's natural freedom.

The existence of any individual as a social being presupposes a series of obligations exercised throughout his life cycle, materialized in a series of norms, some of which complement each other, others appear contradictory to others, being specific to different interest groups. Sorin M. Rădulescu considers that "the diversity of these norms, as well as their specific way of functioning in various life contexts, creates the so-called normative order of a society, based on which the rational development of social life is regulated".

The term "nomos" meaning from the Greek language natural law, norm, which implies the observance of the order established by the gods, has its counterpart in Asian spirituality, through "Dao", in several forms: Dao of heaven; Dao of man. Genoveva Vrabie defines the social norm as "a general pattern of behavior that regulates certain social actions of people, their conduct and activity, and thus the relationships between people. There is no kind of social activity to which no rules of development or exercise should be imposed or recommended". The social norm is a rule that determines the behavior of the individual in a concrete situation. Moreover, society as a complex set of structures imposes a developed and dynamic system of social norms.

This system of rules is a condition for the existence of society, a mechanism that requires good management of human relations and removes the imminent danger of chaos. Social norms are imposed, promoted and perpetuated by several methods, namely: those behaviors or conducts that are detrimental to the values of society or the social group are prohibited; those behaviors or conducts that preserve the order of that society are mandatory and those behaviors or conducts that help the integration of the individual as a member of the society are recommended, approved.

As emanations of the collective consciousness of society, social norms, in their entirety, represent the conditions for the rational organization of human behavior, directly contributing to ensuring the continuity of social life, by establishing patterns of behavior for certain conditions. Thus, social norms presuppose the organization of human actions in accordance with the rules, the values positively appreciated by the respective society. Through them, society, as a coherent set of social relations and actions, develops a normative reference system that allows members to behave intelligibly and normally.

As we have mentioned, social norms impose patterns of behavior on individuals, creating optimal conditions for achieving life in the social framework that determines their existence. The various fields of social activity, which are constantly developing, involve the continuous modernization of the system of social norms.

Regardless of the field they regulate, social norms contain rules addressed to individuals, describing and detailing the ways in which values must be translated into legitimate behaviors and accepted by society.

As social relations are extremely varied, a variety of social norms governing these relations are also outlined. Thus, the system of social norms consists of the following groups of norms: ethical norms, ordinary norms (customs), corporate norms, religious norms and legal norms.

There are also technical norms that are not part of social determinism because they do not regulate social relations.

Adherents of social contract theory argue that the transition of man from the natural state to the social state determines the need for social norms, especially moral and legal ones.

The social norm is imperative, obligatory, even if in law theorists also speak of the existence of supplementary norms and recommendations. Being an expression of social determinism, the norms condition and determine the social conduct of man. In relation to these rules, the responsibility and, as the case may be, the social responsibility of the persons are established. Failure to do so may result in moral, religious or legal sanctions.

Their imperative character is not a constitutive one but derives either from a social recognition or from a manifestation of will of a center of power, most of the times the state.

Where does the need for social norms come from? It is a question that theorists, including philosophers and sociologists, answer by referring to the characteristics of the state-organized society. We believe that this explanation is not enough. Proponents of the utopian Marxist view of man and society believed that a time would come when the state would disappear, that society would exist in itself without a state and without legal norms. This moment was marked by the complete victory of communism all over the world, the achievement of a general welfare and the removal of any social differentiation and the formation of the new man with a perfect social consciousness, fully integrated into the social environment whose conduct is harmonized with the requirements of good social coexistence. Therefore, there is no need for normative coercion.

This conception is a utopia because Marxists believed that in this world and form of existence the only possible happiness and full freedom can be achieved, but without God and for a man reduced to the stage of socially integrated individual without personality and without individual consciousness and freedom.

The very freedom and fundamental rights to be guaranteed and respected must be included in normative systems, but which are based on coercion often incompatible with the ontological freedom of man in the social environment.

It is a freedom that unites. In contrast, the social and implicitly legal state of man is based on the distinction between mine and yours that Kant mentioned, which divides, divides and limits. This is how the philosophical and legal concept of coexistence of freedoms and legal norms arose.

The limits of social normativism, especially the legal one, are obvious especially in relation to human freedom. Social normative determinism cannot comprehend or constrain the freedom of man as a person. The existential freedom of man in the social environment is manifested in its phenomenal forms, determined, guaranteed but also controlled by the power of the state, the creator of the social order through laws. It is therefore a freedom whose content is expressed through the forms of culture and civilization, a creative freedom, but a limited, conditioned freedom, possible to be subject to the restrictions imposed by the state. It is a freedom of the legal norm.

The constitutions enshrine the possibility of restricting the exercise of legal rights and freedoms. But also, in the legal sphere there is the principle that any restriction of a fundamental right cannot affect its very substance, cannot abolish it, which means that the origin and basis of legal freedoms are outside the law, is the existential freedom of man as a gift of God. Moreover, the doctrine, but also the judicial practice enshrines and recognizes natural rights, essential for the social existence of man whose exercise cannot be restricted or conditioned. We consider, among other things, the right to life or freedom of conscience.

Regarding the complex relationship between the normative legal system and, on the other hand, society, it can be seen that at the same time the legal system tends to have its own functional autonomy, apart from the objective or subjective determinations that society transmits. The autonomy of the judiciary tries to transform itself from a secondary, phenomenological and ideational structure, into one with its own reality, with the power to impose its order on the social and natural order. In this context, the legally established legal freedoms try to determine the existential freedom of man, explaining it, ordering it and conditioning it. It is a situation contrary to the natural reality; the phenomenology of the legal must be conditioned, determined, by the existence of man, as a person, and by the particularities of social existence and not vice versa. It is an expression of the dictatorship by law even in democratic societies, because the legitimacy of the legal norm is, in such a situation contrary to nature, only in the will and interests of the rulers who express themselves, paradoxically, on behalf of the people.

The reality described above, specific to contemporary society, has negative consequences, in the sense that man, as a person, the only holder of existential freedom, is no longer aware of his own freedom and expects the normative order, the state or even justice to give him freedom. he needs. It can be said that in such a situation, not realizing his own freedom, contemporary man does not exist authentically, but lives by delegation, his existence being determined externally by state and legal normativism, abstract, impersonal and often, meaningless.

The jus naturalistic conceptions consider freedom as an ontological data of the human being and try to realize the transition from freedom as an ontological essence to liberties as a social phenomenon, specific to the legal state of man and determined by the norm. We say that none of the forms of jus naturalistic conceptions succeeds in making such a transition fully, and the attempt to preserve within the legal liberties the immutability and prestige of liberty is often unsuccessful.

We note, in this ideological context, that legal freedoms, as a structural element of the legal state of man, have as a metaphysical basis the principle of coexistence of freedoms, postulated by jus naturalism, but also by the French Declaration of Human Rights of 1789. It is an expression natural of human social existence, understood by the limits and not by the absolute of existential freedom. In other words, in this phenomenal legal plan, man's freedom is up to the limit of his neighbor’s freedom. It is about the specific distinction of the right between “mine” and “yours”, through which legal freedom is not constituted as a spiritual opening, but as a closing within the limits of the individual. We believe that the legal norm, in this way, cannot be addressed to the person, focused on the ontological idea of freedom, but only to man as an individual, included in the multiple structures of the social scaffolding.

Obviously, such a reality is not in itself negative, because the dimension of human social phenomenality is a reality through which the human essence is manifested and the affirmation, recognition, normative consecration and guarantee of fundamental human rights and freedoms, a fact realized relatively late in history, it is a remarkable act of culture and civilization, which places the man in his social individuality in an equal relationship with the power of the state and places limits on the absolute and discretionary power of those who exercise state power. The constitutional statement of human freedoms and rights is the most important fact in the contemporary history of mankind, a re-establishment of the relationship between state and

man, in the sense that man is not for the state, but the state for man. But this is also a gift from God. Unfortunately, in contemporary society this fundamental reality of the legal is altered and distorted by abusive manifestations of power, which cannot always be effectively controlled and eliminated by legal means.

The starting point that marks the legal and implicitly normative consecration of human rights is the "Declaration of the Rights of Man and of the Citizen" adopted on August 26, 1789. It is the starting point of Enlightenment rationalism in the field of law, rationalism that now culminates in human beings are unlimited, that man is the result of natural evolution, and legal rights and freedoms have their origin and basis in the legal norm and form what has been called "a new religion". This exacerbated rationalism excludes God and man's connection with God, believing erroneously, but with disastrous consequences for man and humanity, that existence has its cause and meaning in itself.

Art. IV of the Declaration expresses the famous legal principle of the coexistence of freedoms: "Freedom is to do everything that does not harm others: thus, the right of every human being has no limits, except those that ensure the other members of society exercise the same rights. These limits can only be determined by law". In other words, my freedom extends to the beginning of another's freedom. Of course, this principle is valuable because it enshrines the legal rule that the exercise of my freedom cannot affect the similar freedom of others. In essence, the coexistence of freedoms, as conceived in legal doctrine, is a principle that divides and does not unite, because it is the expression of the same fundamental dichotomy for law and the legal status of man that I mentioned. It is a rational principle.

We believe that the principle of the coexistence of liberties, in order to overcome the mentioned legal dichotomy, to include in itself the fundamental truth that freedom is an invaluable gift from God, and God's gifts are offered to man from His boundless love, which unites and does not divide, should be stated differently: I am free only if the other is also free; the exercise of my freedom is conditioned by the exercise of freedom by other people. Such an approach, in our opinion, would change the way of consecration and legal guarantee of fundamental human rights and freedoms, because it would take into account the existential freedom as a gift of God and any legal interpretation would be directly or indirectly related to God. For now, this legal perspective is a mere ideal, but by God's will could become a reality.

The legal norm, especially in the conditions of the will of "legal normalization" that the contemporary society knows, is moving further and further away from human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but of a formal recognition within the normative system considered. The abandonment of values, including Christian ones, results in normative relativism based almost exclusively on the pure will of the legislator.

The doctrine of legal normativism recognized and applied in almost all states is a concretization of those shown above.

The normative theory, as a current of legal positivism, is reflected in the main work of the American jurist Hans Kelsen "Pure Theory of Law". In this doctrine, the author aims to study law only in the context of its existence. According to Kelsen, the science of law must be limited to the study of law only in its pure state, apart from its links with politics, morality. Otherwise, it will lose its objective character and turn into an ideology.

Kelsen examines the rules of law in terms of validity, and then effectiveness, in a way that can be called "pure" because it leaves out any other extrinsic elements that are not strictly legal (for example, politics).

The theory of law aims to eliminate dualism subjective – objective law, arguing that the objective law is the legal normative framework through which subjective law is exercised. Kelsen also relativizes through his theory the dualism of private law - public law, stating that this dichotomy should not be seen as separating two branches of law in opposition. The noticeable difference between the two branches, Kelsen believes, can be analyzed ideologically, not theoretically.

The central place in the pure theory of law is occupied by the legal norm which, formally, has a pure character, as opposed to the moral norm, which has a content. Through his system of rules, Kelsen supports the theory of the creation of the right in cascade. Thus, the authority of a court decision originates in a presidential decree; this, in turn, in a law adopted by parliament, and this being claimed by the constitution. All legal norms belong to a given legal order; they justify their validity by referring to a fundamental norm.

In case of non-compliance with the higher legal norm, the legal regulation does not achieve its purpose. The theory of law has the task of deciphering the relationship between the fundamental norm and the inferior norms. It is not the science of law that has to assess whether the fundamental norm is good or bad, political science, ethics or religion rule in this regard.

Kelsen's normative theory purifies the right of all its foreign elements: psychology, ethics, sociology, theology. Thus, he determines the content of the law as totally normative. It can be deduced only from legal

norms and not from social facts. The norms are broken by social life, by the relations between people.

One of the most controversial and important legal issues is the relationship between stability and innovation in law.

This issue can be addressed in two ways. From a historical perspective, legal norms as well as social and state organization are not immutable but constantly changing. The evolution of the legal normative system is marked by historical moments of progress but also by important involutions and contradictions. The evolutionary nature of norms and law is part of social determinism and is explained by the fact that they are an expression of the will of those who govern are created by the state and determined by multiple economic, social, cultural factors, the interests of the rulers. There are, however, fundamental principles of law with a special value and moral load, essential for the rational configuration of a legal system and whose stability is historically demonstrated. Most, such as the principles of justice, fairness, truth, human dignity, are external to law, in the sense that they are not a normative construction, an expression of the will of the legislator, but the rule of law only enshrines them. The evolutionary change, the becoming of the society and of the social normative system correspond to the nature of the human being, of the consciousness and of the thinking, unstable and always in change.

The relationship between stability and change in law can be analyzed in relation to a specific historical moment and the current state of a legal regulatory system and a company.

The stability of legal norms is an indisputable necessity for the predictability of the conduct of subjects of law, for the security and proper functioning of economic and legal relations as well as for giving substance to the principles of the rule of law and the Constitution.

On the other hand, it is necessary to adapt the legal norm and in general the right to the social and economic phenomena that follow one another so quickly. It is necessary for the legislator to be constantly concerned with eliminating everything that is "obsolete in law", of what does not correspond to reality. The relationship between stability and innovation in law is a complex and difficult issue that needs to be addressed carefully, taking into account a wide range of factors, which can lead to a favorable or unfavorable position for legislative change.

One of the criteria that helps to solve this problem is the principle of proportionality. Between the legal norm, the work of interpretation and its application, and on the other hand the social reality in all its phenomenal complexity, an adequate relationship must be made, in other words the right to be a factor of stability and dynamism of the state and society, to satisfy as best as possible the requirements of the public interest, but also to allow and guarantee the person the possibility of a free and predictable behavior, to realize himself in a social context. Therefore, the right, including in its normative dimension, to be viable and to represent a factor of stability but also of progress must be adequate to the social realities but also to the purposes for which the legal norm is adopted or, as the case may be, interpreted and applied. This is not a new finding. Centuries ago, Solon, being called upon to draw up a constitution, asked the leaders of his city the question, "Tell me for what time and for which people", for the same great sage would later say that he did not give the city a perfect constitution but only one appropriate to the time and place.

The relationship between stability and innovation in law is of particular importance when it comes to maintaining or amending a constitution because the constitution is the political and legal establishment of a state on which the entire scaffolding of the state and society is structured.

Essential for a constitution is its stability over time because only in this way can the stability of the entire normative system of a state, the certainty and predictability of the conduct of subjects of law, but also to ensure the legal, political and economic stability of the social system as a whole. Stability is a requirement for guaranteeing the principle of the supremacy of the constitution and its implications. In this sense, Prof Ioan Muraru stated that the supremacy of the constitution is not only a strictly legal category, but a politico-legal one, pointing out that the fundamental law is the result of economic, political, social and legal realities. "It marks (defines, outlines) a historical stage in the life of a country, it enshrines victories and gives expression, political and legal stability to the realities and perspectives of the historical stage in which it was adopted".

We do not intend to analyze in this study all the components of the social normative system that we have identified and listed above. We stop by evoking some aspects of what we have called ethical norms. Many authors, philosophers, sociologists, jurists speak of moral norms as a component part of the social normative system. We believe that we must distinguish the ethical normative system from the moral one. Only ethics can be normalized and not moral. There are many codes of ethics applicable to different professions, organizations, activities or social and professional statutes. These ethical imperatives regarding the conduct of different social subjects in different situations also form a legal normative system because they are established by laws adopted by the state, more precisely those who exercise governance at a given time and are abstract impersonal and imperative like any legal norm and are subject to change.

Morality does not contain norms but only values that can become constitutive of man's existence and conduct as a conscious, free and responsible person both in relation to himself and to other members of society. Relevant in this respect is the conception of the great German philosopher Kant.

His moral system is based on the belief that reason is the highest instance of morality. From this point of view, there are two ways of making a decision dictated by the will: a conditioned or hypothetical imperative, which arises from a subjective inclination and pursues a certain individual purpose, and a "categorical imperative", which is subject to an objective law, universally valid and necessary. Kant thus formulates the principle of the "categorical imperative" considered the foundation of morality: "Act in such a way that the maxim of your actions can be imposed as a universal law". The philosopher's assertion that "duty is the necessity of performing an act of respect for the law" is a plea for the moral law and for the "epicenter" of the whole Kantian construction, that is, the concept of debt. The author operates with the distinction between debt-compliant actions and debt-related actions.

In this context, moral values are necessary, universal and stable. Ethical norms expressed in law can contain perceptions and social values, which become phenomenal and applicable to social relations but without losing the character of moral values, independent of the ethical legislative norm.

3. Conclusions

Law is a normative rule, a system of rules governing human conduct. This human conduct can have a legal content only on the basis of a legal norm. The law, unlike the moral, religious norms, has a constraining character, in case the subject refuses to comply with the normative provisions.

Public power imposes on individuals a normative conduct of law, because law is a reflection of the common interests of society. Law cannot be conceived without power.

The state, in Kelsen's view, identifies with law. It represents the legal order, and its reality is the content of positive law. The state and the law are two sides of the same phenomenon. In creating the law, the state must be subordinated to the law, and this, in turn, regulates its building process. Identifying the rule of law, according to Kelsen, any state is a rule of law, which obviously does not correspond to the current reality.

We appreciate that the "pure doctrine of law" as a theory is not convincing, as law cannot be broken by social reality, seen as objective reality and especially cannot be deprived of moral values by its foundation which is justice. The normative system cannot subordinate the individual.

Applying the principles of abstract and impersonal legal normativism in all democratic constitutions is enshrined the principle No one is above the law. It is valid only in man's formal relations with the law and in accordance with the social determinism in which freedom is a given of the law and conditioned by it.

Law has many political, historical, economic and sociological implications that are intrinsic to it, arising naturally from interpersonal relations and the citizen-state relationship. Although the status of law as an autonomous science cannot be denied, a rule of law cannot be analyzed without being placed in a historical context, without being correlated with the political and economic factors that led to its promulgation, and without assessing the social impact which it has produced among the population by its application.

We believe that Immanuel Kant's words are applicable to both social normativism: "Only the law of becoming really explains the permanence of existence, making it intelligible according to empirical laws".

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THE PHILOSOPHICAL BASIS OF THE PRINCIPLE OF PROPORTIONALITY

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Abstract

The proportionality is a general principle of law, signifying the ideas of balance, justice, responsibility and the needed adequate suiting of the measures adopted by the State to the situation in fact and to the purpose aimed by the law.

The principle is expressly formulated in the European Union documents but also in the constitutions of other states. The normative or jurisprudential regulation of the principle explains the numerous preoccupations at scientific level to identify its dimensions. In this study, the principle of proportionality is analyzed from the perspective of the philosophy of the law, in order to try to identify its value dimensions that are to be found in the normative consecrations or in jurisprudence.

The normative of jurisprudential dimension of proportionality, as a law principle has its content in the concepts and philosophical categories that make up the contents of the principle of proportionality, in the law philosophy's main periods and currents.

We consider that such a scientific attempt is useful, having into consideration the importance of this principle for the contemporary law. The principle of proportionality is an important guaranty in the observance of the human rights, mainly in situations in which their exercising is being restricted by the actions ordered by state's authorities, being at the same time an important criterion to delimit the discretionary power from the power excess in the activity of state's authority.

In our opinion, only in the extent of our knowledge and understanding of the philosophical contents of this principle it is possible this one's correct applying in jurisprudence. This study is aiming to be a pleading for the possibility and usefulness of law's philosophy in this epoch dominated by juridical pragmatism and normativism.

Keywords: *proportionality, equity, idea of justice, lawful state, rational law, adequate relationship, freedom of action, margin of appreciation, just measure, principle of law, human rights.*

1. Introduction

The legal understanding of the principle of proportionality presents difficulties, because its content depends on a certain philosophical conception of justice. The legal doctrine, from antiquity to the present, evokes proportionality as meaning the idea of order, balance, rational relationship, fair measure.

Proportionality is not exclusively a principle of rational law, but at the same time, it is a principle of positive law, a principle of normative value. Thus, proportionality is a legal criterion that assesses the legitimacy of the interference of state power in the field of exercising fundamental rights and freedoms.

This principle is explicitly or implicitly enshrined in international legal instruments, or by the majority of the constitutions of democratic countries. The Romanian Constitution expressly states this principle in art. 53, but there are other constitutional provisions that imply it.

In constitutional law, the principle of proportionality is applied especially in the field of protection of fundamental human rights and freedoms. It is considered an effective criterion for assessing the legitimacy of the intervention of state authorities in the situation of limiting the exercise of certain rights. Moreover, even if the principle of proportionality is not expressly enshrined in the constitution of a state, doctrine and jurisprudence consider it to be part of the notion of the rule of law[1].

This principle is applied in several branches of law. Thus, in administrative law it is a limit of the discretionary power of the public authorities and represents a criterion for exercising the judicial control of the discretionary administrative acts. Applications of the principle of proportionality also exist in criminal law or in civil law.

The principle of proportionality is also found in European Union law, in the sense that the legality of Community rules is subject to the condition that the means used correspond to the objective pursued and do not go beyond what is necessary to achieve that objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the case law of the European Court of Human Rights, proportionality is conceived as a fair, equitable relationship between the factual situation, the means of restricting the exercise of certain

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[1] Petru Miculescu, *Statul de drept*, Lumina Lex Publishing House, Bucharest, 1998, pp. 87-88.

rights and the legitimate aim pursued or as a fair relationship between the individual interest and the public interest. Proportionality is a criterion that determines the legitimacy of the interference of the Contracting States in the exercise of the rights protected by the Convention.

In the same sense, the Constitutional Court of Romania, through several decisions, established that proportionality is a constitutional principle[2]. Our constitutional court stated the need to establish objective criteria, by law, for the principle of proportionality: "it is necessary for the legislature to establish objective criteria that reflect the requirements of the principle of proportionality"[3]. Therefore, the principle of proportionality is increasingly imposed as a universal principle, enshrined in most contemporary legal systems, explicitly or implicitly found in constitutional norms and recognized by national and international jurisdictions.

As a general principle of law, proportionality presupposes a relationship considered fair, between the legal measure adopted, the social reality and the legitimate aim pursued. The doctrine states that proportionality can be analyzed at least as a result of the combination of three elements: the decision taken, its finality and the factual situation to which it applies. Proportionality is correlated with the concepts of legality, opportunity and discretion[4]. In public law, a breach of the principle of proportionality is considered to be a violation of the freedom of action left to the authorities and, in the last resort, an excess of power. There is interference between the principle of proportionality and other general principles of law, namely: the principles of legality and equality, as well as the principle of fairness and justice. The essence of this principle lies in the relationship considered fair between the components.

In summary, we can say that proportionality is a fundamental principle of the law enshrined explicitly or deduced from constitutional regulations, legislation and international legal instruments, based on the values of rational law, justice and fairness and which express the existence of a balanced or adequate relationship between actions. situations, phenomena as well as the limitation of the measures ordered by the state authorities to what is necessary to achieve a legitimate aim, thus guaranteeing the fundamental rights and freedoms, and avoiding the abuse of rights.

2. Content

Many contemporary authors consider the principle that ensures the unity, homogeneity, balance and capacity of the particular normative development of society to be the principle of justice[5]. In essence, the principle of fairness and justice supposes the existence of fundamental, a priori prescriptions derived from reason or from a superindividual order and whose purpose is to give security to social life.

Proportionality expresses the content of this principle through the idea of balance between situations and social phenomena, between state and individual, but also as a "fair measure", when comparing different situations or to assess the legitimacy of decisions of state authorities.

Justice is synonymous with justice and emphasizes the ideal of fairness, which must characterize any legal relationship. The balance that it supposes and that represents proportionality is not only an abstract notion, but it also has a concrete dimension that is achieved through the equivalent of benefits, or in other words "to give everyone what they deserve". Justice protects every natural or legal person, establishes the proportion of interests in order to ensure everyone's freedom in the context of achieving the freedom of all. In the literature it has been shown that: "Justice is an absolute victory over selfishness, and whoever says justice says subordination to a hierarchy of values"[6].

It is necessary to distinguish between the values of fairness, justice and proportionality, analyzed from antiquity to the present, of theology, philosophy and law, and on the other hand proportionality as a principle of established normative law and jurisprudence. Mircea Djuvara said: "There can be no immutable principles of law that are valid for any time and any place"[7]. The author wants to say that on the one hand there are principles and values of universal law, and on the other hand their capitalization is variable according to time and place. Indeed, one is the existence of fairness and proportionality, long since law existed, and another is their formulation as principles in contemporary law as an expression of justice and fairness, given that the modern legal meanings of the principle of proportionality contain the traditional and perennial value connotations of the idea of justice.

Since ancient times, the ideas of justice and justice have been well outlined, and their content is formed by the concept of proportionality, as a way to

[2] Decision no. 139/1994 published in the Official Gazette of Romania no. 353/1994; Decision no. 157/1998 published in the Official Gazette of Romania no. 3/1999; Decision no. 161/1998 published in the Official Gazette of Romania no. 3/1999.
[3] Decision no. 71/1996 published in the Official Gazette of Romania no. 13/1996
[4] M. Guibal, "De la proportionnalité", in *L'actualite juridique. Droit administratif 5*, Dalloz, Paris, 1978, pp. 477-479.
[5] Gheorghe Mihai, Radu Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, ALL Publishing House, Bucharest, 1999, p. 127.
[6] Nicolae Popa, *Teoria generală a dreptului*, Actami Publishing House, Bucharest, 1999, p. 129.
[7] Mircea Djuvara, *Drept şi sociologie*, ISD, Bucharest, 1936, p. 11.

achieve the balance between the benefits of participants in legal relations. The purpose of justice is to exclude any discriminatory behavior between people.

Plato makes the issue of the nature, origin and purpose of the law the central issue of his political dialogues[8]. The fundamental principles of Plato's philosophy are: One, Good, Virtue, and Truth. Laws are created by people, not anyway, but as a reflection of these principles. The law is based on the rational principles, listed above, and its purpose is virtue and good, as moral realities, in the ideal state conceived by Plato. The law determines the social order, but in turn it is based on reason. Plato says that "…in a word, wherever the laws will endeavor, in all their power, to make the state as unitary as possible, it can be argued that the culmination of the political virtue has taken place there". The laws to which the state is subordinated, in Plato's philosophical doctrine, are imbued with the ideas of *justice* and *morality*. The great philosopher wants to apply the moral principles to society as a whole, but also to the behavior of each individual. In this context, the laws must be assessed from the point of view of correspondence with the principle of justice, *i.e.* on considerations superior to the legal order[9]. The laws are accompanied by a statement of reasons, which has the role of making citizens understand not only the existence of the norm, but also its necessity. The rulers, in the state conceived by Plato, are subject to the laws and cannot act arbitrarily. Platonic theory expresses an absolute confidence in law, the only one capable of limiting political power, thus preventing the formation of an authority too strong, "not temperate"[10] as a result of which the state must pursue the "union, science, and freedom"[11].

Plato argues for the need to moderate state power and subordinate the law to the principle of justice. The limitation of the power of the rulers by law, the balance and the moderation in the exercise of state authority are forms of expression of proportionality, as an element of content of the principle of justice, as Plato conceived it. The rule of law is based on the concept of justice. However, Plato conceives of a state in which individuality is considered in the background. In Plato's ideal state, the individual will unconditionally submit to the law, everything being governed by the law, from intimate life to the highest political relationship. Therefore, in Plato's philosophical conception, which is part of the ancient traditional thinking of "state – city", there is no proportional relationship between individual and state, because man is fully integrated into the state, and material equality between members of a state represents the guarantee of social harmony.

The principle of justice and implicitly the idea of proportionality are well emphasized, in Antiquity, in the work of Aristotle, many of these considerations remain valid today.

In order to define justice and law, and then to explain the nature of the state, Aristotle started from the concept of sociability: "man is by nature a social being"[12]. In this context, "justice is a social virtue, for law is only the order of the political community"[13]. In another work, Aristotle states that "law is what creates and maintains for a political community happiness and its constituent elements, and happiness in the city is given by legality and equality"[14]. For the trainee, justice as well as the law is a medium term that ensures the balance between extremes, in other words justice and implicitly the principle of justice have in their content and express the idea of proportionality.

Justice is no longer for Aristotle, as for Plato, virtue in general, but that social virtue which consists in the harmonization of interests respecting proportionality, in social relations. The legislator who wants to introduce just laws must consider the public good. Justice is equality here, and this equality of justice takes into account both the general interest of the state and the individual interest of the citizens[15]. Unlike Plato, in whom the state represents the absolute, and the human individual a simple means in achieving his goals, Aristotle notes a greater attention paid to the human individual, according to a relationship of balance, proportionality, between state and citizens, a relationship that substantiates the principle of justice.

Aristotle distinguished between *distributive justice* and *corrective justice*[16]. The first presupposed the fact of attributing to each one what is due to him, of achieving not a formal equality but a concrete one, an equivalence of the benefits on the condition of observing the distribution criteria. Distributive justice is based on *proportion*, being conceived as an equality of relations. "The justice in question here is, therefore, a *proportion*, and the injustice is that which is out of proportion, assuming on the one hand more, on the other hand less, than what is proper. This also happens

[8] Plato, *The Laws* (Bucharest: IRI, 1995); "Republic" in *Works*, 5th vol., Scientific and Enclopedic Publishing House, Bucharest, p. 1986.
[9] Plato, *The Laws*, p. 155.
[10] *Idem*, p. 112.
[11] *Ibidem.*
[12] Aristotle, *Politics*, Antet Publishing House, Bucharest, 1997, p. 29.
[13] *Idem*, p. 7.
[14] Aristotle, *Nicomachean Ethics*, *Book I*, IRI, Bucharest, 1998, p. 28.
[15] Aristotle, *Politics*, p. 29.
[16] Aristotle, *Nicomachean Ethics*, p. 128.

in practice because the one who commits the injustice owns a larger part of the distributed good, and the unjust one, a smaller part than he deserves"[17]. Aristotle considers that justice consists in reciprocity and the existence of a common standard by which to appreciate facts. Reciprocity ensures the connections between people, respectively the legal relations, it being based on proportion, and not on equality in the strict sense.

Justice or corrective justice intervened when disputes arose between people, and the judge determined the proportion, granting the necessary compensation. It is interesting that Aristotle conceived of justice as proportion, but not purely quantitative, but as an equality that is achieved between persons participating in legal relations, through various consideration: "Justice is therefore a kind of *proportion* (for proportion is not a property only of the abstract number, but of the number in general), the proportion being an equality of relations and assuming at least four terms"[18].

The Roman jurists also contributed to the definition and understanding of the principle of justice. The Latin adage is known, which defined law as "*Jus est boni et aequi*". The idea of equity, existing in this definition, represents a dimension of proportionality. not to hurt your neighbor; to live honestly[19]. The principle of "giving everyone what is their own" expresses distributive justice, which in turn imposes the idea of proportion between the performance of the participants in the justice reports.

Proportionality, as a concept, appears in the doctrine of natural law, either by direct reference, as in the work of Jean Jacques Rousseau, or in the form of categories such as "right reason", which expresses the essence of law and signifies the idea of justice and fairness. Equality is a consequence of sociability resulting from natural law. Proportionality also appears in the analysis of the relations between the state and the citizen and of the way in which the freedom of the individual in relation to the authority of the state is conceived.

An important representative of this school is Montesquieu, who reveals in his work some ideas that involve the principle of proportionality. In Montesquieu's view, everything is subject to the action of universal laws, expressions of necessary relations which derive from the nature of things: "There is a primordial reason, and laws are the relations between it and different entities, and the relations between these entities"[20]. The author considers the law in general to be human reason, and the civil and political laws of a state are particular cases of human reason. The idea of "necessary relations" and especially the identification of the law with human reason means the principle of justice and implicitly the proportionality understood as a balanced relationship between the different entities.

One of Montesquieu's greatest contributions to legal doctrine is the theorizing of the principle of the separation of powers in the state. The essence of this theory, developed in his work "The Spirit of Law", is to prohibit the accumulation of state powers. At a first analysis it is found that the author promotes equality between powers. However, he argues that the judiciary does not play a very important role in relation to other powers. At the same time, in the author's conception, the separation of powers is achieved by reference to the law, or in this situation, the legislature becomes the dominant power in the state[21]. There is not so much equality between the powers of the state but especially a balance, based on the differentiation of roles, which is a form of the principle of proportionality. The activity of the executive and the judiciary aims at the sovereignty of the law and the assurance of the freedom of the citizen.

Related to the idea of social justice, the principle of proportionality appears explicitly formulated, or through other concepts, in the work of Jean Jacques Rousseau[22]. The social pact gives the state authority full power over all members of society. This power is not unlimited, because the state must respect the natural rights of the citizens: "It is appropriate, therefore, that the respective rights of citizens and the sovereign, as well as the duties which citizens should perform in their capacity as subjects, should be clearly distinguished from the natural rights which they should enjoy as human beings"[23]. The author's effort to harmonize the rights of the individual with sovereign power is noted. Man transmits part of his rights to the sovereign, who is animated by the general will expressed by law. On the other hand, the general will cannot annul the natural rights of the individual. In this sense, Jean Jacques Rousseau said: "We have agreed that what alienates everyone from his power, from his goods, from his freedom – through the social pact – is only that part of whose use is important for the community"[24]. This relationship between the rights of the sovereign and the

[17] Aristotle, *Nicomachean Ethics*, p. 115.
[18] *Idem*, p. 114.
[19] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002, p. 83.
[20] Montesquieu, *The Spirit of Law (1748)*, 1st vol., Scientific Publishing House, Bucharest, 1964, p. 11.
[21] Montesquieu, *The Spirit of Law (1748)*, 2nd vol., p. 200.
[22] Jean Jacques Rousseau, *The Social Contract*, Antet Publishing House, Bucharest, 1999, p. 23.
[23] *Ibidem.*
[24] *Idem*, p. 29.

natural rights of the citizen evokes proportionality and, implicitly, the idea of limiting state power, but also of harmonizing it with the natural, inalienable rights of the individual. The author believes that there must be a balanced relationship between the power of a state and its extent: "The stronger the social bond, the weaker it becomes, otherwise a small state is generally proportionally stronger than a large one"[25].

The principle of proportionality is applied to the relationship between sovereign, executive power (government) and state. "So, what is government? An intermediate body placed between the subjects and the sovereign, for their mutual connection and in charge of the application of the laws and the maintenance of the freedom, both civil and political"[26]. In Jean Jacques Rousseau's view, government is the middle ground between a sovereign and a state in a mathematical relationship of "continuous proportion". This proportion is not arbitrary, but a necessary consequence of the nature of the political body. Failure to respect the proportionality between the three terms can have consequences in the author's conception, disturbing the balance and social harmony. If the power of government increases too much in relation to that of its subjects, the rule of law and that of private judgments will be confused. This can lead to despotism. If the subjects become too strong, then anarchy prevails. "Moreover, says Jean Jacques Rousseau, none of these terms could be changed without the proportion immediately disappearing. If the sovereign wants to govern, if the magistrate wants to make the laws, or if the subjects refuse to obey, disorder instead of order, force and will no longer act in harmony, and the decomposed state falls into despotism or anarchy"[27]. Proportionality appears in this report, more in a mathematical, quantitative sense, but it is also a legal principle based on which the powers of the state are organized and the connection between the state and the individual is explained. The author reveals the nature of social relations with reference to the relationship between the individual, society and sovereign power, proportionality expressing balance and harmony, necessary for the stability of the state.

Proportionality as a way of expressing the principle of justice and fairness is also found in the work of the representatives of the rational school of law. This doctrine states that by law we must not only understand the positivist meaning, but we must also consider the rational dimension, which is the essence of law, meaning its understanding as "*jus-dike*", or in other words, as "*just measure*". This is the expression of proportionality as a rational principle of law. For rationalists, the application of proportionality to the legal norm means to give it meaning and value, while achieving the equivalence between law, understood as the totality of legal norms, and justice as a principle.

Immanuel Kant considers that law comes from reason and man can rise to the pure universal, intelligible through morality, whose fundamental concept is that of freedom[28]. For Kant, "law is therefore the set of conditions by which the arbitrator of one can agree with the arbitrator of the other following a general law of liberty"[29]. The conditions to which Kant refers impose limits on freedom in order to be able to correlate with the freedom of the other. It follows from the definition that freedom in law is a freedom of relationship, limited and constraining. Consequently, it is in accordance with the law, and therefore just any action that reconciles my freedom with the freedom of all, following a general rule. Exceeding these limits makes freedom an unjust act. A person's freedom must not harm the freedom of others but be in harmony with it. Although Kant does not explicitly refer to the principle of proportionality, *freedom as a relationship*, which is the basis of law, means balance, fairness, in a word an appropriate proportion between individual freedoms.

In the conception of Giorgio del Vecchio, who is an important representative of legal rationalism, neo-Kantian ideas constitute a reaction to legal positivism and empiricism. Giorgio del Vecchio constructs a philosophy of law starting from an a priori principle, which is the ultimate limit and on which the entire legal edifice rests. This fundamental principle is the *principle of justice*. The author makes an analysis of the Aristotelian conception of justice, criticizing the fact that in Aristotelian theory various species of justice appear, which are not deduced from a single principle. "What is essential – argues Georgio del Vecchio – in any kind of justice is the element of intersubjectivity, or correspondence in the relations between several individuals, which is found in the last analysis, even where it does not appear at first sight"[30]. The author considers that in a very general sense, justice implies a certain harmony, congruence and proportion, to which Leibnitz also referred[31]. At the same time, said the great jurist, "not every congruence or correspondence realizes – properly – the idea of justice, but only that which is verified or can be verified in the relations between several persons; not any proportion between

[25] *Idem*, p. 53.
[26] *Ibidem.*
[27] *Idem*, p. 54.
[28] Immanuel Kant, *Foundations of the Metaphysics of Morals*, Antaios, Bucharest, 1999, p. 49.
[29] *Idem*, p. 50.
[30] Georgio del Vecchio, *Justiția*, Cartea Românească Publishing House, Bucharest, 1936, p. 64.
[31] *Idem*, p. 33.

objects (whatever they may be), but only that which, in Dante's words, is a *hominis ad hominem proportio*. Justice, in its own sense, is the principle of coordination between subjective beings"[32]. Proportion is the quality of relations between persons, which only insofar as it meets this requirement means justice as a principle. The author emphasizes other features of the principle of justice, one of the most important being that the prescriptions of positive law are subject to this principle[33]. Thus, laws can be unfair if they do not correspond to the concept of "Justice", understood as a balanced, harmonious proportion between the content of the norm and social reality. In this situation, it is necessary to change the existing laws and even the existing legal order in order to achieve the imperative of Justice.

The law, as a normative act, is general, impersonal, and the legal equality it implies is formal, because the generality of the law is categorical in nature. In contrast, equality, understood as a fair proportion, as required by the principle of justice, involves the reporting of concrete situations and legal assessments to be achieved according to rigorously established criteria. Equity, understood as legal proportionality, requires taking into account the factual situations, personal circumstances, the uniqueness of the case, the relationship between the legal means used and the appropriate legitimate purpose, thus completing the generality of the legal norm. For Giorgio del Vecchio, the rule of law corresponds to the principle of justice, only if it is appropriate to the diversity of social reality, but also to the ideal of justice, as a rational value. This appropriate report is the expression of proportionality as a general principle of law.

Mircea Djuvara analyzes the principle of justice from the perspective of rational law inspired by Kantian philosophy. For the representatives of the neo-Kantian school of law, justice is transcendental. It may be, or as the case may be, not insured by law enforcement. Law as a system of legal norms is not always equivalent to the principle of justice. Prof Mircea Djuvara divided the "characteristics of justice" into rational and factual elements. As rational elements he suggested: a) equality of the parties; b) the objective (rational) and logical nature of justice; c) the idea of equity, which establishes a balance of interests in essence; d) the idea of proportionality in the conduct of justice. Proportionality would operate primarily through qualities between which relationships are established. Second, it would operate on the idea of equivalence.

Analyzing the legal report and its applicable prescriptions, the author states that the ideal of justice refers to: "the rational equality of free persons, limited in their actions only by rights and debts"[34]. This is the basis in relation to which there is the possibility of normative generalization and the consecration of the formal equality of the law without any discrimination. However, equality in principle can be achieved only by taking into account factual situations, particular factors and individual cases. The author emphasizes that the administration of justice makes necessary the idea of proportion in any legal relationship, including the criminal one: "The idea of proportion proceeds through quantities between which relations are established"[35].

Respect for the principle of proportionality is a general condition for a law to be "fair" or in other words, to be conform to the principle of justice and fairness. In this sense, the author states: "Why in the application of justice do we find the idea of proportion? The penalty must always be proportionate to the guilt. If the idea of proportion were not a rational idea, this assertion would make no sense. The idea of proportion proceeds through quantities, between which relationships are established. Rational appreciation always tends to quantify relationships. Science also aims to establish quantitative relationships; it is known that contemporary science, in any branch, is considered all the more advanced as it eliminates the subjective elements of experimental knowledge, reduces them to simple quantities and thus matures"[36]. It is obvious that for Mircea Djuvara, proportionality is a principle of rational law, which evokes the idea of justice and justice. In the desire to provide rigor and precision to the application of the legal norm, the author conceives the proportionality more, mathematically, as a quantitative ratio, between two quantities or values.

Eugeniu Speranţia, another representative of the neo-Kantian school of law, considers that the spirit is the one who leads the human activity. The need for normality and non-contradiction is realized in social life "by organizing the law, the norm and the sanction"[37]. In the author's opinion, coercion and sociability are the two elements that can define law, and both belong to rationality. Law is "a system of rules of social action, rationally harmonized and imposed by society"[38]. Normativity means that, in all his actions, man must follow certain directions and must strictly observe certain limits. The author does not refer to proportionality as a principle, but as we have noted in other situations, proportionality, even if not explicitly

[32] *Ibidem.*
[33] *Idem*, p. 56.
[34] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, p. 268.
[35] *Idem*, p. 271.
[36] *Idem*, p. 272.
[37] Eugeniu Speranţia, *Principii fundamentale de filozofie juridică*, Institutul de Arte Grafice Ardealul, Cluj, 1937, p. 7.
[38] *Idem*, p. 8.

stated, is implicit in the idea of rationality which means a certain harmonious ordering of the constituent elements of society and compliance with the rules in order to achieve social order, and ultimately justice.

George Alexianu evokes the principle of proportionality, although he does not explicitly use this concept. Referring to the role of the state in contemporary society, the author points out that it must ensure social order and guarantee individual freedoms. Its power must be limited in relation to the exercise of individual freedoms. State authorities can restrict individual freedoms only if this measure is absolutely necessary for the preservation of society. The state is only a means of guaranteeing individual freedoms. The limitation of the power of the state, the fact that the actions of the state must not exceed the purpose of their exercise, as well as the existence of the "necessity" to justify the interference of the state in the exercise of fundamental freedoms implies the principle of proportionality[39]. "The state has a duty to ensure the social order without which the life of society is not possible. By ensuring the social order, it ensures and guarantees the individual life, because the individual can only live in a society. He must demand of individual freedom only those sacrifices which are absolutely necessary for the coexistence of individuals in society. The state is therefore a means of securing individual life. "The necessary strictness to which its intervention is limited is dictated by political science"[40].

The French jurist François Geny pointed out that the rule of law is guided by the ideal of justice and that this, beyond the inclusion of basic perceptions, not to harm, not to harm another person and to give everyone what they deserve, involves deeper thought. of establishing a balance between conflicting interests in order to ensure the essential order to maintain the progress of human society[41].

Paul Roubier noted that the rule of law that aspires to govern human societies must conform to a certain ideal of justice, otherwise it will be neither respectable nor respected if it rejects that ideal. The author proposes among the values that guide law "justice as an essential value of the good order of human relations with its own qualities of equality and proportionality"[42].

For Rudolf Stammler, the law is justified in so far as the aims pursued by him are just. "Fair law" must always be in line with social aspirations. "The basis of the justice of a legal system must be sought in the fundamental law of the will. We deduce the possibility that a legal will is fair exclusively from the highest concept of free will. "Justice will therefore be the harmonization of all social wills"[43]. In our opinion, the harmony that Stammler speaks of is the expression of proportionality as a value and principle of law.

In contemporary Romanian legal literature, there are characterizations of the principles of equity and justice that imply proportionality. Thus, for Radu Motica and Gheorghe Mihai "the principle of equity implies moderation in the prescription of rights and obligations by the legislator, in the process of elaborating legal norms… This principle and equity first appeared because experience has shown that there is no perfect equality between people, absolute, this must be covered"[44]. Proportionality is perceived by legal doctrine as a form of expression of the principle of justice and justice through the idea of an equivalent, balanced, harmonious relationship between two or more values or quantities. works of authors or law schools.

The question is whether the understanding of proportionality, in relation to the general principles of law, in particular, the idea of justice, justice and fairness is relevant to contemporary law and especially to constitutional law. We consider that the answer is in the affirmative, for the following reasons:

The end of the 18th century and the beginning of the 19th century marked the accentuation of preoccupations, both in terms of legal doctrine and in the elaboration of political declarations, or normative acts, which enshrine and guarantee human rights and normative continued previous rationalist traditions and at the same time meant an emphasis on the analysis of the limits of state power and the inalienable human rights.

The fundamental question that arises in the legal doctrine of this period is: how can man be a free being, whose fundamental rights and freedoms are recognized and at the same time live in an organized society? The answer to this question depends on how the law is considered and implicitly the content of its fundamental principles. The solution of this problem has meant and means an evolution of the legal doctrine, oriented more and more towards the conciliation of the law, as an instrument of affirmation of the human being through the freedoms that must be recognized and guaranteed by law.

In the legal doctrine of the mentioned period, man is not only a citizen, a subject of law passively

[39] George Alexianu, *Curs de drept constitutional*, Casa Școalelor, Bucharest, 1930-1937, p. 149.
[40] *Ibidem.*
[41] François Geny, *Science et technique en droit positif*, 1st vol., Sirey, Paris, 1925, p. 258.
[42] Paul Roubier, *Théorie générale du Droit*, L.G.D.J., Paris, 1986, p. 268.
[43] Rudolf Stammler, *Theorie der Recktswissenschaft*, University of Chicago Press, Chicago, 1989, p. 58.
[44] Radu I. Motica and Gheorghe C. Mihai, *Teoria generală a dreptului*, ALL Publishing House, Bucharest, 2001, p. 81.

integrated into social relations, dominated by state power, but he is a person who has rights and freedoms essential for his existence, inalienable, which he can oppose to power. state. Law is increasingly understood as the "coexistence of freedoms" and not just a system of positive rules applied by the discretionary authority of the state. In this context, proportionality is found in legal doctrine both to characterize the principle of justice and to explain the increasingly complex social relations that require the recognition of individual freedoms in the context of the freedoms of all, but also to determine the limits of state power. in relation to the fundamental rights recognized to man. Proportionality is increasingly understood as a guarantee of respect for fundamental rights and a criterion for assessing the legitimacy of their restriction by the state authority.

The French Declaration of the Rights of Man and of the Citizen of 1789 enshrines the principle that people "are born and remain free and equal in rights. Freedom means being able to do everything that does not harm another". The documents with constitutional value from that period, evoke the idea according to which, if the man is born with some inalienable rights, from which no one can separate him, it means that the state power is not unlimited either. There is, therefore, a fair, proportionate relationship, on the one hand, between the recognized freedoms of each individual, and on the other hand between the liberties of the individual and state power.

The doctrine and the constitutions enshrined the principle of equality. The elimination of privileges and discrimination is a condition for any democratic state. However, the principle of equality has a formal, abstract dimension: equality before the law or equality of opportunity. Few legal concepts have supported material equality. The enshrinement of the principle of equality by the liberal doctrine in law did not mean ignoring the differences between social situations or between participants in social life. The law applied to social relations must take into account these differences, it must not be a simple uniforming factor, based on the abstract and general nature of the legal norm. Different normative regulation of different situations is an application of the principle of proportionality.

Although fundamental human rights are inherent in the human being and essential to his development, liberal legal doctrine holds that there is no equality between the private interest and the public interest, but only a fair balance, *i.e.* a relationship of proportionality, because the two social realities and legal, however, have a different nature. Therefore, the liberal doctrine in the field of law has led to the assertion of human individuality, constituted as a counterweight to statism. The liberal doctrine in law is based on the assertion of human rights, but does not support the abolition of any authority, but a society in which the power of the state is limited, only in drafting and enforcing the law, there is a balanced, proportionate relationship between the state and individuals.

An important representative of liberal doctrine, John Stuart Mill, evoked proportionality as the relationship between the fundamental rights of individuals and state power, or so to speak, between freedom and authority, two concepts which in a first analysis are mutually exclusive[45]. The author considers that a limit should be found beyond which the interference of the state in the sphere of individual independence is no longer legitimate. "Finding this limit and defending it against any violation is an indispensable condition for the smooth running of people's lives, an indispensable condition for protection against political despotism"[46]. As a result, there must be a balance between human rights and the right of the state to intervene in individual life. This balance actually means a relationship of proportionality. For the intervention of state authorities in individual life to be justified, there must be a legitimate purpose: "the only purpose which entitles men, individually or collectively, to interference in the sphere of the freedom of action of any of them is self-defense, the only purpose in which power may be legitimately exercised over any member of civilized society against his will is to prevent harm to others"[47]. The balance that the author is talking about is an application of the principle of proportionality and imposes the existence of limits for individual freedom, beyond which the authority of the state begins. The first limitation of individual liberty is not to infringe on the rights of others. The second restriction is to bear the burdens imposed by the existence of the company. This self-limitation of individual behaviors expresses proportionality in the relationships between members of society.

We also notice Alexis de Tocqueville's conception of democracy as a form of government. The basic principle of democracy, in the author's conception, is equality of conditions. Tocqueville believes that the ideal democracy is realized through the reciprocity of legal equality and political freedom, the latter signifying the possibility and the right of all to participate in government. One danger in democratic society, the author says, is "the tyranny of the majority and the tendency to centralize power"[48]. The tyranny of

[45] J.S. Mill, *Despre libertate (1859)*, Humanitas Publishing House, Bucharest, 1994, p. 7.
[46] *Idem*, p. 12.
[47] *Idem*, p. 17.
[48] Alexis de Tocqueville, *Despre democraţie în America (1840)*, Humanitas Publishing House, Bucharest, 1994, p. 160.

the majority is the result of the equality and independence of every human being in society. If everyone is right, the disproportion of believing the mass increases, so that the opinion of the majority leads the world. This danger is an obvious disproportion between the power of the state and the freedom of individuals. In order to counteract this risk, the political freedom of man must be ensured, whose role is to limit the power of the state in its relationship with individuals and at the same time, to limit individual excesses. Consequently, a balance is achieved, *i.e.*, a relationship of proportionality, between state power and individual freedoms, and man ultimately benefits from this balance.

Another representative of the liberal doctrine in law, in whose conception is found the principle of proportionality is John Rawls. His main objective is to theoretically establish a constitutional democracy. His whole conception of law is based on the principle of justice[49]. The theory of justice, in which equity plays a major role, supports the enshrinement and observance of human rights, the principle of just equality of opportunity and the principle of difference. In a democratic, pluralistic society, the idea of reasonableness plays a major role. Reasonable, in John Rawls's view, is that which brings together different situations, and which expresses "tolerance", the achievement of harmony and stability in a pluralistic society. The principle of "equal opportunities, the principle of difference, fairness and reasonableness" are categories that express, in our opinion, the proportionality in social relations. Democratic equality, in the author's conception, does not exclude the "differences", and social harmony is achieved through equitable, proportionate relations between participants in social life.

Once the state is created, it must intervene in the regulation of the social phenomena. This intervention must be well justified, it must serve a legitimate purpose, it must be done only to the extent necessary and by appropriate means that can be controlled. The existence of the state and its manifestation implies a "status of power" that creates its limits, prevents it from becoming discretionary. State power is institutionalized by law, but the law must legitimize its exercise, first and foremost by the constitution[50]. "The rule of law – said J. Chevallier – is inseparable from the representation of a minimal state, respectful of social autonomy and which does not go beyond its legitimate powers". The same author states that the doctrine of the rule of law is based on the fundamental idea of limiting power through threefold game: 1) the protection of individual freedoms; 2) the submission of power to the nation; 3) entrusting a restricted area of competence to the state. The structuring of the legal order is only a means to ensure and guarantee this limitation through the mechanisms of law creation. Thus, the rule of law covers a) a conception of public liberties; b) a conception of democracy; c) a conception of the role of the state, which constitutes the underlying basic foundation of the legal order.

The application of the principles of the rule of law posed the problem of finding a criterion for assessing the measures ordered by the state authority, in the situation when they are taken within the limits of the competence established by law. Thus, in order not to be arbitrary and discretionary, the measure ordered by a state authority must be in accordance with the law, but also adequate for the proposed legitimate purpose. The relationship between means and purpose is in the doctrine of the rule of law, but also in jurisprudence, one of the particular aspects of the principle of proportionality.

The rule of law is also based on the idea of harmony, balance between its constituent elements. This balanced relationship "is another aspect of the principle of proportionality, in fact a dimension of the general principle of fairness and justice. Thus, the analysis of fundamental rights or the perpetuation and preservation of human life, through the prism of the way of thinking of natural law, will reveal the principle of proportionality. Between the individual and the general, between the public and the private, there must be a fair measure, a balance, because "the exacerbated individual bears in himself the seal of absolutism and totalitarianism"[51], as the exaggerated and disproportionate power of the state in relation to fundamental human rights leads to same purpose: abuse of power and right. In the classical conception of natural law, taken over by the doctrine of the rule of law, law was only a "just measure", that is, proportionality.

The principle of proportionality represents in the doctrine of the rule of law the introduction of a new concept, namely legitimacy. The right that limits the power of the state is not only the "the rule of power", in the sense of "legislative power", *i.e.* to create legal norms as an expression of the will of the legislature, nor of "subjective rights", in the sense of human rights, as powers of the individual to claim something, even the state, only if these rights are recognized by objective law, as legal norms enacted by the legislator, but the law must be understood, in addition to these two meanings, which are real, and by the criterion of law as

[49] John Rawls, *Liberalismul politic (1988)*, Sedona, Bucharest, 1999, p. 8.
[50] George Burdeau, *Traité de science politique*, 4th vol., L.G.D.J., Paris, 1976; Ion Deleanu, *Drept constituţional şi instituţii politice*, 1st vol. Europa Nova, Bucharest, 1996, p. 260.
[51] Louis Dumont, *Eseu asupra individualismului*, Anastasia, Bucharest, 1998, pp. 27-35.

"fair measure", in the sense of giving each He deserves it, as Aristotle said. Legitimacy, conceived as an adequate and fair measure, is the expression of the principle of proportionality[52].

The role of the state is another area of application of the principle of proportionality. The state cannot do them all, nor is it good to do them. There are objective limits to state activity, which result from the nature of things. The most important criterion for determining these limits is the principle of proportionality. In this regard, J.J. Chevallier states that social activities must, as far as possible, escape the influence of the state, which must reduce its interventions to what is strictly necessary, which means the adequacy (proportionality) of the measures adopted by the state for the purpose pursued, namely maintaining order and ensuring law enforcement. At the same time, it is better for the market and the initiative to be diffuse, spreading throughout the social body, than to be concentrated in a single body that has an exorbitant power. The balance of the social system is all the better ensured as it results more from the free play of the natural laws of functioning and not from a state regulation that risks falsifying and distort them.

3. Conclusions

The application of the principle of proportionality results in the concretization of the legal norm, the legitimacy of which is given by the fair application to each particular case or situation. At the same time, by this principle the individual is not subsumed to the general, the latter expressed by the legal norm, but has its own legitimacy, which imposes a different relationship than the logical-formal one, which confers existence and necessity only to the general. Therefore, the principle of proportionality used in its philosophical meanings imposes the right adequacy of the rule of law (of the general) to the individual who is essentially man in all his existential determinations. Thus, the legal norm is not only "legal" but also legitimate.

The question is whether the understanding of proportionality, by reference to the general principles of law, in particular, the idea of justice, justice and fairness is relevant to contemporary law and especially to constitutional law. We consider that the answer is in the affirmative, for the following reasons:

Law cannot be reduced to a positivist or normative dimension, which, we must admit, dominates the contemporary legal reality. Not every right is expressed by the rules. Therefore, the reference to principles, including the principle of proportionality, is likely to give value to normative regulations. Moreover, the application of legal norms to the diversity of individual cases cannot ignore the idea of justice, of equity, in the sense that the application of the norm must be adequate to the concrete situation, which means the observance of the principle of proportionality.

From the perspective of the idea of justice, the principle of proportionality is also important for constitutional law. The constitution is "the political and legal establishment of a state"[53]. "Moreover – says Ioan Muraru – a constitution is viable and efficient if it achieves the balance between citizens (society) and public authorities (state) on the one hand, then between public authorities and of course even between citizens. It is also important that the constitutional regulations ensure that public authorities are at the service of the citizens, ensuring the protection of the individual against arbitrary attacks by the statute against his freedom"[54]. It does not limit itself to regulating only the exercise of power. It also regulates the principles that govern society. Thus, art. 1 para (3) of the Romanian Constitution enshrines justice as the supreme value of the state and society. The term "justice" is equivalent to the principle of justice and implies proportionality. Aristotle stated that "justice is a middle term"[55], which explains why the principle of justice has a regulatory role in the application of law.

Taking this idea into account in contemporary doctrine, it has been stated that: by limiting them. It therefore has a positive role, because it ensures social cohesion and a negative one, because it ensures that none of the other principles become predominant"[56].

Schleiermacher's words are still valid today, including for any actor in the field of law: "Every scientist must philosophize in order not to remain only a crossing point of a tradition that is transmitted through him, a collector of material, because whatever representation in which neither principles nor connections are seen, it is only a material".

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THE PRINCIPLE OF EQUAL RIGHTS: CONCEPT AND REFLECTION IN THE CASE LAW OF THE CCR

Elena ANGHEL [*]

Abstract

In this study I aim to analyze the constitutional principle of equality of rights, starting from the concept. Equality is an objective law principle, is also a subjective public law right and, more than that, as qualified in the doctrine[I], is a "fundamental right with the value of a general principle for the field of fundamental rights". Equality "is rather considered as a principle right than as a law principle", because it accompanies and guarantees the use of the other rights.

On the other side, equality has also been interpreted as a distinct set of rights, composed of different specific realities. In its general form, equality resides in each citizen's right of not being subjected to discrimination and of being treated equally, both by public authorities and by the other citizens. This is about an "equality in rights", opposed to the concept of "actual equality" because the lawgiver provides an equal juridical framework for all citizens, ascertaining a formal equality, but he cannot guarantee equal results.

The jurisprudence of the Constitutional Court underlined the other perspective: the material equality, actual equality or equality by law, which refers to all concrete cases, considering the existent differentiations and aiming for a concrete equality of the results. As we`ll notice, the Constitutional Court analyzed equality also as a possibility of admitting a right to difference in case of different legal situations.

Keywords: *equality, principle, right, constitutional, discrimination.*

1. Introduction

No matter how different people are in terms of sex, race, nationality, language, religious belief, they all carry the same essence. Equality is an innate and inherent right of the human being. The definition of this innate right by normative acts represents only the necessary legal form by which equality takes meaning, and not the act of birth.

Professor Gh. Mihai refers to a principle of "anthropological" equality: "people are equal in the sense that no one is more or less a biopsychosocial being, in any way; this qualitative equality would lead us to identity, because people are essentially identical"[1].

But as poetic as the definition of The Declaration of the Rights of Man and Citizen 1789 is - "*men are born and remain free and equal in rights*"-, throughout life, they feel differently, act differently and valorize differently, therefore, natural equality described above remains only a concept to refer to. It is true that a relative identity of individuals can be nourished by their belonging to a certain human community, which delivers over them common ideologies and beliefs springing from a unique culture, religion or moral, but man goes through his own life experience, distinct of that of his peers.

The aim pursued by means of this study is that, starting from the concept of equality, to analyze the evolution of the constitutional principal of equality in the case law of the CCR[2].

2. Paper content

Human beings have certain rights simply because they are human, not because they are Jewish, Catholic, Protestant, German, or Italian[3]. However, as we have shown above, human beings valorize differently abstract equality of opportunity and abstract freedom of choice. We are born with a common biological background, but each of us consolidates his own traits, aspirations, values. Even though we are similar in the values we receive, we are different in the valorizations we make. There is no universal, perfect, timeless and aspatial moral model[4].

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[I] Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 1999, p. 4.

[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, p. 185.

[2] For detailed and exhaustive analyzes of the review of constitutionality performed by the CCR, see I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019; I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

[3] Otfried Hőffe, *Principes du droit*, Les éditions du Cerf, Paris, 1993, p. 65.

[4] For more, see E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

According to Simina Tănăsescu[5], equality is "a fundamental right with the value of a general principle for the matter of fundamental rights", a guarantee right and, at the same time, an objective principle of law concerning the balance of life, being considered "rather as a right of principle that as a principle of law", due to the fact it accompanies and guarantees the exercise of the other rights. As a right to equal rights, the principle of equality has a content enhanced by the content of the fundamental rights accompanied by it.

Therefore, the principle of equality is analyzed in the doctrine as a consequence of all the other rights, as it secures the full and non-discriminatory fulfillment thereof. The concept of "equal rights" concerns all the rights of citizens, whether or not defined in the Constitution or other laws[6]. In this respect, equality is assigned an essential feature: it has the role of strengthening the effectiveness of the other citizen's rights.

S.E. Tănăsescu highlights the fact that, in the field of the law, the standard called principle of equality is one of the most polymorphic principles of positive law. The author analyzes the options available to the legislator: either he resorts to a formal legal equality, thus establishing an equality by right of all subjects, or he supports his reasoning on a material equality, which aims at an equality of results.

Formal equality of opportunity is the one inspired by the famous formula defined by the Declaration of the Rights of Man and Citizen: "men are born free and equal in rights". By reprobating the inequalities enshrined in feudal law, French Revolution of 1789 proclaimed equality, freedom and fraternity among its commandments, being subsequently taken over and regulated as fundamental principles of law. The law has thus become a guarantor of the fulfillment of equal opportunities for human beings.

Natural equality starts from the premise that people are born equal by right, ignoring the reality that they are not equal in fact. The doctrine points out that "the famous natural equality does not identify itself *eo ipso* with legal equality": if positive law were an accurate reflection of natural law, legal equality should require the legislator not to discriminate against nature. The legislator strives to establish an equal legal framework for all citizens, the latency to universalism of equality taking meaning by means of the general legal norm.

However, by legally enshrining equal opportunities, the legislator cannot guarantee equal results, because inequalities in fact are inherent in social life. The fact that the law cannot establish privileges and discrimination does not mean that it can remove inequalities existing in social life, by ensuring mathematical equal treatment. Therefore, the concept of equal rights is purely formal, it remains at a superficial level of the prohibition of discrimination[7], as "this framework has only the vocation to universalism; it cannot cover all subjects of law at the same time".

Material equality is situated at the opposite pole, de facto equality or equality by law, which descends from the abstract of the general and impersonal legal norm and focuses on concrete cases. Taking into account the existing natural differences and pursuing a concrete and fair equality of results, material equality "rejects the vocation to universalism of the principle".

By giving expression to the requirements regarding the generality and impersonality of the legal norm, the law can only provide a virtual equality of opportunity for the members of the society. If the identity of the legal norms that define equality is a natural and necessary reality, the equal treatment under the law is inconceivable, social life not being able to produce perfectly identical situations, but at most similar. In this background, a rigorous identity of the legal treatment applicable to different situations would be discriminatory, unequal, so that a differentiated equality must exist behind formal equality. "In order to compensate for the inequalities inherent in social life, equality redistributive discriminations are needed", according to Simina Tănăsescu. These positive discriminations, which the material equality itself postulates, have a corrective role, aiming at repairing de facto inequalities or reducing certain existing legal inequalities, materialized in (negative) discriminations that certain categories of persons endure.

This perspective which implies not only a vocation to equality, but an effective, tangible equality able to diminish the inequalities inherent in social life, as well the establishment of certain obligations on public authorities[8], has rarely been adopted by the Romanian constitutional judge.

Therefore, by means of **Decision no. 27/1996**[9] , the CCR noted that the wording of art. 16 para. (1) of the Constitution, corroborated with that of art. 4 para.

[5] See Simina Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publishing House, Bucharest, 2003. See also, Tudorel Toader și Marieta Safta, *Constituția României*, 3rd ed., Hamangiu Publishing House, Bucharest, 2019.

[6] To have a view on the principle of equality in the Romanian Constitution of 1866, see C. Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, p. 288.

[7] We point out an interesting study regarding discrimination in our times, please see Marta-Claudia Cliza, *What Means Discrimination in a Normal Society with Clear Rules?*, published in LESIJ - Lex ET Scientia International Journal, no. 1/2018, vol. XXIV, pp. 89-99.

[8] For more information on public authorities in Romania, please see Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ. Editie revizuita conform modificarilor Codului administrativ*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 7-22.

[9] CCR Decision no. 27 of 12 March 1996 on the ruling on the second appeal against CCR Decision no. 107 of 1 November 1995.

(2) of the Fundamental Law, refers to prohibited discrimination, not to admissible discrimination, therefore to "negative discrimination" not to "positive discrimination", taking into account the specificity of certain situations or the purpose of achieving distributive justice, in order to nullify or reduce objective inequalities. Furthermore, the aforementioned constitutional wording aims at equality between citizens as regards the recognition in their favor of certain rights, not the identity in legal treatment as regards the exercise or fulfillment of those rights. This explains not only the admissibility of a legal treatment which is different and privileged compared to certain categories of persons, but also the necessity hereof.

Essentially, equality, in its general wording, lies in the right of every citizen not to be subject to discriminations and to be treated on equal footing, both by public authorities[10], and by the other citizens. Notwithstanding, Tudor Drăganu distinguishes between equality in subjective rights and equality in the exercise of such rights. Therefore, it is shown that equality has two dimensions: an ideal dimension, defined under the law, equality as an intangible right and a technical dimension, by which equality acquires substance in the exercise of subjective law, as the case may be.

The principle of equality has been the subject of great resizing in the case law of the CCR. Therefore, the construction given by the Constitutional Court to the principle of non-discrimination has evolved from a strict conception according to which equality means non-discrimination, and the criteria of appreciation are those expressly provided by the aforementioned wording, to an extensive conception according to which discrimination is not necessarily the opposite of equality, only arbitrary discrimination being prohibited. By means of **Decision no. 26/1995 on the settlement of the second appeals against Decision no. 1/1995 ruled by the Constitutional Court on 4 January 1995**, the Constitutional Court provided that the legislator is free to assess objective situations in social life but "he cannot exceed the constitutional limits thus established, because otherwise he would violate the provisions of the fundamental law". In addition, differences in situations must be based on the law.

The scope of the wording of art. 4 of the Constitution was considerably widened when the case law of the Constitutional Court marked out the idea that not only the non-discrimination criteria expressly provided in the fundamental law must be complied with; all arbitrary exclusions of subjects of law shall be deemed discriminations. Therefore, according to Simina Tănăsescu, "within the categories set out by the law, the legislator shall not create discrimination between categories, but differences are possible or even necessary".

The doctrine points out that "any act that tends to degrade or enslave certain categories of persons due to such criteria is an act that threatens the universality of man, an act that tends to exclude from the human race some beings who have an inalienable right to belong to it". It is considered that human dignity, the supreme value of society, is the one to oppose to both differentiation for exclusion, and to assimilationist identity. Human dignity prescribes unity in diversity, thus reconciling freedom with equality.

The evolution of the constitutional case law reveals two distinct tendencies: on the one hand, there has been stated that equality should not be defined by opposition to discrimination, but by reference to that of difference; on the other hand, equality does not mean uniformity, but rather proportionality.

Therefore, in the first stage of the evolution of the concept in terms of the case law, a relative version of the principle of equality was admitted, stating that equality does not mean uniformity. Equality does not mean equal treatment in all situations; equal treatment must correspond to equal situations, but in different situations there may be different treatment.

By means of **Decision no. 70/1993**, the Constitutional Court, notified to rule on the unconstitutionality of art. 11 para. (1) and (2) of the Law on accreditation of higher education institutions and diploma recognition, which established the possibility for the students of a state higher education institution to continue their studies within both state and private institutions, while para. (2) established that the students of a private higher education institution can continue their studies only within institutions of the same nature, namely private, noted that: "special situations in which the students from the two types of higher education institutions find themselves have also determined different solutions of the legislator, without violating the principle of equality, which, as we have already mentioned, does not mean uniformity. In other words, the principle of equality does not challenge the possibility of a law to establish different rules in relation to persons who find themselves in special situations".

Subsequently, the Constitutional Court reconsidered its case law, by admitting not only the possibility, but also the need to establish a different legal regime in different situations. Therefore, it was established that "equal treatment must correspond to

[10] E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

equal situations; in case of different situations legal treatment can only be different". However, in the latter case, there must be an objective and reasonable justification, so that there is no obvious disproportion between the aim sought by the unequal legal treatment and the means employed.

In the light of these considerations, we note that the limits of the constitutional principle of equality have varied between strict equality, sometimes assimilated with non-discrimination and relative equality, which accepts and subsequently claims a differentiation of legal treatment for different legal situations. By postulating that legal equality in subjective rights does not mean an equal measure for different situations, the court of constitutional control confirmed the need for the right to apply different treatment for situations which, by their nature, are not identical.

There was only one step from the admission of a right to differentiation to the definition of a new fundamental right, the right to difference, "as an expression of the citizens' equality before the law, incompatible with uniformity". By means of **Decision no. 107/1995 on the constitutional challenge of art. 8 para. (1) of Law no. 3/1977**, the Constitutional Court provided that "it is generally held that the violation of the principle of equality and non-discrimination occurs when different treatment is applied to equal cases, without an objective and reasonable justification or if there is obvious disproportion between the aim sought by the unequal legal treatment and the means employed. In other words, the principle of equality does not prohibit specific rules in the event of different situations. Formal equality would lead to the same rule, despite the difference in situation. Therefore, real inequality that results from this difference may justify distinct rules, depending on the purpose of the law they are contained in. This is why the principle of equality leads to the emphasis on the existence of a fundamental right, the right to difference, and provided that equality is not natural, to impose it would mean to establish discrimination".

In its case law, the CCR has ruled that when the criterion according to which a legal regime is applied is objective and reasonable and not subjective and arbitrary, being established by a certain situation provided by the hypothesis of the norm, and not by the belonging or quality of the person, the application of which depends on, therefore *intuitu personae*, there is no ground for the classification of the regulation subject to control as discriminatory, therefore contrary to the constitutional norm of reference[11].

In the same respect, we mention the constant case law of the ECtHR, which provided, in the application of the provisions of art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition of discrimination, that any difference in treatment committed by the State between individuals in similar situations without an objective and reasonable justification shall represent an infringement of these provisions (for example, by means of Judgment of 13 June 1979, ruled in case Marckx v. Belgium, and by Judgment of 29 April 2008, ruled in case Burden v. The United Kingdom). Furthermore, by means of Judgment of 6 April 2000, ruled in case Thlimmenos v. Greece, the European Court of Human Rights provided that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification (such as Judgment of 28 October 1987, ruled in case Inze v. Austria), but also when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different (**Decision no. 545 of 28 April 2011, OJ no. 473 of 6 July 2011**).

The ECtHR provided that a difference of legal treatment is discriminatory if it has no objective and reasonable justification[12], this means that the aim sought is not legitimate or that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized (in this respect, see judgments ruled in cases "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, 1968, Marckx v. Belgium, 1979, Rasmussen v. Denmark, 1984, Abdulaziz, Cabales and Balkandali v. The United Kingdom, 1985, Gaygusuz v. Austria, 1996, Larkos v. Cyprus, 1999, Bocancea and others v. Moldova, 2004). Furthermore, in accordance with the case law of the same Court of Human Rights, the States benefit from a certain margin of appreciation in deciding whether and to what extent the differences between similar situations justify a legal treatment, and the aim of this margin varies according to certain circumstances, scope and content (in this respect, see judgments ruled in cases "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, 1968, Gaygusuz v. Austria, 1996, Bocancea and other v. Moldova, 2004) (**Decision no. 190 of 2 March 2010, OJ no. 224 of 9 April 2010**).

Following the assessment of the aforementioned case law, we note that, despite the vocation for universalism of natural equality, legal equality is not an absolute principle. The following are considered **limits**

[11] Decision no. 192/2005.

[12] Please see Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului*, Hamangiu Publishing House, Bucharest, 2019, pp. 180-181.

of the constitutional principle of equality: the principle of non-discrimination[13] and the principle of proportionality.

Paragraph (1) of art. 16 is correlated with the constitutional provisions of art. 4 para. (2), which established the criteria of non-discrimination, namely race, national or ethnic origin, language, religion, sex, political opinion or affiliation, property or social origin.

The principle of non-discrimination entails two possibilities of conception: in the narrow sense, it concerns the protection of persons against any restriction or preference in the exercise of the rights and freedoms enjoyed by other persons for reasons of identity; in the broad sense, combating discrimination[14] involves taking special measures in favor of disadvantaged groups. We thus distinguish between negative and positive discrimination.

In what concerns the concept of "negative discrimination", this must be understood as an unjustified, illegitimate, arbitrary differentiation. By the constitutional definition of the equality before the law, the legislator is prohibited to introduce arbitrary discriminations between different categories of addressees in the content of the norm. According to art. 2 para. (1) of GO no. 137/2000 on preventing and sanctioning all forms of discrimination, republished, discrimination shall mean "any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life".

In addition to the State's obligation to abstain, public authorities are required in certain circumstances to adopt positive measures in order to secure equal treatment. In what concerns "positive discrimination", sometimes called compensatory inequality, art. 2 para. (9) of GO no. 137/2000, republished, provides that "measures taken by public authorities or by legal entities under private law in favor of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disfavored groups, shall not be regarded as discrimination under the ordinance herein". The aforementioned normative act defines in art. 4, the concept of disfavored category as the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to their social origin or is facing rejection and marginalization.

The Treaty on European Union also provides on "positive discrimination", specific right being recognized for children, elderly and disabled persons. A constant concern of the Union is to ensure equality between men and women, in this respect art. II-83 para. (2) of the Treaty provides that "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.".

The establishment of special measures to protect disfavored categories (women, minorities, disabled persons or HIV infected persons) is a necessary redistribution of formal equality, a remedy against discrimination.

3. Conclusions

Equality valorizes the whole system of law, representing the foundation of the European construction, along with universal ideas such as human dignity, freedom, solidarity, democracy. The European rule of law model is a liberal model, structured around the idea of respecting and defending fundamental rights[15]. In this respect, the Preamble of the Treaty Establishing a Constitution for Europe defines equality and the other inviolable and inalienable human rights as universal values inspired by Europe's cultural, religious and humanist heritage.

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[13] For more see E.E. Ștefan, *Opinions on the right to nondiscrimination*, in CKS e-Book 2015, pp. 540-544, available online at http://cks.univnt.ro/cks_2015/CKS_2015_Articles.html, Public law section.

[14] For a specific perspective, see C. Ene-Dinu, *Discriminarea și libera circulație a lucrătorilor în lumina dispozițiilor art. 45 din Tratatul privind funcționarea Uniunii Europene*, in Revista de Drept Public no. 1-2/2021, pp. 145-150.

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EVOLUTION OF SUCCESSION IN ROMAN LAW

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Abstract

At the beginning, the Romans did not accept the idea that patrimonial rights could be passed on to each other, neither by acts inter vivos, nor by the cause of death. Therefore, they considered that, upon the death of the person, the patrimonial rights are extinguished and by taking possession of the succession, the inheritors did not acquire the same rights, but a new right of property. This concept of property-power has also been reflected in terminology, proof that the oldest term by which the inheritor was appointed is "heres", and it comes from the word "herus", meaning owner. Later, it has been admitted that the patrimonial rights of the person pass over to the inheritors, and from that moment in the Roman legal terminology, the terms of succession and successor have appeared.

In Roman law succession evolved under the influence of 2 trends.

A first trend is the decline of formalism. Originally, inheritance deeds required the observance of extremely complicated formal conditions. For example, the first Roman testament, calatis comitiis, took the form of a law voted by the people. In time, the principle of autonomy of will was accepted, so that towards the end of classical roman law, the will could be drawn up by a simple manifestation of will.

The second trend concerns the protection of blood relatives. For a long time in the Roman law, agnation (civil kinship) was the only foundation of inheritance, so that only civil relatives could come to the succession. Towards the end of the Republic, a series of reforms were initiated in order to protect the blood kinship in succession, and during the time of Emperor Justinian, the old system was completely abandoned, and blood kinship (cognation) became the sole foundation of the inheritance.

Keywords: *succession, roman, formalism, civil kinship, blood kinship.*

1. Introduction

Succession means the transfer of the estate of a decedent, named *de cuius*, to certain living individuals, designated as heirs. The succession was opened by the death of the person, and the call to inheritance of those entitled was made either by an act of last will of the decedent, also called testament, or under the law.

The Romans established **3 succession systems**: succession called *ab intestat* was divided under the Law of the Twelve Tables; testamentary succession was deferred on the basis of a will; the third system of succession – the succession deferred against the will – was rather a disinheritance that had to be performed with the observance of certain formalities.

In terms of legal and testamentary succession, the Romans gave preference to testamentary succession, always seeking to construe the will of the testator in order to produce the legal effects sought by him. Two fundamental principles of the Roman law of succession lay as a testimony in this respect. The first principle provided that nobody could dispose in a will only a part of its property leaving the distribution of the rest to the rules of intestacy (*nemo pro parte testatus pro parte intestatus decedere potest*). This meant that legal inheritance could not be opened along with testamentary inheritance, so that the testator disposed by will only a part of his estate, the one determined as pro parte heir collected the whole inheritance[1].

The second principle is *semel heres semper heres* (once the heir, always the heir). Therefore, the determination of heirs was not allowed until a certain term, this being considered to be done forever due to the fact succession is a way of acquiring property, and the right to property is perpetual and not temporary.

According to civil law, the law applicable to Roman citizens, upon the death of a person, the heir who accepts the succession takes possession of the entire estate of the decedent, by continuing his personality. Therefore, the heir replaced the decedent in all his rights and took over both his assets and receivables (succession assets), and his outstanding debts (succession liabilities).

In the doctrine, the idea of continuing the personality of the decedent was explained by the fact that the owner of all goods is the patriarchal family, not the individual. The head of the domus is only an administrator of the goods, and his death does not entail a devolution of the property, in the contemporary sense of the term. According to the rules of agnation, there is a replacement of the one who leads the destinies of the human group united on the basis of the connections of paternal power; the son who succeeds (takes the place

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[1] Emil Molcuț, *Drept privat roman. Terminologie juridică romană*, ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2011.

of) *pater familias* is a *heres necessarius* (necessary heir) and at the same time *heres suus* – meaning one's own and necessary heir, being co-owner of the goods since life. The family never dies, but some of its members take care in turn to perpetuate the cult of the forefathers[2].

2. Paper content

As we have already mentioned above, the Roman law of succession has evolved under the influence of two tendencies: the tendency of the decline of formalism and the tendency of the protection of kinship by blood. While the old civil law imprinted on the institutions of succession law the same formalist nature found in the origin of all Roman legal institutions, praetorian law was the one to ensure the evolution of successions, by removing formalism and by calling to inheritance kins (cognates), together with civilian relatives (agnates)[3].

Therefore, in in the system of the Law of the Twelve Tables, heirs were called to the *ab intestat succession* in three classes:

a) **Sui heredes** were those to become *sui iuris* at the death of the pater familias: sons, daughters, women married with *manus* (who inherited as daughters), adopted and adrogated children, grandchildren of sons only when their father had preceded the grandfather, in which case they inherited by representation and collected the part that would have been due to their father. These successors were called *heredes necessari*, because they could not refuse the inheritance, given that they had owned the estate since the lifetime of de cuius.

Emancipated children were not called to inherit, due to the fact they ceased to be under parental authority under the act of emancipation.

b) **Adgnatus proximus** designated the closest collateral relatives, namely brothers, cousins, fraternal nephews or cousins (in matters of succession, the term of agnates refers only to collateral relatives). They inherited only if there were no first-class heirs. If there were several agnates of the same rank, the inheritance was divided by heads. This category was not fixed, but mobile, because in the absence of closer agnates, very distant collateral relatives inherited. Notwithstanding, the Law of the Twelve Tables provides that when the closest agnate disclaims the succession, it will not belong to the next agnate, but the succession becomes vacant[4].

c) ***Gentiles*** (members of the gens) inherited if there were no *sui heredes* or collateral relatives and divided the inheritance in equal parts, as a reminder of the time when the members of the gens exercised collective ownership over the land.

We note that the system of the Law of the Twelve Tables did not take into account the cognatic kinship, thus excluding from inheritance the emancipated children and other blood relatives *(cognati*) so that it became inapplicable at the end of the Republic, when marriage without *manus* and children's emancipation practice are generalized. By means of the reforms established in order to remove these injustices, the praetor established new rules on succession aiming to protecting blood relatives and to consolidating relationships between spouses within marriage without *manus*. In this way, the praetor laid the foundations of the praetorian succession (*bonorum possessio*) and created four classes of heirs, as follows:

a) bonorum possessio unde liberi included *all sons of the blood*, including those emancipated, as they came to inherit as blood relatives, provided that they made the report of the estate.

b) bonorum possessio unde legitimi *included agnates and gentiles*, who came to inherit only in the absence of descendants. At first sight, it would seem that, by means of this reform, the praetor confirmed the provisions of the Law of the Twelve Tables, but in fact, this is another case when the praetor made an innovation, given that if the closest agnate disclaimed the succession, it did not become vacant as provided in the system of the Law of the Twelve Tables, but passed on to the next category of heirs.

c) bonorum possessio unde cognati designated *blood relatives which were not civil relatives*, namely the mother and the children resulted from marriage without *manus*, who inherited each other as blood relatives.

d) bonorum possessio unde vir et uxor designated man and woman married *without manus*, which inherited each other only in the absence of civil or blood relatives (those married with *manus* inherited each other as civil relatives). Therefore, in the absence of heirs of the first three classes, the praetor designated the living spouse as heir (*vir et uxor*).

However, *bonorum possessio* granted to the one who was not called to inherit according to civil law was

[2] Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 214; For more about sources of law, see E.E. Ștefan, *Drept administrativ Partea I, Curs universitar*, 3rd ed., revised, completed and updated, Universul Juridic Publishing House, Bucharest, pp. 44-49.

[3] Also see I.C. Cătuneanu, *Curs elementar de drept roman*, Cartea Românească Publishing House, Bucharest, 1927; C.St. Tomulescu, *Drept privat roman*, Typography of the University of Bucharest, 1973; E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021; E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[4] Emil Molcuț, *op. cit.*, pp. 151.

a fragile possession. The praetorian heir was "assimilated" to the civil one, so that he did not acquire the quiritary ownership over the inherited assets, but only the praetorian ownership, and succession action established for or against him were not civil actions, but praetorian actions, with the fiction of the quality of civil heir.

The praetor's reforms were supplemented by imperial reforms. Therefore, by means of Tertullian *senatus consultum*, given in the time of Emperor Hadrian, mother came to inherit children from marriage without *manus*, in the capacity of legitimate relative, thus passing from the 3rd category to the 2nd category of praetorian heirs.

Subsequently, by means of Orfitian *senatus consultum*, given in the time of Emperor Marc Aureliu, children from marriage without *manus* were called to the succession of their mother in the capacity of children, being passed from the 3rd category to the 1st category of praetorian heirs.

Emperor Justinian initiated a series of reforms whereby blood kinship became the sole foundation of succession. Therefore, 4 categories of heirs were created: a) descendants; b) ascendants, full siblings and their children; c) blood brothers and sisters (from the same father, but not mother) / uterine siblings and their children; d) distant collateral relatives.

We have already mentioned above that the Romans gave preference to testamentary succession, given that the entire organization of the family and estate was based on the all-powerful role of the pater familias, who had to decide on the person entitled to inherit the estate after his death. If *pater familias* did not establish this by means of a last will, legal succession was opened.

The praetor also intervened in the matter of testamentary succession, in order to simplify the formalities that a will had to cover. Therefore, in ancient law, the Romans resorted to **calatis comitiis** in order express their last will, which took the form of a law voted by the people (the assembly of the people was *comitia curiata*). In this way, all the solemnities of the adoption of a law had to be observed: the testator expressed his last will before the people, and the people approved or rejected in the form of a law the respective manifestation of will. The doctrine showed that the role of the people was to approve a change in the ordinary legal order, according to which *sui heredes, adgnatus proximus* and *gentiles* were called to inheritance, in the order established by the Law of the Twelve Tables[5].

This solemn form of will had two disadvantages: it was accessible only to the patricians because they were the only members of the *comitia curiata*, an assembly that met only twice a year, on 24 March and 24 May.

The Law of the Twelve Tables established that the testator was free to make his last will, the *comitia curiata* becoming a simple collective witness of the elaboration of the deed.

In time of war, the soldiers could make their will in front of the army on the eve of battle, by means of **in procintu** will. This form of will entailed a solemn declaration of the Roman soldier made in front of the group of soldiers he was part of, and the members of the group acted as a collective witness. It was also accessible to patricians and plebeians, but only to those who were part of the legions of juniors and who were between 17 and 46 years old. Therefore, those who were over 46 and part of the legions of seniors could not use this form of will.

Another form of will, called **per aes et libram** (with bronze and balance) represents an application of mancipatory contracts *(mancipatio familia*) and evolved in 3 phases.

In the first stage, the testator passed on the estate by mancipatory contract to a person called *emptor familiae*. Certain agreements of good faith, called ***fiduciary agreements*** were subsequently concluded between the purchaser of the succession assets and the testator, whereby the testator showed *emptor familiae* how to distribute the estate. Therefore, the execution of the will depended on the good faith of *emptor familiae*, because he acquired the estate *with ownership title*, and fiduciary agreements were not sanctioned by law, therefore if the *emptor familiae* failed to execute the testator's last will, heirs had no action against him.

In view of these disadvantages, they moved on to the second stage – **per aes et libram public**: the emptor acquired the estate not with ownership title, but *in custody*, therefore if he failed to execute voluntarily, heirs had available actions against him. The disadvantage of this form was that the fiduciary agreements were concluded verbally, and the names of the heirs were known from the moment of drawing up the will, therefore, there could be heirs with the intention to accelerate the death of the testator.

This is why, they moved on to the third stage - **per aes et libram secret:** fiduciary agreements were concluded *in writing* and bore the seals of 7 witnesses, and the document was open only upon the death of the testator.

In order for a will to be validly drawn up, the testator, heirs and witnesses must have testamentary capacity, called **testamenti factio**. The testamentary capacity was of two kinds: active and passive.

Testamenti factio activa is the ability of a person to draw up a last will or to assist as a witness in drawing

[5] Grigore Dimitrescu, *Drept roman vol. II, Obligaţiuni şi Succesiuni*, Imprimeria Independenţa Publishing House, Bucharest, p. 353.

up a will. All those bearing *de facto* and *de jure* capacity had *testamenti factio activa*.

Those who lacked patrimony did not have the capacity of making a last will (sons of the blood, women married with *manus*, slaves; those who were struck by certain disabilities, such as insane, impoverished persons, prodigies, women). Notwithstanding, certain exceptions were admitted: state-owned slaves could dispose of half of their money by will; sons of the blood who were part of the Roman legions and had their own assets (*peculium castrense*) could dispose of them by will, in what concerns woman, as of the time of Emperor Hadrian, it was admitted that *sui iuris* woman who had own assets could made her last will, only with the permission of the guardian.

Testamenti factio pasiva was the capacity of a person to come to succession either as an heir, or as a legatee. All those bearing *de facto* and *de jure* capacity had *testamenti factio pasiva*, but it was exceptionally accepted that sons of the blood and slaves could also be entitled to inherit. Roman law allowed a slave to be entitled to inherit due to the fact that there were cases when the succession was burdened with debts and no other person would have accepted it; the slave, however, had no right to refuse the inheritance, thus acquiring his freedom by it.

The master's interest was that his estate to be sold at auction by creditors not in his own name, but in the name of the heir slave, so that the infamy that struck the insolvent debtor would not affect the memory of the deceased, but that of the heir slave. Secondly, a slave being established as heir, with no opportunity to refuse succession, the other provisions referred to in the last will were also saved (such as the appointment of guardians, the release of slaves etc.)[6].

In what concerns passive capacity of women, at first, woman could be entitled to inherit, but in order to end women's luxury, a law was passed in 169, the Voconia law, which established that woman was not entitled to inherit a patrimony with a value greater than 100,000 asses.

The person established as heir had to have capacity both at the time of drawing up the will and at the time of the testator's death. If the testator had not the capacity to make a will or if the formalities required by the law were not fulfilled, the will was void (*ruptum*).

In what concerns succession deferred against the will, Roman law considered that as the testator could establish the descendants as his heirs, just as well he could disinherit them, provided that certain solemn forms were fulfilled.

Therefore, sons of the blood had to be disinherited individually, by specifying the name of the disinherited son ("my son Filip to be disinherited"); otherwise, if the solemn forms were not observed, the will was void (*ruptum*). Therefore, *heredes sui*, co-owners of the family estate, could not be tacitly deprived of this quality, but by means of an express act, which would be the obvious materialization of such a will on the part of the head of the family[7].

Moreover, the doctrine states that, at the time when the will was made before the assemblies of the people, such an express disinheritance could, if it had been unjust, be rejected by their vote, while a simple omission, caused by the negligence of those called to discuss and approved the will, could be unfair to legal heirs[8].

Daughters and grandchildren could be disinherited in general terms ("all the others to be disinherited"). Those disinherited without observing the solemn forms could still acquire a part of the inheritance by amending the will so that to acquire a share of the succession.

3. Conclusions

The full freedom of the testator's will, defined in the Law of the Twelve Tables, was gradually restricted. To the end of the Republic, there was a practice of challenging before the centumviral court the wills made in favor of strangers, considering that the testator would have violated the *de officium* obligation to his close relatives, namely the obligation to love his descendants, ascendants, brothers and sisters. Therefore, the descendants disinherited in observance of the solemn forms were entitled to file a special action– *querela inofficiosi testamenti*, by which they obtained the annulment of the will in view of the fact that the testator was not in full command of his mental faculties.

The action could be filed by ascendants, descendants, as well as by brothers and sisters, relatives that had been disinherited in favor of strangers and considered unworthy (such as infamous persons). If they won the lawsuit, the will was annulated and the legal succession was opened.

However, there were certain cases that justified the disinheritance of the descendants (such as patricide

[6] Vladimir Hanga, Mircea Dan Bocşan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 222.

[7] Also in Mesopotamian civilization, disinheritance was permitted – "Disinheritance of children was not allowed except by judicial act. The father had to justify his desire to exclude a son from the succession by proving serious misconduct, and the judge then pronounced decree cutting off that son from family rights", please see Laura-Cristiana Spătaru-Negură, *Legal Sanction in Ancient East*, in CKS Proceedings CKS (Challenges of the Knowledge Society), 2010, vol. I, Pro Universitaria Publishing House, Bucharest, p. 993, http://cks.univnt.ro/cks_2010_archive.html.

[8] Vladimir Hanga, Mircea Dan Bocşan, *op. cit.*, p. 226.

attempt), but these were not listed, but were left to the discretion of the court. In order to end contradictions, Justinian listed all the cases that justified the disinheritance of the descendants, as well as the cases that justified the filing of the complaint.

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RIGHT TO A FAIR TRIAL IN THE CONTEXT OF CLASSIFIED INFORMATION. A SURVEY IN THE LIGHT OF CCR'S CASE-LAW

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Abstract

The paper intends to analyze the issue of respecting the right to a fair trial in the situation where the effectiveness of the defence depends on documents containing classified information. There is a delicate issue regarding the vulnerability of guarantees of the right to a fair trial in order to ensure the right of defense, given that the parties' lawyers should have access to all the evidence in the file. Obtaining an ORNISS certificate is the solution offered by law, but to really get one can be problematic. Based on various situations occurred during the proceedings, the whole legal regime of classified information and its influence on the conduct of the trial, in the qualitative requirements of fairness imposed by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms, have been subject to the constitutional review exercised by the CCR. This article aims to summarize the case-law of the Constitutional Court, drawing the appropriate conclusions from it, in order to find the most efficient way to harmonize the need to protect the national security by classifying certain pieces of information with the right to access to public information and with the constitutional and conventional imperative of respect for the right to a fair trial.

Keywords: *Right to a fair trial, Classified information, Right to defence, Constitutional review, Constitutional case-law.*

1. Introduction

The right to defence, as an indispensable part of the right to a fair trial, cannot be fully accomplished unless the parties involved in the trial, as well as the trial judge and the prosecutor are able to know in full the contents of the file, including all the evidence it contains. However, there are situations where some important documents on which the accusation is based fall into the category of classified information and are therefore subject to a special regime regarding access to their content. It is about that information, data, documents of interest for national security, which, due to the levels of importance and the consequences that would occur as a result of unauthorized disclosure or dissemination, are protected by law, access to their content being allowed only to certain persons, which meet the conditions strictly provided by Law no. 182/2002 on the protection of classified information[1].

In such cases, there is an issue regarding violation of the principle of equality of arms in the process, for the party unable to read all the information in the file, due to the fact that it does not meet the standards of trust required by law to allow access to this kind of information. For this party, the right to defence remains only illusory and theoretical, contrary to the requirements established by art. 21 para. (3) of the Romanian Basic Law and those established by art.6 para. 1 of the ECHR and Fundamental Freedoms, as well as by the case-law of the ECtHR, which shows that it should have sufficient guarantees to make it concrete and effective.

Even if it generates intense tensions, this issue has not been the subject of analysis of doctrinal studies and has been limited to the jurisdictional area, where a number of courts have faced the issue of providing a fair balance between the need to ensure access to information and, subsequently, the right of defence of the parties to the proceedings - on the one hand - and the interest in protecting national security and safety - on the other. In order break this vicious circle, CCR was asked to analyse various aspects involved in the application of the provisions of Law no. 182/2002 in criminal proceedings, but also in civil or administrative litigation.

Through the solutions it rendered, the CCR brought necessary clarifications, highlighting the vulnerabilities of the legal provisions regarding the classified information, from a constitutional point of view. The present paper aims to make a synthesis of the wide and complex issues contained in its decisions and to underline the practical implications of the case-law of the Constitutional Court in this particularly sensitive matter.

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[1] Published in the Official Gazette of Romania, Part I, no. 248, April 12, 2002.

2. General overview of the legal framework referring to classified information

In a democratic society, where human rights and fundamental freedoms enjoy general respect and are granted both by state authorities and other subjects of law participating in social life, free access to information of public interest, with its multiple implications in the legal field, is essential to ensure a climate based on certainty and predictability, where all individual have the effective opportunity to evolve in accordance with their own aspirations, orienting their development according to clear and firm information landmarks.

The fundamental law of Romania enshrines in art. 31 para. (1) and (2) the right of access to information, stating that "The right of a person to have access to any information of public interest may not be restricted" and that public authorities have an obligation to ensure that citizens are properly informed about public affairs and on matters of personal interest. Also, art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, entitled "Freedom of Expression", regulates the right of everyone to freedom of expression, which includes freedom to hold opinions and to receive and share information and ideas.

As a consequence of the cited constitutional provisions, Law no. 544/2001 regarding the free access to information of public interest has been adopted[2]. It provides, in art. 1, that free and unrestricted access to any information of public interest is one of the fundamental principles that guides the relations between individuals and public authorities.

However, there are certain categories of information that go beyond the realm of the public interest, being in an area protected by law due to the fact that, by their nature and content, making such information public may harm crucial values, such as national security and safety. As a result, legislation has been enacted in many states to protect such information against espionage, compromise, or unauthorized access, sabotage, or destruction, while creating conditions for it to be distributed exclusively to those who are entitled to know them[3]. A study drawn by Transparency International UK's Defence and Security Programme[4], dated February 2014, made a detailed review of current legislation across 15 countries and the EU, namely Austria, Australia, Czech Republic, Germany, Estonia, Hungary, Lithuania, Macedonia (FYR), Mexico, New Zealand, Poland, Republic of South Africa, Slovenia, Sweden, United Kingdom and the European Union. The report has also analysed, at a certain level, the system in the United States of America and took a glimpse at the NATO information standards. Basically, it shows that the freedom of information (FOI) has been gradually gaining ground all over the world and this development is positive for raising the accountability and transparency of defence and security forces. Accordingly, national security and defence sectors, which are traditionally inaccessible, have to increasingly accommodate new values of transparency and accountability.[5]

Based on the study developed, the report draws the guiding lines regarding the good practice in secrecy classification legislation. Firstly, any restriction on right to information has to meet international legal standards which have to be also present in the applicable national legislation. Secondly, the authority to withhold or classify information needs to be well defined and has to originate from a legitimate source of power and be performed in line with procedures prescribed by published legal rules. Thirdly, the report states that information may be protected by classification and/or exempted from disclosure if there is a real and substantial likelihood that its disclosure could cause serious harm. Finally, if information is withheld there should be procedures accessible to all that allow for substantial review by independent bodies.[6]

The report makes some interesting findings, featuring the negative practices that some countries adopt. The Polish law, for instance, allows for eternal classification of certain sensitive data. To similar effect in Lithuania the classification period of state secrets can be extended by 10 years as many times as needed.[7]

Surprisingly, the study states that "Austria is perhaps the farthest behind global trends as it has failed to accommodate either the developments of the right of access to information or to introduce transparency measures into its classification system. The Austrian system is an anomaly in Europe since secrecy is still the default position and access to information is treated as an exception."[8]

The fore mentioned report also notices that „little is known about the information standards within NATO since not many documents on the subject are

[2] Published in the Official Gazette of Romania, Part I, no. 663 of October 23, 2001.

[3] See the explanatory memorandum to Law no. 182/2002 on the protection of classified information, available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=2517.

[4] *Classified Information A review of current legislation across 15 countries & the EU*, report available at http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf.

[5] *Idem*, p. 4.

[6] *Ibidem.*

[7] *Classified Information. A review of current legislation across 15 countries & the EU*, p. 5.

[8] *Ibidem.*

made public. However, from the few that are, a number of weaknesses in the system are highlighted. These include not defining rules of protection and thus making the system prone to arbitrary classifications, not listing the subjects which may require classification, and not developing an expiry of classification periods".[9]

In Romania, Law no. 182/2002 on the protection of classified information aims to protect classified information and confidential sources that provide this type of information and states, in this regard, that the protection of this information is done by establishing the national system of information protection[10]. At the same time, as established by art. 4 of the law, the main objectives of the protection of classified information are the protection of classified information against espionage, compromise or unauthorized access, alteration or modification of its content, as well as against sabotage or unauthorized destruction. It also aims achieving the security of computer systems and the transmission of classified information.

According to art. 15 b) of Law no. 182/2002, constitutes classified information "information, data, documents of interest for national security, which, due to the levels of importance and consequences that would occur as a result of unauthorized disclosure or dissemination, must be protected".

Moreover, the law expressly states that measures resulting from the application of the law are intended to prevent unauthorized access to classified information; to identify the circumstances as well as the persons who may endanger, by their actions, the security of the classified information; to guarantee that classified information is distributed exclusively to persons entitled to know it; to ensure the physical protection of the information, as well as of the personnel necessary for the protection of the classified information[11].

An landmark statement is contained in art. 3 of Law no. 182 of 2002, according to which no provision thereof may be interpreted as limiting access to information of public interest or ignoring the Constitution, the Universal Declaration of Human Rights, Covenants and other treaties to which Romania is a party, regarding the right to receive and disseminate information.

3. The institutional framework created in Romania to protect classified information

The complexity and importance of this area and the seriousness of the negative consequences that could result from compromising intelligence has required the creation of an institutional infrastructure to carry out the operations necessary to protect this type of information and those who come into contact with it. Precisely in view of the maximum importance of this area, it has been established that the entire activity regarding it will be carried out under the dome of the Supreme Council of National Defence, which will ensure the coordination at national level of all classified information protection programs[12].

Considering the legislation and practice in the matter developed in various other countries, Law no. 182/2002 prescribed the establishment of the Office of the National Register of State Secret Information (ORNISS) under the subordination of the Romanian Government. Together with the Office of State Secrets Surveillance within the Romanian Intelligence Service and the National Security Authority under the Ministry of Foreign Affairs, it implements the national standards for the protection of intelligence[13].

The Office of the National Register of State Secret Information organizes – among others - the lists of information in this category and the length of time for keeping the information in certain classification levels[14].

The national standards for the protection of classified information are established by the Romanian Intelligence Service, with the consent of the National Security Authority. An important provision sets that these standards must be in line with the national interest as well as with NATO criteria and recommendations. However, the law gives priority to NATO rules in the event of a conflict between them and internal rules on the protection of classified information[15].

4. Legal guarantees established in order to maintain the rule of law

The Romanian legislator has shown a democratic spirit in this matter, given that the rigidity and strictness of these legal provisions cannot be misused by the public authorities involved, because a system of guarantees has been imagined to counteract such non-democratic tendencies. As such, art. 20 of Law no. 182/2002 enshrines the right of any Romanian natural

[9] *Ibidem.*
[10] Art. 1 of the Law no.182/2002.
[11] Art. 5 of the Law no. 182/2002.
[12] Art. 14 of the Law no. 182/2002.
[13] As stated in the explanatory memorandum to Law no. 182/2002.
[14] See art. 14 and 21 of the Law no.182/2002. See, for practical details, www.orniss.ro.
[15] Art. 6 of the Law no. 182/2002.

or legal person to appeal to the authorities that have classified the respective information. The appeal may concern either the classification of the information itself, or the duration for which it was classified, or the manner in which a certain level of secrecy has been assigned. The appeal will be resolved in accordance with the law of administrative litigation.

Another guarantee likely to serve the realization of the right of free access to information consists in the fact that the declassification of the information classified as state secrets it is possible, by Government decision. Moreover, the law prohibits the classification of information, data or documents as state secrets in order to conceal violations of the law, administrative errors, limiting access to information of public interest, unlawfully restricting the exercise of certain rights or harming other legitimate interests. At the same time, information, data or documents related to a fundamental scientific research that has no justified connection with national security cannot be classified as state secrets. [16]

Access to state secret information is also allowed to other persons, but only on the basis of a written authorization, issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information.[17] This is the so-called "ORNISS certificate", which is issued on secrecy levels, following verifications carried out with the written consent of the person concerned. The validity of the authorization is up to 4 years. During this period the checks may be resumed at any time.

5. Control of constitutionality, as a means of ensuring fundamental human rights facing the requirement to protect classified information

5.1. The issue of access to classified information of the parties or their representatives (lawyers) in the proceedings

Probably the most difficult problem to overpass in terms of ensuring the proper confidentiality and integrity of classified data has been the need to balance national security concerns with granting citizens the right to a fair trial, when this kind of information is necessary to be exposed in order to find the truth and solve the situation in legal manner during a fair trial.

Issues regarding the clash between the fundamental right to access the information of public interest and the mechanism meant to protect the classified information were often brought in front of the Romanian courts. It has been argued that the right to a fair trial is endangered as the provisions of Law no. 182/2002 prevent persons who are parties to a trial from becoming aware of the content of certain classified documents, for the sole reason that they do not fall into the category of persons for whom a security certificate has been issued. The criticisms of unconstitutionality claimed that the legislative solutions implemented by the Romanian legislator through Law no. 182/2002 seriously violates the necessary balance between the need of the State to protect state secrecy and the rights and interests of the parties to the process.

In 2008, a few years after entering in force of the Law no. 182/2002, the Constitutional Court accepted[18] the fact that the said law contains specific rules on access to classified information of certain persons who have the status of parties to a process, respectively provided that the security certificate is obtained, and must be met in advance the requirements and the specific procedure for obtaining it, provided by the same law. The Court found that the criticized provisions of the law did not have the effect of absolutely blocking access to certain information, but conditioned it on the performance of certain procedural steps. These steps are justified by the importance of such information, the violation of the right to fair trial or the principle of uniqueness, impartiality and equality of justice for all. On the other hand, the Constitution itself provides, according to art. 53 para. (1), the possibility of restricting the exercise of certain rights - including guarantees related to a fair trial - for reasons related to the defence of national security.

The Constitutional Court considered that the strict regulation of access to information classified as state secrets, that establishes conditions that must be met by persons who will have access to such information, as well as verification, control and coordination of procedures that grant access to this information is a necessary measure to ensure the protection of classified information, in accordance with the constitutional provisions aimed at protecting national security[19].

Moreover, in its case-law[20], the Court has ruled that "it is the exclusive competence of the legislator to establish the rules of the process before the courts", as well as that "the legislator may establish, in view of

[16] See art. 4 para. 3 to para. 5 of the Law no. 182/2002.
[17] Art. 28 of the Law no. 182/2002.
[18] Decision no. 1120 of October 16, 2008, published in the Official Gazette of Romania no. 798 of November 27, 2008.
[19] *Idem*.
[20] Decision of the Plenum no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no. 69 of March 16, 1994 and Decision no. 407 of October 7, 2004, published in the Official Gazette of Romania, Part I, no. 1112 of November 27, 2004.

special situations, special rules of procedure and the ways for exercising procedural rights."

More recently, The Court noted[21] that the criticized legal provisions contained in Law no. 182/2002 do not exclude the access of lawyers to classified information that constitutes a state secret and, respectively, a service secret, this access being ensured under the conditions of Law no. 182/2002 and of the Government Decision no. 585/2002 for the approval of the National Standards for the protection of classified information in Romania[22]. In this sense, the analysed law provides, at art. 28 para. (1), that access to state secret information is allowed only on the basis of a written authorization, issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information. These provisions apply, according to art. 31 para. (3) of the same law, in the field of secret service information as well. In turn, Government Decision no. 585/2002 provides, in art. 33, that access to classified information is allowed, in compliance with the principle of the need to know, only to the persons holding a security certificate or access authorization, valid for the level of secrecy of information necessary for the performance of duties. Both of the above-mentioned normative acts regulate procedural norms for access to the two categories of information. However, all these legal provisions constitute means of access that guarantee to the different professional categories - therefore also lawyers - the access to all the information they need to exercise their legal role in the criminal process, including those regulated by the criticized text, constituting thus guarantees of the right to defence, access to justice and the right to a fair trial.

The Constitutional Court concluded that the strict regulation of access to classified information, including in terms of setting conditions that must be met by those who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the settlement. but it creates precisely the normative framework in which two conflicting interests - the particular interest, based on the fundamental right to defense, respectively the general interest of society, based on the need to defend national security - coexist in a fair balance, which gives satisfaction both legitimate interests, so that neither of them is affected in its substance. Consequently, the infringement of the rights of the defense and of a fair trial cannot be sustained.

5.2. The issue of access of judges to classified information during trials

5.2.1. Magistrates' access to classified information until 2013[23]

Quite soon after rendering the fore mentioned decision, the CCR dealt with an exception of unconstitutionality[24] raised *ex officio* during the same trial as the one in which it was raised and the previous exception. This time, the criticism of unconstitutionality was formulated in view of the possibility of the judge of the case to have access to the evidence in the file which represents classified information only after obtaining an ORNISS certificate. But the verifications performed regarding magistrates by an institution outside the judiciary would collide with the constitutional provisions regarding the competence and the role of the Superior Council of Magistracy. At the same time, one of the essential components of the professional conduct of judges is the observance of the obligation of confidentiality of this kind of documents. Also, the access of all parties to a fair trial must be viewed both from the perspective of an impartial court and from the perspective of equality of arms, which requires that all parties be able to defend themselves knowingly and may administer the evidence or have access to the evidence so as not to create a clear disadvantage for one of them.

Examining the objection of unconstitutionality, the Court noted[25] that the legal provisions on persons to have access to classified information, the protection of such information by procedural measures, their level of secrecy, and the prohibition of classifying certain categories of information or access to secret information state, does not represent impediments likely to affect the constitutional rights and freedoms, being in full agreement with the invoked norms of the Fundamental Law. Also, they do not rule out the possibility of the judge having access to state secret information, in compliance with the rules of procedural nature provided by law.

The Court considered that it could not be accepted that different categories of magistrates were created in the same judicial system. That is because, for reasons

[21] By Decision no. 805 of December 7, 2021, published in the Official Gazette of Romania, Part I, no. 247 of March 14, 2022, para. 21.

[22] Published in the Official Gazette of Romania, Part I, no. 485 of July 5, 2002.

[23] When Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the modification and completion of some normative acts that modified the provisions of art. 7 of Law no. 182/2002 on the protection of classified information, in the sense of introducing judges, prosecutors and assistant magistrates of the High Court of Cassation and Justice among the holders of the right of access to classified information constituting state secret, respectively service secret, provided and taking the oath.

[24] See, for a detailed analyze of the exception of unconstituionality as a way to contest the constitutionality of a norm by means of constitutional review performed by the Constitutional Court, Benke K., S.M. Costinescu, *Controlul de constituționalitate în România. Excepția de neconstituționalitate*, Hamangiu Publishing House, Bucharest, 2020.

[25] See also Decision no. 1335 of December 9, 2008, published in the Official Gazette of Romania, Part I, no. 29 of January 15, 2009.

of expediency, not all employees of an institution should obtain security certificates. On the other hand, the magistrates accredited to hold, to have access and to work with classified information, although they meet the requirements for appointment and professorship of the position they hold, in accordance with the provisions of Law no. 303/2004 on the Statute of Judges and Prosecutors, they are evaluated only from the perspective of honesty and professionalism regarding the use of this information. Thus, there can be no sign of equality between the criteria for appointment as a magistrate and those necessary to obtain authorizations for access to classified information, especially since for the latter the access is limited by compliance with the principle of need to know, given aspects of vulnerability or hostility as a result of pre-existing conditions (such as the relationship environment, previous workplace, etc.) and the indisputable loyalty or character, habits, relationships, discretion and lifestyle of the person concerned. It is natural to be so, because otherwise there is a risk of creating a breach in the national system of protection of classified information, which, unlike the specific activity of the act of justice, cannot be covered by invoking causes of incompatibility or recusal. As a result, the criticized regulations are a procedural remedy for situations in which the presumption of honesty or professionalism of the person who manages classified information is questioned.

In addition, the Constitutional Court stated that the statements of the said decisions are in accordance with the jurisprudence of the ECtHR. Thus, by the Judgment of February 9, 1995 in the *Vereniging Weekblad Bluf Case! v. the Netherlands*, the Strasbourg court ruled that access to public information may be restricted in order to protect the national interest, in accordance with the provisions of art. 10, para. 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which, for national security, territorial integrity or public safety, the protection of law and order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary. Therefore, in order to comply with the provisions of the Convention, the restrictions on freedom of information must meet the following conditions: a) be provided for by law; b) have a legitimate purpose; c) be necessary in a democratic society.

Also, in its judgment of 8 July 1999 in *Surek v. Turkey*, the ECtHR ruled that it was up to the State to decide whether and when it was necessary for certain information to remain confidential and, consequently, the State has a wide margin of appreciation in this matter.

In the present case, the Court notes that the restrictions on access to information are provided by law - Law no. 182/2002 -, have a legitimate purpose - the protection of classified information and confidential sources that provide this type of information, by establishing the national system of information protection - and are necessary in a democratic society.

5.2.2. Magistrates' access to classified information after 2013

Since 2013, the legislator's vision has broadened, opening up to a more efficient realization of the right to a fair trial, by consecrating a different legal regime for magistrates than the previous one. Thus, by Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the modification and completion of some normative acts that include criminal procedural provisions[26], the provisions of art. 7 of Law no. 182/2002 on the protection of classified information, in the sense of introducing judges, prosecutors and assistant magistrates of the HCCJ among the holders of the right of access to classified information constituting state secret, respectively service secret, provided and taking the oath[27].

The Constitutional Court noted that, although the explanatory memorandum of Law no. 255/2013 does not refer to the considerations that formed the basis of this legislative amendment, it aimed at ensuring access to classified information to the three categories of magistrates regulated by Law no. 303/2004 on the status of judges and prosecutors, in order to guarantee the speedy settlement of criminal cases. This legislative solution was possible considering the fact that the three categories of magistrates represent public positions and, regarding them, the provisions of Law no. 303/2004 provide for a procedure for the appointment and taking of the oath, the condition of the lack of criminal record and of the fiscal record, as well as the condition of the good reputation in order to be admitted to the National Institute of Magistracy.

Moreover, the Law no. 303/2004 stipulates in the task of judges, prosecutors, assistant magistrates and specialized auxiliary staff certain obligations that denote their ability to get acquainted without risk with

[26] Decision no. 1335 of December 9, 2008, published in the Official Gazette of Romania, Part I, no. 29 of January 15, 2009.

[27] Prior to this moment, the access to classified information that constitutes a state secret, respectively a service secret, was also guaranteed, under the condition of validating the election or appointment and taking the oath, for the following categories of persons: President of Romania; prime minister; ministers; deputies; senators. All other categories of persons were required to obtain an ORNISS certificate in order to have access to such information.

the content of classified information. It is about the obligation to give an annual statement on one's own responsibility stating whether the spouse, relatives or relatives-in-law up to and including the 4th degree are exercising a function or carrying out a legal activity or criminal investigation or investigation activities, as well as the place their work; the obligation to make an authentic statement, on one's own responsibility, according to the criminal law, regarding the affiliation or non-affiliation as an agent or collaborator of the security bodies, as a political police; the obligation to complete annually a holographic statement on one's own responsibility, according to the criminal law, showing that they were not and are not operative workers, including undercover, informants or collaborators of any intelligence service. Violation of these obligations is considered so serious that it is sanctioned with dismissal from the position held, respectively that of judge or prosecutor. All these declarations are registered and submitted to the professional file, respectively they are archived at the human resources department. Or, all the obligations previously shown are such as to guarantee the fulfilment by the magistrates of the conditions of honesty provided in art. 7 para. (1) of Law no. 182/2002. [28]

Unlike the magistrate positions shown above, according to art. 1 para. (1) of Law no. 51/1995 for the organization and exercise of the legal profession, the legal profession is free and independent, with autonomous organization and functioning, under the conditions of the aforementioned law and the status of the profession, but the obligation to give such statements is not provided in the task lawyers. Considering the differences in the regulation of the conditions of good reputation and dignity, respectively, in order to occupy the position of magistrate, respectively to hold the profession of lawyer, the guarantees of honesty that magistrates present through the annual statements they give, as well as the different nature of the two professions (civil service and liberal, respectively), the Court noted that the different legal regime provided by the legislator regarding the two professional categories for access to classified information is based on objective and reasonable criteria, which justify the procedure for verifying the honesty of lawyers, prior to granting access to classified information. [29]

5.3. The access of the parties and their defenders to the classified information starting with 2018

An admission decision of the Constitutional Court[30] radically changed the relationship of the parties or their lawyers with the evidence containing classified information, greatly facilitating their access. Thus, the Constitutional Court verified the constitutionality of the provisions of art. 352 para. (11) and (12) of the Code of Criminal Procedure, according to which, if the classified information is essential for solving the case, the court urgently requests, as the case may be, total declassification, partial declassification or transfer to another degree of classification. The court can also request allowing access to classified information for the defendant's lawyer, and if the issuing authority does not allow that, those pieces of classified information may not serve as a solution to a conviction, waiver or postponement of the sentence in question.

The exception of unconstitutionality resolved by the Constitutional Court was raised by the Prosecutor's Office attached to the HCCJ - National Anticorruption Direction, on the grounds that the right to a fair trial and the principle of equality before the law of citizens are violated because the legal norm allows the exclusion from criminal proceedings of evidence that constitutes classified information, as a result of an unreasonable and discretionary decision of the administrative authority that classified the information and refuses to declassify it or the defendant's defence counsel (lawyer) has access to it.

Given that the evidence is at the heart of any criminal case and that classified information, which is considered "essential to the resolution of the case", has probative value in criminal proceedings, on the one hand, and that the adversarial principle is an element of the principle of equality of arms and of the right to a fair trial, and on the other hand, that the legality of the administration of evidence has a direct influence on the conduct and fairness of criminal proceedings, the Constitutional Court held that the defendant must have access to classified information to combat or support with the accuser, the legality of the administration of this evidence. As such, at the end of the preliminary chamber proceedings, the evidence consisting of classified information and on which the court notification is based must be accessible to the defendant in order to ensure the possibility of challenging their legality. Only in such a situation can they substantiate a solution of conviction, waiver of the application of the sentence or postponement of the application of the sentence, adopted as a result of a fair criminal trial.

[28] Decision no. 199 of March 24, 2021, published in the Official Gazette of Romania, Part I, no. 640 of June 30, 2021, para. 15, 16 and 18.
[29] Decision no. 199 of March 24, 2021, para. 19 and 20.
[30] Decision no. 21 of January 18, 2018, published in the Official Gazette of Romania, Part I, no. 175 of February 23, 2018.

Thus, it is not the court of first instance that has to request, *ex officio*, as a matter of urgency, as the case may be, the total declassification, partial declassification or transfer to another degree of classification and allowing access to them for the defendant's defence counsel. The issue of classified information, essential for the settlement of the case, respectively the verification of the legality of the administration of such evidence, must have already been solved in the preliminary chamber, so before moving on to the procedural phase of the trial on the merits. That is because in this stage of criminal proceedings, there can be no evidence consisting of classified information inaccessible to the parties, without violating the provisions of art. 324-347 of the Code of Criminal Procedure and the case-law of the Constitutional Court in the matter of the preliminary chamber procedure.[31]

With regard to the request made by the judge requesting the public authority which ordered the classification to allow the defendant's defence counsel access to the classified information, the author of the exception argued that the condition of the right of access to classified information violates the right to a fair trial in terms of uncertainty of access to such a procedure. On the other hand, the author argued that the protection of classified information could not have priority over the defendant's right to information.[32]

With regard to the fact that the protection of classified information cannot take precedence over the accused's right to information, the Court, starting from the finding that classified information has probative value in criminal proceedings, found that the criticized rules, as amended, places the defendant (through his lawyer) in a more difficult position than the previous law, in the sense that, in addition to maintaining the requirement of access authorization in his respect, the defendant's lawyer needs the consent of the issuing authority of classified information on access to this information. Therefore, following the judge's assessment of the "essential nature of the case" of the classified information and the need to ensure access to it, by virtue of the right to information, corollary of the right to a fair trial, a public administrative authority may deny the defendant's defence counsel access to classified information. Due to the issuing authority's refusal to allow access to the classified documents / information, they remain inaccessible to the defendant and, consequently, "cannot be used to rule on a sentence, waive the sentence or postpone the sentence".

Or, such a legislative solution, which conditions the use of classified information, qualified by the judge as essential for solving the criminal process, by the accept of the issuing public administrative authority, is likely to prevent judicial bodies from fulfilling their obligation under art. 5 para. (1) of the Code of Criminal Procedure, that of "ensuring, on the basis of evidence, the finding of the truth about the facts and circumstances of the case, as well as about the person of the suspect or defendant". [33]

The Court found that the criticized legislative solution upset the right balance between the general and private interests, imposing an impediment to the defendant's right to information, with direct consequences on his right to a fair trial, an impediment that is not subject to any form of judicial review. In such a case, access to classified information is not conditioned only by the completion of procedural steps in order to obtain an authorization provided by law, but, after completing the legal procedure and obtaining the necessary authorizations, the defendant's defence counsel may be denied. This has the effect of absolutely block of access to classified information. The legal consequences are all the more serious as the request for access to this information does not belong to the defendant / defendant's defence counsel, but to the judge of the case, who previously found it essential to resolve the criminal case, assigning it probative value. It is obvious that it is no longer possible to discuss equality of arms and, implicitly, a fair trial. [34]

Furthermore, the Court found that the criticized legal provisions are likely to create discrimination even within the category of defendants in a case, the issuing authority of the classified act having the possibility to selectively allow their defenders access to classified evidence, so that, depending on the decision of the administrative authority, the defendants in identical or similar situations, in the same criminal case, some could be convicted and others acquitted, based on criteria that, according to the law, cannot be subject to judicial review[35].

Given the need to find out the truth in criminal proceedings and the explicit requirement of the Code of Criminal Procedure that a person should be convicted only on the basis of evidence proving his guilt beyond a reasonable doubt, the Constitutional Court held that any information that could be useful to find out the truth must be used in criminal proceedings. Thus, if classified information is indispensable to the finding of the truth, access to it must be provided by the judge of the case, both to prosecution and defense, otherwise the

[31] Decision no. 21 of January 18, 2018, para. 31 and 32.
[32] *Idem*, para. 58.
[33] *Idem*, para. 62.
[34] *Idem*, para. 63.
[35] *Idem*, para. 64.

equality of arms and respect for the right to a fair trial are enfringed. On the other hand, access to classified information may be refused by the judge, who, although noting its essential role in resolving the case before the court, considers that access may seriously endanger the life or fundamental rights of another person or that the refusal is strictly necessary to defend an important public interest or may seriously affect national security[36]. Therefore, only a judge can judge on the conflicting interests - the public interest, regarding the protection of information of interest for national security or for the defense of a major public interest, respectively the individual interest of the parties to a case, so that, through the solution it pronounces, to ensure a fair balance between the two.[37]

The Court concluded that the protection of classified information cannot take precedence over the right to information of the defendant and over the guarantees of the right to a fair trial of all parties to the criminal proceedings, except under express and restrictive conditions provided by law. Restriction of the right to information can only take place when it is based on a real and justified purpose of protecting a legitimate interest in the fundamental rights and freedoms of citizens or national security, the decision to refuse access to classified information always belonging to a judge.[38]

5.4. Administrative contentious review of acts concerning defence and national security

An interesting decision regarding the guarantees of respect for fundamental rights through the possibility of contesting administrative acts before the administrative contentious courts concerned the provisions of art. 5 para. (3) of the Law on administrative contentious no. 554/2004, according to which "Administrative acts issued for the application of the state of war, state of siege or emergency, those concerning defence and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics can only be attacked for excess of power. "The Constitutional Court found[39] that the phrase "those concerning national defence and security" contained therein was unconstitutional.

The exception of unconstitutionality was raised by reference to the provisions of art. 126 para. (6) of the Constitution, which exempts from the rule of judicial control of administrative acts only military command acts, so that an extension, by law, of the notion of "military command acts" beyond the real will of the constituent contradicts with the Basic Law. The court held that, in order to avoid over-power of the institutions in the field of national security, defence and public order, national law must allow judicial control over them in an effective manner, in order to comply with the requirements of a fair trial.

Examining the exception of unconstitutionality, the Constitutional Court held that, the para. (6) of art. 126 of the Constitution establishes that the courts, by way of administrative litigation, exercise judicial control over the administrative acts of public authorities This kind of control is guaranteed and only two categories of acts are absolutely excepted - those of military command and those relating to relations with Parliament - which, by their nature, are not subject to judicial review in any form.

From a constitutional point of view, art. 126 para. (6) is the only seat of the matter regarding the administrative acts exempted from the judicial control[40], and art. 5 para. (3) of Law no. 554/2004, even if it is an organic law, cannot provide other exceptions, without thereby violating the indicated constitutional text, the provisions of which are limiting and imperative.

The Court found that the constitutional provisions mentioned must be interpreted restrictively on the basis of the rule *exceptio est strictissimae interpretationis*, any other exception to the judicial review of administrative acts being an addition to the Constitution, not allowed by its supreme character and its preeminence over all under-constitutional laws.

The term "excess of power", used in the text of the criticized law, has the meaning, according to art. 2 para. (1) letter n) of the law - "exercising the right of appreciation of public authorities by violating the limits of the competence provided by law or by violating the rights and freedoms of citizens". Thus, since the administrative acts regarding the defence and national security, except for the excess of power, to which the text that is the object of the exception of unconstitutionality refers, are not among the exceptions expressly provided by art. 126 para. (6) of the Constitution, it follows that they must be subject to judicial review.

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[36] Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, published in CKS-eBook, 2013, file:///C:/Users/user/Downloads/100_cks_2013.pdf.

[37] Decision no. 21 of January 18, 2018, para. 70.

[38] *Idem*, para. 71.

[39] By Decision no. 302 of March 1, 2011, published in the Official Gazette of Romania, Part I, no. 316 of May 9, 2011.

[40] See, for further details on this issue, Elena Ștefan, *Acts extempt from the judicial control of the contentious administrative*, published în CKS e-Book 2016, pp. 534-538, http://cks.univnt.ro/cks_2016/CKS_2016_Articles.html and Claudia Marta Cliza, *Administrative acts exempted from judicial review by administrative courts*, published în CKS e-Book 2014.

6. Conclusions

The present paper aims to summarize the issue of classified information concerning criminal cases, when the evidence that seeks to find out the truth and establish the guilt or innocence of the accused comprise this kind of information. To this end, we first set out the relevant regulatory framework and then we depicted the difficulties faced by the parties' lawyers. Until the amendment, in 2013, of Law no. 182/2002, not even the judges were granted the right of access to classified information, unless they obtained an ORNISS certificate.

The case-law of the Constitutional Court has clarified this issue to a large extent, examining up to what point a reasonable balance can be struck between the right of access to public interest information and the national security defence interest.

As there is a growing tendency at the international level to open up public access to a wide and various range of information, it remains to be analyzed in the future the degree to which the Romanian state will agree to provide a greater number of certain types of information subject to classification. Such an approach would increase the need for transparency and democratization of information, which is desirable in a state governed by the rule of law.

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EFFECTS OF THE DEMATERIALIZATION[I] PHENOMENON OF THE COURTS UNDER THE IMPACT OF VIDEO TECHNOLOGIES AND DIGITALIZATION

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Abstract

The dematerialization phenomenon of the courthouse under the impact of video-technology and digitalization is a phenomenon in progress. During the history the spaces dedicated for justice have been strongly correlated with technologies of the period.

In ancient Greece the trials took place in open air, in agora according with the participatory democracy concept, but the Romans brought the law indoor. The XIXth century produced the concept of palace of justice, strongly correlated with the fact that written papers were the main result of the act of justice.

The XXIst century characterized by the acceleration of development of video technologies and digitalization produce new concepts in the process of justice such as the dematerialization of the courthouse, and the video-trial which produce a new architectural paradigm concerning the buildings for justice. Court buildings can be analyzed from three perspectives. The first perspective is about the Court buildings as public places where justice procedures are carried out. These buildings are also workplaces for judges, court staff, support workers, lawyers, and interpreters occasionally for jurors or expert witnesses.

The third and less tangible role of these buildings is the embodying community values about the rule of law in society. If in the nineteenth century the symbolism of courts convey an impression of national authority the actual trend towards 'e-justice' creates a difficulty in recreate the symbolic level of the court buildings. The article is analyzing the implication of this phenomenon.

Keywords: *video technologies, digitalization, video-trial, buildings for justice, courts.*

1. Introduction

In the last decade of the twentieth century, architects, lawyers, law enforcement officers, magistrates and artists have concentrated their efforts in a common attempt to reconceptualize the spaces dedicated to justice. Beyond some regional or local variations, through the common referral to international standards and in light of more and more widespread concepts of transnational cooperation, a common ideal of expressing the attitude towards the law was pursued.

Following these efforts, starting with the second decade of the XXIst century, the governments of European countries, including Romania, have joined an extended investment program in the field of buildings that were to constitute the infrastructure of the judiciary.[1]

The allocation of significant public funds in this direction reflected the importance that society attaches to the judiciary. Architecture was invited to support and even emphasize the importance of law in society. Moreover, there are researchers who argue that the design of a space dedicated to justice can be considered an important partner that plays a positive role in how justice can process its own experience. We can say that architecture and design can have an active contribution in the act of justice and not only that of reflecting the law[2].

However, as a result of the continuous expansion of the use of digital technology and video links, a parallel phenomenon appears, namely the introduction of the concept of the virtual court.

The aim of this article is to underline the importance of maintaining, at least partial, the physical space of the court of justice, and also to provide for the courts a significant design.

The administration of justice and concepts of an ideal courthouse during the time

Over time, the manner in which the act of justice took place was correlated with the technical and technological possibilities of the time. The ancient Greeks did not use writing in the act of judgment, conducting trials outdoors, in the agora. They used the walls of *stoa*-type buildings only to publish, inscribed in stone, the laws. With the introduction of written

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[1] Dematerialization is an expression first used by L. Mulcahy in *Legal Architecture Justice, due process and the place of law*, Routledge Publishing House, 2011, chapter 8, p. 162.

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[1] A.A. Tait, *Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere*, 2013, University of Richmond, Chapter 23 *Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere* Judith Resnik, Dennis Curtis, and Allison Tait.

[2] L. Mulcahy, *Legal Architecture Justice, due process and the place of law*, Routledge Publishing House, 2011, p. 163.

documents in the unfolding of the acts of justice, the Romans moved the processes inside, using the multifunctional spaces of the great basilicas. Until the XIXth century, there were only a few buildings dedicated exclusively to the judiciary.

In the second half of the XIXth century, the concept of the Palace of Justice crystallized, as a large construction, which aimed to provide a space exclusively for the act of justice, a construction that in addition to an increasing studied functionality, also had the role of symbolically illustrating the principle of order through the judicial system over the subordinate territory. Thus, it can be seen that, from a historical perspective, the program of spaces for justice is in a process of continuous development. About what is the most suitable court architecture and how it might be achieved, it was a major concern in the last years.

2. The XXIst Century - a new paradigm shift

The impact of technology on the operation of cases in courtrooms and in the administration of justice is creating a change and paradigm shifts. Recently, digital technologies and the use of video links, created the premises of a new paradigm, that of virtual courts, a phenomenon that has had a strong impact both on the act of justice and on the spaces intended for justice. The theme of debating security and the uses of emerging technologies is available for new architecture but also for being implemented in old building. Through a careful design it is aimed the goal of obtain a hybrid form in the architecture between the traditional law court and the use of technology

However, there are researchers who believe that the introduction of virtual court systems has the potential to disrupt[3] the very concept of the courts of justice.

Case studies - The impact of technology in court-rooms, experience, advantages and disadvantages

Beginning with the last years of the XXth century, Australia has experienced the exercise of the act of justice through video sessions of court panels.

In Europe, the Secretary of State for Justice, Jack Straw, announced in 2009 the implementation of a pilot project in which a first virtual court system was to be tested in England[4],

The project involved creating a link between a South London Court and a police station. In this system, cases would be heard without people having to leave the police station. In some cases, the procedure was so established that the accused would never physically enter a courtroom again.

Following the analysis of how the impact of the virtual court affected the quality of the legal procedure, it was found that the cost savings were not substantial and those who used the system experienced a loss of quality of the act of justice.

Over time, it has been observed that the assumption that technologies that allow the organization of video conferencing have a neutral impact on the quality of justice has not been confirmed. It was later pointed out that there are conditions for the use of video conferencing to be likely to alter the experience of the process.

For example, a major objection to the video-link hearing system was raised by lawyers who legitimately asked whether it was indicated to be physically present during hearings, with the accused at the police station, or in the same space as the judge.

Emma Rowden, at one point, asks: What do we lose when we lose our courts?[5], and based on empirical evidence from the experience of video links used in Australian courts, points out that this mode of operation ignores the importance of the symbolic function of the courthouse building as a space dedicated to law in the community.

In the mean time in a society that is moving towards a world characterized more and more by the use of virtual spaces, the courts have a particular course.

In every field of the justice system, from commercial disputes to war crimes trials the video technologies are transforming hearings. This process began over thirty years ago in Australia (1990-1991), but during the pandemic, the transition towards video enabled hearings became a necessity.

The year 2020 was the moment which made the extensive use of video technologies a reality.

The judicial system experienced situation of judges sitting sometimes alone in courtrooms, or participating in hearings together with other participants, including prosecutors or lawyers, from home. In many situations judges presided over hearings from their chambers, or homes. Many courts have developed during the pandemic guidelines for using video technologies. With a high rate of probability the justice systems will consider to continue the use of video technologies after the pandemic is over. Some countries are analyzing practical suggestions about a way to make this transition towards video links. It is taking in consideration for what types of matter it is recommended this protocol. The question is how the

[3] *Ibidem.*

[4] E. Rowden, *Virtual Courts and Putting 'Summary' back into 'Summary Justice': Merely Brief, or Unjust?*, S. Jonathan, *Architecture and Justice Judicial Meanings in the Public Realm*, University of California Berkeley Publishing House, 2013, p. 110.

[5] E. Rowden, *Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?*, Sage Journals, November 5, 2015.

use of video links impacts on important justice principles like openness, fairness and the chance to test evidence thoroughly.

In 2018 the UK Ministry of Justice and Her Majesty's Courts and Tribunal Service in England and Wales experienced one of the real-world applications of a virtual court approach – using a single screen. UK virtual court pilot experience was a "pre-hearing".

Other pilot projects analyzed the transition to the virtual court. An UK virtual court pilot project has attempted to recreate a virtual journey to a courtroom in comparison with the real one journey.

It was taken in consideration that the solemnity and rigor of the main entrance to the courthouse, the stairs, the doors, the main hall, the moving along the corridors and up elevators or interior stairs, the waiting outside and the process of being called into the courtroom, all these transitions provide the participant information about the process and a specific mood, helping to create a respectful disposition.

The pilot project for the virtual court room proposal was to take in consideration to implement a series of screens before entering to the video hearings. Each page was projected in order to provide information about the case, the time of the hearing, and the court. It was taken into consideration a certain etiquette. It was considered a modality of recreating the solemnity of the process, and users are required to acknowledge that they are about to enter a formal court.

Physical court buildings will continue to be the center of many, if not most, virtual hearings, a range of other spaces will be involved as well. Participants may be taking part in a virtual hearing from a variety of locations, including one's office, home, court or other public building. It is important to take in consideration that the environment should also be suitable in visual, lighting, acoustics.

Dr. Andrew Huberman, a professor of neurobiology and ophthalmology at Stanford University School of Medicine consider that the way we arrange the physical environment can be used to induce a more analytic or on contrary an abstract thinking. Discussed for hundreds of years, the *cathedral effect* was formally enunciated since the early 2000. It seems that people being in high ceiling spaces would shift their thinking and their ideas to more abstract type of thinking. It seems also that our cognition follow our visual environment. In conclusion the high ceiling space of traditional court-room is facilitating a more abstract and moral thinking than a low ceiling space of an anonymous office[6].

In the case of video-links it is necessary to find ways to preserve the formality of hearings because the authority of the judicial officer might be less evident in a virtual court setting than in a traditional one where the hierarchy is produced by the way of using the space in opposition with due the flattening of hierarchy produced by the screen configuration. In the single-screen configuration the judicial officer appears in a box, just like any other participant. The limited research on what effect this might have is equivocal.

3. Benefits of using technology in courts

There are certainly many benefits to digital technology. Equipping the courts with the possibility of connecting to audio-video recording platforms, which includes the possibility of converting the audio document into a written document is a useful technical solution. This innovation will change the role of the clerk in the traditional conduct of the process. The impact of this innovation will be reflected in the morphology of the court building, in the office area which in the XXth century model provided significant office space, intended for clerks' areas with a special functional relationship with the judges' offices. Prior to the introduction of these types of systems, the share of space dedicated to clerks in the office area of the court building was significant.

Also, the endowment of the court buildings with high-capacity storage and archiving platforms reconfigures its morphology, minimizing the physical archiving spaces.

From another perspective, electronic applications will allow with much greater ease, the submission or consultation of files from a distance, which will lead to a considerable reduction in the spaces that were previously intended for this type of activity.

New fields of preoccupation for aspects like taking in consideration new angles such particular attention to the psychology of justice, methods of promoting psychological safety in the courthouse, and how to communicate appropriate are explored themes concerning the architecture of the court design. In this direction Australians said in 2009 that they were getting closer to having hologram witnesses appearing at trial, which they believed would allow vulnerable witnesses to attend trials without the trauma of physical contact with the accused.

It is assumed that the video-link interrogation system will reduce the costs of transporting the accused and the necessary security measures. At the same time, this new interrogation system will obviously change the morphology of a courthouse by eliminating both the area for detainees and the courtroom of the criminal court itself, which will lead to some decrease in investment in the case of those buildings.

[6] #HubermanLab #Neuroscience #Productivity, Optimizing Workspace for Productivity, Focus, & Creativity | Huberman Lab Podcast #57.

4. Conclusions

This article has looked at a neglected aspect of judge craft: the physical and material context in which judging takes place. In contrast to the arguments in favor of the use of digital technology and video links, there are views that the use of virtual courts will undermine the seriousness and solemnity of court proceedings. Most of the time, for example, there has been a lack of attention to the anonymous spaces that host the video conference. This lack of meaning and dignity that the image of an anonymous space gives as a background to the judiciary, in the case of video-link hearings is not able to contribute beneficially to the quality of the act of justice.

Roger Smith, an expert in international law, human rights and access to justice, expressed concern that television trials would be confused in the collective consciousness with the act of taking part in a video game, degrading the experience of solemnity in the courtroom.

One can speculate on the fact that writing as the main method of recording facts or events created the concept of building for justice, but as a result of the adoption of video technologies and digitization there is a risk that this concept will lose its importance.

However, there are arguments in favor of maintaining the court as a physical space.

On March 30, 2020, Cambridge University Press published an article on *Aesthetics and International Courts*, which highlights the link between art and legal experience.

At the same time, many buildings designed to serve the cause of justice have often become commonplace office buildings without plastic expression.

Inexpressive, perceived as just places where litigation procedures are carried out, justice buildings have now come to be located on the outskirts of cities, without being a pole in its symbolic geography.

Turning these buildings into simple, file-handling factories, into a world where ignorance of the law does not absolve you of violating it, deprives us of the connection with the meaning and symbolism of such buildings. It is obvious that we are in a situation where necessity prevails. The large „amounts of injustice" committed by people which is also increasing, needs an oversizing of the authorities to treat this toxin, this injustice.

Even if modernity marks the beginning of a relativisation of the object of art and modern art cultivates some „anti-Platonic" and „anti-Aristotelian" levels, we wonder how far we can push the expressionless character of a building for justice in the conditions in which we want architecture to serve the spirit of the law and not just its letter?

It is true that we find in all areas of contemporary reality a certain intention to simplify and eliminate formalism, but we believe that in the case of buildings intended for justice the requirement that these buildings have the quality of „significant" needs to be maintained.

As an argument in this direction we emphasize the fact that: in an urban space, the presence of these buildings is in fact, from a symbolic point of view, a reflection of the importance of the law in that community.

Is it in the power of architecture and art to transform a space dedicated to justice into a place that inspires an ideal relationship to the notions of law and justice? Do we still need metaphors in the case of justice buildings or are we stepping into a world where we no longer need such buildings?

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EUROPEAN UNION'S LIMITED COMPETENCE IN HARMONIZING LABOUR – HOW THIS MAY AFFECT THE NEW WAYS OF WORKING WITHIN THE MEMBER STATES

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Abstract

Considering the lack of a harmonized approach to labor law, the Member States are still the key actors with relatively independent standpoints and traditions in the employment law sphere. Critical aspects of labor law are excluded from the regulatory competences in the social chapter of the Treaty on the Functioning of the European Union ("TFEU"). This implies that legal conditions in this field of law remain quite different and labor requirements are heavily dependent on national law. Nevertheless, European Union's ("EU") intervention in employment matters has strongly increased in the last years, but since, as a rule, labor law cannot be legislated at European level by Regulations, Member States are reluctant to implement many of the prevailing legal guidelines and the provisions of the directives are not necessarily transposed in an efficient, coordinated, and timely manner.

Keywords: *new ways of working; digitalization; future of work, harmonizing European Union labor law.*

1. Introduction

In accordance with art. 4 of the Treaty on the European Union ("TEU"), „*competences not conferred upon the Union in the Treaties remain with the Member States*"[1]. In addition, in accordance to art. 5 TEU, „*the limits of Union competences are governed by the principle of conferral*"[2] and „*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*"[3].

Therefore, the EU can only exercise the competences that the Member States have conferred upon it through the Treaties on which its law order is based upon (namely, the Treaty on the European Union and the Treaty on the Functioning of the European Union). Or, as the German Constitutional Court put it in the so-called *Solange* cases, the Union „*lacks the power to determine the legal limits of its own competences*"[4], therefore having to rely solely on the competences conferred by the Member States.

Also, the EU can exercise its competence not whenever it deems necessary, as the States do, but in order to attain the objectives set out in the art. 3 of TEU. The attainment of these objectives is the background purpose of all the EU's actions, regardless of their domain and the type of competences exercised in each particular situation.

However, from this principle of conferral derives the fact that the EU not only has to exercise exclusively the competences conferred upon it by the Member States, but it also must exercise them in the manner prescribed in the Treaties. That is, in accordance with the principles laid down by the aforementioned Treaties and with the specific rules proper to each category of competences.

The aforementioned principles are, besides the principle of conferral, the principles of subsidiarity, proportionality and sincere cooperation.

For example, „*under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*"[5], while

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[1] Art. 4 para. 1 TEU.

[2] Art. 5 para. 1 TEU.

[3] Art. 5 para. 2 TEU.

[4] Carl-Johan Breitholtz, *From Costa to Constitution: The Case Continues…*, Faculty of Law – University of Lund Master Thesis supervised by Henrik Norinder, 2003, available at https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1556499&fileOId=1564009, accessed 20.04.2022.

[5] Art. 5 para. 3 TEU.

„*under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*"[6]. This constitutes, in fact, the expression of an older philosophical principle „*used by the Catholic Church since 1891 and enshrined even in the Quadragesimo Anno Encyclical from 1930*"[7].

Finally, the principle of sincere cooperation states that „*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*"[8]. This, in turn, implies the existence of two types of obligations, one positive and the other one, negative. Under the first one, „*the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*"[9], while under the second one „*the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives*"[10].

Therefore, the EU exercises its competences set out in the Treaties, in order to achieve the objectives from art. 3 TEU, and it must do so according to the principles set out above.

Nevertheless, the EU must also act, in each category of competences, according to the specific rules of the category in which the specific domain or domains of the act it intends to adopt fall. These rules are laid down in art. 2-6 TFEU.

For example, as far as the exclusive competences are concerned, TFEU states that „*when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts*"[11].

Differing from that significantly, „*when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*"[12]. There can also be found areas where the „*Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas*"[13] and areas where the Member States shall coordinate their efforts, in the frameworks provided by the EU.

So, the general scheme of the EU decision process would be the following: the Union must act in order to achieve certain objectives, laid down in art. 3 TEU, observing the values set out in art. 2 TEU (which are not analyzed within the present study, as they have little connection to it), in accordance to the specific rules of each category of competences (depending of the category in which the subject area of the proposed act falls in), observing the applicable principles and the fundamental rights set out in the EU Charter of Fundamental Rights (which also, are not referred below).

What may have caused this extreme complexity is the fact that the EU decision process evolved as a result of the fact that „*the transfer of competences from the States to the Union was achieved gradually, with the economic and political evolution at national and international level*"[14], therefore resulting a number of compromises inherent to the effort to „promote the application of uniform juridical solutions to different social and cultural contexts"[15] while, at the same time, achieving the goal of integration. And the integration's complexity relies in the fact that is „*a process of unification (...) that cannot be realized by referring to the classical methods of inter-state cooperation, methods that rely mainly on the unanimous agreement of the states (consensus), but it must resort to much more energetical and forcefull processes for the Member States, in the frame of an organization that can be classified as supranational*"[16].

However, this complex scheme is even more complicated that it seems, as certain areas fall within different categories of competences and each area has its own specific rules, set out mainly in the TFEU, in the part dedicated to the EU policies. Hence, in order to

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[6] Art. 5 par. 4 TEU.

[7] Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, Editura Universul Juridic, București, 2015, pp. 68-69.

[8] Art. 4 para. 3 TEU.

[9] *Ibidem.*

[10] *Ibidem.*

[11] Art. 2 para. 1 TFEU.

[12] Art. 2 para. 1 TFEU.

[13] Art. 2 para. 5 TFEU.

[14] Oana Mihaela Salomia, Augustin Mihalache, *Principiul egalității statelor membre în cadrul Uniunii Europene*, in Dreptul no. 1/2016, pp. 166-174.

[15] Monica Florentina Popa, *Legal Taxonomies between Pragmatism and the Clash of Civilizations*, in Public Law Review / Revista de Drept Public no. 1/2016, pp. 58-67.

[16] C.-A. Colliard, L. Dubouis, *Institutions internationales*, 10th ed., Dalloz, 1995, p. 171, apud Roxana-Mariana Popescu, *Aspecte constituționale ale integrării României în Uniunea Europeană*, in Dreptul no. 3/2017, pp. 131-148.

get a glimpse of the Union's competence in the area of labor policy, a detailed analysis of this specific field must be carried on.

2. Introductory considerations. European Labor Law – challenges and opportunities

Critical aspects of labor law - such as income, right of strike and termination, are excluded from the regulatory competences in the social chapter of the Treaty on the Functioning of the European Union (art. 153.5). Also, the Directives are quite vaguely and minimally regulating many of the essential circumstances of the working relationships.

Historically, the EU's role is to address labor law only partially, although we cannot ignore it strongly increased over the past decades.

This may be caused both by the Member States reluctance to adjust their labor laws and by the fact that *„the 'market' values and criteria such as efficiency and utility tend to obscure and even to replace non-market values like social solidarity, equity or civic engagement, changing the allocation of resources within society"*[17].

Nonetheless, both social actors and labor law professionals have somehow naturally outgrown the older problems of the labor field and began to feel the need for greater alignment of the European social policy in this field, in the light of current and future challenges that are related to new forms of work (such as varieties of Kurzarbeit and the on-call work[18]), working time flexibility and sovereignty – which is the reason why the 9-to-5 job will become progressively harder to hold on to, health and safety, human-in-command approaches in artificial intelligence era and worker privacy in a digital work environment.

Nowadays areas of improvement for labor and employment regulation concern rather the growing digitalization of the world of work and new ways of working, as well as the right to disconnect[19], so it remains to be seen how European legislation can be uniformly aligned across all categories of EU countries - highly developed countries (such as Germany or France), or countries still developing (such as Romania or Poland).

The law-making process is enshrined in the TFEU, but these rules are just setting minimum standards to the Member States. In accordance with the Treaty – particularly art. 153 - the EU adopts laws (namely, Directives) that set minimum requirements for working and employment conditions, as well as informing and consulting workers. Positive harmonization (that is, the establishment of such minimum standards) is in fact recognized in all Social Action Programmes since the beginning in 1974[20].

Therefore, the open debate remains whether and to what extent the legislative bodies at EU level and the Court of Justice of the EU (through its rulings) can focus more on significant technological innovation, organizational and individual developments associated with new ways of working also considering massive digitalization, in a way that pressures Member States to implement uniform and consistent legal amendments and adjustments, so that the shock of EU-wide labor market differences is mitigated in the near future.

3. EU current legal framework in labor and employment law – brief incursion

The most important Treaty area for labor and employment law is "Title IX – Employment" (art. 145-150 TFEU), introduced with the 1997 Amsterdam Treaty.

This Title confers employment policy competences on the European level (*i.e.*, primarily the use of directives), while at the same time respecting the basic starting point that the Member States keep their competence for regulating employment policies.

The role given to the EU bodies is more of a "supervisory role", which contrasts with the classic European legislative methods in the field of social policy. For that matter, the originally predominant underlying principle in EU social policymaking was the need for a broad equivalence in labor standards, which imposed basic employment rights at an EU level[21].

This method of supervision in labor policies may have had helped to develop many EU initiatives while a wide range of EU labor and employment directives have come into existence, but the perennial question was and is to what extent the practical effects of the EU intention are implemented in practice in each of the Member States.

At the same time, we cannot deny the active involvement of EU bodies, within the limits allowed by the existing legal framework, as many directives have been adopted at EU level.

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[17] Monica Florentina Popa, *What the economic analysis of law can't do - pitfalls and practical implications*, Juridical Tribune no. 11/2021, pp. 81-94.

[18] Sarah de Groof, *Travelling Time is Working Time According to the CJEU… at Least for Mobile Workers*, European Labour Law Journal, vol. 6 (4)/2015, pp. 386-391.

[19] Pepita Hesselberth, *Discourses on disconnectivity and the right to disconnect*, New Media & Society 2018, vol. 20(5)/1994-2010, passim.

[20] Nick Adnett, Stephen Hardy, *The European Social Model - Modernisation or Evolution?*; Edward Elgar Publishing Limited, United Kingdom, 2005, p. 8.

[21] *Idem*, p. 39.

Yet, we also cannot ignore the fact that by 2022 the newest directives on employment and labor field, which address newer issues, are those such as Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union and Directive 2019/1158 of 20 June 2019 of the European Parliament and of the Council on work-life balance for parents and careers and repealing Council Directive 2010/18/EU.

Since Regulations with direct effect on national legislation are non-existent in this area, and although Directives have created fairly strong guidelines for national legislators, there are still noteworthy gaps in the legislative competences of EU bodies, such as (minimum) wages/income and employment termination[22]. No directives are currently in place to expressly address the novel problems of modern work - in the context of digitalization of the world of work and new ways of working.

Such policies however, we believe, are increasingly needed. We point out that there are still traditional labor field issues over which EU has no competence to harmonize national laws, so the problem of the lack of regulation on payment in the cases such as teleworking, on-call work or financial compensation (if any) in the case of the right to disconnect[23] (which is not to be confused with the right to rest leave or weekly rest days), creates the challenge of even greater pressure felt by the key players, in terms of the differences in these provisions between states.

It is also true that the principle of "mutual recognition", agreed by the "Cassis de Dijon"[24] judgement in 1979, stated that national standards and systems need not harmonize to an EU administrative norm,[25] but that it can be taken that the national standard or system is sufficient and should be recognized as such by the member states[26] - which perhaps should be looked at whether it is currently possibly applicable to the EU labor law regime.

The EU has been grappling with the differences in national law on work requirements and the related problems for many years, so two possible solutions shall be more thoroughly analyzed and speculated. The first is the better harmonization of technical requirements and the second is the principle of mutual recognition.

Furthermore, also in the category of principles governing the interpretation of the application of EU law in the Member States that should be applied more often in this area, is the principle of subsidiarity which was initially endorsed by the EU in the Single European Act and was later clarified in the TEU.

In consequence of this principle, the European Commission is obliged to explain why EU intervention is preferable to national action when addressing a matter. It must show that the proposed action is proportional to the problem that is being addressed[27].

So, as previously mentioned, the outlook for EU labor and employment law shows some gaps and highly relevant issues remain unregulated, precisely because these issues mentioned above do not typically characterize the EU's legal regulatory framework in labor law.

For example, In Romania, there are no specific termination requirements for certain types of contracts. The legislation regulates indefinite-term and fixed-term contracts of employment, fulltime and part-time contracts, temporary work contracts, home-working and apprenticeship contracts without mentioning any special rules in relation to the termination of these types of employment contracts.[28]

However, in Poland, there are special rules for: fixed-term contracts of employment, apprenticeship contracts, home workers. A fixed-term employment relationship terminates with the expiry of the agreed period. Neither party (the employer or the employee) may give notice of termination prior the expiry of the contract, unless a special agreement is made by the parties to this end who concluded such contract for at least a period of six months; in this case the notice period is two weeks. In case of contracts concluded with the purpose to substitute an absent employee, the period of notice is three working days. Home workers and apprentices are not considered to be employees under the labor legislation. Their contracts do not

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[22] A. Jacobs, *Labour law, social security and social policy after the entering into force of the Treaty of Lisbon*, ELLJ 2011, vol. 2 (2), p. 122, apud Manfred Weiss,, *The future of labour law in Europe: Rise or fall of the European social model?*, European Labour Law Journal, vol. 8(4)/2017, p. 349.

[23] "*The right to disconnect refers to a worker's right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours*." (See: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect.).

[24] Judgment of the Court of 20 February 1979, Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*; EU:C:1979:42, passim.

[25] Emer O'Hogan, *Employee Relations in the Periphery of Europe - The Unfolding Story of the European Social Model*, Palgrave Macmillan, 2002, p. 98.

[26] Kalypso Nicolaidis, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, Jean Monnet Working Papers 7/97. http://www.jeanmonnetprogram.org/papers/9 7/97-07.rtf, 1997, accessed 20.04.2022.

[27] Emer O'Hogan, *op. cit*., pp. 98-99.

[28] European Commisison's Report - Termination of Employment Relationships Legal situation in the following Member States of the European Union: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia, consulted on: https://ec.europa.eu › social, f.a., p. 28.

constitute contracts of employment and their termination is subject to special rules. Moreover, summary dismissal/resignation is possible (*i.e.*, without a period of notice), if there is an important ground justifying prior termination of the contract.[29]

This is just a mere example of how different national laws are on an essential and historic issue of labor law – like that of termination of employment.

Apprenticeship and home-workers are not effectively and expressly covered by law in some new Member States – as Romania, some cover only part of this issue - such as Slovenia, where labor legislation regulates different types of the so called atypical, flexible contracts of employment: fixed-term employment, temporary work, homework (and tele-work) and part-time work. All of them are considered as employment contracts and labor legislation applies to them as a whole and, as a rule, part-time workers, temporary workers, home workers and workers with fixed-term contracts are subject to the same rights as all other types of workers.[30]

Another example of such inconsistency is that although in all new Member States, the employee is free to resign at any time, without presenting any reason, one must respect the period of notice. In certain exceptional cases, if there is a serious ground, a summary (immediate) resignation without a period of notice is possible. Such regulation is for example available in Poland, but not available in Romania, unless the employer conventionally agrees (which is already beyond national law).[31]

By comparison, in Romania the employee can resign without notice, according to the law, only if the employer does not fulfil its obligations under the individual employment contract.

Therefore, in these cases we find that two countries, despite their proximity in terms of distance and economic and social development, have quite different core labor law rules.

Similarly, tele-working (differing from homeworking) is (especially in the context of the pandemic) an extremely widespread form of work throughout the EU, although still a significant number of countries do not have specific regulations for this type of employment relationship or the existent regulation is rater narrow, while others have a comprehensive legislation already.

It is worth mentioning that although a recent initiative of the European Parliament dated 2021[32], which calls on the European Commission to propose a law aimed at recognizing the much-discussed "right to disconnect", no specific directives address expressly this right.

Likewise, it should be mentioned that no specific initiatives and directives focus on telework, although several directives and regulations address issues that are important for ensuring good working conditions for teleworkers.

The main EU regulation addressing telework was introduced through the EU Framework Agreement on Telework dated 2002[33]. This is an autonomous agreement that commits the affiliated national organizations to implementing the agreement according to the 'procedures and practices' specific to each Member State.[34]

Hence, the European Union's regulatory framework now lacks even the minimum conditions of telework, as well as definitions of telework (including mobile work, home-based telework and hybrid work); organization of working time; provision of equipment for working remotely; the right to disconnect; or protection against psychosocial risks such as isolation.

All these aspects make us wonder how EU employees can be effectively protected, as although they have the right to move and work in other Member States, they will face such different rules from one country to another and whether the benefit of minimum rights at EU level is still sufficient for today's reality.

4. Law harmonization capabilities that EU has in light of the current general legal framework – the technical perspective

Given the numerous requirements that govern the EU's action in its areas of competence, a question arises about the reasons why the Union's harmonization capabilities in the field of labor law are so feeble. Hereafter we will attempt to explain this.

Keeping in mind the general specifications of each category of competences, the first step in answering the aforementioned question is to check art. 3-6 TFEU for dispositions regarding the EU's competence in the labor field.

The first aspect that captures our attention is the fact that the social policy, for the aspects defined in the Treaty, falls under the shared competence between the Union and the Member States, according to art. 4 letter

[29] *Idem*, p. 27.
[30] *Idem* p. 28-29.
[31] *Ibidem.*
[32] European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).
[33] The Framework Agreement of the European social partners ETUC, UNICE, UEAPME and CEEP of 16 July 2002 concerning telework.
[34] Pablo Sanz de Miguel, Maria Caprile, Juan Arasanz (NOTUS), *Regulating telework in a post-COVID-19, European Agency for Safety and Health at Work, 2021*, consulted on: https://euagenda.eu/upload/publications/telework--20post-covid.pdf , accessed 20.04.2022.

b) TFEU. As a consequence, the general rules of exercising shared competences apply in this field.

However, this is not all given that art. 5 para. 3 TFEU states that *„the Union may take initiatives to ensure coordination of Member States' social policies*", while para. 2 of the same article states that *„the Union shall take measures to ensure coordination of the employment policies of the Member States*".

As regards the certain means that the Union has at its disposal for ensuring the coordination of Member States' social policies, art. 5 TFEU does not offer any more details. The competence to coordinate Member States' employment policies is stated under the Treaty *„in particular by defining guidelines for these policies*"[35].

The wording of this disposition indicates the Directive as the most probable instrument of choice, thus it *„shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*"[36], unlike the regulation, which *„shall have general application* (…) [and] *shall be binding in its entirety and directly applicable in all Member States*"[37] and the decision, which is binding in its entirety. However, it is to be noted that the Treaty indicates the Guideline as being the most likely instrument of choice, but not the only one, as deduced from the word *particularly*.

As we prior stated, knowing all these general specifications is not enough, and for understanding how EU's competence in the labor field is functioning, one must consult the specific provisions of TFEU's Title X.

The first article of this Title, art. 151, states the general objectives of the EU's social policy, as follows: *„the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labor, the development of human resources with a view to lasting high employment and the combating of exclusion*"[38]. These objectives must, however, be achieved taking into consideration *„the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy*"[39], diversity that not only does not exclude *„the approximation of provisions laid down by law, regulation or administrative action*"[40], but, according to the Treaty, makes it even more necessary.

This apparent conflict between harmonization and coordination is only partly resolved by separating the fields that are subject to each of them. For example, according to art. 152 TFEU, a Tripartite Social Summit for Growth and Employment is used for facilitating the dialogue between the social partners, their autonomy being respected in the process.

In a series of fields[41], art. 153 TFEU confers the Union a competence to *„support and complement the activities of the Member States*", exercised by the European Parliament and the Council by adopting *„measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences*"[42], with the important specification that **any harmonization of the laws and regulations of the Member States is expressly excluded by the Treaty** and by adopting, in the fields specified by the Treaty, *„minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States*"[43] directives that are also limited in their effects by the fact that they have to *„**avoid imposing administrative, financial and legal constraints** in a way which would hold back the creation and development of small and medium-sized undertakings*"[44].

Also, after stating the legislative procedures applicable to each field (mainly ordinary legislative procedure, with some expressly stated exceptions, subject to special legislative procedures described by the dispositions imposing them) and the necessary majority in the Council, the Treaty also states several general limits to the provisions adopted according to art. 153 TFEU, as follows:

- on the one hand, they „shall not affect the right of Member States to define the fundamental principles of their social security systems and must not

[35] Art. 4 para. 2 TFEU.
[36] Art. 288 TFEU.
[37] *Ibidem.*
[38] Art. 151 TFEU.
[39] *Ibidem.*
[40] *Ibidem.*
[41] Improvement in particular of the working environment to protect workers' health and safety; working conditions; social security and social protection of workers; protection of workers where their employment contract is terminated; the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination; conditions of employment for third-country nationals legally residing in Union territory; the integration of persons excluded from the labour market; equality between men and women with regard to labour market opportunities and treatment at work; the combating of social exclusion; the modernisation of social protection systems.
[42] Art. 152 para. 2 letter (a).
[43] Art. 152 para. 2 letter (b).
[44] *Ibidem.*

significantly affect the financial equilibrium thereof"[45];

- on the other hand, they „shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties"[46];
- and, finally, they „shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs"[47].

An exception from the feeble harmonizing conferred to the Union in the field of social affairs is the matter of equal payment between the sexes, area in which the European Parliament and the Council, in accordance to the ordinary legislative procedure, are entitled to *„adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value*"[48]. Practically, in this field, the European Parliament and the Council act like a veritable *„bicameral legislative of the European Union*"[49].

However, although this competence is a possible answer to the preoccupation that *„discrimination and deep indignation that can affect the balance on the labor market*"[50], the fact that other important fields remain subject to multiple limitations may severely diminish the efficiency of EU's action meant to combat the various challenges of present day labor market, undermining the need of the EU and member states to *„take joint action to identify, manage and limit them; to adopt positive measures to try to prevent the occurrence of cases of inequality*"[51].

Although we agree that *„such policies are characterised by a double conditionality: the legal framework, on one hand, and the economic content, on the other*"[52], we strongly consider that a more action-friendly Treaty frame is necessary in order for the objectives to be properly achieved.

5. Conclusions

EU labor law suffered and still suffers from inconsistency in its application and persons may fall outside the scope of protection. While the Court of Justice of the EU has attempted to intervene and to "regulate" several traditional matters of labor law, it has not yet delivered a uniform approach for all already existing EU directives.

Yet, the Court clarified at least, on a preliminary basis, some of the demanding challenges of modern labor. For example, until present time the Court is the only body which stated that travelling time is related as working time (*i.e.*, applicable to workers with no fixed office - where workers do not have a fixed or habitual place of work).

It is therefore clear that it will be some considerable time before these interventions regarding the new features of the "modern" labor market will take place and clearly even longer before these interventions are settled as "law".

Nevertheless, new issues of the modern era may prove being much more difficult to regulate, since new form jobs are emerging (*e.g.*, employed youtuber, app-developer) and new forms of works and skills and competences will be needed in the future job market. As such, these all will represent both challenges and opportunities for the EU.

It is also not to be ignored that technology provides incentives for employers to work remotely and in novel structures, but beyond technological change, many other factors shape the evolution of the employment landscape – for instance, the evolution of the labor market is currently looked more carefully at through the lens of occupational health and safety law (including the new emerged right to disconnect).

Consequently, supporting the alignment of the national labor legislations means that not only EU bodies would have to prove an invigorated approach on how these new circumstances of modern work can be regulated to a greater extent than hitherto, but also the Member States must keep up with this modern EU acquis.

Nevertheless, it is quite obvious that a number of major changes in the labor market will continue to be regulated by the EU - only as part of the positive harmonization scope, precisely because of the existing distinctive legal framework, which does not have as its

[45] Art. 153 para. 4.
[46] *Ibidem.*
[47] *Ibidem.*
[48] Art. 157 para. 3 TFEU.
[49] Augustin Fuerea, *Legislativul Uniunii Europene între unicameralism şi bicameralism*, in Dreptul no. 7/2017, pp. 187-200.
[50] Delia Mihaela Marinescu, *The discrimination - a risk factor for social security in the European Union*, in: Proceedings. The 15th STRATEGIES XXI International Scientific Conference, „Strategic Changes in Security and International Relations", vol. XV, Part 1, Bucharest, April 11-12, 2019, „Carol I" National Defense University, Security and Defence Faculty, pp. 59- 68.
[51] Delia Mihaela Marinescu, *Respecting equal opportunities - a guarantee for maintaining societal security in Romania and in the European Union*, in Proceedings of the „ Romania in the New International Security Environment" Conference, „Carol I" National Defense University, National Defence College, June 26, 2020, pp. 38-45.
[52] Monica Florentina Popa, *Law, economy and ideology in the Western democracies today: a typical carrot and stick interaction*, Perspectives of Law and Public Administration, vol. 11, Issue 1, March 2022, available online at: http://www.adjuris.ro/revista/articole/An11nr1/11.%20Monica%20Popa.pdf, 2022, pp. 88-102.

aim and vision the total harmonization of labor law within the EU.

This conclusion is derived particularly from the conflict between very distinctive social policies of the Member States, and the need of the creation of a community employment market.

In this respect, the European Commission shall ensure with more vigor a correct application and transposition of EU law across all Member States and shall reinvigorate its capacity to anticipate specific circumstances that could arise from the uneven application of EU law (including also the rulings of the EU Court of Justice).

Member States' efforts should increase so that compliance with EU Directives to become much more uniform, but this goal seems a long way from being achieved - the opportunity dimension of each country's labor and social policies may ultimately take priority over the strategy of aligning national legislation in the EU.

Not least, EU bodies, with the help of the European center of expertise in the field of labor law, employment and labor market policies created in 2016, shall also improve awareness and encourage public debate on topics of interest for EU labor law and legislation, as the final outcome is providing a clear framework of rights and obligations in the workplace (increasingly in the light of new ways of working) and protecting the health of the workforce.

We do believe that this approach of the EU legislative bodies needs to be more adapted both to the times we live in and even to its historical intent – where EU aims to promote social progress and improve the living and working conditions of the people of Europe, as the preamble of TFEU states.

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TO BE OR NOT TO BE PLAGIARISM? UNCONSTITUTIONALITY CRITICISMS OF ART. 170 PARA. (1) OF THE ROMANIAN NATIONAL EDUCATION LAW

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Abstract

Plagiarism in Romania became a controversial issue analyzed by the specialists. Also, the problem became not only a subject for the administrative authority (CNATDCU), but also for the courts of law who were empowered to analyze if doctoral theses were authentic or not, solving therefore plagiarism allegations.

Historically speaking, we can discuss about legislation in this field starting with 2004. Could it be considered that doctoral theses defended before 2004 are subject to the application of the respective piece of law?

The current study will try to analyze the legal provisions applicable to the withdrawal of the title of doctor and to argue that this text is clearly unconstitutional from our point of view.

Keywords: *plagiarism, ethics, author, high standards of quality, unconstitutionality.*

1. Introductive Remarks

In recent years there has been considerable debate over the originality of doctoral theses in case of Romanian public officials. For this reason, we have noticed that plagiarism[1] in Romania became a very controversial issue that has been scrutinised by the specialists, when interest in a person increased.

The problem became not only a subject for the Romanian administrative authority, the National Council for Accreditation of University Degrees, Diplomas and Certificates[2] (hereinafter "*CNATDCU*"), but also for the Romanian courts of law who were empowered to analyze if doctoral theses were authentic or not. Depending on the interest manifested in the media, plagiarism allegations soon appear in the discussions.

Historically speaking, in Romania, we can discuss about legislation in this field since the beginning of 2004, which is why we can't help but wonder if doctoral theses that have been defended before 2004 could be subject retroactively to the application of the respective piece of law?

The current study will try to analyze the legal provisions applicable to the withdrawal of the title of doctor and to argue that this text is clearly unconstitutional.

2. Legal Provisions under Review

According to the provisions of **art. 170 para. (1)** of the Law no. 1/2011 of national education[3] (hereinafter the "*National Education Law*"), in force at the time of writing this study:

"***(1)*** *In case* ***the quality or professional ethics standards are not observed****, the Ministry of Education, Research, Youth, and Sports, based on external evaluation reports drafted as the case may be, by CNATDCU, CNCS, the University Council of Ethics and Management or the National Council of Ethics for Research, Technological Development and Innovation, may take the following measures, alternatively or simultaneously:*

a) to withdraw the doctor mentor competence;

b) ***to withdraw the title of doctor****;*

c) to withdraw the accreditation of the doctoral organizing school, which implies the withdrawal of the right to organize admissions for doctoral programs in order to select new students.".

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[1] For information on plagiarism in Romania, please see Elena-Emilia Ștefan, *Etică și integritate academică*, 2nd ed., revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2021, pp. 232 and following.

[2] For more information about CNATDCU, please visit its official website http://www.cnatdcu.ro/.

[3] Published in the Official Gazette of Romania no. 18 of 10 January 2011, as further amended and supplemented.

3. Suspicions Regarding the Unconstitutionality of art. 170 para. (1) of the National Education Law

Considering the great number of disputes in which the withdrawal of the title of doctor of certain public persons is challenged, we are sure that such persons could claim exceptions of unconstitutionality regarding the provisions of art. 170 para. (1) of the National Education Law, in order to establish the unconstitutionality thereof.

Therefore, by observing the conditions provided by art. 33 of the Code of Civil Procedure[4] [*the purpose of the request for a writ of summons being to prevent the withdrawal of the title of doctor according to the provisions of art. 170 para. (1) of the National Education Law to be done under the violation of the non-retroactive application of law and predictability of law principles*], the persons concerned would try to avoid harming their fundamental rights which would be permanently affected (the withdrawal of the title of doctor being definitive).

Therefore, under the provisions of art. 29 of Law no. 47/1992 on the organization and functioning of the Constitutional Court (hereinafter "*Law no. 47/1992*") in conjunction with the provisions of art. 146 letter d) of the Romanian Constitution and of art. 2 and art. 11 para. (1) item A letter d) of Law no. 47/1992, the persons in question would make referral requests to the CCR, whereby they would request the courts of law to order the reference to the CCR in order to rule on the unconstitutionality of the provisions of art. 170 para. (1) of the National Education Law.

4. Unconstitutionality Grounds of art. 170 para. (1) of the National Education Law

4.1. If art. 170 para. (1) of the National Education Law applied to administrative acts whereby titles of doctor were conferred prior to its entry into force, it would violate the principle of non-retroactive application of the civil law, and implicitly, art. 15 para. (2) of the Romanian Constitution

As of 1991, for reasons of stability of the rule of law and protection of fundamental human rights and freedoms, *the rule of the non-retroactive application of the law has received constitutional definition*, being mandatory for the legislator, law enforcement bodies, jurisdiction bodies and participants in the general legal circuit[5].

According to the provisions of art. 15 para. (2) of the Romanian Constitution:

"*The law shall only act for the future, except for the more favourable criminal or contravention law.*".

The principle of non-retroactive application of laws consists therefore in the fact that the law applies only to situations that arise after its entry into force; it applies only to the future and not to the past. The reason of this principle is based on ensuring the civil circuit[6].

Given that the rule of non-retroactive application of the law was defined as a constitutional principle, it became mandatory *erga omnes*, being applied to the parties, to the judge and to the legislator.

In this respect, the legislator should not pass laws concerning past legal situations. If such laws were passed or applied, the respective provisions could be declared unconstitutional by the Constitutional Court, except for the more favourable criminal or administrative law.

Another natural consequence of the principle of non-retroactive application of laws is the immediate application of the law.

Therefore, once the law enters into force, the law will apply to legal situations in progress or which occurred after its entry into force, and not to legal situations already committed.

It is natural and logical for the past to escape the application of the new law, because such law can only require a fact to take place in accordance with its provisions only after its entry into force.

Moreover, the vocation of the new law to invalidate previous legal situations would create uncertainty and would inoculate mistrust in the law, as any possibility of predictability and stability would disappear. Consequently, the provision of a potential law (ordinary or organic) or of another normative act which would provide that the respective law or normative act would apply retroactively would be unconstitutional[7].

In support of the above, by means of Decision no. 830/2008, the CCR found that:

"(...) *the sole temporal field of action of the new law is the initial phase of establishing the legal situation, by essentially modifying the legal regime created by submitting notifications within the legal deadline, in violation of tempus regit actum principle*

[4] Art. 33 of the Civil procedure Code provides as follows:
"*The interest must be determined, legitimate, personal, innate and actual. Notwithstanding, even if the interest is not innate and actual, a request for a writ of summons can be filed in order to prevent the infringement of a threatened subjective right or to prevent the occurrence of an imminent and irreparable damage*.".

[5] Mona-Maria Pivniceru, Pavel Perju, Corina Voicu, *Codul civil adnotat*, Hamangiu Publishing House, Bucharest, 2013, p. 17.

[6] Carmen Tamara Ungureanu et alii, *Noul Cod Civil – comentarii, doctrina și jurisprudență*, vol. I, Hamangiu Publishing House, Bucharest, 2012, p. 17.

[7] Gabriel Boroi, Carla Alexandra Anghelescu, *Curs de drept civil: partea generală,* Hamangiu Publishing House, Bucharest, 2012, p. 15.

and of the constitutional provisions referred to in art. 15 para. (2) on the non-retroactive application" [8] (emphasis added).

The following were established by means of CCR Decision no. 287/2004:

"(...) *the new law shall apply immediately to all situations which will occur, will be modified or extinguished after the enforcement thereof, as well as to all the effects of the legal situations occurred after the repeal of the old law.*" [9].

Therefore, we emphasize the fact that, in order for the principle of non-retroactive application of the law provided by art. 15 para. (2) of the Romanian Constitution to be observed, the measures provided by art. 170 para. (1) of Law no. 1/2011 must bear the capacity to be applied exclusively and with limitation regarding the doctoral theses and the titles of doctor defended, respectively granted under Law no. 1/2011, and not regarding the theses and titles prior to the enforcement of Law no. 1/2011.

This interpretation is all the more necessary if the possibility of ordering the measure of withdrawal of the title of doctor was not regulated at the date of the defence of the doctoral thesis by a candidate to the title of doctor.

Therefore, art. 170 para. (1) of the National Education Law, provided that it applies to administrative acts issued prior to the entry into force of this law, shall prejudice the provisions of art. 15 para. (2) of the Romanian Constitution, thus being unconstitutional.

4.2. Article 170 para. (1) of the National Legislation Law infringes several constitutional provisions and flagrantly disregards the binding effect of CCR Decision no. 624/2016

We consider that the provisions of art. 170 para. (1) letter b) of the National Education Law infringe the provisions of art. 1 para. (3) and (5) in conjunction with those of art. 147 para. (1) and (4), of art. 16 para. (1) and (2), of article 21 in conjunction with those of art. 24, art. 52 para. (1) and (2), as well as those of art. 126 para. (2), all of the Romanian Constitution, by flagrantly disregarding the binding effect of CCR Decision no. 624 of 26 October 2016[10], as we will detail below (hereinafter "*CCR Decision no. 624/2016*").

As a preliminary point, we should start from the context in which CCR Decision no. 624/2016 was ruled.

First of all, CCR Decision no. 624/2016 was ruled on the background of the approval of the draft law for the approval of the GEO no. 4 of 10.03.2016 on the amendment and supplementation of the National Education Law no. 1/2011[11] (hereinafter "*GEO no. 4/2016*").

In the same context, there was also the ruling of CCR Decision no. 412 of 20.06.2019 regarding the objection of unconstitutionality of the Law approving Government Emergency Ordinance no. 4/2016 on the amendment and supplementation of the National Education Law no. 1/2011[12] (hereinafter "*CCR Decision no. 412/2019*"), but without any relevance from the perspective of the provisions of art. 170 para. (1) of Law no. 1/2011 criticized in this study, these provisions not being subject to subsequent constitutional review.

Returning to CCR Decision no. 624/2016, as we have noted, this was ruled by reference to the content of legislative initiative PL-x no. 66/2016 the scope of which was the approval of GEO no. 4/2016 including on the provisions of art. 170 of Law no. 1/2011[13] (hereinafter the "*Draft law*").

According to the Draft law, the provisions of art. 170 of Law no. 1/2011 were amended as follows (extract):

"*12. Art. 170 is hereby amended and shall read as follows:*

«Art. 170 - (1) In case the quality or professional ethics standards for the titles of doctor granted under the order of the Minister are not observed, the Ministry of Education, Research, Youth, and Sports, based on external evaluation reports drafted as the case may be, by the CNATDCU, CNCS, the University Council of Ethics and Management or the National Council of Ethics for Research, Technological Development and Innovation, may take the following measures, alternatively or simultaneously:

a) to withdraw the doctor mentor competence;

b) to withdraw the title of doctor granted by Order of the Minister of National Education and Scientific Research;

c) to withdraw the accreditation of the doctoral organizing school, which implies the withdrawal of the

[8] Published in the Official Gazette of Romania, Part I, no. 559 of 24 July 2008.

[9] Published in the Official Gazette of Romania, Part I, no. 729 of 12 August 2004.

[10] CCR Decision no. 624 of 26 October 2016 regarding the objection of unconstitutionality of the Law approving Government Emergency Ordinance no. 4/2016 on the amendment and supplementation of National Education Law no. 1/2011, published in the Official Gazette of Romania, Part I no. 937 of 22.11.2016.

[11] Published in the Official Gazette of Romania, Part I, no. 182 of 10.03.2016, approved by Law no. 139/2019 approving Government Emergency Ordinance no. 4/2016 on the amendment and supplementation of National Education Law no. 1/2011, published in the Official Gazette of Romania, Part I, no. 592 of 18.07.2019.

[12] Published in the Official Gazette of Romania, Part I, no. 570 of 11.07.2019.

[13] Please see this draft law available on the website of the Chamber of Deputies http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=1554.

right to organize admissions for doctoral programs in order to select new students.»".

As can easily be seen, by making a simple comparative analysis between the provision of art. 170 para. (1) letter b) and the provisions of art. 170 para. (1) letter b) of the Draft law, there are no substantive amendments, being identical both in relation to the hypothesis, disposition, and in relation to the sanction (regarded as structural elements of the legal norm).

In relation to the aforementioned aspects and going further to the considerations of CCR Decision no. 624/2016 on the provisions of art. 170 of the Draft law, the following are noted:

"*In this context, the Court notes that the possession of the title of doctor can be a condition for accessing a position, for acquiring a professional quality, a professional status and sometimes has implications including patrimonial, where the legislator understood to reward the person who holds the title of doctor with salary benefits corresponding to this scientific training. However, the new legal provisions fail to establish the extent to which the legal relations concluded by the person in question, in the capacity of doctor, are affected and they are limited to provide on the effects of the "act of revocation whereby the administrative act establishing the scientific title is annulled", which will be produced "for the future only". The failure to regulate the effects of the unilateral act of waiver or withdrawal of the title of doctor, as the case may be, entails the risk that the former holder of the title of doctor to continue to benefit from those rights acquired under the title, although he/she no longer meets the capacity under which they were awarded. The legal treatment thus regulated identifies the infringement of the intellectual property right of the original author, provided that plagiarism has patrimonial consequences, on the one hand, and creates the possibility of the person who has deviated from the observance of professional ethics standards to continue to enjoy the results of his fraud, on the other hand. However, the Court considers that such a purpose of the law is unacceptable form a legal and social point of view, as it encourages illicit behaviour and removes punitive and preventive nature of the sanction of withdrawal of the title of doctor.*"[14].

After the ruling of CCR Decision no. 624/2016, the legislative initiative continued, but was exclusively focused on the provisions of art. 146^1 and 146^2 of the National Education Law, which means that the rulings made by the Constitutional Court in the aforementioned decision are perfectly valid and generally binding in relation to the content of the norm that currently substantiates the provisions of art. 170 para. (1) letter b) of Law no. 1/2011.

It cannot be argued that the provisions of art. 146^1 and 146^2 are in conjunction with the provisions of art. 170 of the National Education Law, coming in its supplementation, given that, by means of a systematic interpretation of the two articles (found in Section VIII, Chapter III of Title III of the National Education Law) it is obvious that they refer to art. 141 and not to art. 170 (found in Section XII, Chapter III of Title III of the National Education Law).

Moreover, according to the provisions of art. 146^1 of the National Education Law:

"*The title of doctor shall cease to produce legal effect as of the date of the notification on the title withdrawal.*".

Therefore, it is obvious that this text of law refers to the effects of the withdrawal of the title of doctor by means of a withdrawal provision, not being clear what the provision is and whether it is subsequent to the sanction of annulment provided by art. 146.

The withdrawal provision is not the same with the withdrawal order, being totally different terms, therefore, we cannot consider that art. 146^1 supplements the provisions of art. 170 para. (1) letter b), from the perspective of the effects produced by the issuance of an order of the Minister of Education for the withdrawal of the title of doctor.

This interpretation clearly results from the fact that after the draft of law was declared unconstitutional in its entirety, although the criticisms referred to in the decision of the court expressly aimed at the ambiguity and inaccuracy of the provisions of art. 170 were obvious, the legislator did not understand to amend art. 170 and continued the legislative initiative exclusively in relation to the provisions of art. 146^1 and 146^2.

The arguments formulated by the President of Romania by the notification of unconstitutionality on the Law for the approval of GEO no. 4/2016 in the form adopted by the chambers of the Parliament, after the pronouncement of CCR Decision no. 624/2016 are also in this respect.

Specifically, the analysis of the arguments[15] of the President of Romania shows very clearly, among other things, that:

"*In this case, in relation to the considerations of Decision no. 624/2016, the re-examination could target at most interventions on the amending provisions of art. 168, respectively of art. 170 of Law no. 1/2011.*"[16].

That the re-examination did not aim at modifying the provisions of art. 170, although even the President of Romania saw this obligation, is a clear proof that the text currently in force is unconstitutional.

[14] See CCR Decision no. 624/2016, para. 55.
[15] See page 6 of the Notification of unconstitutionality filed with CCR under no. 3173 of 19.04.2019.
[16] See CCR Decision no. 412/2019, para. 13, final thesis.

The unconstitutionality of the provisions of art. 170 para. (1) letter b) in force at the time being results from the fact that even at the time being they are not in accordance with CCR Decision no. 624/2016, by omitting the following:

a) to establish the extent to which the legal relations concluded by the person in question, in the capacity of doctor, are affected;

b) to regulate the effects of the unilateral act of waiver or withdrawal of the title of doctor.

Secondly, the unconstitutionality of the claimed legal text also results from the perspective of the legislator's failure to comply with other requirements established by the Constitutional Court by Decision no. 624/2016.

Specifically, according to para. 51 of the aforementioned decision, the Court provides the following*:*

"In such a case, if there are suspicions on the non-compliance with the procedures or standards of quality or professional ethics, the Court notes that the administrative act can be subject to the control of an entity independent of the entity which issued the title of doctor, with specific powers in this area, which can take sanctioning measures with regard to the withdrawal of the title in question.".

As we have pointed out, the Constitutional Court expressly held, when admitted the objection of unconstitutionality and annulled the draft law in its entirety, that the withdrawal of the title of doctor can be performed only following a procedure carried out by an entity independent of the entity which issued the title of doctor.

According to the provisions of art. 170 of the National Education Law, the withdrawal of the title of doctor shall be established by the order of the Ministry of Education, Research, Youth and Sport, entity which issued the title of doctor, exclusively based on evaluation reports drafted by CNATDCU, body in full dependence on the issuer of the administrative act, which violates the provisions of the CCR Decision no. 624/2016.

CNATDCU was established based on art. 140 para. (3) of Education Law no. 84/1995[17], wording according to which:

"*For the confirmation of university titles, diplomas and certificates, the Ministry of Education and Research establishes the National Council for Accreditation of University Degrees, Diplomas and Certificates. The members of the council are university professors, personalities of scientific, cultural and moral prestige, recognized nationally or internationally. They are selected on the basis of university senate proposals. The Council operates according to its own regulation, approved by order of the Minister of Education and Research*.".

Article 140 para. (2) of the Education Law no. 84/1995 provided the following*:*

"(2) For the exercise of its tasks, the Ministry of Education and Research shall constitute expert structures and shall be supported by advisory bodies, at national level, composed on criteria of professional and moral prestige: the National Council for the Education Reform, the National Council for Accreditation of University Degrees, Diplomas and Certificates (…).".

Therefore, right from the establishment, CNATDCU represented a specialized structure of the Ministry of Education, contributing to the fulfilment of the tasks of this Minister.

The situation is not different even today, as art. 217 of the National Education Law provides the following:

"*(1) For exercising its duties, the Ministry of Education, Research, Youth, and Sports sets up expert records and is supported by specialized bodies nationwide, established based on professional prestige and moral criteria: National Council of Statistics and Forecast of Higher Education (CNSPIS), the National Council for Accreditation of University Degrees, Diplomas and Certificates (CNATDCU)* (…).

(2) The Councils mentioned in paragraph (1) have a technical secretariat that is established and operates by order of the Minister Education, Research, Youth, and Sports.

(3) The establishment, organization and operation regulations, the structure and composition of the specialized organisms provided in paragraph (1) are regulated by order of the Minister Education, Research, Youth, and Sports, in compliance with the law. Their budgets are managed through the Executive Unit for the Financing of Higher Education, of Research, Development and Innovation (UEFISCDI) and is constituted on a contractual basis between the Ministry of Education, Research, Youth, and Sports and UEFISCDI or other legally constituted sources, managed by UEFISCDI. (…)".

This fact also expressly emerges from the analysis of the provisions of art. 1 of the Regulation on the organization and functioning of CNATDCU[18], according to which:

[17] Published in the Official Gazette of Romania, Part I, no. 167 of 31.07.1995, currently repealed.

[18] Approved by Order no. 3482/24.03.2016 of the Minister of National Education and Scientific Research, published in the Official Gazette of Romania, Part I, no. 248 of 4 April 2016, currently repealed by Order no. 4621/2020 approving the Regulation on the organization and functioning of the National Council for Accreditation of University Degrees, Diplomas and Certificates, published in the Official Gazette of Romania, Part I, no. 564 of 29.06.2020.

"The National Council for Accreditation of University Degrees, Diplomas and Certificates, hereinafter referred to as CNATDCU, is an advisory body, without legal personality, of the Ministry of National Education and Scientific Research, hereinafter referred to as MENCŞ.".

Furthermore, in order to point out the total dependence of CNATDCU on the Ministry of Education, we also mention the provisions of art. 19-21 of the aforementioned normative act, according to which:

"Art. 19. – The activity of CNATDCU, under the law, shall be technically supported by a technical secretariat approved by order of the Minister.

Art. 20. – The material and financial resources required for the functioning of CNATDCU and its working commissions shall be ensured by MENCŞ, under the law.

Art. 21. - CNATDCU budget shall be managed through the Executive Unit for the Financing of Higher Education, of Research, Development and Innovation (UEFISCDI) and is constituted on a contractual basis between the Ministry of Education, Research, Youth, and Sports and UEFISCDI or other legally constituted sources, managed by UEFISCDI.".

Therefore, it is obvious that the general binding effect of the CCR Decision no. 624/2016 is infringed by regulating the possibility of performing the analysis underlying the withdrawal of the title of doctor by CNATDCU, the administrative act not being subject to the control of an entity independent of the entity which issued the title of doctor.

Another notice is that, according to the opinion of the Constitutional Court, expressed in para. 51 of the CCR Decision no. 624/2016,

"(…) the administrative act can be subject to the control of an entity independent of the entity which issued the title of doctor, with specific powers in this area, which can take sanctioning measures with regard to the withdrawal of the title in question. (…)".

Therefore, the independent entity and not the entity which issued the title of doctor shall be entitled to take sanctioning measures (including the withdrawal of the title). However, according to the legislative formula criticized for unconstitutionality, the Minister who has issued the title can also withdraw the title, which means the revocation of an individual administrative act that entered the civil circuit.

Moreover, also in direct connection with the principle of the right to a fair trial, the principle of the right of defence and the principle of non-discrimination, the Court notes the following in para. 51:

"However, if the option of the legislator is to revoke or annul the administrative act, the legislator can operate only under the conditions provided by the law, respectively the measure can only be ordered by a court of law, in compliance with the provisions of Law no. 554/2004. In fact, this is the solution defined by the case law of the High Court of Cassation and Justice (see Decision no. 3.068 of 19 June 2012 or Decision no. 4.288 of 23 October 2012), according to which the provisions of Law no. 1/2011 do not represent exceptions to the rule of irrevocability of individual administrative acts, regulated by the common law in the matter, respectively by Law no. 554/2004.".

Therefore, even if the Court refers to revocation and annulment in the paragraph above, in relation to the fact that the sanction of "withdrawal" is a *sui generis* one, in what concerns the procedure generated after the application of this sanction, addressee must benefit from the same securities as in case of revocation, respectively annulment.

The qualification that the Constitutional Court gives to the scientific title of doctor is also relevant in this context, namely "*(…) administrative nature act, a quality that calls the incidence of the norms on the contentious administrative*"[19].

It is well known that the legal regime of the administrative acts is governed by the principle of revocability, together with the principle of legality, "*having implicit constitutional definition (art. 21 and 52 of the Constitution) and legal support (art. 7 para. (1) of Law no. 554/2004 of the contentious administrative). (…) all administrative acts can be revoked, the normative ones at any time and the individual ones with some exceptions, and the administrative acts that entered the civil circuit and generated subjective rights secured by the law are also among the exempt individual administrative acts. However, the scientific title of doctor in an individual administrative act which, once entered the civil circuit, produces legal effects in the field of personal, patrimonial and non-patrimonial rights.*"[20].

By introducing this sanction – the withdrawal of the title of doctor – direct effects are created in the procedure of the contentious administrative, adding another way of ceasing the effects of an administrative act, by means of a special law.

Therefore, in connection with this *sui generis* sanction, the provisions and securities regulated by means of the Law no. 554/2004[21] of the contentious administrative must be observed, the measure can only be ordered by a court of law, any other procedure giving rise to discriminatory situations and seriously affecting the principle of legality.

[19] See para. 48 of CCR Decision no. 624/2016.
[20] See para. 49 of CCR Decision no. 624/2016.
[21] Published in the Official Gazette of Romania, Part I, no. 1154 of 7.12.2004, as further amended and supplemented.

On the other hand, it should be noted that the sanction on the withdrawal of the title of doctor, introduced by an imprecise, unclear legal norm borrows elements from both the nullity and revocability of the administrative act, which is contrary to the stated constitutional principles.

Moreover, we hereby point out that the application (without any time limit!) of the sanction on the withdrawal of the title of doctor, on the one hand, encourages and maintains the superficiality and inconsistency of key state institutions in the field of education (line ministry, CNATDCU), which, despite the fact they have validated and conferred/granted this title, can at any time change their minds (including in the event that previous evaluations have led to the adoption of the decision to maintain the scientific title, as in this case), even on the basis of new criteria, non-existing at the time of awarding the title, and on the other hand, violates the principle of security of legal relations, by generating mistrust and disrespect in higher education institutions in Romania.

The fact that the annulment of the doctor diploma is referred to the analysis of the courts of law does not mean that such thing covers the unconstitutionality defects underlying the issuance of the withdrawal order, as the court invested with the annulment of a doctor diploma only finds that the title was withdrawn and exclusively following this finding, without no analysis on the legality of that procedure, annuls the doctor diploma.

Last but not least, neither the fact that the addressee of the administrative act of withdrawal of the title of doctor can subsequently resort to the court of law on the verification of its legality can cover the unconstitutional defects underlying the issuance, as the court of law does not have the possibility to verify neither the independence of the body within which the withdrawal procedure is carried out, nor the framework in which the specialized commission (appointed by the same body dependent on the issuer of the act) decides on the referral.

We would also like to point out that the subjects of law concerned, for example, do not benefit from the established concept of challenge of the members of the commission if they are not impartial and they cannot request the change of venue of the referral to an independent body (the court is to verify if the grounds of the change of venue are substantiated), as in case the withdrawal of the title of doctor were considered in court proceedings.

5. Concluding Remarks

The identification[22] of plagiarism in scientific paper works is not an easy task, and the legislator fails to clarify the legal framework.

Depending on the interest manifested in the media, plagiarism allegations soon appear in the discussions, the methodology of elaboration of these scientific papers being under suspicion[23].

We believe that the CCR Decision no. 624/2016 is flagrantly infringed by the fact that the procedure underlying the order of the withdrawal of the title of doctor is carried out by a body that is totally dependent on the issuer of the administrative act.

Furthermore, by the fact that the concerned subjects of law cannot support their point of view[24] in this procedure, the constitutional provisions governing the right to a fair trial and the right to defence are flagrantly violated, by creating discrimination among persons whose administrative act is annulled and among persons whose administrative act is revoked.

For all the reasons set out in this study, we believe that the arguments claimed by the concerned persons in legal proceedings could lead to the referral to the CCR, in order to pronounce a decision to establish that the provisions of art. 170 para. (1) of the National Education Law are unconstitutional.

And this could even happen in the very near future...

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[22] Please see Elena Emilia Ștefan, *Etică și integritate academică*, second edition, revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2021, pp. 260 and following.

[23] Elena Emilia Ștefan, *Metodologia elaborării lucrărilor științifice*, Pro Universitaria Publishing House, Bucharest, 2019.

[24] The same would be if the withdrawal of the title of doctor would be requested before an independent court of law, by means of an evaluation performed by independent experts appointed by the court and with the permanent presence of the person in question throughout the proceedings.

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CERTAIN CONSIDERATIONS ABOUT THE RIGHT TO WORK AND THE REINSTATEMENT OF AN EMPLOYEE AFTER UNLAWFUL DISMISSAL

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Abstract

The consequences of finding by a court of law that the decision to dismiss an employee is void, are to annul with retroactive effect the measure terminating the employment relationship between the parties (i.e. the applicant and the employer) and to restore the previous situation.

According to the retroactivity principle of the effects of the legal act nullity - nullity does not produce effects only for the future (ex nunc), but also for the past (ex tunc), i.e. these effects are produced up to the moment of the conclusion of the civil legal act.

The most important consequence of the annulment of the dismissal decision and the reinstatement of the previous situation is the effective reinstatement in employment.

Reinstatement means the continuation of the old employment agreement (without changing its provisions - including the place of work or salary), by resuming the position previously held.

In this study we shall tackle down certain considerations regarding the proper reinstatement of an employee, without breaching his or her legal rights, including the right to work.

Keywords: *right to work, reinstatement, employee, employer, unlawful dismissal.*

1. About right to work

According to human rights classifications, the right to work is included in the category of economic and social rights, along with the right to equal pay for equal work, the right to safety and health at work, the right to paid leave, the right to social security, the right to health (which implies the right of a person to enjoy the highest attainable standard of physical and mental health)[1].

These economic and social rights are considered *second-generation rights*, which require positive intervention by states to create the material and social conditions necessary for their realisation.

From the point of view of the content of the obligation to respect and guarantee which is incumbent on States, the right to work falls into the category of virtual rights which are characterised by the fact that they do not enjoy the full force of an authority effectively sanctioned by law.

2. Preliminary considerations on the invalidity of the dismissal decision and reinstatement of employees in Romania

Art. 80 of the Romanian Labour Code states that:

„(1) If the dismissal has been unfairly or unlawfully effected, the court shall order its annulment and shall oblige the employer to pay compensation equal to the indexed, increased and updated salaries and other rights which the employee would have enjoyed.

(2) At the request of the employee, the court which ordered the dismissal to be annulled shall restore the parties to the situation prior to the issue of the dismissal.

(3) If the employee does not request the reinstatement of the situation prior to the dismissal, the individual employment agreement shall be terminated automatically on the date of the final and irrevocable judgment.".

In recent years there has been considerable debate over the constitutionality of art. 80 para. (1) of the Labour Code [former art. 78 para. (1) of the same piece of law] providing the annulment of the dismissal by the court of law and the award of damages, and the CCR dismissed the non-constitutionality exception through

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[1] LSN, PIDO, pp. 12 and 31.

several decisions[2], by underlying three things in particular. *Firstly*, the employee has suffered actual loss through deprivation of his or her salary to which he or she was entitled, regardless of whether or not, between the time of dismissal and the time of re-employment, he or she earned or not income from other sources[3]. *Secondly*, the termination of the employment agreement in breach of the legal conditions is an objective and reasonable cause which allows on the one hand the restriction of economic freedom and, on the other hand, the restriction of the right to property. *Thirdly*, the analysed legal provision does not prevent free access to justice, as the parties can benefit from all procedural guarantees to uphold their rights.

Otherwise, as the doctrine emphasizes „it is obvious that the dismissal institution does not breach the right to work and the freedom of work. The employee does not benefit of an absolute liberty in this quality, and the right of the employer to dismiss him/her can not be removed"[4].

Moreover, through the Decision no. 243/2016[5], the Romanian Constitutional Court once declared that the legal text is constitutional, underlying that „the nullity of a legal act returns the parties to the situation in which they were before that act came into existence, so the rule of reinstatement applies. (…) Reinstatement to the previous situation can be achieved in two ways specific to labour law, namely by reinstatement of the employee and payment by the employer of compensation equal to the indexed, increased and updated salaries and other rights that the employee would have benefited from, or only by paying this compensation. Thus, the annulment of the dismissal measure must be accompanied by the payment of the compensation referred to above and, optionally, at the request of the employee, by his or her reinstatement."[6].

Please note that this compensation is awarded in full if the employee was not at fault, because if there were concurrent faults, the employer would be obliged to pay to the employee only a part of the compensation corresponding to his or her fault.

The consequences of finding that the decision to dismiss an employee was void are to annul with retroactive effect the measure terminating the employment relationship between the parties (*i.e.* the employee and the employer) and to restore the previous situation.

Nullity does not produce effects only for the future (*ex nunc*), but also for the past (*ex tunc*), *i.e.* these effects are produced up to the moment of the conclusion of the civil legal act.

The most important consequence of the annulment of the dismissal decision and the reinstatement of the previous situation is the effective reinstatement in employment, if expressly requested by the employee in front of the court of law. Please note that "if the employee has not applied for reinstatement through the dismissal challenge, he or she can still apply for reinstatement, according to art. 204 para. (1) of the Code of Civil Procedure, until "the first term at which he/she is legally summoned", after which operates the forfeiture of the right to invoke art. 80 para. (2) of the Labour Code, both in the present case and in a subsequent case."[7].

Reinstatement means the continuation of the old employment agreement (without changing its provisions - including the place of work or salary), by resuming the position previously held.

From our perspective, reinstatement could be also applicable to *de facto* dismissals, when employees are no longer accepted at work by the employers, without being issued dismissal decisions – would it be any other solution than the one to demand in front of the competent court of law damages and reinstatement?

3. Effective reintegration of the employees

According to art. 17 of the Romanian Labour Code, the function/occupation according to the specification of the Romanian Classification of Occupations or other normative acts, which is reflected in the job description, specifying the duties of the job, as well as the place of work are essential clauses of the individual employment agreement, which are agreed between the employer and the employee. The individual employment agreement can only be amended in these respects by agreement between the parties.

Although the reinstatement of the parties to the previous situation *does not require* the conclusion of a new individual employment agreement or the issue of a reinstatement decision, we recommend that the employer issue a reinstatement decision for the

[2] For instance the Decision no. 318/2007 published in the Official Gazette of Romania no. 292 of 3 May 2007, the Decision no. 1241/2010, published in the Official Gazette of Romania no. 848 of 17 December 2010, the Decision no. 290/2013 published in the Official Gazette of Romania no. 383 of 27 June 2013.

[3] Certain exceptions can be deduced from the law (*e.g.* in case of parental leave allowance, when the employee is entitled only to the allowance, not also to a salary), otherwise an abuse of the employee's right to obtain damages could be taken into consideration.

[4] Alexandru Țiclea, Laura Georgescu, *Dreptul muncii. Curs universitar*, 7th ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 420.

[5] Published in the Official Gazette of Romania no. 495 of 1 July 2016.

[6] Para. 17 of the Decision.

[7] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017, p. 535.

employee, stating the post to which he or she will be reinstated and the date on which he or she will return to work.

It should be noted that the employee's consent is not required for the reinstatement decision to be issued, but that he or she has the right to appeal.

From our perspective, normally, the question of an employee's reinstatement should be analysed from two perspectives:

i. Reinstatement to the post and position held prior to the dismissal

Following the interpretation of art. 80 of the Romanian Labour Code, we note *ab initio* that the legal provision does not distinguish whether the post to which reinstatement is to be ordered still exists or not.

If there is no vacancy in the specialized department of the employer, in the position held by the employee before his or her dismissal, difficulties may arise. In such situations, we recommend to take steps to change the organisation chart as soon as possible and keep the employee informed of the progress of these steps.

If it has become impossible to perform in kind (reinstatement in the post and position held prior to the dismissal), the employer should order reinstatement in an equivalent post, as indicated below.

ii. Reinstatement to a post equivalent to that held before the dismissal

According to the legal doctrine, such an equivalent post requires the cumulative fulfilment of several conditions:

a. the same or a similar professional qualification;

b. similar duties and responsibilities;

c. salary at least equal to the one previously held.

Furthermore, we would point out that the job title could be the same or different, and the post could be in another directorate, department or component unit, but with the same salary as before the dismissal.

In view of the fact that the European Court of Human Rights has ruled in several cases on the issue of reinstatement to an equivalent post, we consider it necessary to point out the following:

”The Court considers that the reinstatement of the applicant in a post equivalent to that held before his/her dismissal, the payment of the sums ordered by the decision of 1 February 1999, updated for inflation, and the payment of compensation for the material and non-material damage suffered as a result of the failure to comply with that decision would, as far as possible, place the applicant in a situation equivalent to that in which he would have found himself/herself if the requirements of art. 6 (1) of the Convention had not been infringed.”.

Please bear in mind that if the resumption of the employment relationship is made under different conditions than before (*e.g.* lower salary, change of function or place of work), the employee would have the possibility to consider these changes unlawful and to challenge them, but not to simply refuse to report for work and resume work.

4. Additional recommendations

In view of the practical problems arising from the effective reinstatement of the employees, each time we deal with judicial proceedings, if the reasoning of the court is not clear, it should be considered necessary to submit a request for clarification of the operative part of the civil judgment delivered in the respective case.

Depending on the clarification of the sentence, we could also consider together the appropriateness of suspending the provisional execution of the sentence (pursuant to art. 450 of the Romanian Code of Civil Procedure), since the immediate execution of the sentence is difficult and could have serious effects, or, in the event of the appeal being admitted, the return of the execution would be particularly difficult, and the failure of this procedure would cause considerable damage to the employer, which would be difficult to repair. This institution makes it possible to suspend the enforceability of the judgment until the appeal has been decided.

At the same time, during the whole procedure, in order not to be accused of not fulfilling the obligations established by the civil court (which cannot be justified by the fact that the workplace has been abolished or reorganization measures have intervened), we recommend that the employer proceeds to:

a. maintain a permanent dialogue with the employee (*e.g.* addresses, notifications, invitation to undergo compulsory occupational medical check-up, if necessary, meetings) and ask him or her to report to work, even if he or she will be offered a job equivalent to the job he or she previously had;

b. calculate and pay compensation equal to the indexed, increased and updated salary and other rights to which he or she would have been entitled from the date of dismissal to the date of actual reinstatement.

5. Failure to execute the reinstatement decision

After the reinstatement decision has been issued, if the employee fails to report for work, disciplinary proceedings may be brought against him or her with all their consequences. How should the employer solve this issue?

Taking into account the provisions of art. 287 para. (1) letter d) of the Romanian Criminal Code, which stipulates that failure to comply with the court

order for reinstatement to work constitutes a criminal offence and is punishable by imprisonment from 3 months to 2 years or a fine, the employer should immediately notify the employee. This specific notification must stipulate that the employee's place of work is at his or her disposal for a certain period of time and that, if he or she fails to report for work, he or she could be subject to disciplinary action (including disciplinary dismissal for unjustified absence). In order to be pro-active, the employer found in such situation could resort to another alternative - to require the former employee, through the same notification, to state whether he or she waives the application of the court decision in terms of reinstatement.

If the employer fails to comply with the reinstatement order, then the employee could seek to enforce the judgment. With regard to the enforcement of the judgment, as well as its prescription, the labour legislation does not establish special rules, which is why the general rules of the civil procedural law will apply (*i.e.* art. 706-711 of the Code of Civil Procedure). The labour courts, as a rule, apply in such cases to the employer the penalty established per day of delay, based on art. 907 of the Code of Civil Procedure[8].

Moreover, in practice appear cases of partial or total impossibility of executing the reinstatement decision, when the employer is exempted of responsibility (*e.g.* in the case of the final sentence of the employee to the execution of a custodial sentence, prohibition to exercise the profession by a final decision of the criminal court, expiry of the term of the individual employment agreement concluded for a fixed term, effective termination of the job in which the employee was supposed to be reintegrated, the employee is remanded in custody). As the legal doctrine states "in such conditions, the reinstatement obligation cannot be executed not even virtually and not for a single moment."[9].

6. Concluding Remarks

Even though the employees do not benefit of an absolute freedom, for their protection, the Romanian Labour Code foresees expressly and limitatively the situations in which employees may be dismissed and the procedure to be followed, in order to protect them of certain abuses and to guarantee their rights.

As emphasized in the legal doctrine, "the restrictive definition of the cases and reasons for which legal employment relationships may be terminated at the unilateral will of the employer is the most important guarantee for the non-infringement of the right to work"[10].

The Romanian Labour Code is very protective with the employees, reason why in art. 38 of this piece of law, it states that employees cannot even waive their rights established by law, any such transaction being null.

In cases of dismissals made in breach of the labour legislation, there are two possible solutions in case the employee wants to contest the dismissal decision. First solution is revocation, second solution is annulment of the dismissal decision decided by the court of law.

Revocation of the dismissal decision could also be a solution for an employer who acknowledges that the law has been violated. The revocation is possible because the dismissal decision is a unilateral act of the employer, who, in this situation, reverses its earlier decision and repeals with retroactive effect that decision. The revocation must be done by the same body of the organization that the one which disposed the dismissal, and it must be done in writing.

The annulment of the dismissal decision decided by the court of law is the most common form of reparation for the harm done in such cases. But, in practice, many problems appear in case of dismissals. For instance, the situation when, after the dismissal, the employer is dissolved, and a new entity takes over its patrimony, being the successor of the respective entity – should the successor be responsible for the breach of the legal procedure?

Questions like what happens in case of reinstatement of employees in such cases, for sure attracts many attention and carefulness. From our perspective, we consider that the legal provision is outdated and the legislator ignores the reality of our times. The legal provision should be amended, as underlined by the labour specialists, with whom we totally agree, at least in the following aspects:

- "accepting the removal of the imperative character of the text with a dispositive wording to the effect that the court "may restore the parties to their previous position";
- expressly recognising the right of the court to order the reinstatement of the employee in an equivalent or similar position;
- the obligation to return to work, which has become impossible, may be replaced by equivalent performance, *i.e.* by the award of (additional)

[8] *I.e.* Who states that "No liquidated damages may be awarded for non-performance of obligations under this Chapter".

[9] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017, p. 537.

[10] Alexandru Țiclea, Laura Georgescu, *Dreptul muncii. Curs universitar*, 7th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 420.

compensation."[11].

For sure, the judicial practice is more pitoresque than the legislator could have imagined when creating the legal norm…

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- www.ccr.ro;
- www.cdep.ro;
- www.sintact.ro.

[11] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017, p. 539.

EU TAXONOMY: QUALIFYING AS GREEN

Alina Mihaela CONEA*

Abstract

What is 'sustainable'? What economic activity qualifies as green and should receive, accordingly, investments? Is nuclear energy green? Is gas green? The legal classification system defines a list of environmentally sustainable economic activities that aims at playing a significant part in facilitating sustainable investment in EU. The paper points the different views member states have on what green means, on the Hinkley Point C Case before the Court of Justice of European Union. The main purpose of this paper is to explore the legal base concerning the concept of sustainable development in EU law. In order to address this question the paper is divided into three parts. The first part is dedicated to the legal framework of EU primary and secondary law relating to the concepts of sustainable development, green and environmental law. The recent classification of sustainable activities in the Taxonomy Regulation is considered in the second part. The third part of the paper selects some interpretations of the Court of Justice of European Union case-law.

Keywords: *nuclear energy, green, sustainable finance, climate law, CJEU jurisprudence, environment protection.*

1. Introduction

On 8 October 2014, the Commission approved an aid scheme planned by the United Kingdom for the construction of a nuclear power station 'Hinkley Point C'[1]. The Republic of Austria (supported by numerous member states) brought an annulment action before Court of Justice of European Union (CJEU), claiming, among others, that the construction of Hinkley Point C is not intended to meet an objective of 'common' interest, that there is a conflict between the promotion of nuclear energy, on the one hand, and the principle of protection of the environment and the principle of sustainability, on the other. In September 2020 the Grand Chamber of the CJEU handed in a final decision.

On 2 February 2022, the Commission approved in principle a Complementary Climate Delegated Act including specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy, a classification of green activities for investments purposes.

The question is what means 'sustainable'? What economic activity qualify as green and should receive, accordingly, investments? Is nuclear energy green? Is gas green?

Green, protection of environment and sustainability.

What exactly is the meaning of these terms? Is there any synonymy between them? Or are they, in fact, different concepts? Reminiscent a mirror situation of the Sergio Leone classical movie, The good, the bad and the ugly, where "Leone narrates the search for a cache of gold by three grotesquely unprincipled men sardonically classified by the movie's title[2].

The purpose of this paper is to explore the legal base concerning the concept of sustainable development, green and environment law in European Union (EU) law.

In order to address this enquiry the paper is divided into three parts. The first part is dedicated to the legal framework of EU primary and secondary law. The recent classification of sustainable activities in the Taxonomy Regulation is considered in the second part. The third part of the paper selects some approaches of the Court of Justice of European Union (CJEU) case-law.

2. The legal sphere: a wide shot

2.1. The sustainable development

- The EU primary law

The concept of sustainable development[3] appears 6 times in Treaty on European Union, and 1 time in the Treaty on the Functioning of the European Union, without any definition provided.

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[1] Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (notified under document C(2014) 7142) (Text with EEA relevance), OJ L 109, 28.4.2015, pp. 44-116.

[2] Jameson, Richard T. *Something to do with Death: A Fistful of Sergio Leone*, Film Comment 9, no. 2 (1973): pp. 8-16, cited by https://en.wikipedia.org/wiki/The_Good,_the_Bad_and_the_Ugly.

[3] For an evolutionary perspective of `sustainable development` concept in the normative filed of EU law, see Nicolas de Sadeleer, *Sustainable Development in EU Law. Still a Long Way to Go*, in Jindal Global Law Review. Special Issue on Environmental Law and Governance (2015) 6(1), pp. 39-60.

The Preamble of the treaty states that the Union has to take into account *the principle of sustainable development* within the context of the accomplishment of the internal market and of reinforced cohesion and *environmental protection.*

Thus, reading it the other way, in the context of environmental protection the Union has to take into account the principle of sustainable development.

Accordingly, the principle of sustainable development is *a limit of the* environmental protection.

Art. 3 of the Treaty on European Union (TEU) laid down the objectives of the Union[4]. Although the objectives do not impose legal obligations on the member states or confer rights on individuals[5], they are relevant for the interpretation of the Treaty provisions[6].

Art. 3 (3) of the TEU states that:

The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Consequently, the purpose of the internal market is to work for the sustainable development of Europe.

The sustainable development is based on: economic growth, price stability and competitive social market.

The aims are full employment, social progress and *a high level of protection and improvement of the quality of the environment.*

The treaty provides for the external dimension of this objective in para. (5) of art. 3 TEU. So, the Union shall contribute to (…) the sustainable development of the Earth. In fact, the sustainable development appears widely within the general provisions on the Union's external action, in art. 21 TEU.

Remarkably, according to art. 21 (d) TEU the Union shall foster the *sustainable* economic, social and *environmental development*.

The Charter of Fundamental Rights also refers to sustainable development as a principle in art. 37.

The Treaty on the Functioning of the European (TFEU) Union, at art. 11 TFEU (ex art. 6 TEC) provides that:

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view *to promoting sustainable development.*

Art. 11 TFEU requires environmental protection requirements to be 'integrated' into the Union's policies and activities and is therefore also referred to as 'integration clause'[7]. According to the CJEU, this provision emphasises the fundamental nature of that objective and its extension across the range of those policies and activities[8].

- The EU secondary law and programmatic documents

The most usually mentioned definition of sustainable development is that of the United Nations Brundtland report from 1987[9]: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The 2001 Goteborg European Council outlines the concept: sustainable development – to meet the needs of the present generation without compromising those of future generations – is a fundamental objective under the Treaties. That requires dealing with economic, social and environmental policies in a mutually reinforcing way[10]. As the Brundtland report express it, "economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind"[11].

A single exception is that if of Regulation (EC) no. 2493/2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, that is no longer in force. According with this act sustainable development relies on the integration of the environmental dimension into the development process[12]. "Sustainable development" means, in the wording of this act, the improvement of the standard of

[4] Conea, Alina Mihaela, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2019.

[5] Klamert, Marcus, *Article 3 TEU*, In The EU Treaties and the Charter of Fundamental Rights: A Commentary, Oxford University Press, 2019, p. 209.

[6] Lenaerts, Koen, Piet Van Nuffel, Robert Bray, and Nathan Cambien. *European Union Law*, 3rd ed., London: Sweet & Maxwell, 2011, para. 7-007.

[7] Klamert, Marcus, *Article 11 TFEU*, In The EU Treaties and the Charter of Fundamental Rights: A Commentary, Oxford University Press, 2019, p. 564.

[8] Judgment of the Court (Grand Chamber) of 15 November 2005, Commission of the European Communities v. Republic of Austria, Case C-320/03, ECLI:EU:C:2005:684, para. 73.

[9] In 1983, the General Assembly of the United Nations created the World Commission on environment and Development chaired by the Prime Minister of Norway Ms. Gro Harlem Brundtland. The report (Brundtland report) entitled "Our Common Future" was presented in 1987.

[10] Presidency Conclusions, Göteborg European Council, 15 and 16 June 2001.

[11] Brundtland report entitled "Our Common Future", presented in 1987.

[12] Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, pp. 1-5, no longer in force.

living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations[13].

The Commission specifies in Europe 2020. A strategy for smart, sustainable and inclusive growth, that "*Sustainable* growth is promoting a more resource efficient, greener and more competitive economy"[14]. The accent is on the development side. Further, according to the explanation of the Commission, Europe must act to have „clean and efficient energy" basically for the following: financial savings (adding an extra 0.6% to 0.8% GDP), energy security and to create more jobs[15].

2.2. The *green*

The using of the word green is abundant, especially, in the non-binding acts of the EU institutions. For example, in different Commission's Communications (*green* solutions, *green* Infrastructure, *green* features such as green roofs and walls, greening our buildings)[16], Reports (lack of *green* engineering know-how)[17] or EU Parliament resolutions (*green* economy, *green* architecture)[18].

Green infrastructure is defined in the *EU green infrastructure strategy*[19] as 'a strategically planned network of natural and semi-natural areas with other environmental features designed and managed to deliver a wide range of ecosystem services. It incorporates green spaces (or blue if aquatic ecosystems are concerned) and other physical features in terrestrial (including coastal) and marine areas. On land, green infrastructure is present in rural and urban settings'.

Accordingly, the central element of the definition is biodiversity, an environment concept. Unlike *single-purpose grey infrastructure*, *biodiversity-rich green spaces* can perform a variety of extremely useful functions, often simultaneously and at very low cost, for the benefit of people, nature and the economy[20].

On 11 December 2019, the Commission presented the *European green deal*. This is a growth strategy aiming to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use[21].

In this strategy, the word green is used in the following manner, referring to: *changes of economy* (green and the digital transformation, green transition), *financial market* (the risk of green washing, 'green claims', green public purchasing, green finance, overall greening of banks activities, EU green bond standard, green assets, greening national budgets, green budgeting tools, green public investment), *the legislative framework* (a green oath to 'do no harm', "green" regulation) and *external action* ('green deal diplomacy' focused on convincing and supporting others to take on their share of promoting more sustainable development).

The concept of *green* is to be found also in the legislative acts of the Union.

For instance, *greening* (or the *green* payment) is a new type of direct payment to farmers introduced with the 2013 reform of the Common Agricultural Policy (CAP). It is the only direct payment whose main stated objective is '*green*', namely to enhance the CAP's environmental performance[22]. The green payment serves two distinct objectives: enhancing the CAP's environmental and climate *performance* and supporting farmers' income.

Greening is mandatory. All farmers participating in CAP direct payment schemes must also apply for the green payment. However, smaller holdings can benefit from support under greening without having to meet all, or even any, of greening requirements. Greening requirements also do not apply to holdings considered 'green by definition': for example, organic farmers benefit from the green payment without having to demonstrate compliance with the three greening

[13] Art. 2 of Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, pp. 1-5.

[14] Communication from the Commission , EUROPE 2020 *A strategy for smart, sustainable and inclusive growth*, COM/2010/2020 final.

[15] *Ibidem.*

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Green Infrastructure (GI) — Enhancing Europe's Natural Capital, * COM/2013/0249 final *, Communication from the Commission, A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives, SWD(2020) 550 final.

[17] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Review of progress on implementation of the EU green infrastructure strategy, COM/2019/236 final.

[18] European Parliament resolution of 17 September 2020 on the European Year of Greener Cities 2022 (2019/2805(RSP)), OJ C 385, 22.9.2021, pp. 167-172.

[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Green Infrastructure (GI) — Enhancing Europe's Natural Capital*, COM/2013/0249 final.

[20] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of progress on implementation of the EU green infrastructure strategy*, COM/2019/236 final.

[21] Communication from the Commission , European Green Deal, COM/2019/640 final.

[22] Regulation (EU) no. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) no. 637/2008 and Council Regulation (EC) no. 73/2009, OJ L 347, 20.12.2013, pp. 608-670, Recital (37).

practices[23]. The European Court of Auditors, in Special Report 21/2017, concludes that: Greening, as currently implemented, is unlikely to provide significant benefits for the environment and climate[24].

In the field of financial market, *sustainable finance* refers to the process of taking *environmental, social and governance* considerations into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects.

A Commission study[25] presents an overview and analysis of worldwide efforts on defining "green" for green bonds, lending and listed equity. The study notes that the term "green finance" is closely associated with related concepts, such as climate finance and sustainable finance and that some organisations use these terms interchangeably. The Commission study is based on the understanding that *climate, green and sustainable finance are nested concepts.*

According to the European Central Bank, the term "green bond" refers to debt securities whose proceeds are used to finance investment projects with *an environmental benefit*. There are different approaches to defining and certifying green bonds, and no global market standard has emerged so far[26]. The definition accepted by the ECB is that of Bank for International Settlements. (Green bonds are fixed income securities which finance investments with environmental or climate-related benefits. Green bonds are an integral component of "green finance" more generally, which aims to "internalize environmental externalities and adjust risk perceptions" for the sake of increasing environmentally friendly investments)[27].

Disclosure frameworks and taxonomies are also developing rapidly to create an information architecture to enable banks to manage the risks and scale up green finance[28].

Speaking about *greenflation*, the ECB Member of the Executive Board, acknowledge that most *green* technologies require significant amounts of metals and minerals, such as copper, lithium and cobalt, especially during the transition period. Electric vehicles, for example, use over six times more minerals than their conventional counterparts.[29]

2.3. The environment law

A definition of *environmental law* is to be found in Regulation no. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. *Environmental law* refers to the objectives of Community policy on the environment as set out in the Treaty[30]. '*Environmental law'* means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems[31].

The EU objectives with respect to the environment, set out in art. 191(1) TFEU, are *preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.*

Recital 10 of the Aarhus Regulation states that[32], in view of the fact that environmental law is constantly evolving, the *definition of environmental law* should

[23] European Court of Auditors, Special Report 21/2017, Greening: a more complex income support scheme, not yet environmentally effective, (pursuant to art. 287(4), second subparagraph, TFEU).

[24] *Ibidem.*

[25] European Commission , Study, Defining "green" in the context of green finance, 2017.

[26] Roberto A. De Santis, Katja Hettler, Madelaine Roos and Fabio Tamburrini, *Purchases of green bonds under the Eurosystem's asset purchase programme*, ECB Economic Bulletin, Issue 7/2018, https://www.ecb.europa.eu/pub/economic-bulletin/focus/2018/html/ecb.ebbox201807_01.en.html.

[27] Ehlers, T. and Packer, F., *Green bond finance and certification*, BIS Quarterly Review, September 2017.

[28] Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, Keynote speech, Industry outreach on the thematic review on climate-related and environmental risks, *Towards an immersive supervisory approach to the management of climate-related and environmental risks in the banking sector*, Frankfurt am Main, 18 February 2022.

[29] Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at a panel on "Monetary Policy and Climate Change" at The ECB and its Watchers XXII Conference, *A new age of energy inflation: climateflation, fossilflation and greenflation*, Frankfurt am Main, 17 March 2022.

[30] Recital (10), Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13-19.

[31] Art. 2 (1)(f), Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[32] Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13-19.

refer to the objectives of EU policy on the environment as set out in the Treaty on the functioning of EU[33].

3. The EU taxonomy regulation: a close-up

To reach the objectives of the European Green Deal, the EU is determined to conduit investments into sustainable activities. For this purpose, the EU adopted Regulation 2020/852 (Taxonomy Regulation)[34] that provides harmonised criteria to determine whether an economic activity qualifies as environmentally sustainable.

The Taxonomy Regulation aims to establish at Union level a classification system to clarify which activities qualify as 'green' or 'sustainable'[35].

Consequently, in the wording of this legislative act 'green' or 'sustainable' appears to be synonymous.

The Taxonomy Regulation defines *six environmental objectives*: (1) climate change mitigation; (2) climate change adaptation; (3) the sustainable use and protection of water and marine resources; (4) the transition to a circular economy; (5) pollution prevention and control; (6) the protection and restoration of biodiversity and ecosystem.

The Taxonomy Regulation sets out *three groups of taxonomy users*: (1) financial market participants offering financial products in the EU; (2) large companies who are already required to provide a non-financial statement under the Non-Financial Reporting Directive; and (3) the EU and Member States, when setting public measures, standards or labels for green financial products or green (corporate) bonds.

An economic activity *can only be classified as sustainable*, according to art. 3 of Taxonomy Regulation, if: (1) The economic activity contributes to one of the six environmental objectives; (2) The economic activity does 'no significant harm' to any of the six environmental objectives; (3) The economic activity meets 'minimum safeguards' such as the UN Guiding Principles on Business and Human Rights to not have a negative social impact; (4) The economic activity complies with the technical screening criteria developed by the EU Technical Expert Group.

Hence, to be classified as a sustainable economic activity according to the EU taxonomy regulation, a company must not only contribute to at least one environmental objective but also must not violate the remaining ones[36]. The taxonomy does not ban investments in activities not labelled "green", but it limits which ones companies and investors can claim are climate-friendly.

The definition of 'sustainable investment' in Regulation (EU) 2019/2088 includes investments in economic activities that contribute to an environmental objective which, amongst others, should include investments into 'environmentally sustainable economic activities'.

The regulation distinguishes between economic activities that directly contribute to one of the defined objectives, activities that serve as *"enabling"* (Article 16) for such direct contributions, and activities that are needed as *"transitional"* technologies (contributing substantially to the transition- art. 10(2)).

The regulation requires the Commission to set out a list of environmentally sustainable activities by defining technical screening criteria for each environmental objective. These criteria will be established by means of delegated acts.

The first delegated act[37], defining green activities from sectors such as energy, chemicals, and waste was adopted in December 2021 and entered into force on 1 January 2022. On 2 February 2022, the Commission complemented the Climate Delegated Act[38], specifying the screening criteria for nuclear and gas activities. This act adds gas and nuclear power as "transitional" technologies under the EU taxonomy.

Under art. 23(6) of the Taxonomy Regulation, the European Parliament and Council have four months to block the publication of this act in the EU Official Journal and thereby keep it from entering into force.

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[33] Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, *ClientEarth v. European Investment Bank*, Case T-9/19, ECLI:EU:T:2021:42.

[34] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020, p. 13.

[35] Recital (5), Ibid.

[36] Gortsos, Christos, The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union (December 16, 2020). European Banking Institute Working Paper Series 2020 - no. 80, Available at SSRN: https://ssrn.com/abstract=3750039.

[37] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (Text with EEA relevance), C/2021/2800, OJ L 442, 9.12.2021, pp. 1-349.

[38] Commission Delegated Regulation (EU) /... amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C/2022/0631 final (not published in the Official Journal).

4. The CJEU jurisprudence: some duels along the way

4.1. The concept of environmental law

The CJEU, interpreted, in the case *TestBioTech*[39], in a board sense the meaning of environmental law: the EU legislature intended to give to the concept of 'environmental law', covered by Regulation no. 1367/2006, a broad meaning, not limited to matters relating to the protection of the natural environment in the strict sense.

Subsequently, the Court states in *ClientEarth v European Investment Bank*[40] that the concept of a measure of individual scope[41] adopted 'under environmental law' (…) must be interpreted broadly, as meaning that it is not limited (…) to solely measures of individual scope adopted on the basis of a provision of secondary legislation that contribute to the pursuit of the objectives of the European Union in the field of the environment, which are laid down in art. 191(1) TFEU, but rather covers any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment.

4.2. The economic- environment balance

As the concepts of (*sustainable*) development and protection of environment can be antagonist, one of most problematic topic in environmental law, is the balancing of environmental with other social and economic interest[42].

In fact, a general balance requirement is enshrined in art. 191 TFEU. The EU legislature has to take into account 'the economic and social development of the Union as a whole and the balanced development of its regions'. The balancing between economic interests and environmental protection is evident in the field of internal market law[43].

In fact, *one restriction to trade is the protection of the environment*[44]. As such, CJEU accepted different measures that can justify the restriction to trade. For example, in Judgment of 1 July 2014 *Ålands vindkraft*[45] the Court admitted that the objective of promoting the use of renewable energy sources for the production of electricity, such as the objective pursued by the legislation at issue in the main proceedings, is in principle capable of justifying barriers to the free movement of goods. Also in Judgment of 13 March 2001, *PreussenElektra*[46] the Court held that statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity are not incompatible with art. 30 TEC (now, after amendment, art. 28 EC), such provisions being useful for protecting the environment in so far as the use of renewable energy sources which they are intended to promote contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.

As to *the level of protection of the environment*, the CJEU stated in *Gianni Bettati v Safety Hi-Tech* that the level of protection aims as being high not highest. Finally, whilst it is undisputed that art. 130r(2) of the Treaty requires Community policy in environmental matters to aim for *a high leve*l of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be *the highest* that is technically possible[47].

The *concept of sustainable development* was considered by the Court in several cases.

In the Judgment of 20 May 2008, ECOWAS[48], the Court annuls a Council decision as it contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP. The Court stated that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the

[39] Judgment of the General Court (Seventh Chamber) of 14 March 2018, *TestBioTech eV v. European Commission*, Case T-33/16, ECLI:EU:T:2018:135, para. 44-46.

[40] Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, ClientEarth v. European Investment Bank, Case T-9/19, ECLI:EU:T:2021:42, para. 126.

[41] For the notion of `administrative act`, see: Ștefan Elena Emilia, *Răspunderea juridică. Privire specială asupra răspunderii juridice în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013.

[42] On judicial precedent, see: Anghel, Elena. *Judicial Precedent, a Law Source*, LESIJ- Lex ET Scientia International Journal XXIV, no. 2 (2017), pp. 68-76.

[43] Peeters, Marjan, and Mariolina Eliantonio, eds. Research Handbook on EU Environmental Law, (Cheltenham, UK: Edward Elgar Publishing, 2020), p. 495.

[44] Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03, C/2021/1457, OJ C 100, 23.3.2021, pp. 38-89.

[45] Judgment of the Court (Grand Chamber) of 1 July 2014, Ålands vindkraft AB v. EnergimyndighetenCase C-573/12, ECLI:EU:C:2014:2037, para. 82.

[46] Judgment of the Court of 13 March 2001, PreussenElektra AG v. Schhleswag AG, Case C-379/98, ECLI:EU:C:2001:160, para. 73, 81 and operative part, pp. 1-2.

[47] Judgment of the Court of 14 July 1998, Gianni Bettati v. Safety Hi-Tech Srl, Case C-341/95, ECLI:EU:C:1998:353, para. 47.

[48] Judgment of the Court (Grand Chamber) of 20 May 2008, Case C-91/05, Commission of the European Communities v. Council of the European Union (ECOWAS), ECLI:EU:C:2008:288.

proliferation of small arms and light weapons, can contribute to the elimination or reduction of obstacles to the economic and social development of those countries. Hence, the sustainable development receives a board meaning.

Sitting in Full Court, at 16 May 2017, the Court stated in Opinion 2/15 (Singapore Free Trade Agreement)[49] that the objective of sustainable development henceforth forms an integral part of the common commercial policy[50]. The Court considers that in the framework of sustainable development, the social protection of workers and environmental protection are mutually reinforcing components.

4.3. No exclusion needed (*Hinkley Point C*)

The final decision handed in case *Republic of Austria v. European Commission (Hinkley Point C)*[51], brings in forefront a tense antagonism between the supporters and the opponents of nuclear energy.

The present decision builds on the constitutional relation between the treaties.

The Court states, contrary to what the General Court held, that the Euratom Treaty does not preclude the application in the nuclear sector of the rules of EU law on the environment. It follows that, since Article 107(3)(c) TFEU applies to State aid[52] in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision[53].

The decision was that the requirement to preserve and improve the environment, expressed in both the Charter and the TFEU, as well as the principles relied on by the Republic of Austria, which flow from it, are *applicable in the nuclear energy sector*[54].

The Hinkley Point C Decision represents a step in the gradual assimilation of the nuclear sector into the EU Treaty framework, including its environmental law requirements, save for the specific matters covered by the Euratom Treaty[55].

Thus, since the choice of nuclear energy is, under those provisions of the TFEU, a matter for the Member States, it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, do not conflict. The principle of protection of the environment and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant[56].

5. Conclusions

It seems to be a discrepancy between the green discourse of the EU, of the sustainability strategies and the decision or legislative acts adopted. We conclude that the primary law and legislative acts are using a more complex meaning of the words, which is narrower (and more *green)* in the programmatic acts of institutions.

In fact, according to the treaties, the principle of *sustainable development* is a *limit of the environmental protection*.

The using of the word green is ample, especially, in the non-binding acts of the EU institutions. In Commission strategy, European Green Deal, the word green refers to: changes of economy, financial market, the legislative framework and external action. The Taxonomy Regulation aims to establish at Union level a classification system to clarify which activities qualify as ‘green’ or ‘sustainable’. In the wording of this legislative act ‘green’ or ‘sustainable’ appears to be synonymous.

As the concepts of (sustainable) development and protection of environment can be antagonist, one of most problematic topic in environmental law, is the balancing of environmental with other social and economic interest. The decision handed in case *Hinkley Point C*[57], that brings in forefront a tense antagonism between the supporters and the opponents of nuclear energy, states that the requirements to preserve and improve the environment are applicable in the nuclear energy sector.

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[49] Opinion of the Court (Full Court) of 16 May 2017, Opinion 2/15 (Singapore Free Trade Agreement), ECLI:EU:C:2017:376.

[50] For aspects related with international legal personality of EU, see: Popescu, Roxana-Mariana, *Legal Personality of International Intergovernmental Organizations*, Challenges of the Knowledge Society; Bucharest (2021), pp. 466-470.

[51] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v. European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742.

[52] For state aid details: Fuerea, Augustin, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 353.

[53] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v. European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742, para. 45.

[54] *Idem*, para. 42.

[55] Kingston, Suzanne, *State Aid and the European Green Deal: The Implications of Case C-594/18 P Austria v Commission* (Hinkley Point C) (March 19, 2021). Forthcoming, European Law Review (2021), UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper no. 6/2021, Available at SSRN: https://ssrn.com/abstract=3808040, p. 12.

[56] Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742, para. 49.

[57] *Ibidem.*

The line between good or bad is not simple, life (and *green*) is more complex than that[58].

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PRINCIPLE OF MULTILINGUALISM AND THE INTERPRETATION OF EUROPEAN UNION REGULATIONS

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Abstract

The general nature of legal regulation, the specificity of the legal language, the dynamics of purposefulness of the law, the internal contradictions of the legal system, the gaps of law are justify the need to interpret the legal regulation. European law is a supranational law system, an aspect which is setting it apart from both domestic and international law. The issue of implementing, interpreting and applying a mandatory legislative system in no less than 27 states with major linguistic and cultural differences is a complex one in terms of the language used. By this study we aim to highlight the significance of linguistic differences in the interpretation and application of the European law.

Keywords: *legal language, interpretation of regulations, European law, linguistic differences, legal regulation, application of European law, multilingualism.*

1. Introduction

The interpretation of legal regulations is an important and necessary step in the enforcement of the law. It may be performed both by those for whom the legal regulation is intended, by the state authorities responsible for the enforcement of the law, as well as by those who have drafted the legal regulations in question. To achieve the objectives for which compliance with a legal regulation is required, it is important to discern both the "letter of the law" and the "spirit of the law". As such, several methods of interpretation emerge, and the result of a thorough interpretation may differ from the first impression left after reading of a regulation, respectively it may reveal a broader or stricter meaning of the intent of the legislator, provided that it is interpreted in good faith.

In order to fulfill the purpose for which the legal regulations have been developed, it is necessary to know the letter of the legal regulations, as well as their spirit[1]. These are revealed during the interpretation process, which is part of the law practice process. In both its meanings, the practice of law involves, in one form or another, to an extent or another, also the endeavor of “interpreting” the legal regulations. The interpretation of legal regulations is a logical-rational operation which is performed according to certain rules, based on law-specific methods for the purpose of establishing the true or full meaning of the legal regulation in its effective application, while representing a moment required for the application of law.

In the activity of legal regulation "application", its knowledge has a dual aspect: on the one hand it involves an integral as possible knowledge of the facts to fall under the provisions of that regulation and on the other hand a thorough as possible knowledge of the spirit and the letter of the regulation to be applied to the relevant facts.

The interpretation of legal regulations must lead to the full clarification of their meaning, both in terms of their internal logical-legal structure and in terms of their external form, style and drafting language, all of which aim to reveal the intent of the legislator. The practical reason for such an endeavor is, ultimately, is ensuring the correct selection and individualization of the regulation applicable to a given factual situation.

2. A brief history of the principle of multilingualism in the European Union

In 1952, during the drafting of the Treaty establishing the European Coal and Steel Community (ECSC), the signatory countries of that time: France, Italy, Federal Republic of Germany, Belgium, Luxembourg and the Netherlands, have decided that this new institution must stand out among the others, by its openness and linguistic diversity. And this is how the principle of "full multilingualism" was born, providing equal recognition to all languages of the Member States.

The body which supports the European Commission in implementing said multilingualism principle, which is one of the fundamental principles of the European Union, is the Directorate-General for

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[1] See Elena Anghel, *Reflections on the juridical system*, in proceeding CKS-eBook 2013, pp. 470-476, http://cks.univnt.ro/cks_2013/CKS_2013_Articles.html; The importance of principles in the present context of law recodifying, in proceeding CKS-eBook 2012, p. 753-762, http://cks.univnt.ro/cks_2012/CKS_2012_Articles.html.

Translation (DGT or DG TRAD). This principle has become the scope of Regulation no. 1 of 1958 [2]and it determines the EEC language regime. The Directorate-General for Translation is the European Commission's translation service. It is one of the world's leading language services, employing about 2,300 people, including 1,600 translators in its offices from Brussels and Luxembourg. Their main mission is to provide language services and to translate texts of a legislative and political nature, as well as any other document of interest for the European Commission, into the twenty-four official languages of the European Union. Thusly, it contributes to the promotion of multilingualism, the language regime of the European Union.

One of the European Commission's major partners in promoting the idea of multilingualism is the European Parliament.

All parliamentary documents are published in all the official languages of the European Union and each deputy is entitled to speak in the official language which he/she prefers. The European Parliament has enacted a regulation[3] recognizing the right of every deputy to review the parliamentary documents, to follow the debates and to speak in his/her own language.

The first Regulation enacted by the European Community in 1958 was establishing the German, French, Italian and Dutch languages as the official languages of its institutions - namely the languages of the founding countries: Germany, Belgium, France, Italy, Luxembourg and the Netherlands. Together with each expansion of the European Communities, the languages of the new Member States have been integrated. In 1973, the English, Danish and Irish languages have been added, the latter only as the "language of treaties", meaning that only the Treaty of Accession of Ireland and the basic texts concerning this country have been translated. The next languages to gain the status of official languages have been the Greek language in 1981, the Spanish and Portuguese languages in 1986, the Finnish and Swedish languages in 1995, the Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Czech, Slovak and Slovenian languages in 2004. As of January 1st, 2007, after the accession of Romania and Bulgaria, the European Union numbers 23 official languages. From this date, the Irish language has also become an official language. Since Croatia's accession to the European Union, 24 languages have been officially used in European legislation, a number that has not been seen so far not event at the level of states with multiple official languages or at the level of other international organizations.

Since 2007[4], the Romanian language has become one of the official languages of EU and the principle of European multilingualism applies to it. Thus, the binding European acts are also translated into our language, and private or public persons of Romania who are seeking justice at the CJEU can hold the court proceedings in their own language. Moreover, many Romanian linguists have been employed in European structures prior to Romania's accession specifically to enable a quick and easy integration. Despite these advantages, the translations into Romanian language are not without gaps, which is why the CJEU reminds the national courts to take into account other translations too when it comes to interpreting the European regulations.[5]

With 24 official languages, more than 506 language combinations are possible, as each language can be translated into 22 other languages. In order to respond to his challenge, the European Parliament has complex services of translation and check of legal texts. Strict rules have also been developed to ensure the effectiveness of these services and to maintain reasonable budgetary costs.

As a general rule, the translators are translating texts from an original version into their mother tongue. However, after the latest EU expansions and the increase in the number of possible language combinations, it has sometimes become difficult to find a person proficient in a particular language combination, especially when it comes to the least widely used languages in the European Union. For the translation of texts written in these languages, the European Parliament has created a "swivel" language system, which involves the translation of texts first into the most widely used languages (English, French or German languages). Over time, other European languages (Spanish, Italian and Polish languages) may also become swivel languages.

The principle of multilingualism is also regulated by art. 3 (3) of the TEU, according to which: *"The European Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced"* , as well as by art. 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties, which states that when a treaty has been authenticated in two or more languages, the text is equally authoritative[6] in each language,

[2] Regulation no. 1/1958 *determining the languages to be used by the European Economic Community*, OJ P 17, 6.10.1958, p. 385.

[3] European Parliament, Rules of Procedure for the 8th parliamentary term, 2014 - 2019, of July 2018 and Rules of Procedure for the 9th parliamentary term, 2019-2024, of July 2019.

[4] From another perspective, regarding the language of drafting administrative acts, see also E.E. Ștefan, *Administrative law. Part II, University course*, Universul Juridic Publishing House, Bucharest, 2022, pp. 42-44.

[5] https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_ordrejur/data/index_A-05.htm.

[6] Elena Anghel, *Values and valorization*, LESIJ JS no. 2/2015, Lex ET Scientia International Journal - Juridical Series.

unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. According to the same Convention, a version of the Treaty in a language other than the one in which the text has been authenticated shall not be deemed as authentic text, except when the Treaty stipulates otherwise or the parties have agreed to this. At the same time, the terms of a treaty are presumed to have the same meaning in the various authentic texts.

The Charter of Fundamental Rights of the European Union guarantees respect for linguistic diversity, and discrimination on the grounds of language is prohibited regardless of a person's country of origin. The European Parliament, the Committee of Ministers, the Economic and Social Committee and the Committee of the Regions are using all the official languages. To this end, the creation of an office of European Commissioner for Multilingualism on January 1st, 2007 proves that the European Executive is thoughtful with regard to this issue. This vision is also recaptured in the recent legislation of the European Parliament. The Code of Conduct on Multilingualism, adopted in 2006, states that the only method to achieve linguistic equality, while keeping the expenditure within acceptable budget limits, is the "integrated controlled multilingualism", built based on the needs communicated and prioritized in advance. This is the only way to ensure equality between Member States and between citizens.

The European Union is a "multicultural and multilingual democracy" where three alphabets are used: Latin, Greek and Cyrillic alphabets. This, however, generates a series of costs. No other body is spending this much on translation and interpretation, and yet in relative terms the costs are quite low - about 1% of the Union's annual budget or € 2.3 per year for a citizen. In the European Parliament, these costs account for more than a third of the total expenditure, in relation to an impressive work load - since 2005, more than one million pages per year have been translated at the Parliament level. On average, the EU's institutional system requires more than 2000 translators and more than 80 interpreters a day.

Unitary interpretation governs the case of ambiguities encountered between several versions of a European provision. In a ruling, the Court of Justice states: "According to constant case-law, the need to unitary apply and, as such, interpret the provisions of the European law precludes the possibility that, in case of doubt, the text of a provision may be regarded on its own, by relation to only one of its versions, conversely requiring its interpretation and application in the light of the versions existing in the other official languages"[7]. In the case Consiglio Nazionale degli Jugegneri versus Ministero della Giustizia, Marco Cavallero, at para. 53 it is stated that: "a constant case-law reveals the need to unitary apply and, as such, interpret the provisions of the European law precludes the possibility that, in case of doubt, the text of a provision may be regarded on its own, by considering one of the versions, but requires its interpretation and application in the light of the versions existing in the other official languages"[8].

In case of inconsistency between the various language versions of an European text, the relevant provision must be interpreted in consideration of the general economics and purpose of the regulation it belongs to. The first recital of the directive reveals that the directive's purpose is to remove the obstacles to the free movement of certain prepacked products containing food liquids, obstacles caused by the existence of compulsory administrative regulations in most Member States.[9]. According to the consistent case-law, a text of secondary European law must be interpreted insofar as possible in accordance with the provisions of the EC Treaty and the general principles of European law.[10].

3. The role of the European Union Court of Justice in the interpretation of the European law

The European Union Court of Justice is the judicial authority of the European Union and has the role of guaranteeing the observance of the law in the interpretation and application of the Treaties. To this end, the European Union Court of Justice has the power to exercise judicial control over the legal acts of the European Union, as well as the acts of the Member States, having the following responsibilities: to verify the legality of the acts issued by the European Union's

[7] Case C-457/05, Schutzverband dere Spirituosen - Industrie ev. v. Diageo Deutschland Gmbh, Court Decision of October 4th, 2007, para. 17. The Court refers to: Case C-29/69 Stander, Decision of November 12th, 1969, Rec., p. 419, para. 3; Case C-55/87, Moksel Import und Export, Decision of July 7th, 1988, Rec., p. 3845, para. 15; Case C-296/95, EMU Tabac and others, Decisions of April 2nd, 1998, Rec., p. 1-1605, para. 36 and Case C-63/06, Profisa, Decision of April 19th 2007, Rec., pp. 1-3239, para. 13. Please see: Case F-32/08, Marie-Claude Klein v. the Commission, European Union Civil Service Tribunal Decision of January 20th, 2009, pct. 35-36; Case F-11/08 Jörg Malling versus Office européen depolice (Europol), European Union Civil Service Tribunal Decision of June 4th, 2009, para. 35-36.

[8] Please also see: Case C-311/06, Court Decision of January 29th, 2009.

Directive 88/316 / EEC of 7 June 1988 of the Council amending Directive 75/106, which introduced in the later directive the relevant provisions of the main proceedings, is based on art. 100a of the EEC Treaty (which became art. 100a of the EC Treaty , which in turn became, following the amendment, art. 95 EC), and consequently seeks to improve the conditions for the establishment and functioning of the internal market. Case C-457/05, para. 21.

[10] *Idem*, para. 22.

institutions; to ensure the compliance of Member States with their obligations under the provisions of the Treaties; to interpret the Union law at the request of national courts of law.

The request for interpretation may be related to the founding treaties, as well as the amending acts and treaties. Moreover, the protocols and annexes to the founding and amending treaties are an integral part of these, which means that their texts may also be subjected to interpretation.[11]

Together with the merging of pillars I and III and the abrogation of art. 35 of the Treaty on European Union and art. 68 of the Treaty establishing a constitution for Europe, the CJEU jurisdiction extends also to the police cooperation in criminal matters. The exception to this rule is represented by art. 276 of the Treaty on the functioning of the European Union which maintains the rule established by former art. 35 para. 5 TEU, according to which the Court of Justice has no jurisdiction in verifying the legality[12] or proportionality of police or other law enforcement operations carried out in a Member State, nor to issue decisions with regard to the exercise of the responsibilities incumbent upon Member States for maintaining the public order and the defense of domestic security.

The court of Justice is authorized to issue preliminary decisions with regard to the interpretation of acts enacted by the institutions of the European Union and the European Central Bank.

Acts of the European institutions mean both the acts specified in the Treaties (Regulation, Directive, Decision) and the acts which are not covered by the Treaties (also known as atypical acts). With regard to the latter category, we refer to the decision of CJEU of 24 October 1973[13]. In this case, Finanzgericht de Bade-Wurtemberg has asked of CJUE, based on art. 177 TCE, to issue a preliminary ruling on the interpretation of two regulations (one of the Council, one of the Commission), certain articles of the Treaty establishing the EEC, but also on the interpretation of the Resolution of the Council and of the Representatives of the Governments of the Member States of 22 March 1971, on the attainment by stages of economic and monetary union in the Community. Thus, according to the Court, „art. 103 does not preclude the power of the Community institutions to enact, without prejudicing other procedures specified in the Treaties, circumstantial measures for maintaining the objectives of the Treaty. The Council is the body which selects, as the case may be, the form of the measure which it deems most appropriate."[14]. In this way, the European Court of Law has provided the requested interpretation to the national court.[15]

As per CJEU case-law, its power to interpret the acts issued by the European institutions is not conditional upon nor secondary to the direct effect of European acts or their binding nature. In this respect, we refer to the ruling for *Impresa Construzioni comm. Quirino Mazzalaï del Renom*[16], a Decision which states the fact that „according to the provisions of art. 177, the Court has the power to establish, by preliminary ruling, the interpretation of acts enacted by the European institutions, whether or not these are directly applicable. It is not for the Court to judge the relevance of the questions submitted under art. 177, which is based on a clear separation of powers, leaving it to the national courts to decide whether it is necessary to have a preliminary ruling procedure in order to issue decisions in the disputes brought before them.

The procedure of preliminary questions is governed by art. 267 TFEU[17]. The procedure of preliminary questions fulfills at least two functions. One is the function of a tool which ensures the unitary interpretation of European Union law, respectively its unitary application by the national courts of the Member States. The effect of this procedure is the elimination of the risk of a non-unitary practice occurring at the Union level, an obvious risk if the task of interpreting the European Union law would be left for the national courts. A second function is to protect the rights of natural and legal persons, the procedure of preliminary questions being essential for their legal protection given that it provides the opportunity to obtain the European Union law application by the national courts of the Member States. Based on this procedure, the relatively limited options of individuals - natural and legal persons from Member States - to lodge a complaint with the Court of Justice, are being compensated.

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[11] For a detailed presentation of the acts which may be the subjected to a preliminary proceedings, please see Augustin Fuerea, *European Union Law. Principles, actions, freedoms*, Universul Juridic Publishing House, Bucharest, 2016, pp. 97-101

[12] From another perspective E.E. Ștefan, *Legality and morality in the activity of public authorities*, în Public Law Magazine no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[13] CJEU, 24.10.1973, *Schluter/Hauptzollamt Loerrach*, C-9/73.

[14] C. D. Radu Prescură, R.-M. Popescu, *The legal regime of CJEU preliminary rulings and their impact on the national legal system* SPOS Project, European Institute of Romania, 2008, p. 15, unofficial translation, C-9/73, specified, Item 2 of the Table of Contents.

[15] C. D. Radu Prescură, R.-M. Popescu, *op. cit.*, p. 15.

[16] CJEU, 20.05.1975, *Impresa Construzioni comm. Qirinto Mazalai del Renom*, C-111/75.

[17] Art. 267 TFEU: *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."*

The procedure is non-contentious, of judicial collaboration, being an intermediate procedural stage of a litigation brought before a national court. Depending on the subject-matter of the request, the purpose of this procedure is to ensure the unitary interpretation and application of the European Union law and, consequently, to ensure the cohesion of the legal order of the European Union; the Court's interpretation seeks to reveal the exact meaning of an equivocal provision, to clarify the meaning and purpose of that provision as it is meant to be understood and applied, as well as to verify the compliance of a particular act with European Union law. The validity of an European Union act is appraised based on a judicial verification of regulations under review.

As such, the Court is the sole responsible for the interpretation of the European Union law. This means that neither the interpretation of the national law provisions nor the appraisal of its compliance with European Union law may be the subject-matter of a preliminary question. Also, the Court may not decide with regard to the European Union law application in effective individual cases, not ruling in the case submitted to the national court. The Court drafts an abstract requisite, providing, depending on the particular elements of the case, an answer required for the settlement of the main litigation. Ruling on the merits of the case and issuing the decision in the main litigation are the exclusive responsibilities of the national courts.

The preliminary referral procedure is a fundamental mechanism of the European Union law, which seeks to provide the national courts of the Member States with the means required to ensure an unitary interpretation and application of this law at the European Union level. Among the proceedings before the Court of Justice of the European Union, the preliminary ruling procedure has an essential role to play in the development of the important principles[18] of European Union law, several of which having been established following preliminary questions.

4. The principle of multilingualism in the procedure and practice of the European Union Court of Justice

The languages of the Member States are official languages of the European Union [19] and of the proceedings of the Luxembourg Court. In the Procedure Regulations of the Court of Justice[20] title I (Organization of the Court), chapter 8 (Language Regime), art. 36-42 govern the language regime before the Court. In *Cilfit* case it was stated that:*" it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic; thus, an interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States*."[21]

Special report concerning the Performance review of case management at the Court of Justice of the European Union [developed based on the second subparagraph of art. 287 (4) TFEU], drafted by the European Court of Auditors[22], the translation of documents plays a crucial role in assisting the judicial activity of the CJEU due to its obligation to treat cases and to disseminate a significant number of legal decisions in all EU official languages. The availability of translation at certain key points can directly affect the duration of a case's lifecycle. In terms of sampled cases of the Court, between 2014-2016, the CJEU had a total number of 1.1 million pages translated each year. The CJEU has different methods for setting deadlines with regard to the translation of case documents. For most translations, tailored time-frames are set. However, the deadlines do not reflect the average potential daily translation capacity of a lawyer linguist. Such information, if available, would enable the identification of certain options to achieve higher efficiency or best practices. The translation of the last procedural documents, in the context of the written procedure, is a key date because it triggers the start of the indicative deadline for the preliminary reports to be drawn by the judges. The Court has found that in a

[18] For more details on the principles, see E.E. Ștefan, *Legal Liability. Special view on liability in administrative law*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

[19] Please see Council Regulation no. 1 determining the languages to be used by the European Economic Community (OJ P 017, 6.10.1958, p.385). According to Art. 1 "The official languages and the working languages of the institutions of the Community shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages." And art. 7 states that "The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.".

[20] OJ, L265 of 29.09.2012

[21] Case 283/81, CILFIT / Ministero della Sanità, Decision of 6 October 1982, ECR 1982 p. 3415, Item 18-19.

[22] In this regard, please see: https://www.eca.europa.eu/Lists/ECADocuments/SR17_14/SR_CJEU_RO.pdf.

significant number of cases (29% for the Court of Justice and 57% for the General Court) translations were made available respectively between 5.5 and 9 days ahead of the fixed internal time - frame set. The CJEU participates in the inter-institutional Executive Committee for Translation whose aim is to promote best practices. Between 1960 and 2010, 246 instances have been reviewed before the Court of Justice of the European Union (CJEU) which required a comparison between translations. Among there, the Court has found translation discrepancies in no less than 170. As such, the question of which are the legal effects of these translation discrepancies must be asked. The case Konservenfabrik Lubella[23] of 1996, whereas material translation error has generated an entire process before the CJEU, may be instructive.

In this case, Regulation no. 1932/93 was establishing protective measures as regards the import of sour cherries, a fact which is recognized in all the national translations of the act, except the German ones. In the German language version the term „Süßkirschen" ("sweet cherries") was used, although the specific code for sour cherries was specified. In this context, a transport of 3 trucks of sour cherries was stopped at the German customs and a specific tax specific the European Regulation was requested. The German importer refused to pay the tax, citing the text of the German translation. Shortly after the event, the German authorities have rectified the error, but Lubella importer has chosen to ask for the annulment of the regulation, claiming that there still were doubts related to the type of cherries, as well as the fact that a change in the translation would mean a retrospective application of the law. In the face of these arguments, CJEU has rejected the request stating that the correct use of the product code, as well as the exiting translations, were sufficient indications to prove the real intent of the legislator at the time of the Regulation entry into force hence, the German rectification was only a normalization of the act and not a retroactive application of the law.[24].

5. Conclusions

This study only paves the way for the research of this vast and constantly present topic.

Obviously, the benefits of multilingualism are outweighing the costs. It has been said may times that the European Union, whose multilingual character is undeniable, can be likened to an ever-larger and more complex Tower of Babel. Linguistic diversity requires that institutions and citizens understand each other as well as possible, this being one of the EU's basic democratic principles. Each expansion of the Union also becomes a linguistic and cultural extension. Given that many citizens speak only one language, the European Union must ensure that they have access to legislation, procedures and information in their mother tongue and that they can communicate with all institutions in any of the official languages.

This is one of the methods by which the fundamental rights and freedoms of the individual are observed.

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[23] Mr. C.J.W. Baaij presentation before DGT and the Council, under the title "Consequences of Discrepancies between Language Versions in Cases of the European Court of Justice", 2010-2011.

[24] Case 64/95 Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v. Hauptzollamt Cottbus. Reference for a preliminary ruling: Finanzgericht des Landes Brandenburg - Germany. Common organization of the market in fruit and vegetables - Protective measures - Sour cherries. *European Court reports 1996 Page I-05105.*

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CONSIDERATIONS ON THE PRINCIPLE OF EQUALITY IN EUROPEAN LEGISLATION

Daniel FLOREA *

Abstract

Among the numerous issues and wishes that mankind faces in general, the fundamental rights and duties of an individual hold a major place. The inclusion of citizens' rights and liberties among the most important issues represents not only the result of their great importance but also of their tight connection with the cardinal problems of the world.

The concern with the promotion and guarding of citizens' rights and liberties have gone beyond the traditional limits and borders, as a result of the historical evolution of humanity, especially after WWII, in the attempt to put an end to exploitation, violence, racism, national discrimination and inequality between people.

As far legislation is concerned, there are both international and national laws regarding the fundamental rights, liberties and duties. The achievement of the best correlation between these two categories involve the guarantee of citizens' rights at the levels required by the international laws, which proves to be difficult to put in practice if we take into account the great economic, social and cultural diversity of the world states.

The progressive evolution of the constitutional principle and of that of equality depend on the very social reality to which it is supposedly applied; its efficiency will provide the best results only to the extent to which equality becomes the criterion for perfection.

Keywords: *principle of equality, rights, liberties, nondiscrimination, European perspective.*

1. Introduction

Recognition and respect for the rights of the human being have been embodied since ancient times when, with the formation of new empires, mankind began to strive for the most enlightened legal ideals of equality, justice, dignity and truth.

Throughout the time, the legal system has undergone numerous transformations due to social and political changes that have existed since the emergence of the state when, in order to preserve a social balance, mankind learned how to defend its rights but also how to respect the rules and values as well as the legal traditions imposed under the rule of law.

The protection of the human being was first scientifically explained in English doctrine through the legal act, the Great Charter of Liberties, in 1215 when, during the reign of John Lackland, the aim was to eliminate abuses committed by the monarch and to guarantee a number of rights for all his citizens.

Globally, the development of legal regulations on the protection of human rights has accelerated with the implementation of fundamental laws in democratic countries such as the Netherlands, France and Spain, which have proclaimed both fundamental human rights and the means of guaranteeing them.

An eloquent example of this is the guarantee of the inviolability of each individual, which is still known today in the constitutions of the aforementioned states.

Human rights began to be addressed at institutional level in the mid-19th century with the signing of the Geneva Convention, which established the standards of international law on humanitarian issues arising in times of war.

The development of this institution entered quite deeply into the content of public international law as well as into a number of legal doctrines of humanitarian, criminal, and diplomatic law that became quite necessary for the protection of human personality.

In order for a society to function as efficiently as possible, freedom in its essence implies the responsibility that each individual assumes according to his or her upbringing and respect for the rules of social coexistence, which are the essential values that provide the mechanism for protecting and safeguarding each society.

2. Paper content

The French constitutional thinking and practice have had a major influence on the development of Constitutional Law. The historical principles comprised in The Declaration of Human and Citizenship Rights[1] ("People are born and live free and equal as regards their rights. Social distinctions can

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[1] Ch. Debbasch, *Constitution Ve Republique-textes, jurisprudence, pratique*, 3rd ed., Dalloz, Paris, 2003, p. 3.

only be based on common usefulness.") have also been included in the texts of the constitutions of some states which have gained their independence. The moral, political and juridical value of the great principles offered by the French Revolution has gone beyond that age, projecting itself as real commandments of democracies in a world ruled by the tribute paid to laws. Although, The Declaration of Human and Citizenship Rights inevitably bears the seal of the historic age in which it was designed, having some flaws, its structure with he big principles that it offered has got into the common juridical thinking concerning human rights and becoming an important part of peoples' lives with regard to constitutional law thinking[2].

It is in the light of this Declaration that one considers today personal rights individuals must enjoy, such as: liberty, equality, property ownership (considered to be sacred and inviolable), safety and resistance to oppression of any kind. These rights have been considered to represent, as regards their social contents, the conditions inherent to the elimination of privileges, to the instauration of a new type of society characterized by private property, the freedom to be part of contracts and take part in competitions under the principles of equality. The principles mentioned above have been allegedly considered to signify fundamental citizens' rights, since people should have equal opportunities to accede to public positions and jobs and society is obliged to consider all these rights and duties. Any citizen has the right to talk, write, express their ideas, have materials published freely and consequently, respond to abuses of this liberty.

The common contribution needed to maintain the public force has to be rightly divided among citizens commensurate with their possibilities. At the same time, citizens have the right to claim, whether directly or indirectly, the necessity of public contribution, to agree to it freely, to watch its use, fix its amount, the manner of imposing and collecting it and its length[3].

The fact that the ideas expressed in The Declaration of Human and Citizenship Rights in 1789 have been included in the current Constitution of France is illustrative of the profound attachment of the people to this document, the French being aware of the this is part of their political thinking and actions to end absolutism. The Constitution of the Fifth French Republic has been due since October 4, 1958, the 2nd paragraph of its Preamble being devoted to the common ideal of liberty, equality and fraternity, which is resumed in the 1st title, 2nd article, as a creed of the French Republic. As a law principle, the right to equality is clearly focused on in the first article of the Constitution, the allegation being that "all citizens, irrespective of nationality, race and religion, are equal as regards laws"[4], women having similar access as men to run for and hold leading positions. The Belgian Constitution in 1831 has been regarded as one of the "classical" constitutions, being one of the most advanced ones at the time it was devised. It served, as a matter of fact, in many ways, as a source of inspiration for other constitutions, including the Romanian one in 1866.

As an expression of the democratic principles, which were becoming more powerful in Europe, the Belgian Constitution states that all individuals are equal as regards laws with a guarantee of their individual freedom. According to it, no form of punishment can be established or applied outside law; the document also states the inviolable status of one's dwelling, the impossibility to one's property or belongings confiscated, the freedom of religions, of education and teaching, of mass-media and meetings. Moreover, any Belgian citizen has the right to address the political authorities though petitions but only associations acknowledged as such have the right to address petitions on behalf of certain groups[5].

The legislative power is assumed by the Houses – the House of the Representatives and the Senate. Since the Constitution in 1831, the former has been made up of members elected exclusively by adults over 18, whereas the latter has been formed both through elections and through designations made by the provincial councils and the Senate itself. Regarding the legislative bodies, there are certain aspects worth mentioning. Thus, according to the laws passed in February 7 and July 28, 1981, deputies have to be elected through direct voting by people over 18, who have lived for at least 6 months in that area, the vote being compulsory and secret. The House is formed of 212 members, according to the laws of July 28, 1971. In order for someone to be chosen in the House of Representatives, they have to be Belgian by birth or benefit of full naturalization and they have to live in Belgium; as far as the Senate is concerned, the requirements are similar[6].

The political evolution of Great Britain offers a classical example of the passage from absolute monarchy to constitutional monarchy (the limited or constitutional monarchy is characterized by a limitation of the monarch's powers through the fundamental law

[2] V. Duculescu, C. Călinoiu, G. Duculescu, *Drept constituțional comparat / Constitutional Law – A Comparative Approach*, vol. I, Lumina Lex Publishing House, Bucharest, 1996, p. 190.
[3] *Idem*, pp. 190-191.
[4] Ch. Debbasch, *op. cit.*, p. 117.
[5] V. Duculescu, C. Călinoiu, G. Duculescu, *op. cit.*, p. 274.
[6] *Idem*, p. 275.

of the state). The role of the monarch in Great Britain nowadays is more symbolical, yet he/she has preserved certain prerogatives, such as, the right to dissolve the Parliament, to make appointments for superior positions, to refuse to sign certain laws; however, Great Britain is considered as one of the typical example of the parliamentary political system. Although one of the few states without a written constitution, the democratic tradition in Great Britain has deep roots; the first documents regarding human rights were issues in this country, thus ensuring a high status for Great Britain in Europe and worldwide. *Magna Charta Libertatum* was perceived at the time as a real constitution given by King John Lackland, as a sequel to the agreement he concluded with his nobles and the representatives of the church, who were dissatisfied with royal abuses of power. Article 29, for instance, states the following: "No man will be arrested or sent to jail or deprived of his property or declared as outside law or exiled or offended in any other way; there will be no action against him/her without a loyal trail form the part of his fellows, according to the laws of the country." Later, the ideal comprised in *Magna Charta* have been resumed and materialized in important documents, such as, "The Petition of Rights" (June 7, 1628), *"Habeas Corpus Act"* (May 26, 1679) and "The Bill of Rights" (February 13, 1683)[7].

At present, the legislation against racial discrimination contains both references to national origin (*i.e.* the group in which a person is born) and to nationality (*i.e.* the state which has given one its citizenship)[8].

Through the Constitution of May 29, 1874, made up of a preamble and 123 articles, to which one can add a series of provisional statements with limited validity, all citizens are equal as regards law in Switzerland. There are no local, birth, personal or family privileges. Men and women have the same rights, especially concerning family, education and work issues, the wages for the same amount of work being equal, according to law, for the two[9].

The Constitution of Finland of July 1919 - still valid - constitutes the fundamental law which establishes the organization and functioning of the Finish state, of all state organisms and citizens' rights. Art. 5 states the principle of equality as regards law and art. 9 is concerned with the full equality of people irrespective of the religious cult they belong to. The right of Finish citizens to practice their religious rituals publicly or privately is stipulated in article 8 of the Constitution. Law no. 518 of December 1, 1967, states that Finish nationality is automatically granted to any person born of Finish parents. To install equality, titles of nobility or hereditary dignities are abolished through article 15. The equal use of Finish and Swedish as national languages of Finland, including in courtrooms and to address authorities – through article 14 – matches the national policy of the Finish state, which supports the principle of equality between the Finish and the Swedish, as stated in article 14, paragraph 2; also, "the state will satisfy the cultural and economic needs of Finish-speaking community and Swedish-speaking population on equal principles"[10].

The principle of equal treatment is acknowledged in article 1 of the Dutch Constitution, which alleges that "people will be similarly treated in similar circumstances"[11].

In Portugal, the Constitution of April 1976 (the Constitution of the Portuguese Republic was adopted by the Constitutive Assembly in April 2, 1976 and has been due since April 25, 1976, with its 298 articles), represents a balanced position between a parliamentary democracy and a semi-presidential system of government. According to the system of proportional representation, an Assembly is voted through universal suffrage.

In the preamble of this Constitution, the Constitutive Assembly states the determination of the Portuguese people to defend their national independence, to ensure the fundamental rights of the citizens, to settle the basic principles of democracy, to enhance the status of the democratic state and to set the path to a socialist society, obeying the will of the Portuguese people with the purpose to achieve a free, just and brotherly country[12]. The fundamental principles are mentioned in a distinct chapter, right after the preamble but before its first part dedicated to the fundamental rights and duties. In art. 1, there is a statement according to which Portugal is a sovereign republic, based on the dignity of its people and on the popular will, with a view to build a free, just and solid society. The pluralism of political organization and expression, together with the guarantee of the practice of fundamental rights and liberties, are stated in art. 2. Similar through the enumeration of rights and duties to chapters in other modern constitutions, the first part of the Portuguese Constitution includes some new features, such as, the possibility to grant foreigners on the Portuguese territory, on mutual grounds, the right to vote in local elections (art. 15, para. 4); the freedom

[7] I. Doltu, V. Drăghici, *Protecția juridică a drepturilor omului / Juridical Protection of Human Rights*, Fundația "Andrei Șaguna", Constanța, 1999, p. 13.
[8] M. Banton, *Discriminarea / Discrimination*, Du Style, Bucharest, 1998, p. 69.
[9] *Idem*, p. 282.
[10] V. Duculescu, C. Călinoiu, G. Duculescu, *op. cit.*, pp. 200-201.
[11] M. Banton, *op. cit.*, p. 112.
[12] *Idem*, p. 213.

to choose their profession or job "with the exceptions of legal restrictions required by the common interest or inherent to self capacity" (art. 47, para. 1); the right to the security of the workplace, "firing without a just cause or out of political or ideological reasons being banned"[13].

At present, the main constitutional documents regulating laws in Austria are: the Federal Constitutional Law of October 26, 1955, comprising the main rights guaranteed by the Constitution, to which we can add the Law of 1955, with the value of a constitutional text, regarding Austria's neutrality. Among the general statements of the Constitutional Law of 1955, there is one according to which there is only one nationality in Austria (article 6, paragraph 1); in article 7, paragraph 1, the constitutional principle of equality is restated, since "all the citizens of the federation are equal as regards law", this allegation representing one more means of protecting the linguistic minorities, with German as the official language, yet, without interference with the rights granted to the linguistic minorities through the laws of the federation[14].

In Italy, the Constitution adopted in December 22, 1947 acknowledges the rights of all citizens to be endowed with the same social dignity, to be equal as regards law, irrespective of sex, race, religion, political opinion, social and personal circumstances. The Republic is the one that "eliminates the social and economic obstacles, which by limiting the citizens' freedom and the equality, hinders the complete manifestation of human personality and the full participation of the adults working in the political, economic and social organization of the country[15]. As far as the ethical and social rapports are concerned, the Constitution admits to the importance of the family, the equality between spouses, the parents' duty to provide for and educate their children; regarding everyone's vocation to study, the statement stresses that all intelligent and promising people, even if deprived of the necessary financial means, have the right to pursue their studies up to the highest degree. As far as the political rights are concerned, there is a general admission of the right to vote, which cannot be limited but as a sequel to a civil incapacity, to definite penal sentence or civil moral degradation. All citizens of both sexes can have equal access to public positions.

The Constitution of May 23, 1949 of the Federal Republic of Germany (at present, the Republic of Germany; after the defeat of Nazi Germany and the temporary occupation of the country by the Allied Powers, the territory was divided into two parts: The Federal Republic of Germany, in the formerly American, French and English-dominated areas and the Democrat German Republic, in the formerly Soviet-dominated areas. On the German territory the two states functioned side by side, the German nation getting together again in 1989, as a consequence of the fall of Erick Honecker's communist regime and of the integration of the Democrat German Republic as the eleventh land of the Federal Republic of Germany) is valid today, representing a minutely detailed document, remarkable through the precision of its regulations and the democratic framework which it offers to the German people with a view to its independence. Unlike in the constitutions of the other countries, in which the principle of equality is mentioned in connection to the citizens, the German one states that "All human beings are equal as regards law. Men and women have the same rights"[16]. As far as marriage and family are concerned, according to an important stipulation, the legislation has to ensure natural children the same rights as to the legitimate ones with a view to their physical and moral development and their social situation.

The Constitution of the Bulgarian Republic adopted in July 12, 1991 features all the characteristics of modern constitution, emphasizing its attachment to the universal values of liberty, peace, humanism, equality, equity and tolerance. Concerning foreigners, the Constitution states that both these ones and juridical associations can only become owners of land through succession, but for certain cases in which they may be granted the right to build and other legal rights[17].

The Constitution of the Republic of Hungary (the current modified version of the Constitution in 1972) was published again in the Official Bulletin of the Republic of Hungary in no. 84 in August 24, 1990. Chapter I contains the general principles, whereas chapter V mentions a body that is "The Parliamentary Guardian of citizenship rights and the Parliamentary Guardian of the rights of national and ethnic minorities". This body, similar to the ombudsman in the Scandinavian countries (the representative of the Government who analyzes complaints coming from the citizens against the government or other authorities) has the task to check and initiate investigations regarding citizens' rights abuses that have been made known to him/her, so that the appropriate measure could be taken. Law permitting, anyone can resort to

[13] *Idem*, p. 214.
[14] *Idem*, p. 225.
[15] *Idem*, pp. 291-297.
[16] E.-S. Tănăsescu, *Principiul egalității în dreptul românesc / The Principle of Equality in Romanian Laws*, All Beck Publishing House, Bucharest, 1999, p. 108.
[17] V. Duculescu, C. Călinoiu, G. Duculescu, *op. cit.*, p. 457.

the use of the Parliamentary Guardian. This is an MP voted by at least two thirds of the MPs after being proposed by the President of the Republic. The role of the Parliamentary Guardian concerning the rights of the national and ethnic minorities are put into practice by a body made up of one representative for each national or ethnic minority, voted by the Parliament as well[18].

As a European state, Romania, through Law no. 30/1994, ratified *The Convention of Human Rights and Fundamental Liberties* or *The European Convention of Human Rights.* Considering that in a democratic society, in which human rights are protected through certain institutions and the process of raising people's awareness, in the sense of teaching respect for the rights of the others, we consider vital the existence of clear regulations, at all levels, to be applied to deal with discrimination. The need of the Romanian society to provide just and prompt solutions to discrimination issues is much to important be offered partial answers. Thus, in order to raise to the European requirements, the Romanian legislation has had to be adapted to the former, this process being largely a successful one.

The progressive evolution of the constitutional and principle and of that of equality depend on the social development to which it must apply; its efficiency will fully manifest itself as long as equality becomes the criterion for perfection.

3. Conclusions

In the context of the expansion of political, economic and legal affairs at an international level, the protection of the human being has become an essential principle, considered by ancient philosophers of justice to be fundamental, eternal and immutable, which every society must possess and at the same time respect.

The human being is the highest value of society and the bearer of his personality, expressing the possibility of fulfilling all his natural aspirations by using his capacities in legal life to achieve legitimate interests and desires based on the respect he owes to his fellow human beings.

The international justice system, in the process of its prefiguration, has undergone numerous transformations due to political and legal mutations that have overturned previous social orders and have introduced new stages of legislative construction and unification that have played a positive role in the spiritual constitution of each society.

Under the auspices of the struggle for the development of fundamental rights and freedoms, a number of legal thinkers argued for the implementation of a new legal institution that would have systematised the general legality and the particular requirements of each nation.

The legislative transformations that followed over the years have brought about a homogeneity of social values and beliefs that have adopted significant regulations that clearly reflect the organisational forms of the human community.

The essence of the legislative act has a fundamental international value and an universal character, since it ensures protection of the rights and freedoms that men and women can enjoy everywhere.

The application of these legislative principles in the sphere of the aforementioned legal act has been a source of inspiration for the domestic law of States, ensuring the consolidation of an international political and legal environment characterised by peace, collective security and social prosperity.

The legislative mechanisms for guaranteeing and implementing human rights have been diversified at national, regional and universal level according to the legal traditions of each State. The dignity and value of the human being has been upheld by states with a fairly advanced modern democracy such as France, Great Britain, Italy, Germany, and Spain.

The institution of fundamental rights and freedoms has undergone many changes over time, due both to the internal social conditions that each state has sought to regulate and to the external conditions that have arisen with the formation of the European family, marking the intervention of each state in the newly established legal framework.

Western doctrine has always been concerned with the development of a legislative infrastructure designed to temper and establish the protection of rights and the satisfaction of interests in order to ensure that everyone has an equal opportunity to assert themselves in society.

In applying constitutional provisions, every state that has become a member of the European Union and has adhered to the new legal principles and values established in international law conventions has established legislative measures to ensure that all the rights that every citizen, regardless of ethnicity, political orientation, sex, religion, has in a modern society are maintained and respected.

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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN THE INSTITUTIONAL ARCHITECTURE OF THE EUROPEAN UNION

Augustin FUEREA*

Abstract

EPPO research and analysis are necessary, useful and opportune, given its involvement in achieving EU objectives. The approach will be continuous, but different. The statement is based on the fact that, at present, we do not have enough data / information to highlight the experience gained in the field. Its activity is only at the beginning, but in time, the details of such an effort will, certainly, increase, contributing thus to the improvement of the field.

Keywords: *European Public Prosecutor's Office (EPPO); legal grounds; Regulation (EU) 2017/1939; competences; complementary law.*

1. General aspects

The indisputable reality of the permanence of the institutional reform[1] within the European Union has determined us to place the establishment of the European Public Prosecutor's Office (EPPO[2]) among the decision makers' preoccupations, regarding this process of adjusting the Union institutional system to the evolutions of the contemporary society. The concern is major and essential, given the role of the European Public Prosecutor's Office in the protection of the European Union's financial interests. This role conferred upon by the Member States, through the Treaty on the Functioning of the European Union (TFEU) states in art. 86 para. (1) that: "in order to combat offences affecting the financial interests of the Union, the Council, acting by means of regulations in accordance with a special legislative procedure[3], may establish a European Public Prosecutor's Office, starting from Eurojust"[4]. Thus, "more than 10 years after upbringing the Green Paper [on the criminal protection of the Community's financial interests and the establishment of a European Public Prosecutor] to debate, in 2013, the European Commission relaunched the proposal of establishing a body specific to the European Union, which would protect taxpayers' money against fraud"[5].

It is necessary to analyse the setting out of the European Public Prosecutor's Office, from the perspective of the opportunity given by such an institutional construction, considering the grounds on which such an effort is based (historical and legal).

a. *The historical and legal reasons for the establishment of the EPPO* through a fundamental legal basis, such as the TFEU, are certainly highlighted by a number of value judgments which are logically and fairly harmonized with the EU's objectives and values[6]. There are reasons based on a series of truths existentially established, not yet codified though, but jurisprudentially and objectively validated, insofar as

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[1] See: Augustin Fuerea, *Permanenţa actualităţii reformei sistemului jurisdicţional al Uniunii Europene*, in Dreptul no. 4/2017, pp. 155-168 (article mentioned in the current References, Part A (Documents on EU integration, cataloged by the ECJ), no. 10/2017 of the Court of Justice of the European Communities); Augustin Fuerea, *Permanenţa procesului de reformă instituţională în cadrul UE*, Romanian Journal of Community Law no. 2/2003, pp. 9-23 (article mentioned in the current References, Part A (Documents on EU integration, cataloged by the ECJ), no. 6/2005 of the Court of Justice of the European Communities); Augustin Fuerea, *Reform carried out within the European Union*, Lex et Scientia, vol. I, no. 7/2000, pp. 116-121.

[2] The abbreviation is, also accepted in the Romanian version (official language of the European Union) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing a form of enhanced cooperation in the establishment of the European Public Prosecutor's Office (EPPO), published in OJ L283,10/31/2017.

[3] The special legislative procedure consists of the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or by the Council with the participation of the European Parliament, as opposed to the ordinary procedure, which has several stages, namely: first reading, second reading, conciliation and third reading.

[4] European Union Agency for Criminal Justice Cooperation. Eurojust's role is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious forms of crime, where two or more Member States are affected or which require criminal prosecution on a common basis (art. 2) para. (1) of Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Cooperation in Criminal Justice (Eurojust) and replacing and repealing Decision 2002/187/JHA of Council, published in OJ L 295, 11/21/2018).

[5] Roxana-Mariana Popescu, from the *"De la „Cartea Verde privind protecţia penală a intereselor financiare comunitare şi crearea unui Procuror European" la „Propunerea de Regulament de instituire a Parchetului European"*, Bulletin of Legislative Information, no. 1/2015, p. 4.

[6] Art. 2 TFEU: "The Union shall be based on values of respect for human dignity, liberty, democracy, equality, the rule of law and the observance of human rights, including the rights of individuals belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men."

the subjective side, more or less present or outlined, cannot be ignored.

The doctrine[7] of the field highlights, by emphasizing the academic approach, the fact that "the paradigm shift in criminal justice (...) [occurred] with the operationalization of the first institution of the European Union with powers of criminal investigation body, to take or propose precautionary or preventive measures and to order the prosecution of defendants who committed crimes within its competence".

If on the date of entry into force[8] of Regulation (EU) 2017/1939, 22 EU Member States[9] agreed to become parties to that legislative process, previously, when the issue of enhanced cooperation was raised, there were just 16 participating States[10].

"The purpose of this Prosecutor's Office is not to get exclusive competence to protect the financial interests of the Union, but to create a system of shared competences, linking the efforts of national authorities to those of EPPO in this field."[11]

b. So, what's the reason for taking into consideration *the reasons of legal nature, too*? The explanations are relatively simple. They can be found, above all, in the fact that the experience gained over time has quite frequently revealed, that the approaches to such an "institutional appearance" can have multiple dimensions, as the following: political, philosophical, theological, sociological, psychological, economic, financial, historical and, last but not least, legal. We can easily see that the above dimensions can be analysed separately, either independently or sometimes within some correlations, the interference being inevitable.

Our approach, in this process, is intended to correlate the legal and historical perspectives. We have added the historical dimension, to the legal dimension, also because the "establishment" of the EPPO can only be envisioned in close connection to the developments of the European Communities and the European Union, from 1950 to the present. These evolutions have necessarily been followed by consistent developments in the objectives and values pursued and defended, at one stage or another, and to the materialization of which, the institutional system (decisively involved in the adoption of European Community and European Union legislation) contributed in an overwhelming manner.

Without insisting on the historical evolutions, we have noticed that, since 1950, some stages have had a special impact on our field of analysis. Thus, we cannot ignore those highly relevant aspects, registered after 1990, with the entry into force of the Maastricht Treaty[12]. This legal instrument is important both in terms of the legislative openings it offers to the states of Central and Eastern Europe, and in terms of the fact that the same treaty lays the foundations of the European Union as a *sui generis* entity which from the beginning has been supported on three pillars, namely: the European Communities - pillar I, community[13] and integration; Common foreign and security policy - pillar II and pillar III - Justice and home affairs[14]. This construction of the EU on three pillars anticipated the consolidation of some economic objectives (e.g. the achievement of the Monetary Economic Union, including the concrete establishment of the transition stages to the single European currency - Euro), but also the specific component of the third pillar - Justice and home affairs, a pillar which, unlike the first pillar (integration), aimed at the cooperation of the EU Member States, remaining at the same level, despite all the substantial changes that took place.

We appreciate that the establishment of the European Public Prosecutor's Office is closely related to the economic-financial dimension of the community / European construction.

Renaming the third pillar, from Justice and Home Affairs to Judicial and Police Cooperation in criminal matters, was the consequence of transferring two important fields, migration and asylum[15], from the cooperation pillar (III) to the integration pillar (I).

Without ignoring the contributions / merits of another EU Treaty, the Treaty of Nice[16], we shall bring to discussion the relevance of the Treaty of Lisbon [17] in

[7] Adrian Şandru, Mihai Morar, Dorel Herinean, Ovidiu Predescu, *Parchetul European. Reglementare. Controverse. Explicații*, Universul Juridic Publishing House, Bucharest, 2021, p. 9.

[8] 20 November 2017.

[9] Austria, Belgium, Bulgaria, Cyprus, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia, Spain and the Netherlands.

[10] Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain.

[11] Adrian Şandru, Mihai Morar, Dorel Herinean, Ovidiu Predescu, *op. cit.*, p. 19.

[12] Signed in 1992, entered into force in 1993.

[13] European Coal and Steel Community; The European Economic Community (hereinafter referred to as the European Community, after the Maastricht Treaty) and the European Atomic Energy Community. All Communities have been established as subjects derived from international law, with their own legal personality.

[14] The name is changed to "Judicial and police cooperation in criminal matters" by the Treaty of Amsterdam (signed in 1997, entered into force in 1999).

[15] Along with two other areas: visas and other policies referring to people.

[16] Signed in 2001, entered into force in 2003. Also, we cannot ignore the Treaty establishing a Constitution for Europe, which was not ratified by France and the Netherlands, but which lays the foundations of the Treaty of Lisbon.

[17] Signed in 2007, entered into force in 2009.

this area. In addition to the fact that the Treaty of Lisbon conferred for the first time, legal personality upon the European Union[18], it also settled, in an unequivocal manner, the issue of competences[19]. The issues related to the establishment of the EPPO are in the scope of second level competences, which are shared competences (art. 4 TFEU) between the EU and the Member States. Among the areas falling within the shared competences, we find the one related to the "space of freedom and security, and justice"[20]. More specifically, it is about "justice" in this area.

Just like the achievement of the economic and financial objectives was followed, after 1990, by the establishment of institutions able to contribute to their achievement (*e.g.* the Court of Auditors and the European Central Bank, preceded by the Monetary Committee and the European Monetary Institute, respectively), in the field of justice, the institutions with specific powers were set up gradually: the Court of Justice, the Court of First Instance (current Tribunal) and the Civil Service Tribunal (until 2016), followed in a specific logic manner by EPPO in close cooperation and starting from Eurojust[21], also with OLAF and Europol.

The analysis focuses on the status of the European Union as subject of international law, with institutions, bodies, offices and agencies that are likely to consolidate this status, along with the regulatory system and EU diplomacy, which is special, bringing together characteristics of both states and international organizations, differing equally from the two categories of subjects of international law.

Gradually, historically, but also legally, there has been a strengthening of the EU's institutional structure, also through the establishment of the EPPO, based on the three powers: legislative (bicameral: European Parliament and Council; according to special and ordinary legislative procedures); executive (European Commission) and judicial (Court of Justice of the European Union, to which, we appreciate, the European Public Prosecutor's Office is added under certain conditions).

EPPO, starting with Eurojust - a pre-existing entity (according to art. 85 (1) TFEU), has the role of "supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious forms of crime affecting two or more Member States or which impose criminal prosecution on a common basis, through operations undertaken by the authorities of the Member States and Europol and through information provided by them".

In summary, we appreciate that the institutional reform at EU level is closely linked to developments at domestic, European and international level. This is a diverse, continuous, complex and multidimensional reform. Its achievement takes into account both the horizontal and vertical planes, being stimulated by the pandemic, but also by the technological evolutions, all being drawn in an unprecedented dynamic.

It is the field that has certainly generated among the deepest and most diverse reflections, raising many questions, and revealing even more answers. One of these questions, to which we will try to find an answer, refers to the status of the EPPO: institution, body, office or agency? The question originates in the different formulations that we have found in the theory and practice of the field.

2. The fundamental legal basis for the establishment of the European Public Prosecutor's Office

In this regard, too, the rule has been observed that EU Member States, as the main subjects of international law, are the ones who decide on the establishment / dissolution of institutional entities, through the agreement of free will, based on their sovereignty, through treaties, as primary sources of EU law. In this case, it is the Treaty on the Functioning of the European Union (after the Lisbon moment), which, in art. 86 para. (1), provides for the establishment of the European Public Prosecutor's Office. Further explanations require the determination of Member States to set up the EPPO, choosing between the ordinary and the special legislative procedure. The option expressed by choosing the special legislative procedure[22] is showing the desire to complete this approach quickly. Why? Because, while the ordinary legislative procedure is involving the institutional decision-making triangle (Commission, the European Parliament and the Council), the special legislative procedure, being faster, is employing only the two legislative institutions, namely the Council and the

[18] Art. 47 TEU.

[19] Art. 3-6 TFEU.

[20] Art. 4 para. (2) letter j) TFEU. "The area of freedom, security and justice is made of: policies on border control, asylum and immigration (art. 77-80 TFEU); judicial cooperation in civil matters (Article 81 TFEU); judicial cooperation in criminal matters (art. 82-86 TFEU); police cooperation (art. 87-86 TFEU)" (Alina Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 84.

[21] Under art. 86 para. (1) TFEU.

[22] Art. 289 para. (2): "In specific cases provided for in the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or by the Council with the participation of the European Parliament shall constitute a special legislative procedure".

European Parliament. Specifically, "the Council shall act unanimously after obtaining the consent of the European Parliament"[23].

The second paragraph of art. 86 para. (1), which has also been applied, states that, "in the absence of unanimity, a group of at least nine Member States may request that the draft Regulation be referred to the European Council. In that case, the proceedings in the Council shall be suspended. After debating, in the event of a consensus being reached, the European Council shall, within four months from the suspension, resubmit the draft to the Council for adoption". Furthermore, it is necessary to clarify that the EU legislator, "in case of disagreement and if at least nine Member States wish to establish a form of enhanced cooperation (also known in this matter) based on the draft Regulation, they shall inform the European Parliament, the Council and the Commission accordingly". This is the reason why, applying art. 20 para. (2) TEU and art. 329 para. 1, the authorization to set a form of enhanced cooperation shall be deemed to be granted by TFEU in accordance with all provisions relating to forms of enhanced cooperation.

The role of the European Public Prosecutor's Office is established, also by the Member States, through TFEU para. (2) art. 86, in the sense that it "has the power to investigate, prosecute and send to court, where appropriate in collaboration with Europol, the perpetrators and co-perpetrators of offences affecting the financial interests of the Union (...). The European Public Prosecutor's Office shall bring an action before the competent courts of the Member States in connection with such offences".

The Statute of the European Public Prosecutor's Office was established in the application of para. (1) in art. 86 TFEU by Regulation (EU) 2017/1939 implementing a form of enhanced cooperation in the setting up of the European Public Prosecutor's Office.

Subject to regulations such as the above are, also those aspects relating to the conditions for the exercise of EPPO's powers, as well as the rules governing the admissibility of evidence and the rules applicable to the judicial review of procedural acts adopted in the exercise of its powers.

There are important concerns about the extent of EPPO's tasks, too. Provided that they concern the financial interests of the EU, they inevitably include those of the Member States as well, and the tasks performed cover the offences committed in the Member States, with regard to the EU budget, but also to the budgets of the Member States, knowing the interdependence between them. In practice, the size of the EU budget (consisting of withdrawals from national budgets) inevitably depends on the amounts of Member States' budgets. What really arouses interest is the provision of para. (4) in art. 86 TFEU, according to which "the European Council may adopt, at the same time or subsequently, a decision amending paragraph (1) for the purpose of extending the powers of the EPPO, in order for them to include the fight against serious crime of cross-border dimension, for the purpose of the corresponding amendment to para. (2) in respect of perpetrators and co-perpetrators of serious offences affecting more than one Member State".

A fundamental legal basis affecting the latest Directive (EU) 2017/1371[24], adopted in the matter, is represented by art. 83 para. (1) TFEU, which refers to the fact that "the European Parliament and the Council, acting by directives (...) may lay down minimum rules on the definition of offences and sanctions in areas of particularly high cross-border crime arising from the nature or impact of such offences or from the special need to fight them on a common basis". The areas covered by the EU bicameral legislation are: terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, cybercrime and organized crime.

Considering the dynamics of developments in the field, the same treaty regulates, at art. 83 para. (1) subparagraph 3, that, "depending on the crime evolution, the Council may adopt a decision identifying other areas of crime".

The criminal field has long been considered the exclusive prerogative of states, including of those of the European Union. The Amsterdam Treaty, evoked as one of the most known developments in the field, brings into question, in the scope of the freedom, security and justice areas within the EU, the direct issue of combating crimes against financial interests, judicial cooperation in criminal matters, considerably strengthened by The Treaty of Lisbon, "covering" such a component of the EU financial circuit.

3. Derivative and complementary law of the European Union incidental to the establishment of the European Public Prosecutor's Office

The efforts have not exclusively been focused on the field of treaties, but also on other regulations, such as conventions and directives. This concerns, first of all, the Convention drawn up under art. K.3 of the Treaty on European Union, on the protection of the

[23] Art. 86 para. (1) final thesis.

[24] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on combating fraud against the financial interests of the Union by means of criminal law, published in OJ L 198, 7/28/2017.

European Communities' financial interests[25] (hereinafter referred to as the Convention on the protection of the European Communities' financial interests). A while later, a legal act of derivative law was added to the Convention, namely Directive (EU) 2017/1371 on combating fraud against the financial interests of the Union by means of criminal law[26]. From that perspective, steps had been taken under the dome of the third pillar on which the EU had grounded its existence until the Treaty of Lisbon. This is why, given the developments over time, "in the field of substantive criminal law, devoted to this area", there is "a propensity for Union law towards harmonization (in the form of the adoption of common minimum rules)"[27].

Thus, the Convention on the protection of the European Communities' financial interests has been seeking to ensure the effective contribution of the criminal law of Member States to the protection of the European Communities' financial interests. The purpose of this goal is to state that fraud affecting Community revenue and expenditure (at that time!; of the Union, at present) is not limited in many cases to a single Member State or non-Member State, but is often committed by organized international networks.

The Convention envisages a reality aimed at protecting the financial interests of the European Communities, by imposing criminal prosecution for any fraudulent conduct which is prejudicial to the interests in question, up to and including commitments on competences, extradition and cooperation, qualifying, on the basis of common meanings of the concepts used, the conduct in question as criminal offences, which may be punishable by effective, proportionate and dissuasive criminal penalties, without prejudice to the application of other sanctions in certain appropriate cases, and to provide for custodial sentences that can lead to extradition. All this is in full agreement with the situation, recognized by the States Parties to the Convention, in which undertakings play an important role in the fields financed by the European Communities, and people having decision-making power in undertakings should not be exempted from criminal liability[28], under certain circumstances.

The gradual regulation of this field, at EU level has been highlighted by the important steps taken since the Convention, as a complementary source[29] of EU law, to EU legal acts, as derived/secondary sources, according to art. 288 TFEU. At this level, too, we are witnessing developments, in terms of legal effects, of the obligation of those to whom it is addressed, *i.e.*, from the directive to the regulation[30]. From this perspective, the focus on the EU's financial interests is in line with the primary law adopted by the Member States. It is about consolidating the status of an EU subject of international law, by acquiring legal personality, after the Lisbon moment. This is Directive (EU) 2017/1371 on combating fraud against the financial interests of the Union by means of criminal law. The Directive is a natural continuation of previous regulatory approaches, taking into account the Convention (with its Protocols of 26 September 1996 and 29 November 1996) adopted more than 20 years ago (1995-2017!) by the European Communities which at the time numbered 15 Member States after the accession of Austria, Finland and Sweden in 1995, and in 2017 the EU had 28 Member States, almost the double, which justifies, among other things, the multiplication of efforts in this area.

An important step in the field was the adoption of Regulation (EC/Euratom) no. 2988/95 on the protection of the European Communities' financial interests[31]. The Regulation established general rules on uniform controls, measures and administrative sanctions for infringements of Union law, as well as sectoral rules in this area, fraudulent conduct, as defined in the Convention, and the application of criminal law and criminal proceedings of the Member States.

Among the harmonization measures that pertain to the Union's policy in the protection field of its financial interests, this regulation is important for ensuring the implementation of the Union's policy in this area, and it is essential to continue the approach of criminal law of Member States, by completing the protection of the Union's financial interests through

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[25] Published in OJ C 316, 11/27/1995.

[26] In the practice of the field, it is known under the abbreviation "PIF".

[27] Anca Jurma, Gheorghe Bucșan, Constantin Claudiu Dumitrescu (coord.), *Studiu cu privire la analiza Regulamentului (UE) 2017/1939 în perspectiva operaționalizării în România a Parchetului European*, p. 7 (available at http://www.pna.ro /obiect2.jsp?id=398 - accessed on 2/25/2022).

[28] In the doctrine, criminal liability is defined as "the criminal legal relation of coercion as the result of a crime, between the state, on the one hand, and the offender, on the other hand, a complex relation, the content of which is the right of the state, as a representative of the society, to hold the offender accountable, to apply the sanction provided for the crime committed and to force him to execute it "(Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 92).

[29] Also called "tertiary law or "*les actes hors nomenclature*", according to French doctrine, or "soft law"(...) or "atypical "or unnamed acts" (Mihaela Augustina Dumitrașcu, *Dreptul Uniunii Europene I*, Universul Juridic Publishing House, Bucharest , 2021, p. 274).

[30] For details on the difference between the two legal acts of the European Union, see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2015, p. 120.

[31] Adopted by the Council on 18 December 1995, published in OJ L 312, 12/23/1995.

administrative[32] and civil law in the case of the most serious types of fraud-related conduct in this field, while avoiding inconsistencies both within and between each of these areas of law.

In addition to the above, Framework Decision 2008/841/JHA on the fight against organized crime[33] is added. This is the main seat of the definition of a crime that is committed within a criminal organization, as an aggravating circumstance, according to the applicable rules established by the legal systems of the EU Member States.

According to the preamble to Directive (EU) 2017/1371, recital 19, "Member States should make sure that the aggravating circumstance is made available to judges to be taken into account in sentencing offenders, although there is no obligation for judges to take into account the aggravating circumstance in settling their decision".

Derivative EU-specific legislation is extremely diverse and complex. By way of example, we add to the above, as follows: Regulation (EU, Euratom) no. 883/2013 on investigations conducted by the European Anti-Fraud Office (OLAF)[34]; Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the general budget of the Union[35]; Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing[36]; Directive (EU) 2016/680 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of prevention, detection, investigation or prosecution of criminal offences or the enforcement of sentences and on the free movement of such data[37]; Regulation (EU) 2018/1725 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data[38].

4. The place of Regulation (EU) 2017/1939 in regulating the protection of the EU's financial interests by the establishment of the European Public Prosecutor's Office

Being the main current EU rule of derivative law, which implements a form of enhanced cooperation on the establishment of the European Public Prosecutor's Office, being materialized, at a higher level, into the protection of EU's financial interests, the approach is limited to the goal agreed by all EU Member States on the achievement of the area of freedom, security and justice. The establishment of the European Public Prosecutor's Office relates to the obligation of the EU and Member States to protect the financial interests of the Union against crimes which cause financial damage every year. The main concern at EU level is that these offences have not, as stated in recital 3 in the preamble to the Regulation, always been sufficiently investigated and prosecuted by national criminal justice authorities.

To the debate on the appropriateness of setting up the European Public Prosecutor's Office, an enlightening answer has been given to us by the application of the principle of subsidiarity[39] as set out in recital 12 in the preamble to the Regulation.

[32] Justified, if we take into account the fact that "the administrative law includes the legal rules that regulate the social relations regarding (....) the responsibility of the public administration, based on and in the execution of the law" (Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ. Ediție revizuită conform modificărilor Codului Administrativ*, Pro Universitaria Publishing House, Bucharest, 2020, p. 8).

[33] Adopted by the Council on 24 October 2008, published in OJ L 300, 11/11/2008.

[34] Regulation (EU, Euratom) no. 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) no. 1073/1999 of the European Parliament and of the Council and Regulation (Euratom) no. 1074/1999 of the Council, published in OJ L 248, 9/18/2013.

[35] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) no. 1296/2013, (EU) no. 1301/2013, (EU) no. 1303/2013, (EU) no. 1304/2013, (EU) no. 1309/2013, (EU) no. 1316/2013, (EU) no. 223/2014, (EU) no. 283/2014 and Decision no. 541/2014 / EU and repealing Regulation (EU, Euratom) no. 966/2012, published in OJ L 193, 7/30/2018.

[36] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) no. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC, published in OJ L 141, 6/5/2015.

[37] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of prevention, detection, investigation or prosecution of criminal offences or the enforcement of free movement of such data and repealing Council Framework Decision 2008/977 / JHA published in OJ L 119, 5/4/2016.

[38] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union's institutions, bodies, offices and agencies and on the free movement of such data and repealing of Regulation (EC) no. 45/2001 and Decision no. 1247/2002 / EC, published in OJ L 295, 11/21/2018.

[39] Art. 5 para. (3) TEU: "In accordance with the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall intervene only if and to the extent that the objectives of the envisaged action cannot be satisfactorily achieved by the Member States, regionally and locally, but due to the size and effects of the planned action, they can be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol. "The principle of subsidiarity" is linked to the principle of respect for national identity and refers to the fact that Community action must fall within the limits of the powers conferred on the Communities and the Union" (Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p. 196).

Accordingly, it is considered that, "in accordance with the principle of subsidiarity, the fight against crimes affecting the financial interests of the Union can be better achieved at Union level, given its scale and effects". The explanations for this legislative intervention are justified by the fact that, until the entry into force of the Regulation or the operationalization of its application in the Member States, criminal prosecution of offences against the financial interests of the Union used to fall exclusively within the competence of the Member States' authorities which have not always contributed to a sufficient extent, to the achievement of this objective. Applying the principle of subsidiarity, in the fight against crimes affecting the financial interests of the Union is considered not to be satisfactorily achieved by the Member States of the Union, given the fragmentation of criminal proceedings. EPPO has the power to better prosecute crime at EU level.

In accordance with the principle of subsidiarity, the principle of proportionality shall be applied in such a way that the measures taken in application of the principle of subsidiarity do not go beyond what is necessary in order to achieve those objectives and, at the same time, making sure that the Regulation impact on legal systems and institutional structures of the Member States is as less intrusive as possible.

The third principle applicable in this matter is that of loyal cooperation, according to which both the EPPO and the competent national authorities support and inform each other in order to effectively combat crimes falling within the jurisdiction of EPPO.

In full accordance with the above principles, the Regulation doesn't prejudice the national systems of Member States concerning the way criminal investigations are conducted.

Another feature of the EPPO is its independence, in the sense that it acts exclusively in the interest of the Union without seeking or accepting instructions from anyone other than itself. Independence is also strengthened by EPPO's accountability to the Union institutions, the interests of which it protects. Thus, the responsibility of the European Chief Prosecutor is placed at the highest level (European Parliament, Council and Commission), being fully responsible for the performance of his tasks, in the position where he performs, but also from the point of view of taking global institutional responsibility for his general activities. Any of the three institutions that are part of the EU's decision-making triangle can initiate proceedings before the Luxembourg Court of Justice for dismissal in certain situations, including in cases of serious misconduct. The same is available for the dismissal (dismissal) of European prosecutors.

The speed of activities carried out at this level is possible, given the organizational structure that allows a fast and efficient decision-making process in the conduct of criminal investigations and prosecutions, regardless of whether they involve one or more Member States. The EPPO structure takes into consideration the presence of all the national legal systems and traditions of the Member States, and prosecutors familiar with each legal system will, in principle, conduct investigations and prosecutions in their respective Member States.

The effectiveness of the EPPO approaches is ensured by the coherent action at two levels (national and Union), both from a normative perspective and from an actional, institutional point of view.

5. Conclusions

EPPO research and analysis is necessary, useful and opportune, given its involvement in achieving EU objectives. The approach will be continuous, but different. The statement is based on the fact that, at present, we do not have enough data / information to highlight the experience gained in the field. Its activity is only at the beginning, but in time, the details of such an effort will certainly increase, contributing thus to the improvement of the field. In fact, even the TFEU, at Art. 86 para. (4) leaves room for such expectations, stating that, "The European Council may, at the same time or later, adopt a decision amending paragraph (1) for the purpose of extending the powers of the European Public Prosecutor's Office to include the fight against serious crime of cross-border dimension and for the purpose of amending paragraph (2) in respect of perpetrators and co-perpetrators of serious offences affecting more than one Member State".

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THE PRINCIPLE OF ADMINISTRATIVE DESCENTRALIZATION

Maria Cristiana IEREMIE*

Abstract

The local public administration in Romania operates on the basis of a series of fundamental principles. One of these elemental principles is decentralization. Administrative decentralization assumes the existence of local public persons, designated by the community of the territory, with their own attributions, which intervene directly in the management and administration of the community's problems, implying the local autonomy. Thus, through decentralization, the unity characteristic of centralization is given up, reserving to the local communities the task of solving their problems and satisfying their specific interests.

Keywords: *local autonomy, local community, local public administration, public administration principles, decentralization in European Union countries.*

1. Introduction

The realization of the unitary national state led to the need for legislative unification of the country. The legislative steps for the integration of the united Romanian provinces were confronted with the various models of administrative organization, existing until then in each of the Romanian territories. The administrative-territorial organization of a country, carried out by law, is an element of superstructure of great importance, due to the fact that it determines the constitution of the state administration system and its local subsystems, territorially frames the political life and organizes the economic and social life of a nation. The models of administrative organization adopted are always imposed by concrete historical, geopolitical, economic and social conditions. Thus, Romania has experienced in terms of administrative-territorial organization at least as troubled experiences as its own history, the search for the optimal model oscillating between centralized, decentralized systems or imposed solutions, all but conceived, since the establishment of the State, in a structure of unitary state.

In the interwar period, Romania faced the inherent problems of the transition determined by the need for legislative unification, in order to ensure state control over the entire territory and administrative unification, which proved to face many obstacles. Therefore, the world economic crisis of 1929-1933, together with the country's political instability, the establishment of the royal authoritarian regime and the beginning of the Second World War, were the events that determined Romania to be in a state of disrepair throughout the period of permanent search for the right model of administrative organization.

Also, the way to achieve administrative unification has encountered difficulties, requiring numerous legislative changes and adjustments. The laws of administrative organization of 1929 and 1936, under the influence of the Constitution of 1923, proposed two different models of organization, one based on local autonomy and decentralization, and the other based on a series of centralist principles. The model of organization based on the regional level, with its particularities, determined by the Constitution of 1938, which enshrined the royal authoritarian regime, imposed by Charles II, brings as a novelty the land as a territorial administrative unit, also noting thorough regulations on building and systematization. After 1944, communist political codes had a major impact on the reorganized administrative territory following the Soviet model in regions and districts. The transformations in agriculture thus led to the merging of lands and the organization of collectivist exploitation. Therefore, starting with 1968, the administrative organization by counties of the Romanian territory and the economic development policies from the socialist period, led to new evolutions in the development of the territory.

Moving on to the contemporary period, the revised Romanian Constitution of 1991 provides in art. 120 para. (1) that: "The public administration in the territorial administrative units is based on the principles of decentralization, local autonomy and deconcentration of public services". Also, the legal regulation of the two principles results from the nature of Law no. 215/2001 of the local public administration, Framework Law no. 195/2006 on decentralization and Law no. 199/1997 for the ratification of the European Charter of Local Self-Government, adopted in Strasbourg on 15 October 1985. It is therefore observed that the principle of decentralization and local self-

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government are enshrined by the constituent, while the legislator, applying these principles.

This observation is of particular importance given the fact that it implies the exclusivity of the law, as an act of the Parliament, which can determine the content of the principles, any other act issued by a state authority in this field being unconstitutional. In fact, this is also the position of the CCR which, through Decision no. 45/1994 declares unconstitutional art. 192 of the Regulation on the organization and functioning of the Chamber of Deputies because "it imposes obligations on local and county councils. Such a thing can only be done by law, and the regulatory provision violates art. 119 of the Constitution on the principle of local autonomy".

2. The principle of Decentralization in Romania

Decentralization is the system that is based on the recognition of the local interest, distinct from the national one, the localities having organizational, functional structures and their own apparatus, affected by the local interest[1]. Analyzing from a historical perspective, the principle of administrative decentralization was first established during the French Revolution of 1789, the period in which Europe raised the issue of a transition from centralization of state leadership to decentralization, administrative decentralization itself[2]. The first legislation on decentralization in Romania was in the Constitution of 1866, in art. 106 and 107, respectively, which referred to laws that regulated county or communal institutions. Currently, the Administrative Code provides in art. 5 letter x), the explanation of the notion of decentralization which it stipulates as the transfer of administrative and financial powers from the central public administration to the public administration in the territorial administrative units, together with the financial resources necessary to exercise[3].

In Romania, decentralization is carried out based on principles stipulated in the Administrative Code under art. 76, these being the principle of subsidiarity, the principle of ensuring the resources corresponding to the transferred attributions, the principle of responsibility of local public administration authorities in relation to their competence, the principle of ensuring a process of stable, predictable decentralization, based on objective criteria and rules and the principle of equity[4]. We will proceed in the extension of the article to analyze individually each of these principles. Thus, the first principle, namely the principle of subsidiarity, is represented by the exercise by the local public administration authorities located on the administrative level closest to the citizen, having at the same time the necessary administrative capacity. It is interesting to note that this principle can be found both in the regulations of domestic law, regulating the relations between the state and the political and territorial communities, and in the norms of international law[5].

The following principle, respectively the principle of ensuring the resources corresponding to the transferred attributions, the Administrative Code stipulates in art. 79 the fact that the transfer of competence, as well as their exercise, are made simultaneously with the provision of material resources. The financing of the delegated competencies is fully ensured by the central public administration [6]. Thus, we find that in order to ensure the principle of good administration, the central public administration, at the moment of delegating the attributions to the local public administration, has the duty to ensure the entire financial, legislative and economic framework for the efficiency of decentralization.

The principle of responsibility of the local public administration authorities in relation to their competence is the principle by which the obligation to achieve those quality standards necessary for an optimal provision of public services and public utility is imposed. Also, the principle of ensuring a stable, predictable decentralization process, based on objective criteria and rules, has the role of ensuring the absence of a constraint or financial limitation of the local public administration authorities. The last principle, that of equity, refers to ensuring the access of all citizens to public services and public utility.

The issue of how to achieve decentralization varies from one state to another with individual features. There is a famous quote in this respect which shows that “it can be governed from afar, but can be administered only from close”[7], by which the essence of the principle of decentralization has been perfectly synthesized and the fact that it cannot exist. only central bodies of the public administration, without the existence and organization of the local ones.

[1] E. Popa, *Local autonomy in Romania*, All Beck Publishing House, Bucharest, 1999, p. 121.
[2] V. Prisacaru, *Treaty of Romanian Administrative Law*, Lumina Lex Publishing House, Bucharest, 1993, p. 751.
[3] GEO no. 57/2019 of 3 July 2019 on the Administrative Code, art. 5, letter x).
[4] V. Vedinaş, *Administrative Law*, 12th ed., revised, Universul Jurdic Publishing House, Bucharest, 2018, p. 215.
[5] D.M. Vesmas, *Aspects on the principle of subsidiarity in the light of the Constitutional Treaty European*, Scientific Notebook no. 8/2006, “Paul Negulescu” Institute of Administrative Sciences, p. 145.
[6] GEO no. 57/2019 of 3 July 2019 on the Administrative Code, art. 79.
[7] Decret sur la decentralisation, 1852.

The doctrine recognizes two forms of decentralization, these being territorial decentralization and technical decentralization[8]. In the following we will analyze individually the characteristics of each category of decentralization as follows. Thus, territorial decentralization is based on the existence of a community of interests to be achieved by the bodies elected by the citizens of a territorial subdivision, invested with general material competence. This implies the recognition of an autonomy of local authorities, administrative or territorial constituencies, which, under the law, are administered themselves. On the other hand, technical decentralization is generated by reasons that want to streamline the activity carried out by legal entities under public law, called local public establishments, invested with the provision of public services independent of the services provided by state bodies[9]. It is important to note that territorial decentralization responds to the needs related to the social and political diversity of the country, while technical decentralization deals with satisfying interests such as a harmonious distribution of functions between branches of administration, responsible for efficiency and management of local interests[10].

3. Decentralization in European Union countries

The administrative organization represents the institutional system through which the state exercises its power over the territory and the population of the administrative units. The division of the territory means the achievement of a division into administrative units, at the level of which, in a logic of subsidiarity, the local problems are managed, units that at the same time constitute points of diffusion of the state authority.

The public administration, currently based on the common belief in legality, in normative rules, has known three stages in the history of its legitimacy, stages that marked the evolution of the administrative organization of the states as follows. The first stage was that of the "gendarme state" in which legitimacy was based on the nature of power; this stage, which covers the entire 19th century, corresponds to the classical liberal conception of the state[11]. The public power of the state was based on the sovereignty transferred by the nation through election, so that. the state had to exercise its prerogatives in the fields of police, justice, diplomacy, without infringing on public and private liberties in the matter of property rights governing the economy.

The next stage is represented by that of the providential state in which the legitimacy of the administration is based on the nature of the aims pursued. At this stage, the concept of "public service" was established as the exclusive result of administrative action[12]. And the last stage was the stage of the ubiquitous state in which legitimacy is based on the methods used, after World War II, the diversity and scope of state interventions gaining new dimensions (planning, taxation, industrial policy, urbanism), and qualitative criteria evaluation began to prevail. The administration needs to demonstrate, on the one hand, the effectiveness of the methods of action and, on the other hand, to take into account the wishes of the citizens.

Depending on the characteristics of the political-administrative systems, the historical conditions, the cultural or linguistic specificities, the states have developed their own ways of organizing in the territory. There are classifications that divide states according to state structure into 3 categories such as unitary, federal, and confederal states. A classification of the states of the European Union that takes into account certain particularities, is that of Jacques Ziller [13] identified 4 categories of states:

1. United States such as Denmark, Greece, Finland, Ireland, Luxembourg, Sweden and the metropolitan part of France, the Netherlands, the United Kingdom and Portugal;

2. Federal states such as Austria, Belgium, Germany;

3. States with strong regional and community structures: Spain and Italy;

4. States integrated into a quasi-confederal ensemble as in the case of France, the Netherlands and the United Kingdom.

In this article I will present a state that belongs to each category so that we can easily make a comparative analysis of the forms of organization and administrative decentralization. First of all, in the case of unitary states, the political power, in the fullness of its attributions and functions, belongs to a sole holder who is the legal person of the state. All individuals placed under state sovereignty are subject to the same sole authority, live under the same constitutional regime and

[8] A. Iorgovan, *Treaty on Administrative Law*, vol. I, 4th ed., All Beck Publishing House, Bucharest, 2005, pp. 44-45.

[9] I. Nicola, *Local autonomy or centralism-critical look at the legislation*, Scientific Notebook no. 6/2004, "Paul Negulescu" Institute of Administrative Sciences, p. 283.

[10] I. Nicola, *Management of local public services*, All Beck Publishing House, Bucharest 2003, p. 44.

[11] V. Stanica, *Territorial Administrative Policies in Modern and Contemporary Romania*, Accent Publishing House, Cluj-Napoca, 2010, p. 52.

[12] R. Laufer, A. Burlaud, *Public Management. Management and Legitimacy*, Dalloz Publishing House, Paris, 1980, pp. 20-23.

[13] J. Ziller, *Administrations comparées, Les Systemes politico-administratifs de l'Europe des Douses*, Montcrestien Publishing House, Paris, 1993, p. 239.

are governed by the same law[14]. The unitary status is not incompatible with decentralization in favor of local authorities, but the autonomy of local authorities is limited, as the competence of local authorities is established by the central power, which then controls how they exercise it.

We will begin the analysis of the United Kingdom of Great Britain and Northern Ireland in which we find that it does not have a written Constitution. The Constitution consists of a set of customary rules and principles and a series of written texts, inaugurated by the Magna Carta in 1215. The fundamental constitutional principle is that of the sovereignty of Parliament, according to which it has the power to legislate for the entire territory of the UK (England, Wales, Northern Ireland and Scotland) and in any field, which demonstrates the unitary character of the state. But, by virtue of the same sovereignty, Parliament may legislate differently for certain parts of the territory and may also delegate a number of tasks to regional bodies, which gives specificity to the British model[15].

Thus, the unity of the British state, unlike other unitary states, is accompanied by the diversity of law, especially with regard to local governments as in the case of English law which differs considerably from Scottish law. Despite these regulations which would lead to the idea that the United Kingdom is a federal state, it remains a unitary state, but with a specific, particular configuration, because the powers of regional authorities are delegated by Parliament, by virtue of its sovereignty and can be withdrawn at any time as was the historic precedent of the Northern Ireland Semi-Autonomous Assembly which was suspended from February to June 2000.

Also, the British Parliament can legislate in any of the delegated areas, its law taking precedence over any other regulation. integrated into a quasi-confederal ensemble.

The next analysis will be on the federal system which presupposes the existence of a state which, although it appears as a single subject of public international law, consists of (federal) member states which retain part of their legislative power and a number of attributes of internal sovereignty. The federal states, unlike the local communities within the unitary system, have, through the federal constitution, their own competences in the legislative, executive and judicial fields. There are currently 3 federal states in the European Union: Austria, Belgium and the Federal Republic of Germany. Next I will analyze the German model to observe the differences in the administrative organization of a federal state.

Thus, the current German Constitution dates back to 1949 and was originally applied to the British, American and French-occupied Länder, with the exception of the Saarland which until 1957 was under French sovereignty. After 1957, the fundamental law was applied to the latter land, and since the fall of the Berlin Wall, it has been applied to the former R.D.G., the reunited Berlin becoming the capital of the country. The federal character of the state is guaranteed by the Basic Law. By virtue of art. 20 para. 1 of this Law, "Germany is a federal, democratic and social state", and according to art. 30 “The exercise of public powers and the fulfillment of state duties are the responsibility of the Länder”[16]. On the other hand, art. 31 establishes the pre-eminence of the federal state, in cases of concurrent competence, which means that the Basic Law establishes a competence common to both the federation and the Länder.

Germany had only one experience as a unitary state between 1933 and 1945, but this organization was an exception to the German tradition. According to art. 79 para. of the Basic Law, cannot be the subject of revision: the principle of the division of the federation into Länder, the participation of the Länder in the elaboration of the federal legislation and the essential content of the fundamental rights. In conclusion, we can say that German federalism has strong legal guarantees and is a structure unanimously accepted by the political class and the population [17].

The last category to be analyzed is the one represented by the states with strong regional and community structures. This type of organization is found in Italy and Spain and is considered a hybrid structure between the unitary state and the federal state. According to Phillipe Lauvaux, “The distinction between the regional state and the federal state is primarily of a legal nature. In the regional state there is only one constitutional order, that of the original central state and the constitution is the one that determines the status and attributions of the regional bodies, but, according to the federalist principle of distribution of legislative powers. On the contrary, the federal state possesses a duality of constitutional orders: the order of the federal state and the orders of the federated states”[18].

The Italian Republic was proclaimed a republic in 1946, and the following year the current Constitution was adopted and entered into force on 01.01.1948. The

[14] G. Burdeaux, *Droit Constitutionnel et institutions politiques*, 19th ed., LGDJ Publishing House, Paris, 1980, p. 54.
[15] V. Stănică, *Territorial Administrative Policies in Romania modern and contemporary*, Accent Publishing House, Cluj-Napoca, 2010, p. 60.
[16] Constitution of the Federal Republic of Germany, All Publishing House, Bucharest, 1998, art. 30.
[17] V. Stănică, *op.cit.*, p. 61.
[18] Ph. Lauvaux, *Les grandes democraties contemporaines*, PUF Publishing House, Paris, 1990, p. 134.

source of inspiration for the legal construction of the regional Italian state, which has as its constituent elements the central state and regions with varying degrees of autonomy, is found in the Spanish Constitution of 1931. Italy has a 3-level regional structure, regulated by the Constitution of December 27, 1947. According to art. 114, the Republic is divided into regions, provinces, 3 provinces with special status with the regime of local and common communities, with the status of local authorities. Art. 116 of the Constitution expressly recognizes the status of autonomy for 5 regions, while for the other 15 regions art. 131 establishes only a decentralization status[19]. The Italian Constitution devotes considerable space to regulating the regime of regions, provinces and communes and in this context, pays special attention to the issue of the distribution of powers between the state and regions, this being one of the most important and complex issues of the regional state.

The economic development of Italy in the 1960s amplified the disparities and also the dissensions between the industrialized North and the patriarchal South, fueling the federalist current. The creation of the regions aimed to reduce the separatist tendencies in the French-speaking or German-speaking border regions. The other regions, those with ordinary status, were created within the statistical regions by the Constituent Assembly, but their institutions did not come into being until 1970. The regions differ from local communities in that they exercise legislative power. This legislative competence has a special status, being determined by the specific status, given by the constitutional law. Ordinary regions have more limited status. The state exercises a constitutionality and legality control over the activity of the regions, the regional laws being targeted by the government commissioners in the region. Regions may develop agreements for joint programs with other communities and administrations. All these program agreements, whether within the competence of the mayor or the president of the province, must take effect by a decree of the president of the province, and then their execution is entrusted to a regional college chaired by the president of the region. In the referendum of October 7, 2001, Italy took an important step towards federalism. Thus, on the one hand, the regions with regular status can acquire special forms of autonomy, thus giving the possibility to standardize the regime of the two types of regions, and on the other hand, the regions have been recognized general legislative competence and financial autonomy.

4. Conclusions

Without representing a perfect organization system, the administrative decentralization proved to be optimal in all the states with developed democracy, and with a market economy, which makes us appreciate that it must be developed in the Romanian administrative system as well. Accelerating the decentralization process is considered one of the pillars of the public administration reform strategy, enshrined in the political programs of all governments, including that of the current government political program. It is important that after this article we can see that decentralization itself is not a goal, but a means to facilitate the approximation of the level at which decisions are made by the one who will bear the consequences, respectively the citizen.

In the current Romanian administrative system, what is absolutely necessary does not count in copying a model or designing a new one, but eliminating from the existing structures and system of relations those elements that affect the proper functioning of public services, the citizen-public administration relationship and which opposes the transfer of competence from the state to local authorities.

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[19] V. Stănică, *op. cit.*, p. 69.

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COMPETITION LAW IN THE EU

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Abstract

The competition policy and norms in the European Union are a vital part of the internal market. Competition, although it is an element whose existence is essential for the proper functioning of the market, can be seen as an element of pressure on companies in trying to offer consumers a variety of products at the lowest possible prices. European Union competition policy has, at its disposal, a set of tools to protect against anti-competitive practices. The purpose of this paper is to analyse how anti-competitive policy is implemented in the European Union.

This essay aims to understand the way in which the European Union is treating anti-competitive practices, addressing the various illegal issues, as well as the exceptions and their conditions. In the case of defining legal terms, the interpretations offered in the case law of the Luxembourg Court will be used. An assessment of the European Union's purpose and objectives with regard to protecting against anti-competitive practices is also an indicator of the implementation of the policy in this area. The paper will analyse the legal instruments and the way in which the Commission applies these instruments of protection against anti-competitive practices in order to restore the competitive conditions, by correcting the inappropriate practices of the enterprises. The results of the interaction between anti-competitive practices (agreements and abuse of a dominant position) and unfair trade practices (including dumping and subsidisation) will be discussed to understand the effectiveness of legal instruments in practice.

Keywords: *business law, competition law, anti-competitive, dominant position, agreements.*

1. Introduction

Competition law plays an important part in European Union (EU) law and it covers anti-competitive agreements between firms, abuse of a dominant position, and mergers. This paper only focuses on the first two matters in order to remain concise. The principal way in which anti-competitive agreements are controlled is through the Treaty on the Functioning of the European Union (TFEU), more specifically art. 101 and 102. The paper will look at what agreements mean and what types of agreements exist, such as horizontal (between companies at the same level of the production cycle) and vertical ones (between companies at different levels of the distribution cycle). It will also look at what the abuse of market power means, analysing the legislative controls of market power, by single or multiple firms.

Competition law is important in the EU because of what it promotes through the competition policy. This policy enhances consumer welfare and it aims to achieve the optimal allocation of resources. The idea is to create a workable competition[1] which would make goods and services be produced more efficiently. Agreements between companies should not hinder this competition. Competition law also aims to protect consumers and smaller firms from other firms that aggregated into monopolies or act as one unit. Finally, EU competition law facilitates the European single market by prohibiting tariffs and quotas through the limitation of the partition of the EU market along national lines by private companies ("undertakings"). Thus, it is important to see what legislative means are available to the EU and whether the EU is capable of assuring the protection that is needed in this domain, for both companies and consumers.

This paper will address this issue first by laying down the legislation and the case law that govern anti-competitive agreements and the abuse of a dominant position. It will conduct an in-depth analysis of art. 102 and 103 TFEU and it will approach all relevant court decisions on this matter. Regarding agreements, the paper will look at what the term refers to, analysing vertical and horizontal agreements, and the relevance of economic factors. Regarding the abuse of dominant position, it is important first to define what the relevant market is and then to determine whether a specific firm has indeed abused its dominant position.

The paper is based on a thorough analysis of the information provided by the literature using a large number of examples, drawing conclusions from them and, finally, illustrating the current situation in the EU.

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[1] Frederic Scherer, David Ross, *Industrial Market Structure and Economic Performance*, Houghton Mifflin, Boston, 1990.

2. Anti-competitive practices - agreements and abuse of a dominant position

Competition policy in Europe is a vital part of the internal market. At the business level, there is constant pressure due to competition, in an attempt to offer consumers a variety of products and at the lowest possible prices. Thus, anti-competitive practices may emerge, but they are supervised and corrected by the EU authorities: agreements between companies, abuse of a dominant position, state aid, economic concentrations, and market liberalization in sectors with a state monopoly that can bring them unfair advantages.[2]

Agreements between undertakings incompatible with the common market are governed by art. 101 TFEU which, in para. (1), prohibits agreements between undertakings, decisions of associated undertakings, activities leading to control of production, sales process, and situations in which the sale or purchase price is established or which creates a competitive disadvantage by applying unequal conditions to equal services, in relation to trading partners.

The notion of "undertakings", although used by art. 101 (1) TFEU, is not defined in the Treaty. This concept is included in the list of autonomous notions of European Union law by the CJEU in the judgment in Höfner[3].[4] In the Court's interpretation of Höfner, the term 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The term was considered to include: corporations, partnerships, commercial companies, liberal professions, state-owned corporations and cooperatives.[5] However, the notion of undertakings does not include entities with social objectives, which are not engaged in economic activities.[6]

As regards the terms "agreement" and "concerted practice", interpretations have been provided in the case law of the Luxembourg Court[7]: both gentlemen's agreements (according to the Chemiefarma[8] case) and concerted practices (with Imperial Chemical Industries[9]) being a court-sanctioned conduct as anti-competitive practices. From an economic point of view, agreements fall into two categories: horizontal agreements (made between economic agents at the same level of the production cycle) and vertical agreements (made between economic agents at different levels of the distribution cycle).[10]

Art. 101 (3) TFEU provides for accepted exceptions to the prohibition of agreements. Exceptions are possible if the agreements lead to efficiency gains, consumers receive a fair share of the benefit, the agreements do not lead to the elimination of competition, and restrictions in the agreement prove indispensable. Exceptionally, these conditions must be tested and met simultaneously.[11]

Derogations have also been regulated by exemption regulations by category of individual agreements (Regulation (EU) 330/2010[12], Regulation 19/65/EEC[13], etc.). Agreements which have an insignificant impact on the market and which do not lead to a restriction of competition are excluded.[14]

The abuse of a dominant position is regulated by art. 102 of the TFEU, which does not prohibit an undertaking from being in a dominant position, but rather the misuse of that position. The notion of "dominant position" is defined by the Commission in its Communication[15] as the situation of economic power of an undertaking which gives it the opportunity to prevent the maintenance of effective competition in the market and gives it the ability to behave, to an appreciable extent, independent of its customers, consumers and competitors (according to United Brands[16]). A dominant undertaking may behave abusively in both the market in which it operates and in

[2] "Competition & you", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition-policy/consumers_en.
[3] Judgment of the Court (Sixth Chamber) of 23 April 1991- Klaus Höfner and Fritz Elser v Macrotron GmbH. Case C-41/90. EU:C:1991:161.
[4] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, (Bucharest: Editura Universul Juridic, 2016), p. 314.
[5] Jurgita Malinauskaite, *Competition Law, by R. Wish and D. Bailey* (Oxford: Oxford University Press, 2012), p. 1015.
[6] Paul Craig, Grainne de Burca, *EU Law Text, Cases and Materials*, (Oxford: Oxford University Press, 2011), p. 962.
[7] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 316.
[8] Judgment of the Court of 15 July 1970. ACF Chemiefarma NV v. Commission of the European Communities. Case 41-69. EU:C:1970:71.
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[10] Tatiana Moșteanu, *Concurența. Abordări teoretice și practice*, Economică Publishing House, Bucharest, 2000, p. 293.
[11] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 319.
[12] Commission Regulation (EU) no. 330/2010 of 20 April 2010 on the application of art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 23.4.2010, p. 1-7.
[13] Regulation No 19/65/EEC of 2 March of the Council on application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices. OJ 36, 6.3.1965, pp. 533-535.
[14] Radostina Parenti, *Competition policy*, European Parliament, accessed March 15, 2022, https://www.europarl.europa.eu/factsheets/ro /sheet/82/politica-in-domeniul-concurentei.
[15] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7-20.
[16] Judgment of the Court of 14 February 1978. United Brands Company and United Brands Continentaal BV v. Commission of the European Communities. Chiquita Bananas. Case 27/76. *European Court Reports 1978 -00207*. EU:C:1978:22.

a different market when the two markets are connected (for example, when having common consumers).[17]

In defining the notion of the relevant market, two aspects must be taken into account: the relevant geographic market and the relevant market for the product.[18] The geographic market is the area in which the conditions of competition are sufficiently homogeneous for the undertakings operating there. The relevant product market is the totality of products (or services) with certain characteristics, price and utility, interchangeable from the consumer's point of view.[19]

The dominant position, in itself, is not prohibited by art. 102 TFEU, but gives the undertaking concerned an increased responsibility to ensure that its conduct does not distort competition. Thus, an undertaking which does not have a dominant position but behaves in the same way does not act illegally. Prohibited behaviours for the dominant undertaking are: the perception of excessively high and costly prices, tied sales and the imposition of a group of products on sale, and the refusal to deal with market partners.[20]

The Microsoft[21] case highlights the way in which the relationship between the Court and the Commission work. The Commission sanctioned Microsoft for finding that it had infringed upon art. 102 TFEU through the practice of abuse of a dominant position in two situations: it refused to provide its competitors with information on the interoperability of the software and conditioned its customers to buy Windows Media Player. The Court of First Instance upheld the Commission's initial decision.[22]

3. A look at the legal basis of anti-competitive business practices

Measures against anti-competitive practices are part of the EU competition policy. In terms of the anti-competitive policy, the foundation is again primary law. The "main weapon"[23] in the control of antitrust anti-competitive behaviour is art. 101 TFEU. Along with this legal instrument is art. 102 TFEU, which regulates the abusive conduct of undertakings in a dominant position on the market. In order to implement primary legislation, as in the case of unfair trade policies, the Council and the Commission have adopted directives and regulations containing general rules and provisions giving the Commission the power to conduct investigations (for example, Regulation (EC) 1/2003[24] on the application of competition rules, Regulation (EC) 773/2004[25], and Directive (EU) 2014/104[26]). The Commission provides details and interpretations of various issues, procedures and concepts in a number of documents: notes, guidelines and rules.[27]

According to the provisions of art. 3 TFEU, setting the rules regarding EU competition, necessary for the functioning of the internal market, is an exclusive competence of the EU. The area regarding the internal market is legislated by art. 4 TFEU as a shared competence of the EU with the Member States. The institutions involved are: the European Parliament, the Council of Ministers, the Commission, the CJEU, respectively the Court of First Instance and the national authorities. As with the common commercial policies, the Commission is the institution responsible for implementing the competition policy at EU level. The Commission adopts formal decisions (prepared by the Directorate-General for Competition) through a simple majority. The investigation procedure is carried out in a similar manner, following a complaint or on its own initiative, with the Commission acting to investigate specific situations or even an economic sector. The European Parliament evaluates the Commission's actions in an annual report. The Council of Ministers is the one that authorizes the regulations on categories of exemptions, as well as any changes in the relevant legislation.[28]

Following the consolidation of art. 101 and art. 102 TFEU ("antitrust rules"), competition policy

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[17] Ioan Lazăr, Laura Lazăr, *Abuzul de poziție dominantă în dreptul european al concurenței*, Universul Juridic Publishing House, Bucharest, 2015, pp. 89-152.

[18] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 337.

[19] Order no. 388/2010, issued by the Competition Council, for the implementation of the Instructions on the definition of the relevant market, published in Official Gazette of Romania no. 553 of 5 August 2010.

[20] Radostina Parenti, *Competition policy*, European Parliament, accessed March 15, 2022, https://www.europarl.europa.eu/factsheets/ro/sheet/82/politica-in-domeniul-concurentei.

[21] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007. Microsoft Corp. v. Commission of the European Communities. Case T-201/04. *European Court Reports 2007 II-03601*. EU:T:2007:289.

[22] *Ibidem.*

[23] Paul Craig, Grainne de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, Oxford, 2011, p. 960.

[24] Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in art. 81 and 82 of the Treaty. OJ L 1, 4.1.2003, 0.1-25.

[25] Commission Regulation (EC) no. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to art. 81 and 82 of the EC Treaty. *OJ L 123, 27.4.2004, pp. 18-24.*

[26] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. *OJ L 349, 5.12.2014, pp. 1-19.*

[27] "Antitrust", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition/antitrust/legislation/legislation.html.

[28] European Institute in Romania, accessed March 15, 2022, http://ier.gov.ro/wp-content/uploads/publicații/Politica_concurenta.pdf.

follows a trend of decentralization, with a significant role being attributed both to the competent national authorities and to the courts and tribunals of the Member States. Art. 1 of Regulation (EC) no. 1/2003 introduces the direct effectiveness of art. 101 and art. 102 TFEU. By art. 6 Regulation (EC) 1/2003 takes over the exclusive powers of the Commission (conferred on it by Regulation no. 17[29]) and confers on the national courts powers relating to the application of Community competition rules. It also assigns to the national competition authorities powers in the application of Community competition rules in close cooperation with the Commission [art. 11 (1) of Regulation (EC) 1/2003].

The final arbiter of the application of the measures is the CJEU. The Court is entitled to act in the case of appeals against decisions of the Commission (in particular, the Court of First Instance), but also in the case of applications from national courts.[30]

4. EU goal and objective of protection against anti-competitive practices

In terms of the competition policy, this is not seen "as an end in itself" but rather as a necessity of the internal market.[31] The doctrine[32] groups the objectives of competition policy in three directions. A first goal is to increase consumer welfare and to achieve an optimal allocation of resources in the EU, given that traditional economic theories claim that the production of goods is rendered much more efficient by fair competition. A second objective is to protect consumers together with small and medium-sized enterprises from large aggregations of economic power (either monopoly or business-to-business agreements) that have market-distorting behaviour. A third objective is the proper functioning of the European single market, by preventing discriminatory government intervention in favour of state-owned enterprises, or by granting state aid to private enterprises.[33]

In order to achieve the goal of ensuring that every European citizen has the best quality products and services at the lowest prices, competition policy has at its disposal a set of tools to protect against anti-competitive practices. These instruments monitor compliance with competition rules so as to achieve the fundamental objective of ensuring the proper functioning of the European internal market. A competitive climate encourages both the development of trade and the efficiency of production. The consumer thus has a greater variety of products at their disposal, which makes it easier to lower prices and increase the quality of products.[34]

The Commission applies anti-competitive practices to restore competitive conditions by correcting companies' misconduct (such as agreements, abusive behaviour of dominant undertakings, concentration and state aid) and the correlation of these instruments with market developments.[35]

5. Comparison between anti-competitive practices (agreements and abuse of a dominant position) and unfair commercial practices (including dumping and subsidies)

The interaction between the anti-dumping policy objectives and the antitrust policy objectives is a highly controversial issue, for both legal and economic reasons. Thus, in its decisions on the imposition of anti-dumping measures, the Commission takes into account and overrides compliance with anti-competitive rules.[36] From a legal point of view, anti-dumping regulations, on the one hand, allow practices such as price undertakings or the limitation of quantities of products marketed - practices that are prohibited by competition regulations; on the other hand, anti-dumping regulations penalize certain price differences (the difference between normal value and export price) - which is justifiable and acceptable from the point of view of competition rules. From an economic perspective, the two policies pursue different objectives, which can lead to conflicting situations at some point. Anti-dumping is a remedy for industries affected by the competitiveness of imports. The ultimate goal of antitrust policy is to promote consumer welfare and the efficiency of the production of goods which, in part, depend on the proper functioning of the

[29] EEC Council: Regulation no. 17: First Regulation implementing art. 85 and 86 of the Treaty. *OJ 13, 21.2.1962, pp. 204-211.*

[30] European Institute in Romania, *Politica în domeniul concurenței, Seria Micromonografii - Politici Europene*, versiune actualizată, European Institute in Romania, Bucharest, 2003.

[31] "Competition. Overview: making markets work better", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition/general/overview_en.html.

[32] Paul Craig, Grainne de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, Oxford, 2011, pp. 959-960.

[33] *Ibidem.*

[34] "Competition. Overview: making markets work better", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition/general/overview_en.html.

[35] Radostina Parenti, "Competition policy", European Parliament, accessed March 15, 2022, https://www.europarl.europa.eu/factsheets/ro/sheet/82/politica-in-domeniul-concurentei.

[36] Meg A. Mataraso, "The Independent Importar's Right of Review of Antidumping Regulations Before the Court of Justice of the European Communities", *Fordham International Law Journal,* vol. 12, no. 4, art. 3 (The Berkeley Electronic Press, 1988), p. 694.

competitive market system, in which, in turn, the competitive import system plays an important role.[37]

Basically, the two types of trade defence instruments pursue different measures by applying their own measures. In reality, however, both are aimed at unfair or non competitive practices of private companies in international trade, in order to correct behaviours that lead to distortions of the basic principles of the functioning of the common market.

6. Conclusions

In the context of market liberalisation, imbalances and inequities may arise between countries. Under these conditions, competitive pressures between market participants are of major importance: economic growth, declining unemployment, and individual well-being can only be achieved by improving global competitiveness. Concepts such as sustainable development and the green economy are beginning to take shape. The European legal framework must keep pace with these changes, requiring the need to monitor the external situation and tighten legislation in order to protect against unfair commercial practices.

In summary, we can say that competition, although it is an element whose existence is essential for the proper functioning of the market, can be seen as an element of pressure on companies in trying to offer consumers a variety of products, at the lowest possible prices. Thus, the role of EU regulations is to monitor and correct cases of illegal anti-competitive practices, such as: agreements between companies, abuse of a dominant position, state aid, economic concentrations, and all those activities that lead to the control of production, sale, and dictating the price. However, if the agreement fulfills, cumulatively, two conditions: the agreement leads to increases in efficiency and consumers receive a fair share of the benefit, then that agreement does not cause the elimination of competition. Thus, the limitation caused by the agreement is considered indispensable, so the exception is allowed. It should be noted that art. 102 TFEU does not prohibit an undertaking from being in a dominant position, but rather prohibits the misuse of that position. Abuse of dominant power is seen by the regulators as the use of the ability to prevent the maintenance of effective competition in the market as well as the use of prohibited behaviors such as charging excessively high prices or prices below the manufacturing cost, tied sales, imposing a group of products for sale and the refusal to deal with market partners. In terms of the regulations imposed on the market, the EU has adopted directives, regulations, as well as a series of documents, such as notes, guidelines and rules, to offer additional clarifications. The Commission is responsible for implementing the competition policy. The Commission acts to investigate specific situations or even entire economic sectors. Following the trend towards the decentralization of the competition policy, an important role has been assigned to both competent national authorities and the courts and tribunals of Member States.

The impact of this research is seen in the results of the analysis on the effectiveness of EU competition law. In itself, competition policy is not seen "as an end in itself" but rather as a necessity of the internal market. Through the adopted legislation and the resulting procedures, the competition policy ensures that the primary objective is to increase the welfare of consumers and to supervise the optimal allocation of resources in the EU. A second objective is to protect consumers and small and medium-sized enterprises from large aggregations of economic power that may have market-distorting behaviors. The ultimate goal is the proper functioning of the European single market, through higher-level surveillance to prevent discriminatory government intervention in favor of state-owned enterprises, or by granting state aid to private enterprises. It is thus observed that the Commission applies the instruments of protection against anti-competitive practices in order to restore competitive conditions, while seeking to correlate these instruments with market developments, by constantly updating the legislation.

I found it particularly interesting how, from an economic point of view, on the one hand, a competitive market price system generates consumer welfare and the efficiency of the production of goods; on the other hand, the competitive market system is affected by the competitiveness of imports, which in turn may harm certain domestic industries. Thus, a limitation imposed due to the anti-dumping policy, may lead to a result sanctioned by the antitrust policy. A contradictory result can also appear from a legal perspective: on the one hand, practices allowed by anti-dumping regulations (such as price setting or limiting the quantities of products sold) are sanctioned by competition regulations; on the other hand, practices sanctioned by anti-dumping regulations (price differences such as the difference between normal value and export price) are accepted from the perspective of competition regulations. I have discussed them in this paper. However, it remains for further research work to find the interaction between the objectives of the anti-dumping policy and the objectives of the antitrust policy.

[37] José Jr. Tavares de Araujo, *Legal and economic interfaces between antidumping and competition policy*, in Revista de comerț internațional (Santiago: United Nations, 2001), p. 7.

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JUDGE INDEPENDENCE - BETWEEN EUROPEAN UNION LAW AND NATIONAL LAW

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Abstract

In this paper we aim to analyze a topical issue for specialists in national constitutional law and European law, namely the independence of the judge - between European Union law and national law.

The subject is of interest in the context of the ruling by the CJEU on several judgments on the rule of law, independence and impartiality of national judges, legal certainty, guaranteeing the national constitutional identity of EU Member States, binding judgments of Constitutional Courts, the supremacy of European Union law.

In this sense, we understand to see the theoretical aspects, the solutions pronounced by the CJEU of recent date regarding Romania, the position of the CCR compared to those ruled by the Luxembourg court, the review of recent decisions by the Court of Justice against Poland, as well as the opinions expressed in the specialized doctrine on this subject.

Keywords: *rule of law, separation, balance and cooperation of powers in the state, the judiciary, the principles of irremovability and independence of judges, system of political control of the content of judicial decisions, the principle of ensuring effective judicial protection in matters governed by Union law, applicable disciplinary regime national judges, national constitutional identity, sovereignty of the Member States of the European Union, cooperation between national and European Union courts.*

1. Introduction

Starting from the Romanian Constitution, at article 1 paragraph (4) stipulates that the Romanian state is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within the constitutional democracy.

Thus, the legislative power belongs to the Romanian Parliament, the executive power is exercised by the President of Romania, the Romanian Government and the central and local public administration bodies, and the judicial authority is held by the courts, the Public Ministry and the Superior Council of Magistracy.

"Here it is necessary to specify that the separation of powers does not mean the lack of correspondence between them. The powers of the state must be distinct, but each is a whole. . . This principle, of the separation of the powers, must not introduce an absolute independency which should constitute the report of the powers as something negative, in the meaning that everything it does to one another, becomes a hostile action, designed to oppose to it."[1]

Also, from reading article 1 of the Romanian Constitution we find out that the Romanian state is a national sovereign and independent, unitary and indivisible state, whose form of government is the republic, being a state of law, democratic and social in which human dignity, rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed.

We remind you that on December 8th, 2021, 30 years have passed since the adoption of the first Constitution after the fall of the communist regime in Romania, a Constitution that was adopted by the Constituent Assembly on November 21st, 1991 and approved by National Referendum on December 8th, 1991.

The Constitutional Court is the guarantor of the supremacy of the Constitution, being the only authority of constitutional jurisdiction in Romania.

At the same time, the Constitutional Court is independent of any public authority and is subject only to the Constitution and Law no. 47/1992 on the organization and functioning of the Constitutional Court.

According to art. 11 para. (3) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, the decisions, judgments and opinions of the Constitutional Court are published in the Official Gazette of Romania, Part I. The decisions and judgments of the Constitutional Court are generally binding and have force only for the future.

In Romania, justice is administered by the High Court of Cassation and Justice and by the other courts established by law, according to art. 126 para. (1) of the Romanian Constitution, "The CCR, despite its name, is

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[1] Nicolae Popa, *General Theory of Law*, 6th ed., C.H. Beck Publishing House, Bucharest, 2020, p. 104.

not a law court, not part of the judiciary, but of the constitutional order."[2]

Magistracy is the judicial activity carried out by judges for the purpose of administering justice and by prosecutors in order to defend the general interests of society, the rule of law, as well as the rights and freedoms of citizens.

In order to administer justice, judges are independent and subject to the law. Thus, according to art. 2 para. (3) of Law no. 303/2004 on the status of judges and prosecutors, judges must be impartial, having full freedom to resolve cases brought before the court, in accordance with the law and impartially, with respect for the equality of arms and the procedural rights of the parties. Judges must make decisions without any direct or indirect restrictions, influences, pressures, threats or interventions, from any authority, even judicial authorities. Judgments in appeals do not fall within the scope of these restrictions. The purpose of the independence of judges is also to guarantee every person the fundamental right to have his or her case examined fairly, based solely on the application of the law.

Based on the aforementioned, this paper aims to analyze the independence of the judge - between EU law and national law, in the context of several judgments of the CJEU questioning the independence of (law) member states, preservation of national identity and supremacy of national constitutions.

2. Content

The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, according to art. 2 of the Treaty on European Union.

Art. 4 para. (2) of the Treaty on European Union provides that the Union shall respect the equality of Member States in relation to the Treaties, as well as their national identity, which is inherent in their fundamental political and constitutional structures, including local and regional self-government. It respects the essential functions of the State and, in particular, those aimed at ensuring its territorial integrity, maintaining law and order and defending national security. In particular, national security remains the sole responsibility of each Member State.

The delimitation of the competences of the European Union is governed by the principle of attribution. The exercise of these powers is governed by the principles of subsidiarity and proportionality.

Under the principle of conferral, the European Union acts only within the limits of the powers conferred upon it by the Member States in the Treaties to achieve the objectives set out in those Treaties, so that any competence not conferred on the European Union by the Treaties belongs to the Member States.

At the same time, in accordance with the principle of subsidiarity, in areas which do not fall within its exclusive competence, the European Union intervenes only if and to the extent that the objectives of the envisaged action cannot be satisfactorily achieved by the Member States either centrally or regionally. locally, but due to the size and effects of the planned action, they can be better achieved at the level of the European Union, according to article 5 of the Treaty on European Union.

Where the Treaties confer upon the European Union exclusive competence in a particular field, only the European Union may legislate and adopt acts with binding legal force, and Member States may do so only if they are empowered by the Union or to implement the Union acts.

The Treaty on the Functioning of the European Union sets out the areas in which the European Union has exclusive competence, namely: customs union, establishing the rules on competition necessary for the functioning of the internal market, monetary policy for Member States whose currency is the euro, conservation of marine biological resources common fisheries policy, the common commercial policy, the conclusion of international agreements where such a conclusion is provided for in a Union legislative act, or is necessary to enable the Union to exercise its internal competence, or to the extent that this could affect common rules or could change their scope.

Where the Treaties confer on the European Union a shared competence with the Member States in a given field, the Union and the Member States may legislate and adopt legally binding acts in that field. Member States shall exercise their powers to the extent that the Union has not exercised its powers. Member States shall re-exercise their competence to the extent that the European Union has decided to cease exercising it.

Competences shared between the Union and the Member States apply in the following main areas namely: the internal market, social policy as defined in the Treaty, economic, social and territorial cohesion, agriculture and fisheries with the exception of conservation of marine biological resources,

[2] Nicolae Popa, (coord.), Elena Anghel, Cornelia Ene-Dinu, Laura Spătaru-Negură, *General Theory of Law. Seminar notebook*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, p. 61.

environment, consumer protection, transport, trans-European networks, energy, freedom, security and justice, the common public health security objectives for the aspects defined in the Treaty.

The European Union is also responsible for supporting, coordinating or supplementing the action of the Member States in the following areas: protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and cooperation. administrative.

To this end, the European Union has an institutional framework aimed at promoting its values, pursuing its objectives, upholding the interests of its citizens and its Member States, and ensuring the coherence, effectiveness and continuity of its policies and actions, through the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

According to art. 276 of the Treaty on the Functioning of the European Union, The Court of Justice of the European Union has no jurisdiction to review the lawfulness or proportionality of police or other law enforcement operations in a Member State, nor to rule on the exercise of the responsibilities incumbent upon Member States for maintaining order and the defense of internal security.

At the same time, the Court of Justice of the European Union shall ensure compliance with European Union law in the interpretation and application of the Treaties, ruling in accordance with the Treaties: (a) on actions brought by a Member State, an institution or a natural or legal person; (b) on a preliminary ruling, at the request of national courts, on the interpretation of Union law or the validity of acts adopted by the institutions; and (c) in other cases provided for in the Treaties.

In art. 267 of the Treaty on the Functioning of the European Union (ex art. 234 TEC) provides that the Court of Justice of the European Union shall have jurisdiction in a preliminary ruling concerning: (a) the interpretation of treaties and (b) the validity and interpretation acts adopted by the institutions, bodies, offices or agencies of the Union.

If such a matter is raised before a court of a Member State, that court may, if it considers that a decision in that regard is necessary for it to give judgment, to apply to the Court for a delivering on this issue.

If such a matter is raised in a case pending before a national court whose decisions are not subject to appeal under national law, that court shall be required to refer the matter to the Court of Justice of the European Union.

If such a matter is raised in a case pending before a national court concerning a person who is being held in custody, the Court shall give its decision as soon as possible.

According to the specialized doctrine, "jurisprudence occupies an important place among the sources of European Union law. The exercise by the Court of Justice of a regulatory activity is characterized, in particular, by the use of methods of dynamic interpretation, as well as by a wide use of general principles of law. '[3]

Returning to the Romanian Constitution, the decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, the decisions are generally binding and have power only for the future, according to art. 147 para. (4).

Art. 148 of the Romanian Constitution, having the marginal name *Integration in the European Union*, provides the following:

1. Romania's accession to the constitutive treaties of the European Union, in order to transfer powers to the Community institutions, as well as to exercise jointly with the other Member States the powers provided by these treaties, is made by law adopted in the joint sitting of the Chamber of Deputies and the Senate, a two-thirds majority of deputies and senators.

2. As a result of accession, the provisions of the Treaties establishing the European Union, as well as other binding Community regulations, take precedence over the contrary provisions of national law, in compliance with the provisions of the Act of Accession.

3. The provisions of para. 1 and 2 shall apply *mutatis mutandis* to the accession to acts of revision of the Treaties establishing the European Union.

4. The Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfillment of the obligations resulting from the act of accession and from the provisions of para. (2).

5. The Government submits to the two Houses of Parliament the draft binding acts before they are submitted to the approval of the institutions of the European Union.

In view of the above, the independence of the judge - between European Union law and national law becomes a topical issue for the Romanian doctrine in the context of the ruling by the Court of Justice of the European Union of decisions questioning the rule of law, national identity, the supremacy of the

[3] Augustin Fuerea, *Handbook of the European Union*, 5th ed., revised and added after the Lisbon Treaty (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p. 141.

Constitution, the primacy of European Union law, the binding force of judgments of the Court of Justice in Luxembourg, the relationship between national and European Union courts and the sovereignty of the Member States.

In this sense, in addition to the theoretical issues regarding the rule of law based on the principle of separation, balance and cooperation of the three powers - legislative, executive and judicial - in the state, the independence of the national judge, the binding nature of Romanian Constitutional Court decisions, supremacy Constitution, the sovereignty of the member states of the European Union, the assurance of the national identity of the member states, in the following we understand to see practical cases on the theoretical aspects enunciated above .

Thus, pursuant to art. 267 of the Treaty on the Functioning of the European Union, related cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, concern the interpretation of art. 2 and art. 19 para. (1) second paragraph of the Treaty on European Union, art. 325 para. (1) of the Treaty on the Functioning of the European Union, art. 47 of the Charter of Fundamental Rights of the European Union, art. 1 para. (1) and art. 2 para. (2) of the Convention on the Protection of Financial Interests, Commission Decision 2006/928 of 13.12.2006 establishing a mechanism for cooperation and verification of the progress made by Romania in achieving certain specific benchmarks in the field of judicial reform and the fight against corruption, as well as the principle of the rule of law.

In Case C-357/19 the following questions were referred to the Court of Justice in Luxembourg, namely:

1. „Art. 19 para. (1) of the Treaty on European Union, art. 325 para. (1) of the Treaty on the Functioning of the European Union, art. 1 para. (1) letter a) and b) and art. 2 para. (1) of the Convention on the Protection of Financial Interests and the principle of legal certainty must be interpreted as precluding the adoption of a decision by a body outside the judiciary (Constitutional Court) to rule on the legality of the composition of panels, necessary to allow extraordinary remedies against final judgments handed down over a period of time?

2. The second paragraph of art. 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter) must be interpreted as precluding the finding by a body outside the judiciary of the lack of independence and impartiality of a panel to which it belongs. a judge with a leading position and who was not appointed at random, but on the basis of a transparent rule, known and uncontested by the parties, a rule applicable in all cases of that panel, the decision adopted being binding under national law?

3. Should the priority application of European Union law be interpreted as enabling the national court to overturn the application of a decision of the Constitutional Court in a referral for a constitutional dispute, which is binding on national law?"

In Case C-379/19, the following preliminary questions were asked:

1. „The mechanism for cooperation and verification of the progress made by Romania in order to achieve certain specific benchmarks in the field of judicial reform and the fight against corruption (hereinafter referred to as CVM), established according to Decision 2006/928 / EC and the requirements set out in the reports drafted under this mechanism, are they binding on the Romanian state?

2. Art. 2 correlated with art. 4 para. (3) of the Treaty on European Union must be interpreted as meaning that the obligation of the Member State to respect the principles of the rule of law also includes the need for Romania to comply with the requirements of the CVM reports established by Decision 2006/928/EC, including withholding the intervention of a constitutional court, a politico-jurisdictional institution, interpreting the law and establishing the concrete and binding application of it by the courts, exclusive competence conferred on the judiciary, and establishing new legal rules, exclusive competence attributed to the legislative authority? Does EU law require the removal of the effects of such a decision by a constitutional court? Does European Union law preclude the existence of an internal rule governing disciplinary liability for a magistrate who revokes the decision of the Constitutional Court in the context of the question raised?

3. The principle of independence of judges, enshrined in art. 19 para. (1) second paragraph of the Treaty on European Union and art. 47 of the Charter, as interpreted by the case law of the Court, [Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses (C - 64/16, EU : C : 2018 : 117)], opposes the substitution of their powers by the decisions of the Court Constitutional (Decisions [no. 51/2016, no. 302/2017 and no. 26/2019]), with the consequence of the unpredictability of the criminal process (retroactive application) and the impossibility of interpreting and applying the law to the concrete case? Does European Union law preclude the existence of an internal rule governing disciplinary liability for a magistrate who removes from the application the decision of the Constitutional Court, in the context of the question posed?".

In Case C-547/19 the following question was asked:

1. „Art. 2, art. 19 para. (1) of the Treaty on European Union and art. 47 of the Charter must be interpreted as precluding the intervention of a

Constitutional Court (a body which is not, according to domestic law, a court) regarding the way in which the supreme court interpreted and applied the unconstitutional law in the activity of constituting court panels?"

In Case C-811/19, the following questions were asked:

1. „Art. 19 para. (1) of the Treaty on European Union, art. 325 para. (1) of the Treaty on the Functioning of the European Union, art. 58 of Directive 2015/849, as well as art. 4 of Directive 2017/1371 must be interpreted as precluding the adoption of a decision by a body outside the judiciary (Constitutional Court), which would resolve a procedural exception that would concern a possible illegal composition of the judgments, in relation to the principle of specialization of judges at the High Court of Cassation and Justice (not provided by the Romanian Constitution), and to oblige a court to send the cases, which are on appeal (devolutive), for retrial, in the first procedural cycle to the same court?

2. Art. 2 of the Treaty on European Union and Article The second paragraph of the Charter must be interpreted as precluding the finding by a body outside the judiciary of the unlawful composition of court panels in a section of the Supreme Court (panels composed of judges in office, who at the time of promotion also met the condition specialization required to be promoted to the criminal section of the Supreme Court)?

3. The priority application of Union law must be interpreted as allowing the national court to overturn the application of a decision of the Constitutional Court, which interprets a lower rule than the Constitution, the organization of the High Court of Cassation and Justice, included in the national law on prevention, detection and the sanctioning of acts of corruption, a norm constantly interpreted, in the same sense, by a court for 16 years?

4. According to art. 47 of the Charter, does the principle of free access to justice include the specialization of judges and the establishment of specialized panels in a supreme court?".

In Case C-840/19, the following questions were asked, namely:

1. „Art. 19 para. (1) of the Treaty on European Union, art. 325 para. (1) of the Treaty on the Functioning of the European Union and art. 4 of Directive 2017/1371, adopted pursuant to art. 83 para. (2) of the Treaty on the Functioning of the European Union, must be interpreted as precluding the adoption of a decision by a body outside the judiciary (Constitutional Court), which requires the referral for retrial of corruption cases in the appeal phase, for the non-constitution at the level of the supreme court of court panels specialized in this matter, although it recognizes the specialization of the judges who composed the court panels?

2. Art. 2 of the Treaty on European Union and Article The second paragraph of the Charter must be interpreted as precluding the finding by a body outside the judiciary of the unlawful composition of court panels in a section of the Supreme Court (panels composed of judges in office, who at the time of promotion also met the condition specialization required to be promoted to the Supreme Court)?

3. Should the priority application of European Union law be interpreted as enabling the national court to overturn the application of a decision of the Constitutional Court of Justice, given in a referral for a constitutional dispute, which is binding on national law?"

As regards the jurisdiction of the Court of Justice of the European Union to answer the questions referred in Case C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 there have been opinions that the Court would not have jurisdiction to answer such questions as long as: (1) the addressed questions regard the compatibility of the law of the European Union with the jurisprudence of the national Constitutional Court, (2) in the law of the European union there cannot be found any reference regarding the application and the effects of judgments handed down by a national constitutional court, and (3) the questions referred are requested by the Court of Justice of the European Union to review the legality of judgments handed down by the national Constitutional Court.

The Court of Justice of the European Union has declared that it has jurisdiction to answer questions referred for a preliminary ruling: (1) the member states must comply with the obligations belonging to them according to the law of the European union, although the organization of the justice in the member states belongs to their competence, (2) It is for the Luxembourg Court of Justice to provide national courts with elements of interpretation and application of European Union law which are necessary for the resolution of the main national dispute, (3) the rejection of a question addressed by a national court can be disposed when the requested interpretation of the law of the European Union has nothing to do with the reality or the subject-matter of the main proceedings, that is to say, with regard to a hypothetical problem, and where sufficient facts and law are not made available to the Court to answer the questions referred, disciplinary investigations, (4) the independence of the national judges who have addressed the preliminary questions seems to be jeopardized, moreover there is the risk to be submitted to certain disciplinary inquiries, etc.

In Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, the Court of Justice of the European Union:

1. "Commission's Decision 2006/928 of December 13th, 2006 establishing a mechanism for cooperation and verification of Romania's progress towards certain specific benchmarks in the field of judicial reform and the fight against corruption is, as long as it has not been was repealed, mandatory in all its elements for Romania. The reference objectives set out in the Annex hereto are intended to ensure that this Member State complies with the value of the rule of law set out in art. 2 of the Treaty on European Union and are binding on the Member State concerned, in the sense that the latter is required to take appropriate measures to achieve those objectives, having due regard to the principle of sincere cooperation provided for in art. 4 para. (3) from the Treaty regarding the European Union, of the reports drawn up by the European Commission under the respective decision, especially of the recommendations formulated in the mentioned reports;

2. Art. 325 para. (1) of the Treaty on the Functioning of the European Union in conjunction with art. 2 of the Convention elaborated pursuant to article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995, and Decision 2006/928 must be interpreted as precluding a national regulation or practice according to which judgments concerning corruption and fraud in the field of value added tax (VAT) which were not delivered at first instance by panels of judges specializing in this matter is null and void, so that the causes of corruption and VAT fraud in question must, where appropriate, be following an extraordinary appeal against final judgments, to be tried at first instance and / or on appeal, in so far as the application of that regulation or national practice is likely to create a systemic risk of impunity for the facts which constitute serious fraud affecting the interests of the Union or corruption in general. The obligation to ensure that such offenses are subject to criminal sanctions that are effective and dissuasive does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in art. 47 of the Charter of Fundamental Rights of the European Union, without this court being able to apply a national standard of protection of fundamental rights that would involve such a systemic risk of impunity;

3. Art. 3 and art. 19 para. (1) the second paragraph of the Treaty on the Functioning of the European Union and Decision 2006/928 must be interpreted as not precluding a national regulation or practice according to which decisions of the National Constitutional Court are binding on the courts of common law, provided that national law to guarantee the independence of the said Constitutional Court in particular from the legislative and executive powers as required by those provisions. On the other hand, those provisions of the Treaty on European Union and that Decision must be interpreted as precluding a national regulation according to which any failure to comply with the decisions of the national Constitutional Court by ordinary national judges is liable to disciplinary action;

4. The principle of the supremacy of European Union law must be interpreted as precluding a national regulation or practice according to which national courts governed by common law are bound by the decisions of the national Constitutional Court and cannot, therefore, risk disciplinary misconduct ex officio the jurisprudence resulting from the mentioned decisions, even if they consider, in the light of a decision of the Court, that this jurisprudence is contrary to art. 19 para. (1) second paragraph of the Treaty on European Union, art. 325 para. (1) of the Treaty on the Functioning of the European Union or Decision 2006/928 / EC ".

Judgment of the Court of Justice of the European Union delivered on 21 December 2021[4] it sets out a number of key ideas, namely: (1) the mechanism for cooperation and verification of Romania's progress towards achieving certain specific objectives in the field of judicial reform and the fight against corruption is in force for as long as Decision 2006/928 of the European Commission has not been repealed and the "recommendations" made through the European Commission Reports are binding on Romania, (2) European Union law opposes the application of a case law of the Constitutional Court leading to the annulment of the decisions delivered by the illegally composed panels of judges where this, in conjunction with the national limitation provisions, create a systemic risk of punishment of the facts constituting serious crimes of fraud touching the financial interests of the Union or of corruption, (3) European Union law does not preclude the ruling of the Constitutional Court from being binding on the courts of ordinary law as long as it is binding. while the Romanian state offers guarantees of independence of the Constitutional Court from the legislative and executive powers of the state, (4) non-compliance / non-application of the decisions of the Constitutional Court is not likely to attract the disciplinary liability of ordinary judges, this intervening only in totally exceptional and extraordinary situations, (5) common law judges may set aside the decisions of the Constitutional Court which are contrary to European Union law, without the

[4] https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3315335.

risk of being subject to disciplinary action, in accordance with the principle of the rule of law.

Regarding the independence of the Constitutional Court from the legislative and executive powers of the state, we point out that in the specialized doctrine it was noted that the Constitutional Court "can be considered a public political-jurisdictional authority. The political character results from the way of appointing the members of the Constitutional Court, as well as the nature of some attributions, the jurisdictional character resulting from the principles of organization and functioning (independence and irremovability of judges), as well as other attributions and procedures."[5]

The judgment of the Court of Justice of the European Union provoked a wave of reactions in the Romanian state, specialists and legal practitioners conducted an analysis of the judgment of the Luxembourg Court, as well as the effects / consequences generated by its ruling.

On December 23rd, 2021, the Romanian Constitutional Court issued a press release expressing its position on the judgment of the Court of Justice of the European Union of December 21st, 2021 in related cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.

Thus, through the Press Release, the CCR referred to the prerequisite situations that led to the referral of questions to the Luxembourg Court, namely: (1) the composition of the panels of five judges at the HCCJ (Decision no. 685/2018 published in the Official Gazette of Romania, Part I no. 1,021/29.11.2018), (2) the establishment of specialized panels in the field of corruption offenses at the level of the HCCJ (Decision no. 417/2019 published in the Official Gazette of Romania, Part I no. 825/10.10.2019), (3) the implementation of the technical supervision mandate (Decision no. 51/2016 published in the Official Gazette of Romania, Part I no. 190/14.03.2016) and (4) the competence of the Public Ministry - the Prosecutor's Office attached to the HCCJ to conclude collaboration protocols with the Romanian Intelligence Service (Decision no. 26/2019 published in the Official Gazette of Romania, Part I no. 193/12.03.2019).

In this regard, the Constitutional Court stated that, "none of these decisions (*indicated above*) was aimed at creating impunity for acts of serious fraud which harm the financial interests of the Union or corruption, nor the removal of criminal liability for such offenses."[6]

Through the Press Release, the Constitutional Court also offers the solution by which the Romanian state can respect the provisions of the Decision of the Luxembourg Court of December 21st, 2021, namely the revision of the Romanian Constitution in force.

Art. 150 of the Romanian Constitution, with the marginal name of the *Revision Initiative*, provides that:

(1) The revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least a quarter of the number of deputies and senators, as well as by at least 500,000 citizens with the right to vote.

(2) Citizens initiating the revision of the Constitution must come from at least half of the country's counties, and in each of these counties or in the municipality of Bucharest must be registered at least 20,000 signatures in support of this initiative.

Also, in art. 152 of the Romanian Constitution provide the limits of the revision, respectively:

(1) The provisions of this Constitution regarding the national, independent, unitary and indivisible character of the Romanian state, the republican form of government, the integrity of the territory, **the independence of the judiciary**, political pluralism and the official language may not be subject to revision.

(2) Nor can any review be carried out if it results in the abolition of the fundamental rights and freedoms of citizens or their guarantees.

(3) The Constitution may not be revised during a state of siege or a state of emergency or in time of war.

In 2014, an attempt was made to revise the Romanian Constitution, regarding the content of art. 148 on integration into the European Union.

Thus, the legislative proposal to revise the Romanian Constitution was intended, among other things, as art. 148 para. (1) and (2) are amended to read as follows:

"1. Ratification of the Treaties amending or supplementing the Constitutive Treaties of the European Union and of the Treaties amending or supplementing the North Atlantic Treaty Act shall be made by a law adopted in a joint meeting of the Senate and the Chamber of Deputies, with the vote of two-thirds of senators and deputies.

(2) Romania shall ensure the observance, within the national legal order, of the law of the European Union, in accordance with the obligations assumed by the Act of Accession and by the other treaties signed within the Union".

The Constitutional Court by Decision no. 80/2014 on the legislative proposal on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I no. 246 / 07.04.2014, among others, found that the amendment of para. (2) in art. 148 of the Constitution is unconstitutional, keeping in mind the following considerations:

[5] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institutions*, 14th ed., vol. I, C.H. Beck Publishing House, Bucharest, 2011, p. 270.

[6] Press release, December 23, 2021 - Romanian Constitutional Court (ccr.ro).

„451. Judgment of 9 March 1978 of the Court of Justice of the European Communities (now the European Union) in Case C-106/77 stated that *"under the principle of the rule of Community law, the provisions of the treaty and the directly applicable documents of the institutions have as effect, in their relations with the national law of the Member States, by the mere fact of its coming into force, the ipso jure inapplicability of any provision contrary to existing national law, but also - because that provision is an integral part, with rank higher to the internal norms, from the legal order applicable in the territory of each Member State - to prevent the valid adoption of new national laws, in so far as they are incompatible with Community rules."*

452. The Court notes that the current text of the Constitution provides that the provisions of the Treaties establishing the European Union, as well as other binding Community regulations, take precedence over the contrary provisions of national law, in accordance with the provisions of the Act of Accession. In connection with the notion of "internal laws", by **Decision no. 148 of April 16th, 2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, the Court made a distinction between the Constitution and the other laws**. Also, the same distinction is made at the level of the Fundamental Law by art. 20 para. (2) the final sentence which provides for the application of international regulations as a matter of priority, unless the *Constitution or domestic laws* contain more favorable provisions.

453. The Court notes that the constitutional provisions do not have a declaratory character, but constitute mandatory constitutional norms, without which the existence of the rule of law cannot be conceived, provided by art. 1 para. (3) of the Constitution. At the same time, the Basic Law represents the framework and the extent to which the legislator and the other authorities can act; thus, the interpretations that can be brought to the legal norm must take into account this constitutional requirement contained in art. 1 para. (5) of the Fundamental Law, according to which in Romania the observance of the Constitution and its supremacy is mandatory.

454. Also, by Decision no. 668 of May 18th, 2011, published in the Official Gazette of Romania, Part I no. 487 of July 8th, 2011, established that the obligatory acts of the European Union are norms interposed within the constitutionality control.

455. Establishing that the law of the European Union applies without any circumstance in the national legal order, not distinguishing between the Constitution and other domestic laws, is equivalent to placing the Basic Law in the background of the legal order of the European Union.

456. From this perspective, the Court notes that the Basic Law of the State - the Constitution is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of a discrepancy between its provisions and those of Europe. Also, accession to the European Union cannot affect the supremacy of the Constitution over the entire legal system (see also the judgment of May 11th, 2005, K 18/04, delivered by the Constitutional Court of the Republic of Poland).

457. At the same time, the Court finds that the courts of constitutional contention *"have jurisdiction by way of jurisdiction, but have full jurisdiction over the powers which have been established. The CCR is subject only to the Constitution and its organic law of organization and functioning no. 47/1992, its competence being established by article 146 of the Fundamental Law and by Law no. 47/1992"* (see, in this sense, the Decision no. 302 of March 27th, 2012, published in the Official Gazette of Romania, Part I no. 361 of May 29th, 2012).

458. Therefore, to accept the new wording proposed in art. 148 para. (2) would be tantamount to creating the necessary preconditions for limiting the jurisdiction of the Constitutional Court, in the sense that only normative acts that are adopted in areas not subject to the transfer of powers to the European Union could still be subject to constitutional review, while normative acts regulates, from a material point of view, in the shared areas would be subject exclusively to the legal order of the European Union, being excluded the constitutionality control over them. Or, regardless of the field in which the normative acts regulate, they must respect the supremacy of the Romanian Constitution, according to art. 1 para. (5).

459. Thus, the Court notes that such an amendment would constitute a restriction on the right of citizens to apply to constitutional justice for the defense of constitutional values, rules and principles, *i.e.* the abolition of a guarantee of those values, rules and principles, which they also include the sphere of fundamental rights and freedoms."

By Decision no. 148/16.04.2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, published in the Official Gazette of Romania, Part I no. 317/12.05.2003, the Constitutional Court noted the following:

"With regard to the issue of the transfer of some Romanian attributions to the community institutions, the Constitutional Court holds that the text of art. 145^1 envisages the sovereign exercise of the will of the Romanian state to adhere to the constitutive treaties of the European Union by a law, the adoption of which is conditioned by a qualified two-thirds majority. The act of accession has a twofold consequence, namely, on the one hand, the transfer of tasks to the Community

institutions and, on the other hand, the joint exercise, with the other Member States, of the powers provided for in those Treaties. As regards the first consequence, the Court notes that, by the mere membership of a State in an international treaty, it diminishes its powers within the limits set by international law. From this first point of view, Romania's membership of the United Nations, the Council of Europe, the Organization of European Union States, the Central European Free Trade Agreement, etc. or Romania's quality as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms or to other international treaties has the significance of a restriction of the powers of the state authority, a relativization of national sovereignty. But this consequence must be correlated with the second consequence, that of Romania's integration into the European Union. In this regard, the Constitutional Court notes that the act of integration also has the significance of sharing the exercise of these sovereign attributes with the other component states of the international body. **Thus, The Constitutional Court finds that through the acts of transfer of some attributions to the structures of the European Union, they do not acquire, by endowment, a "super-competence", a sovereignty of their own.** In reality, the Member States of the European Union have decided to jointly exercise certain powers which have traditionally been in the realm of national sovereignty. It is obvious that in the current era of globalization of human issues, interstate developments and interindividual communication on a global scale, the concept of national sovereignty can no longer be conceived as absolute and indivisible, without the risk of unacceptable isolation. In view of all this, the Court notes that, as Romania's desire to join the Euro-Atlantic structures is legitimized by the country's interest, sovereignty cannot be opposed to the goal of accession.

However, the Constitutional Court is to examine whether the provisions on accession to Euro-Atlantic structures are subject to the limits of the review, in relation to the concepts of sovereignty and independence. With regard to the sovereignty of the state, as its peremptory feature, the Court observes that it does not fall under the incidence of art. 148 of the Constitution, which establishes the limits of the revision of the Constitution, instead the independent character of the Romanian state falls under this incidence. Independence is an intrinsic dimension of national sovereignty, even if it is independently enshrined in the Constitution. In essence, independence takes into account the external dimension of national sovereignty, giving the state full freedom of expression in international relations. In this respect, it is obvious that the accession to the Euro-Atlantic structures will be made on the basis of the independent expression of the will of the Romanian state, not being a manifestation of will imposed by an entity external to Romania. From this point of view, the Court finds that the introduction of the two new articles in the Constitution – art. 145^1 and 145^2 - does not constitute a violation of the constitutional provisions regarding the limits of the revision. On the other hand, the Court also notes that accession to the European Union, once achieved, entails a series of consequences that could not have occurred without proper regulation, of constitutional rank. The first of these consequences requires the integration into the national law of the acquis communautaire, as well as the determination of the relationship between the community normative acts and the internal law. The solution proposed by the authors of the revision initiative envisages the implementation of Community law in the national space and the establishment of the rule of priority application of Community law over the contrary provisions of domestic law, in compliance with the provisions of the Act of Accession. The consequence of accession is that the Member States of the European Union have agreed to place the acquis communautaire - the founding treaties of the European Union and the regulations derived from them - on an intermediate position between the Constitution and other laws, when it comes to binding European regulations."

Having regard to the judgment of the Court of Justice of the European Union of December 21st, 2021 in Case C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 "The worrying issues in this judgment are that legal uncertainty may arise in any of the Member States [19] in the sense that, whatever a Constitutional Court decides on a national rule, that decision can be applied by some common law courts and not by others, as well as the fact that it violates the jurisdiction of the constitutional courts, although this is established by the fundamental law. Thus, the CJEU automatically places itself above any constitutional court of the Member States, but does not stop there, but places inclusively the common law courts above any constitutional court of the member states, giving a real hit to the democratic state of law, that it is presumed to defend."[7]

We must remember that the judgment of the Court of Justice of the European Union of December 21st, 2021, comes against the background of some differences between the CCR.[8] and the Luxembourg Court of Justice[9] on the Section for the Investigation of Crimes in Justice.

[7] https://www.juridice.ro/764579/cvm-cjue-si-ccr-de-ce-cvm-a-expirat-in-2010-si-o-analiza-a-suprematiei-si-primatului-in- the-relations-between-the-national-legal-order-and-the-legal-order-of-the-eu-part-a-ii.html.

[8] https://www.ccr.ro/wp-content/uploads/2021/06/Decizie_390_2021.pdf.

[9] https://curia.europa.eu/juris/document/document.jsf?docid=241381&text=&dir=&doclang=RO&part=1&occ=first&mode

The specialized doctrine stated the following: "First of all, the harmonization of the internal law with the European law cannot be complete, and the application of the principle of the preeminence of the European norms over the internal ones will always generate tensions and conflicts. (...) These differences have two main sources: the insufficient delimitation of the powers that have been transferred by the national states to the Community institutions from the powers that remain in the competence of the states and the existence of different arbitrators making decisions to resolve legal disputes (CJEU, Constitutional Courts and national courts). In the absence of a supreme arbitrator, in addition to the ordinary legal conflicts, *i.e.* those subject to the judgment of the various arbitrators, legal conflicts arise even between arbitrators. It is the main vulnerability of the communitarian institutional system, generating frustrations both for the sovereigns and for the Europeans: some fear due to the supposed abandon of the sovereignty, others fear due to the excesses of some arbitrary sovereignty. Secondly, precisely because there is no supreme court to arbitrate disputes between arbitrators, namely differences between the CJEU and the Constitutional Courts, as well as between the latter and national courts (Sarmiento and Weiler's proposal to set up such a court cannot be adopted in the foreseeable future), these disputes concerning the delimitation of the powers of application of European law can now be resolved only through dialogue between arbitrators."[10]

At the same time, the following ideas were retained according to which: "It all starts with the fact that the EU is neither a federation, nor a confederation, nor a simple union of states. (…) *Each state agreed to cede some of its sovereignty upon accession. However, it is difficult to see how much the treaties require them to give in. States have not lost their sovereignty, but they do not have full sovereignty either. (…) The CJEU is trying to attract more powers than the treaties give it, which is upset by the Constitutional Courts or they do not accept what is legitimate for the CJEU to exercise. The only way to resolve differences is through dialogue. And this dialogue has great syncope. (…)* There are also excesses on the part of the CJEU, which should be wiser when adopting radical solutions, because they generate reactions not only from the CCR. There have been reactions in the Czech Republic and in Germany, not to mention Poland and Hungary. It is a question of a certain national identity protected by the founding treaty. National identity can have some values and principles that, if violated, the reactions are also violent. Sovereign accents are the result of decisions in which the arguments were too radical. The key is a balance between sovereignty and EU authority. This is a difficult time for the EU."[11]

Also, "although its role is to determine whether a law respects the Constitution, for several years the CCR has exceeded its traditional competence. Thus, through several decisions he intervened directly in the act of trial, establishing with binding effect for the Romanian judges what composition to have certain panels of judges, how to apply the law in certain cases, what evidence to remove or be preserved, what acts should be considered illegal. However, these aspects are not related to the Constitution. Moreover, according to the fundamental act of the country, justice is administered through the courts, and the CCR is not part of the court system. Now, the CJEU judgment analyzed above establishes the relationship between the CCR and the courts: ordinary judges are the first European judges and they must be excluded from any form of interference,[12] represents another opinion compared to the Judgment of the Court of Justice of the European Union of December 21st, 2021.

On the legal nature of the European Union, "we believe that the European Union, since it was not founded by a nation or a people, could not be assimilated to a nation-state or a constitutional structure. It is an international *sui generis* organization, created on the basis of treaties concluded between sovereign states, which have decided to exercise joint powers for an indefinite period of time."[13]

Among the pending cases pending before the Court of Justice of the European Union, we mention:

c. **Case C-216/21** by which the Ploiești Court of Appeal addressed the following preliminary questions to the Court, namely:

1. The Cooperation and Verification Mechanism (CVM) established by European Commission Decision 2006/928 / EC of December 13th, 2006 shall be deemed to be an act adopted by an institution of the European Union within the meaning of art. 267 TFEU, which may be interpreted as The Court of Justice of the European Union? Content, character and extent [OR. 58] of the European Union Decision established by European Commission Decision 2006/928/EC of December 13th, 2006 are limited to the Treaty on the Accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on April 25th, 2005? Are the requirements

=DOC&pageIndex=0&cid=4421197.

[10] https://dilemaveche.ro/sectiune/tilc-show/articol/dialogul-necesar-dintre-ccr-si-cjue.

[11] https://spotmedia.ro/stiri/politica/valeriu-stoica-interviu-citu-pnl-video.

[12] https://vedemjust.ro/cjue-21-dec-2021/.

[13] Laura-Cristiana Spătaru-Negură, *European Union Law - a new legal typology*, Hamangiu Publishing House, Bucharest, 2016, pp. 80-81.

formulated in the reports prepared within the CVM binding for the Romanian State?

2. The principle of the independence of judges, enshrined in the second paragraph of art. 19 (para. 1) of the Treaty on European Union (TEU) and art. 47 of the Charter of Fundamental Rights, as well as in the case law of the Court of Justice of the European Union, reference to art. 2 TEU, in the sense that it also concerns the procedures for the promotion of judges to office?

3. This principle is violated by the establishment of a system of promotion to the higher court based exclusively on a summary assessment of the activity and conduct of a commission composed of the chairman of the court of judicial review and its judges, which performs separately the periodic assessment. of judges, both the evaluation of judges for promotion and the judicial control of judgments handed down by them?

4. The principle of the independence of judges, as enshrined in the second paragraph of art. 19 (1) of the Treaty on European Union (TEU) and art. 47 of the Charter of Fundamental Rights, as well as in the case law of the Court of Justice of the European Union, art. 2 TEU, where the Romanian state disregards the predictability and legal certainty of European Union law, accepting and complying with the CVM and its reports for more than 10 years, and then unexpectedly changing the procedure for promoting judges to positions of against CVM recommendations?"[14] and

d. **Case C-430/21**, by which the Craiova Court of Appeal referred the following questions for a preliminary ruling, namely:

1. "The principle of the independence of judges, enshrined in the second subparagraph of art. 19 (1) TEU in relation to art. 2 TEU and art. 47 of the Charter of Fundamental Rights of the European Union, precludes a national provision such as that of art. 148 (2) of the Romanian Constitution, as interpreted by the Constitutional Court, by Decision no. 390/2021, according to which the national courts do not have the power to analyze the conformity of a national provision, found to be constitutional by a decision of the Constitutional Court, with the legal provisions of the European Union?

2. The principle of the independence of judges, enshrined in the second subparagraph of art. 19 (1) TEU in relation to art. 2 TEU and art. 47 of the Charter of Fundamental Rights of the European Union, precludes a national provision such as art. 99 (s) of the Law no. 303/2004 on the status of judges and prosecutors, which allows the initiation of disciplinary proceedings and disciplinary sanctions against judges for non-compliance with a decision of the Constitutional Court, provided that the judge is called upon to establish the priority of application of European Union law. decisions of the Constitutional Court, a national provision which deprives the judge of the possibility of applying the judgment of the Court of Justice of the European Union which he considers a priority?

3. The principle of the independence of judges, enshrined in the second subparagraph of art. 19 (1) TEU with reference to art. 2 TEU and art. 47 of the Charter of Fundamental Rights of the European Union, precludes national judicial practices prohibiting the judge from disciplinary proceedings, to apply the jurisprudence of the Court of Justice of the European Union in criminal proceedings such as the appeal regarding the reasonable duration of the criminal trial, regulated by art. 488^1 of the Romanian Code of Criminal Procedure? "

In Case C-430/21, the Advocate General asks the Court of Justice of the European Union to answer the questions referred as follows: "The principle of the independence of judges, enshrined in the second subparagraph of art. 19 (1) TEU with reference to art. 2 TEU and with the art. 47 of the Charter, precludes a provision or practice of national law according to which the national courts of a Member State have no jurisdiction to examine the conformity with European Union law of a provision of national law which has been found to be constitutional by a decision of the Constitutional Court of that Member State. A fortiori, the same principle precludes the initiation of disciplinary proceedings and the imposition of disciplinary sanctions on a judge as a result of such an examination."[15]

It should be noted that, to date, the Luxembourg Court of Justice has not ruled on Cases C-216/21 and C-430/21, and the Opinion of the Advocate General is not binding on the Court, in complete independence, a legal solution in the assigned case.

As noted in the specialized doctrine, Romania is not the only Member State that encounters difficulties in its relations with the European Union, more precisely with the Luxembourg Court of Justice regarding the independence of the judiciary, an eloquent example in this respect, but not singular, being the case in Poland.

As regards Poland, the Court of Justice of the European Union has recently been referred either by way of the infringement procedure or by reference for a preliminary ruling on the interpretation and application of European Union law on justice in Poland, independence judges and the rule of law.

[14] https://curia.europa.eu/juris/document/document.jsf?text=&docid=244581&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=4297347.

[15] https://curia.europa.eu/juris/document/document.jsf?text=&docid=252467&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=4275317.

Thus, I briefly state cases C-619/18[16], **C - 192/18**[17], in Joined Cases C-585/18, C-624/18 and 625/18 in Joined Cases **C558 / 18 and C-563/18**[18], **C-824/19**[19]**C-791/19**[20]**, C-487/19**[21]**, etc.**

In those cases, the Court of Justice of the European Union has ruled on the rule of law, effective judicial protection in areas governed by European Union law, the principles of immovability and independence of judges, the statute of the National Council of Magistracy, the composition of the Supreme Court of Poland, the disciplinary regime applicable to judges, the deliverance of some decisions by the Constitutional Court of Poland repealing the provision on which the jurisdiction of the referring court is based, the power to leave unenforced national provisions that do not comply with European Union law and so on.

In conclusion, against de decisions delivered by the Court of Justice of the European Union, there were issued opinions according to which the Luxembourg court exceeds its jurisdiction, thereby ruling that a national court of common law is superior to the Constitutional Court, moreover it could leave a decision of the Constitutional Court unenforceable if it disregards European Union law, which gives rise to a strong phenomenon of uncertainty about legal certainty and security.

At the same time, the decisions of the Luxembourg Court according to which the national courts may not give effect to some judgments handed down by the Constitutional Court, although the Romanian Constitution expressly provides that they are generally binding, could give rise to abuses, favors or discrimination unjustified in the administration of justice, which would raise more suspicions about the impartiality and independence of national judges.

In this sense, we understand the view according to which, "we cannot exclude that in one case a judge should consider a decision of the Romanian Constitutional Court compatible with Union law, and another judge should consider the opposite: a disagreement of the court against of a decision of the Constitutional Court based on its possible incompatibility with EU law must be duly substantiated and, in particular, if an issue is addressed for the first time, may lead to a referral to the CJEU preliminary ruling."[22]

Last but not least, we refer to Case C-493/17[23] in which, following the judgment of the Court of Justice in Luxembourg, the German Federal Constitutional Court declared it to be *ultra vires*, which is why the judgment will not be applied in Germany.[24]

We believe that the solution adopted by Germany to the judgment of the Court of Justice of the European Union is not a preferable one, but on the other hand, the national constitutional identity of the Member States of the European Union cannot be undermined, which is why cooperation is the solution.

In this sense, the specialized doctrine noted that, "the original conception regarding the relationship between the national courts and the CJEU does not reflect the reality. The report remains one of cooperation, but many developments have transformed it from a *horizontal* and *bilateral* report to a *vertical* and *multilateral* report. These developments include: the declaration of the supremacy of European Union law; developing the doctrine of precedent; *acte clair* doctrine; delegation of sectoral responsibility to national courts; the exercise by the CJEU of control over the cases it will hear; blurring the line between interpretation and application. These changes highlight the development of a judicial hierarchy of the European Union, in which the CJEU is at the top, in the position of the Constitutional Court of the Union of last degree, assisted by the national courts, applying and interpreting the law of the Union.[25]

3. Conclusions

In view of the above, in this paper we have tried to analyze the independence of the judge - between

[16] https://curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4911000.

[17] https://curia.europa.eu/juris/document/document.jsf?text=&docid=219725&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=5404843#Footnote*.

[18] https://curia.europa.eu/juris/document/document.jsf?text=&docid=224729&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=5855516.

[19] https://curia.europa.eu/juris/document/document.jsf?text=&docid=238382&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=9472300.

[20] https://curia.europa.eu/juris/document/document.jsf?text=&docid=244185&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=9469224.

[21] https://curia.europa.eu/juris/document/document.jsf?text=&docid=247049&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=9471282.

[22] https://www.juridice.ro/763772/note-la-hotararea-cjue-din-21-decembrie-2021-pronuntata-in-cauzele-conexate-euro-box-promotion-si-altii-solutionarea-litigiilor- de-contencios-administrativ-si-fiscal-entre-obligativitatea-deciz.html.

[23] https://curia.europa.eu/juris/document/document.jsf?text=&docid=208741&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9947756.

[24] https://ceere.eu/pjiel/wp-content/uploads/2020/06/pjiel-2020-1-editorial.pdf

[25] Paul Craig, Grainne de Burca, *European Union Law. Comments, jurisprudence and doctrine*, 6th ed., translation: Georgiana Mihu and Laura-Corina Iordache, Scientific control and translation revision: Beatrice Andresan-Grigoriu, Translation revision: Laura-Corina Iordache and Ruxandra Antal, Hamangiu Publishing House, Bucharest, 2017, p. 569.

European Union law and national law, seeing theoretical and practical issues, as well as the opinions expressed in the doctrine on the situation between the solutions pronounced by the Court of Justice of the European Union and the CCR.

Cooperation between national and European courts is essential and yet difficult to achieve, but in this context the Court of Justice of the European Union must not confer new powers, it must not give rise to a state of uncertainty as to how application and interpretation of law (both national and European) must be without prejudice to the national constitutional identity and sovereignty of the Member States, as we also consider that the solution of not giving effect to provisions laid down by the European is to follow.

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PHILOSOPHICAL-LEGAL CONCEPTUAL FOUNDATIONS REGARDING THE STATUS OF LAW AND ITS EVOLUTION
THE EVOLUTION OF THE RULE OF LAW IN ANTIQUITY

Iulian NEDELCU*

Abstract

The rule of law has been and always will be written about the rule of law. Considered a seemingly nebulous reality by some, everyone talks about it, even if most of the time without explaining it. The phrase is invoked, in its name making decisions, making choices and arguing actions.

And so it becomes a postulate, considered by many as a last bastion of defense against abuses of power.

Throughout his life, man, an essentially social person, endowed with intelligence, felt the need to live in various forms of association, in which he shared his habits, moral and religious norms or, finally, his interests.

Human activity, as a great Italian jurist and philosopher states, can be considered to be governed by a complex system of norms, and indeed, in any historical phase we find such a system.

It has been perfected in societies, constantly producing social relations, its entire social path being crowned by the construction of the rule of law, a construction that has as a defining feature the protection of individual rights. An edifice in which the law provides the general and obligatory rules, according to which the state power is exercised, and the state ensures the obligation of the legal norms and their transposition in life.

Keywords: *abuses of power, man, essentially social person, complex of rules, rule of law, individual rights.*

1. Introduction

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It has been perfected in societies, constantly producing social relations[2], its entire social path being crowned by the construction of the rule of law, a construction that has as a defining feature the protection of individual rights. An edifice in which the law provides the general and obligatory rules, according to which the state power is exercised, and the state ensures the obligation of the legal norms and their transposition in life.

2. Content

The concept of the rule of law becomes, through its evolution to a universal dimension, a reference element for assessing the degree of development and civilization of a country.

The permanent and indisputable topicality of the rule of law can only be explained by the permanence of the need to look for concrete means to make the concept an uncontested daily record[3].

The concept of "rule of law" evokes a legal construction of great scientific interest, with a history that keeps alive the preoccupation for its research for several centuries; today, however, the risk of this wonderful building slipping on a pejorative slope increases alarmingly, mainly by its easy utterance.

The scientific achievements of the doctrinaires, although brilliant, make it impossible to exhaust the subject, ensuring its permanence and, demonstrating with each contribution, if necessary, the possibility of perfectibility.

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[1] George of the Old Man, *Lessons in legal philosophy*, Europa Nova Publishing House, Bucharest, p. 45.

[2] Ion Deleanu, *Institutions and constitutional procedures*, Servo-Sat Publishing House, Arad, 2003, p. 30.

[3] Steluța Ionescu, *Justice and jurisprudence in the rule of law*, Universul Juridic Publishing House, Bucharest, 2009, p. 5.

The rule of law is, we dare say, like Brâncuși's column, infinite in its construction and lasting over generations through the simplicity of creative genius.

All theories and opinions on the concept of the rule of law are the result of reflection on relatively long, contradictory historical developments, with successes, failures and always researchable horizons of the two interdependent phenomena: the state and the law[4].

Any study of the rule of law is closely linked to the social organization of the period referred to, historical moments, social relations and the level of civilization creating, for each period, its own image.

In order for the state to emerge, it was necessary for the authority of either an absolute monarch or a limited group of people to appear in the middle of a human community, located in a given territory, or to a system of organs to which the capacity of to take, by unilateral expressions of will and outside any subordination, mandatory measures for all members of the group, imposed, if necessary, with the help of the coercive force specially organized for this purpose.

We further review the way in which Greek society was organized, from the perspective of its evolution and the traces and patterns that it has established and imposed to this day.

In ancient Greece, more precisely in the Greek city, are the origins of democracy[5], the evolution of society has as its source material development, on the one hand, but also the transformation of human intelligence catalyzed, obviously by the religious factor.

The appreciation of the evolution of Greek society cannot be analyzed without a focus on the works of the great philosophers: Lycurgus, Solon, Socrates, Physis, Nomos, Protagoras, Gorgias, Plato, Aristotle. However, whatever the cause of the changes in ancient society, it is certain in our opinion that they followed a one-way street, that of the transition from the omnipotence of the state (city) to individual freedom.

The real revolutions that have taken place for the transition to greater individual freedom have gradually undermined the city-state in the name of individual freedom. From the city-state one reaches the Empire of Alexander the Great, in which the transition is made from the "man of the city" to the "man of the world", which is no longer conceived as being closely linked to the city. In this way, the transition from the model of the closed society to that of the open society, which brought with it a greater freedom of movement in space.

It was Lycurgus who dealt a decisive blow to royalty by the reform he promoted in the time of Charilaus, "when the monarchy gave way to the aristocracy,"[6] as Aristotle mentions. Lycurgus, a legislator during a revolt when Charilaus had to take refuge in a temple, had the opportunity to suppress royalty, but he did not, considering royalty to be inviolable. Royalty could not be suppressed, but instead, according to Lycurgus, it could be limited by its subordination to the Senate in all matters of government. Thus, we notice that by establishing the Senate as a counterweight to the royalty and power of the people, the concept of balance of power appears for the first time. What Lycurg accomplished has the value of a revolution given that his reform encompasses the whole secret of social life and not just that of political life.[7]

The concrete ways of limiting the powers of the kings of Sparta, of reducing their powers only to those of a religious nature, consisted in granting their right to distribute justice in civil matters to the Ephors and in criminal matters to the Senate, also in granting the right to decide the external relations of the state and to command the military operations of the Ephors, who, however, could not exercise this power without the approval of the Senate. It can be said that the kings of Sparta had more of a decorative role, the power being in the hands of the Ephors in all areas not related to religion, thus achieving the exchange of authority between the Ephors and the King.

From this presentation it can be deduced that Lycurgus' reforms were intended more to strengthen the city and not individual freedom as it is perceived today, as the antithesis of the state.

The origins of the Greek democratic system must be traced back to the forms of collective government of the polis, which were consolidated during the 6th century BC. when the first “True Constitution of Athens” appeared - the one given by Solon in 594 BC. - and which remained in force for 86 years, so for almost the entire century, had a definite democratic character”.[8]

Solon "is a great legislator in the eyes of some, who attribute to him the destruction of the omnipotence of the oligarchy, saying that he put an end to the slavery of the people and constituted national democracy, creating a series of fairly balanced institutions: oligarchic through the Areopagus Senate, aristocratic

[4] Sofia Popescu, *The Rule of Law in Contemporary Debates*, Romanian Academy Publishing House, Bucharest, 1998, pp. 14-35.
[5] Raluca Grigoriu, *Notă introductivă la – lucrarea lui Aristotel – Politica*, Paideia Publishing House, Bucharest, 2001, p. 1.
[6] Aristotel, *Politica*, V. 10.3, Didot Publishing House, 1996, p. 589.
[7] Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *Philosophy of Law. The Great Currents*, All Beck Publishing House, Bucharest, 2002, p. 7.
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organization of courts"[9]. Solon's reform was one of the deepest due to measures that strengthened the power of the people and with it democracy, measures to establish the right to vote for all citizens in the People's Assembly and the active participation of citizens in the Heliath Tribunal. Solon promoted moderate political reforms that supported and strengthened democracy, so the laws he wrote, as he put it, were "... the best he could have received"[10] the Athenian people.

In the 5th century BC. Greece, it has been said, "has seen the emergence of two new phenomena: democracy and sophistication"[11] which are supposed to be reciprocal because „the democratic orientation regime recognizes the recognition of the power of the word in the political debate and the art of rhetoric aimed at gaining conviction."[12] That is why it is considered that the Sophists were the initiators of the Greek Enlightenment, being of overwhelming importance for the evolution of Greek philosophy.

The relativity of perceptions establishes the parameters of individual freedom, guided in the end by advantages and interests. This is a time when hedonistic or utilitarian ideas are taking place. The law is a human creation and can be changed. " Such a statement comes to shake the belief in the divine origin of state authority, which means that the form of government is in turn transient."[13] In this sense, "the concept that the law is only a human institution destined to meet specific needs and has nothing permanent or sacred has gained ground. In order to provoke this opposition, it is usually said that the act of legislating is the result of an agreement or pact between members of a community who have put together, composed or agreed on certain articles".[14]

As was the philosophy of Socrates, "much of Plato's philosophy is a reaction to the claims of the sophists."[15]. Plato's extremely modern contributions to the classification of political regimes were possible due to the special attention paid to educating those who will lead the destinies of the city and their orientation towards knowing the truth as a premise for achieving the Good.

We can thus observe that the forms of government were characterized by it according to their availability in relation to the Good.

In his dialogue Republic, Plato will move on to forms of government only after he has clarified the place of the individual in his relation to what is real and will distance him from what is only apparent. In this regard, *"the famous myth of the cave"*[16] is meant to show that man must be taught to look at the truth which is also one with the good, concepts which Plato sees at the basis of the organization of the state.

Adherent to an organicist perspective, he analyzes power by considering the functions of the state only in comparison with those found in the functioning of man (as an organism). In his view, the state is like a human being, whose faculties must be harmonized and hierarchized. Therefore, in the center of human action, as in that of state action, there is "reason"; the balanced man is the one who subordinates to his reason his "heart" and his "lusts[17].

The government of reason results naturally from the contribution of all human faculties. Likewise in political society, every element must lead to the harmony of the whole. The function of thinking and directing belongs to the philosophers who are considered, in his thinking, the "head" of the state, the warriors constitute the "heart", and the farmers and traders constitute the "belly". Plato did not go beyond this organicism and gave myths a predominant place.[18]

The change of one political regime from another is due to the excesses manifested by those who take power, the latter being the determining factor in establishing the form of government, which in Plato's conception are: timocracy or timarchy - honorary constitution, oligarchy or oligarchic man , democracy or democratic man and tyranny or tyrannical soul.

Timocracy has as its ordering principle the zeal of domination, the desire to win and glory, the timocratic man is devoid of virtue, but most importantly for Plato and reason. After the timocracy, follows the political regime of the oligarchy "where the magistrates belong to the income, in which the rich rule and the poor do not participate in power"[19] and where the tranquility of the city is maintained by force. The oligarchic man is uneducated and is subject to the idea of learning, he considers the size of wealth as the basis of the existence of society.

The transition from oligarchy to democracy is caused by the greed of magistrates, who develop

[9] Aristotel, *op. cit.*, p. 68.
[10] Plutarch, *Parallel Lives*, Scientific Publishing House, Bucharest, 1960, p. 213.
[11] J.C. Billier, Aglaé Marzioli, *Histoire de la philosophie du Droit*, Armand Collin, Paris, 2001, p. 49.
[12] *Ibidem.*
[13] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *op. cit.*, p. 18.
[14] W.K. Guthrie, *The Sophists*, Humanitas Publishing House, Bucharest, 1999, p. 114.
[15] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *op. cit.*, p. 27.
[16] *Idem*, p. 34.
[17] Plato, *Republica*, in *Opere* vol.V, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1986, pp. 309 and following, quoted by I. Alexandru, M. Cărăuşan, S. Bucur, *Administrative law*, Lumina Lex Publishing House, Bucharest, 2005, p. 20.
[18] *Ibidem.*
[19] Platon, *op. cit.*, p. 355.

profiteering skills and are eager to hold political office. Plato's democracy is nothing but a pleasant order without a master, in which equality is distributed to all citizens. The democratic man arranges his own way of life, he thinks he is free, but his freedom offers the possibility of triggering tyranny. Any excess causes a change in the opposite direction *„Fleeing the people from the smoke of the bondage of free men, he fell into the fire of the slavery of the slaves, he exchanged that too great and ill-fated freedom for the heaviest and bitterest slavery brought by the slaves"*.[20] Democracies are for the most part run by a leader chosen by a people, who support and empower them; the tyrannical man always emerges from such a leader. Plato considers that the whole system of laws is oriented towards a virtual part, namely the warrior part, because it is useful for domination[21].

The ideal form of state, described by Plato in the Republic, we notice that it is based on virtues whose only foundation is education, a state that does not need laws. However, in his Laws, Plato concludes *„If in the ideal state there is no need for a law, for the law is inscribed in the soul of each, there will be a need for a rule in the second state, where there are no more perfect philosophers at the helm, and a brake will be needed. impersonal, equal for all to stop and prevent the abuse, intemperance, violence and injustice to which, by their nature, those called to lead a social whole are, unfortunately, so often inclined*".[22] This second form of the state, identified by Plato, in which the rule of law is supreme, which is based on justice and in turn establishes justice, can lead to a social concord. Social justice, promoted by Plato, was based on the fact that the state is everything and the individual is nothing, a conception resulting from speculative ideas according to which *„the part exists for the sake of the whole, not the whole for the sake of the part ... you are created for the sake of the whole and not the whole for your sake*".

If for Plato, the politician is embodied by the philosopher, the only one capable of leading the city, in Aristotle the philosopher is destined for contemplation and does not have to worry about the worries of the city. In his studies of various forms of government, Aristotle often wondered who should hold sovereignty in the state. The conclusion he reaches, remarkable for its timeliness, is that *„the sovereignty of the law must therefore be preferred*"[23] in a state.

3. Conclusions

The basis of state organization is the Constitution, which springs from the social nature of man. Laws must be drafted in accordance with constitutional principles *„The constitution of the state is the organization of the judiciary, the division of powers, the attribution of sovereignty in a word, the decision of the special purpose of each political society. Laws on the contrary ... are the norm of the magistrate in the exercise of power and in the repression of crimes that defeat these laws*".[24]

In his view of both Nicomachean Ethics and Politics, the law can only be enforced if it is based on friendly relations between citizens, because friendship is the only one that can ensure equality, and this, in turn, is the only one that can ensure equality. sanctifies justice.

According to Aristotle, both legality and equality must be the backbone of the city, because they aim to achieve virtuous people and thus virtue becomes *„the first concern of a state that deserves this quality and that is not a state only in name"*.[25]

We notice that in the work of the philosopher, the emphasis is on the man who is in the middle of the city and who, due to his self-sufficiency, led to the appearance of the state. However, given his conception that the whole is prior to the part, we have to conclude that the state was prior to the individual and not the other way around. Even if the state comes in the natural order of things being only a result of an evolution, in Aristotle, this cannot be stated because its state is more one based on interpersonal relations, than on time.

Moving on from the issue of the origin of the state, Aristotle in Politics identifies the Constitution as the one that determines the systemic organization of powers in the state and is confused with the Government. Starting from this statement, we believe that the author divides the Constitution into three pure species which correspond to as many forms of government: royalty, aristocracy and republic. From these, however, three deviations can be noted: tyranny for royalty, oligarchy for aristocracy and demagoguery for the republic.

Royalty is the form of government that is based on the absolute superiority of the ruling individual, and if he leads despotically he turns it into tyranny.

The aristocracy is the form of government in which aristocrats are elected equally on merit and wealth, and if the balance is tilted in favor of the latter then the oligarchy is born.

[20] *Idem*, p. 381.
[21] See Aristotle, *Politics...*, *op. cit*., p. 47.
[22] *Idem*, p. 266.
[23] Aristotel, *Politica*, vol. IV-XIV, Antet Publishing House, 1996, p. 110.
[24] *Idem*, p. 177.
[25] *Idem*, p. 29.

The Republic is based on democracy that is not where the minority rules the majority or where sovereignty belongs to the rich, it is where the law is sovereign, and the most respected and free citizens have business leadership.

Thus we find in Aristotle the modern conception of democracy according to which "What is especially necessary for the city are equal and similar beings, qualities which are more easily found than anywhere in the middle class, and the state is necessarily better governed when it is composed of these elements that form after us, its natural basis".[26]

Also in Politics, the philosopher differentiates three missions of power, which must be found in any constitution of a city. "All constitutions have three parts ... one that decides on common affairs, the other that establishes the judiciary (how many they should be, on which areas their sovereignty extends and how they should be determined to be elected holders), and the third part is the one that divides justice (justice*).*[27]"

These three functions (judgment, command and justice) which were found in the institutional structure of the city of Athens, must be conducted by three distinct bodies, namely: The decision (deliberation) belongs to the Citizens' Assembly, composed of representatives of the people, the policy of the Citadel, that is, to adopt legislation; The command is entrusted to the civil magistrates (to be the holder of a civil magistracy means to be invested with political or administrative authority that contributes to the leadership of the Citadel); The administration of justice is carried out by the judiciary composed of judicial magistrates - the judges themselves. In this vision are found the germs of the theory of separation of powers in the state[28].

This distinction of functions, exercised by the organs of the Greek City, is the first effort to decipher the elements of power. It is also noted that Aristotle establishes a hierarchy of components of power when he considers that deliberation is the essential function, because it goes far beyond the simple *„making laws"*.

Thus, the Assembly deliberates and decides on peace and war, pronounces capital punishment, punishment with exile or confiscation of property, and may also hold magistrates accountable. We notice that the "deliberation" mixes the legislative attributions with those of police, finance, criminal justice and administration.

We believe that this is the source of the command function (of the executive) that allowed (and allows) the civil magistrates to lead the city, a function that cannot be strictly separated from the prerogatives of the Assembly. Moreover, Aristotle agrees that, at the same time, the same person may belong to the deliberative Assembly and exercise a civil magistracy, and even have "a seat in the court". As for military operations, they are entrusted to the Command, but the decision on war or peace belongs to the Assembly.

For Aristotle, the most important thing was to describe the different modes of action of the state organs and not to defend a certain separation of powers. Aristotle went further, considering that "since any political community is made up of leaders and leaders, it must be examined whether these leaders and leaders must be different or remain the same for life"[29]. During the Roman Empire, some of his conceptions were revived.[30]

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[26] Aristotel, *op. cit*., p. 197.
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[28] We appreciate that Aristotle is the first philosopher who outlined, in a form specific to the historical period lived, the theory of separation of powers in the state.
[29] Aristotel, *op. cit*., 2001, p. 189.
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ROMANIAN STATUS

Paul-Iulian NEDELCU[*]

Abstract

The socio-political and legal thinking of Marcus Tullius Cicero is based on the concept of the supreme good without which a state cannot last. Therefore, the subordination of the individual to the state is a natural law, and the city must be organized based on public law and moral principles. Starting from morality, like Plato but contrary to Aristotle, Cicero argues that the philosopher, as a sage of the city, must be involved in politics and even lead, because he is the link between the upper, lower and middle classes.

The state seen as res publica is the work of the people, but the people are not just a bunch of people gathered at random, but a crowd united in a legal system founded by a common agreement for the common good. We distinguish from the above that justice is the basis of the state and is not to be confused with the usefulness reached by man's immeasurable love for others, by subordinating his own benefit to the general.

Keywords: *supreme good, fortress public law, moral principles, res publica.*

1. Introduction

The socio-political and legal thinking of Marcus Tullius Cicero is based on the concept of the supreme good without which a state cannot last. Therefore, the subordination of the individual to the state is a natural law, and the city must be organized based on public law and moral principles. Starting from morality, like Plato but contrary to Aristotle, Cicero argues that the philosopher, as a sage of the city, must be involved in politics and even lead, because he is the link between the upper, lower and middle classes.

The state seen as *res publica* "is the work of the people, but the people are not just a bunch of people gathered at random, but a crowd united in a legal system founded by a common agreement for the common good."[1] We distinguish from the above that justice is the basis of the state and is not to be confused with the usefulness reached by man's immeasurable love for others, by subordinating his own benefit to the general.

The state must be governed, and "power must be entrusted to one person, to an elite, or to all citizens"[2]; so we believe that three forms of government can be identified: the monarchy, the state ruled by a small group of people, called optimists, and the state, in which everything depends on the people. But in order to resist, the state, the fourth form resulting from the optimal combination of the three originals would be the best. However, Cicero states that the monarchy is also good, provided that the king is virtuous, a conclusion he reaches based on the idea that just as the universe is ruled by a deity, so the state must respect and be based on the principle single leadership best assembled by the king.

What we can observe is that regardless of the form of government, the law is seen as the cohesive element of the community, and legality is ensured through a judicious distribution of functions in the state. Thus, the praetor must be at the head, the judge must judge, and the consul must give advice based on the perception "The welfare of the people should be the supreme law for all"[3].

Directly involved in the political activity of ancient Rome, Seneca promoted exactly the perceptions of the Stoic school according to which wise men should lead public affairs from the top, or be advisers to those who lead them. As an educator of Nero, through the maxims of government, he created a discourse of philosophy of the monarchy, considering that royalty is a form of the virtue of the sage, it is the image of the universal order.

Seneca is a follower of the principality, because he sees in the monarchy a form of state in accordance with nature, the only one capable of stopping some exaggerated, destructive liberties. The prince becomes the spirit of the state, whose body is the citizens; he must be present in the farthest corners of the empire. Therefore, clemency is the best art of government, because any harm to the community affects the prince.

It is also observed that although he is a follower of the empire, he tries to state the principle of individual autonomy above the political activity that he considers

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[1] Cicero, *About the state*, Scientific Publishing House, Bucharest, 1983, p. 258.

[2] *Idem*, p. 60

[3] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *Philosophy of Law. The Great Currents*, All Beck Publishing House, Bucharest, 2002, p. 73.

a personal choice for the achievement of good in society. Seneca's assertions predicted that the balance between the state and the individual would be upset in favor of the latter.

2. Content

2.1. The evolution of the rule of law in the Middle Ages

If Greco-Latin antiquity was based on the notion of the Constitution, the analysis of which defines the political doctrine of the Jewish regime, Christian principles start from the idea of an agreement between God and the chosen people. He who rules, whether king or not, is only a deputy of God.

Even if he is chosen from among men, he can rule only by the higher will of God. The divine law is superior to any human constitution.

The city of God, according to St. Augustine, is in reality a double, eternal city that coexists with the earthly, time-limited city. These are defined in detail in Book XIV, chapter 23: "Two kinds of love built the two cities; self-love to the point of contempt for God: the earthly city; love of God led to self-loathing: the city of God."

The city of God can be understood as a community of the elect, which already exists but is not visible on Earth and overlaps to the point of coincidence with the earthly city or Satan's, a kind of community of the condemned. God is the one who created the world over time; From the beginning, the world needed divine assistance, but God did not intervene in the election of his representative on earth - that is why St. Augustine does not legitimize by divine will any holder of power.

The authority, in its conception, must fulfill three functions: command, foresight, wisdom. The command, given to a person endowed with superior virtues that takes him away from the vulgar, gives the possibility to expose and make decisions. Foresight means finding out what is good for the people, and taking them away from what is bad, taking them away from vice to the path of virtue. Wisdom joins this prediction of the leader that he must help and support the people.

The notion of divine creation enables the philosopher to evaluate all political regimes — monarchy, aristocracy, democracy — provided that the holder of power is right. Imbalances are the result of the lack of determination of the leader or leaders, the lack of virtue, devotion to the general interest or the nature of the regime.

Thomas Aquinas followed in his views on the state the political ideas advanced by Aristotle, believing with him that "Man is naturally inclined to live in society. The society is a crowd organized under a law of justice in consensus with a common interest"[4] and that is why the state occupies a special place in society, because it ensures to the highest degree the perfection of the human individual.

The state thus ensures order in society, and although man must obey this order, he also enjoys a certain freedom of action, just as the state has a certain autonomy from those who compose it. However, the individual must submit not only to the legal order of the state, but also to the divine order "which objectively limits the full potential power of the state".[5]

The state must, therefore, develop in close connection with the perfection of the members of society, not against them, it being a fact of reason imposed as a social framework, to which we are bound by history. Given this purpose, the forms of government are defined, in full accordance with those of Aristotle, as: monarchy, aristocracy, republic - pure forms that can degenerate into tyranny, oligarchy and democracy. But following St. Augustine, he states that the holder of power must pursue justice, the pursuit of good.

It can be seen that d'Aquino is one of the followers of democracy, provided that the prince has the virtues necessary to hold this position. Therefore, elites and the people must be equally involved in governing the public good. In this sense, the best form of government of Aristotle is resumed, in which everyone participates in the exercise of power, from the prince to the citizens who have the right to choose and to be elected.

In his analysis of the powers and in his proposal for the establishment of a mixed regime, he will make a compromise between reason and faith, which will bring the reproaches of the Aristotelians and Augustinians; the former reproaching the betrayal of reason, the latter the sacrifice of faith for the benefit of reason. We can see, then, that the Thomistic doctrine thus confers a double origin on power. God is the only and last foundation of power but, through its forms, it is organized by the people, so it belongs to the human domain**.**

But the one who provides the organizational framework of the state must remain the law, which is based on the natural law, the rational law. This statement leads us to conclude that the foundation of legality is legitimacy and not legality is legitimacy. Therefore, Thomistic philosophy is not limited to maintaining obedience, which is necessary for those in

[4] Antonio Brimo, *Les grands courants de la philosophie du droit et de l'Etat*, A. Pedone Publishing House, Paris, 1978, p. 61, quoted by Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *op. cit.*, p. 94.

[5] *Idem*, p. 115.

authority, but introduces elements characteristic of modernism: the participation of citizens and not their unconditional submission.

Considered conservative, Thomas Aquinas's work aims to strengthen the church's role in the political leadership of society, putting authority above the will of individuals, man becoming a means and not an end in itself.

2.2. The rule of law in the modern and contemporary era

It has been argued that talking about a rule of law is a pleonasm[6], appreciating that every right is a rule of law and every state is a rule of law and the rule of law is a formal principle that designates all procedures for generating the rule of law.

The rule of law thus becomes a coercive order, an order that justified the police state.

This theory of the time produces an important change in traditional legal thinking, which catches the attention of legal theorists and obviously attracts a lot of criticism from them.

The criticisms come from several directions, among which we could mention, on the one hand, the critique of the identification of the state with law, the critique of the application to the legal order of a formal mathematical logic or, on the other hand, a critique of the concept of purity. the object of the science of law.

Of these, the one that led to the conception of a rule of law is the identification of the rule of law, the theory characterized by objectivism, which results from the very importance that the author attaches to the legal norm and constructivism developed based on a conception of hierarchy of norms in the legal system. on the constitutional norm. Starting from this objectivism, it can be said that the essence of the rule of law is normativism „*This is not the Government of the People, it is the Rule of Norms. After the Inferno of Arbitrary Power and the Purgatory of Controlled Government, the Pure Existence of the Rule of Law Means Legal Paradise*".[7] Proclaiming the power of the rule, the rule of law is nothing but the high order of principle and this in the name of eliminating power. In support of this normative order, the norms - order and norm - foundation are no longer enough. The state, as an order of law personified, makes its presence in absolutely all areas through an order of systematized legality, the norms being "the narrow gate of legality".

As the rule of law is the normative order in application, "it essentially tends towards a normative perfectionism, the norms not determining the order except as part of a certain degree of normative intensity and extension"[8]. The rule of law tends to the perfect being who must be everywhere. Normative perfectionism proclaims legality as absolute, which is equivalent to proclaiming it totalitarian, the rule of law embodying, in this sense, the concept of absolute value. All these powers of the rule of law are designed in the name of democracy, to guarantee human rights and to predict the obstacles that may arise in the establishment of a legitimate power.

Critics of Rechtsstaat's Kelsian theory point to the contradictions of this theory. We briefly present some of them:[9]

a. Normativism tried to eliminate any contradiction that might arise between the enactment of the rules and their application, proclaiming, intensively and extensively, normative absolutism. This is not possible because the application of the rule by the judge is a real work of recreating it according to the concrete needs, the rule of law proclaiming the power of application. Each time, however, through the work of application in which the norm is recreated according to each particular case, a real fault is always created within the rule of law. The one who applies the rule becomes an unknown force;

b. the idea of the rule of law has as main requirement the elaboration of concrete norms. The level of abstraction of the norm, however, remains to the liking of the legislature. The idea of the rule of law concerns the concrete norm, but the notion of norm allows the increase of the level of abstraction according to the needs of the power, which can always create a very dangerous arbitrariness;

c. the normative perfectionism of the rule of law allows it to regulate the exceptions normatively in its own principles, because the exceptions are also norms. What the citizen does not allow as a human being, he accepts in normative form. "The normative technique is a surrogate of freedom";

d. the rule of law of normative essence is the state of what must be. But trust in the state is about what it is, not what it should be, as is the nature of the norm. Under the principle of legal perfectionism, the rule of law can change its own rules, which could potentially be an attack on non-retroactivity. The more we regulate, the less we stop at the past in which the future has often already begun. In accentuated retroactivity we kill self-confidence for the future;

e. the rule of law must ensure[10] maximum

[6] Hans Kelsen, *General Theory of the State*, Bucharest, 1928, p. 59.
[7] W. Leisner, *L'État de Droit - une contradiction ?*, in Recueil D'Études en Hommage à Charles Eisenmann, Cujas Publishing House, Paris, p. 66.
[8] *Idem*, p. 67.
[9] *Idem*, p. 397 şi 398.
[10] Hans Kelsen, *op. cit.*, p. 128.

predictability, *i.e.* the state is bound in all its actions, especially those of authority, by general rules according to which the citizen will be able to calculate future risks. However, predictability is often compromised by the density of the norm fabric. Reality does not remain unchanged, and law must adapt to change. The legislature, the one that regulates, makes these normative changes, not allowing the executive to lead the details. The legal imperative that emanates from the legislature, apparently in general form, will in reality always be more detailed, closer to the concrete case. "Normativism produces, in fact, only one result: it transposes on the legislative level the dynamism of adopting the law, which, in this way, will make the state act in the administrative field".[11]

In such a system in which the state and law are identified, the individual possesses freedom only to the extent that the state does not legislate. Otherwise, everything is under the rule of the legal norm, whose domination is absolute: normative imperative.[12]

If Kelsen[13] he advocated an imperative normativism and the identification of the state with the rule of law and his critics fought against them by supporting the rule of law XXI, with a flexible structure, susceptible to evolution and change.

3. Conclusions

The legal literature has consistently emphasized over time that the notion of the rule of law has its own universal dimension, it being expressly enshrined in several international and European documents[14], the existence of the rule of law depends essentially on national realities, which have contributed to the definition and citizenship of the rule of law as a primary concept of the existence of the modern state.

As a legal term, the rule of law comes from the German constitutional tradition - Rechtsstaat, but in the vast majority of constitutions in the world it is found under various names - état de droit, state of law, statto di diritto, estado de derecho etc., each of which being marked by the constitutional historical traditions of each system.

Seventeenth-century England is the one that promotes the idea of the rule of law in a social-historical context dominated by the common-law tradition, to which were added a number of acts of the British Parliament of a constitutional nature[15]. These, together with the establishment of the separation of powers and the organization of an independent judiciary, were the first step towards the establishment of the rule of law.

By the constitutional acts of the English Parliament not only was the rule of law established, but also the supremacy of Parliament in a monarchy in which the Constitution and public law were not recognized. Thus, the "rule of law" in the British system can be translated not only "rule of law" but also "rule of law", more precisely compliance with the rules of positive law, respectively the rule of law in all areas of social life, through the control exercised by Parliament[16] and by ordinary courts.

The idea of a violation of what should be law persists not only in the common-law tradition, but is also embraced by other traditions, considering that "there is no doubt that the primary element, that idée mère, in the constitution of justice was the idea of conformity with the law".[17] No one wants the law to interfere in every detail of privacy, although everyone agrees that in every day's conduct a person can manifest, and actually manifests himself either in a just way or in an unjust way, so here's how John Stuart Mill conceived of the rule of law over the life of the individual. However, the magistrates point out that in the case of additional inconveniences, it is fearful that magistrates will be given such unlimited power over individuals, even if we are happy to see fair conduct rewarded and unjust punishment punished.

In France, the rule of law is a building that has been built over time, characterized by the fact that "historically, the judiciary has never played a major role in defending individual freedoms[18]", a building in which the almighty state, as a representative of the people, inherits the rights of royalty, but limits its power through the Constitution in relation to those governed, beneficiaries of rights.

Therefore, in France, the "state of law" must be understood in the spirit of the French Revolution, "government governed by law" and ensured by the

[11] W. Leisner, *op. cit*., p. 71.
[12] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *op. cit*., p. 399.
[13] See Hans Kelsen, *op. cit.*, p. 130. He claims in law that this is an "objectivist doctrine of the pure state." He considers that law is a system of valid rules in itself, valid in relation to another rule which is superior to them. But it is incapable of limiting the State by law, for the individual is deprived of all his objective liberty before the State whose force is the essential legal virtue".
[14] European Convention on Human Rights, ratified by Romania by Law no. 30 of May 18, 1994; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, published in the Official Gazette of Romania, Part I, no. 107 of 13 February 2008.
[15] Petition of Rights - 1628, Habeas Corpus Act - 1679, Bill of Rights - 1679, Act of Settlement –1701.
[16] Ewald François in L'Etat providence argued that "Parliament can do anything but turn a man into a woman, no."
[17] John Stuart Mill, *Utilitarianism*, All Publishing House, Bucharest, 2014, p. 74.
[18] Alain Monchablon, *The Citizen's Book*, Humanitas Publishing House, Bucharest, 1991, p. 11.

separation of powers and the practice of constitutional authorities[19] specially created for this purpose.

One of the sociological-legal conceptions about the state and law was elaborated, claiming that any society is a discipline, and man, not being able to live without society, can only live subject to a discipline.[20] Any political system must be based on the postulate of a rule of conduct that is binding on all. The legal rule that is imposed is not based on respect and protection of individual rights, but the need for social cohesion in order to fulfill the function, the "duty" of each individual.

One of the sociological-legal conceptions about the state and law was elaborated, claiming that any society is a discipline, and man, not being able to live without society, can only live subject to a discipline. Any political system must be based on the postulate of a rule of conduct that is binding on all. The legal rule that is imposed is not based on respect and protection of individual rights, but the need for social cohesion in order to fulfill the function, the "duty" of each individual.

Under the influence of Enlightenment liberalism, the German philosopher Immanuel Kant [21] directed the conception of state, law and morality on a rational path systematizing the conceptions of Rousseau and Montesquieu, "it is impossible to conceive of a reason which, aware that it is the author of its judgments, attribute the determination of judgment to his reason, but to an impulse"[22]. Thus, the law is defined as "all regulations that reconcile the autonomous will of the subjects based on the absolute principle of freedom"[23] and the state is seen as "a set of people and rules of law" aimed at guaranteeing individual freedom by law. Kant is said to have "ushered in a new way of thinking, with a method exactly the opposite of what we are currently pursuing[24]." Referring to Kant, Fichte said that he "confined himself to pointing out the truth, he did not expose it nor"[25].

Formulated and based on philosophical and political coordinates, the concept of "rule of law" acquired legal content in German doctrine in the early nineteenth century in the works of authors such as Otto Baehr[26] who, extending the notion of all state activity, support the principle of independence and a sine quo non condition of the rule of law, stating that "a court sentence is just only if the judicial activity is separated from the executive activity of the state and assigned to independent state bodies. The importance of this separation lies not only in the separation of state activities between them, but especially in the possibility of subordinating the administration to an external jurisdiction. For the rule of law to become a reality, it is not enough for the state activity to be strictly circumscribed in legal frameworks, but above all there must be a capable jurisdiction to apply the law in concrete cases and to be an unequivocal basis for restoring legality in case its harm".[27]

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[25] Mircea Djuvara, *op. cit.*, p. 265.
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[27] Ernest Wolfgang Bockenforde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, Festschrift für Adolf Arndt, Frankfurt-Maine, 1969, p. 63.

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THE NOTION OF UNDUE PAYMENT OF THE AMOUNTS PAID IN RELATION TO THE COURT DECISIONS PRONOUNCED PURSUANT TO ART. 906 PARA. (2), RESPECTIVELY PARA. (4) CODE OF CIVIL PROCEDURE

Beatrice NICULAE[*]

Abstract

Analyzing art. 906 para. (2), respectively para. (4) Code of Civil Procedure, there are a series of legal aspects that have the potential to bring into question issues that may generate different opinions. Thus, the court decisions pronounced pursuant to art. 906 para. (2) Code of Civil Procedure do not have the character of an enforceable title, being, in essence, the last chance of the debtor to fulfill his legal obligations, before being obliged to pay an overall amount, based on a court decision pronounced under art. 906 para. (4) Code of Civil Procedure. As such, any amount paid prior to the existence of an overall amount determined and calculated by the court, represents an undue payment and will have to be recovered accordingly. On the other hand, it will be analyzed to what extent there is the possibility for the courts to establish penalties for delay even if the debtor executes his obligations within the legal term of 3 months. Also, the analysis of the prescription of the debtor's right to action, in the situation of paying unjustified delay penalties, related to the provisions of art. 906 Code of Civil Procedure, is definitely useful and possibly susceptible to different interpretations.

Keywords: *undue payment, recovery, enforceable title, debtor, overall amount.*

1. Introduction

The Romanian legislator has always tried to provide a set of regulations as accurate as possible, but, as we all already know, it is literally impossible to regulate legal norms for absolutely every situation in which a subject could find itself at any given time. Therefore, there are methods of interpretation that even the courts frequently use, but also mechanisms for unifying the practice, in order to avoid contradictory solutions.

This article aims to analyze two paragraphs of art. 906 Code of Civil Procedure, more precisely para. 2 and 4, since it was necessary even the intervention of the High Court of Cassation and Justice to settle a series of opinions. We strongly appreciate that the study is of interest, especially since it has the potential to satisfy, to a certain extent, the wishes of the creditor, but, at the same time, it clarifies the fact that such an approach can lead to the excessive burden of the debtor.

As such, Decision no. 16/2017[1], but also Decision no. 39/2021[2], both being pronounced by the High Court of Cassation and Justice, the Panel for resolving legal issues, will be taken into account.

We consider that the court's arguments are at least interesting, and for a correct application of the legislation, in the situations provided by art. 906 para. 2 and 4 of the Code of Civil Procedure, the usefulness of the two decisions cannot be denied.

The decisions mentioned above can be understood completely and clearly by referring to a concrete factual situation.

2. Analysis of a concrete factual situation

Supposedly, the plaintiff formulates a request against the defendant in order obtain certificates stating his seniority in work, income and bonuses from which he benefited during the period when he was an employee of the defendant.

The latter, for reasons more or less independent of his own will (for example: the employer's archive was destroyed by a natural disaster), does not issue the requested documents, so the plaintiff naturally addresses the courts of justice in this respect. Both in the first instance and in the appeal, the obligation of the defendant to issue the certificates requested by the plaintiff is established and maintained. Thus, a final decision in this regard is born, meaning that, in this precise moment, the plaintiff has an enforceable title against the defendant.

The plaintiff, who has now become a creditor, addresses the bailiff in order to open an enforcement case against the defendant, who has become a debtor, since even at this moment the requested documents have not yet been transmitted.

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[1] Published in the Official Gazette of Romania no. 258 of April 13th, 2017, decision available on the scj.ro website, site consulted on February 3rd , 2022.

[2] Published in the Official Gazette of Romania no. 733 of July 27th, 2021, decision available on the scj.ro website, site consulted on February 3rd , 2022.

Therefore, the bailiff proceeds to send a summons to the debtor, through which he is informed to comply with the writ of execution. A person who does not specialize in legal studies may have difficulty knowing what would be the advantage of resorting to this approach, since we do not find ourselves in a situation of a clear claim from an economic point of view, so there is no definite, liquid and due.

We emphasize that the provisions of art. 663 of the Code of Civil Procedure specify the definition of each component element of a claim, as follows:

"*(1) Enforcement can only be done if the claim is certain, liquid and due.*

(2) The claim is certain when its undoubted existence results from the enforceable title itself.

(3) The claim is liquid when its object is determined or when the enforceable title contains the elements that allow its establishment.

(4) The claim is due if the debtor's obligation has matured or he has forfeited the benefit of the payment term[3]".

Consequently, the bailiff has no clarity of the exact amounts to be seized, thus only sends summons to the debtor, considering that the obligations we are referring to can only be fulfilled by the debtor.

However, there is an obvious advantage in enforcing the debtor in this particular situation, because, only after the opening of the execution file and the fulfillment of the term of 10 days from the communication of the summons / conclusion of approval from the bailiff, the creditor can address the courts of justice with an action based on the provisions of art. 906 para. 2 Code of Civil Procedure.

As such, the creditor may request the courts of justice to oblige the debtor to pay a penalty from 100 lei to 1,000 lei, established on each day of delay, until the complete execution of the obligations provided in the enforceable title. However, this decision of the courts of justice cannot be qualified as an enforceable in any way, even if it can appear that way to an unformed eye. The High Court of Cassation and Justice, by Decision no. 16/2017, pronounced by the Panel for the resolution of certain legal issues, in paragraph 65, stated the following: "*Since the penalty is provisional, neither liquid nor enforceable, the conclusion is not susceptible to execution. Therefore, the legislator allowed the creditor to, within three months from the date of communication of the conclusion of the application of the penalties in which the debtor does not fulfill his obligation, to address again to the enforcement court with a request to fix the final amount, which the debtor must pay as a penalty*".

As such, any amounts paid pursuant to art. 906 para. (2) Code of Civil Procedure are not certain, liquid and due claims. Any other interpretation has no legal basis, especially since, in accordance with art. 521 para. (3) Code of Civil Procedure, "*the resolution given to legal issues is mandatory from the date of publication of the decision in the Official Gazette of Romania*", in this case from April 13th, 2017.

The only situation in which the subscription could have been forcibly executed is based only on art. 906 para. (4) Code of Civil Procedure, first thesis: "*If within 3 months from the date of communication of the conclusion of the application of the penalty, the debtor does not execute the obligation set by the enforceable title, the enforcement court, by decision given with the summoning of the parties, will fix the final amount due*". The bailiff will enforce only a certain, liquid and due claim, and will not proceed to calculate the debt owed to the creditor in this particular situation. The only amounts that the bailiff calculates are the execution expenses, meaning his own fee, and the updating with the inflation rate of the debt already established by the enforceable title, the latter only at the request of the creditor.

Consequently, we consider that the payment of the delay penalties, at the initiative of the debtor, prior to the existence of a decision based on art. 906 para. (4) Code of Civil Procedure cannot be taken into account, as long as we do not find ourselves in the hypothesis of an enforceable title, with a claim that can be qualified as certain, liquid and due. It is true that there is a possibility for the debtor to engage in such conduct precisely in order to cause the creditor to waive the introduction of another request for the purpose of establishing a definitive, final amount, representing penalties for each day of delay.

However, in the event that late payment penalties are paid in the above case, and the creditor continues the proceedings, there are two options, as follows:

A. the request is admitted and a global amount is established: in this hypothesis, we will find ourselves in the situation of an enforceable title, with a claim that can be qualified as certain, liquid and due, as established even by art. 906 para. (6) Code of Civil Procedure, in the sense that the decision given under the conditions of para. (4) of the same article is, in fact, enforceable.

B. the request is rejected, but we must take into account that this second variant offers two possibilities. Thus, in the situation of rejecting the request, but with the withholding of the amount already paid by the debtor as sufficient, then it results that the debtor does not have the right to a refund of the amounts paid.

However, if the creditor's claim is rejected and the court concludes that the debtor has managed to fulfill his obligations, without taking into account in

[3] See in this respect the provisions of art. 663 Code of Civil Procedure.

considerations the payments made by the latter, then we can easily state that in this particular case, there is an undue payment to the creditor.

Thus, at the moment when it was ascertained by a court's decision the fact that the debtor completed his obligations, meaning that he sent the necessary documents, within the term of 3 months established in thesis I of art. 906 para. (4) Code of Civil Procedure, it results that, from that exact moment, any payment made by the debtor became undue. If the plaintiff's claim had been accepted, the court would have calculated a definitive amount, from which the sums that had already been paid would have been deducted.

For these reasons, we consider that the prescription period can be viewed from two perspectives, as the case may be, depending on the introduction of a request for a global determination of a definitive amount. As such, in the event that no such action is introduced at all, the prescription period representing the material right of the debtor in order to recover the amounts paid voluntarily, will be calculated starting from the moment the payment is made.

However, in the situation where the request for establishing the final amount introduced by the creditor is rejected, without taking into account any payments, such as the fulfillment by the debtor of its obligations deriving from the enforceable title, we consider that the prescription period will not be calculated from moment of payment. Therefore, the 3 years of the general prescription period will be taken into account starting from the moment the courts of justice reject the action based on art. 906 para. (4) Code of Civil Procedure. Given that this decision cannot be subjected to any appeal, being final from the first instance, it results that the prescription period will be calculated from the moment when the courts rule on the request to establish a final amount, and not from the moment such decision is received by the debtor.

Considering the arguments above, we understand to bring into discussion the provisions of art. 2523 Civil Code, in the sense that "the prescription begins to run from the date when the holder of the right to action knew or, according to the circumstances, should have known its birth". However, the debtor knew and should have known the birth of the right to recover the amounts already paid only when the court finally concluded that the debtor had fulfilled its obligations by sending the necessary documents, not by any amounts of money paid.

Therefore, the debtor has made an undue payment, as such he is entitled to a restitution of the amount that was unduly paid. It cannot be considered a natural obligation, but simply an undue payment, the situation in this case being fully in line with the provisions of art. 1341 para. (1) Civil Code. Also, it cannot be a question of a liberality or a business management, as long as the provisions of art. 1341 Civil Code are very clear in this respect, showing unequivocally that the one who pays without debt has the right to a restitution.

According to the provisions of art. 1635 para. (1) of the Civil Code, the restitution of benefits takes place whenever someone is required, by virtue of the law, to return the goods received without right. The legislator expressly provided by art. 1636 of the Civil Code the fact that the right to restitution belongs to the one who performed the service subject to restitution.

From the interpretation of the legal texts above, we can conclude that the undue payment represents the execution by a person of an obligation to which he was not been obliged and which he performed without the intention to pay the debt of another. As such, making an undue payment gives rise to a legal report under which the person who made the undue payment has the right to claim a refund of what he paid in error, and the person who received the payment has the obligation to return the benefit.

Therefore, the obligation to reimburse the undue payment arises if the following conditions are cumulatively met: the service performed is to be made as payment; the payment is not due, meaning that the debt for which the payment was made does not legally exist in the relationship between the payer and the payee; the payment was made in error, in the sense that the payer believed he was the debtor of the payee.

In addition, the particularity of this situation is represented by the fact that the conclusions pronounced pursuant to art. 906 para. (2), respectively art. 906 par. (4) Code of Civil Procedure are not subject to appeal. They are separate actions, separate litigation, so that we do not find ourselves in the classic situation presented by art. 2525 Civil Code, which in our opinion does not exclude by default the application of the same reasoning.

The legal norms should be considered in the sense of their application, not in order to exclude them from application. In the absence of a specific regulation for this particular situation, then there should be applied the closest regulation, as a principle of application and reasoning, meaning the optics provided by the provisions of art. 2525 Civil Code. Since, in the end, the action based on art. 906 para. (4) Code of Civil Procedure has been rejected, we deeply conclude that the decision pronounced on art. 906 para. (2) was left without object, and no new request could be brought to establish a final amount, considering primarily the doctrine of *res judicata*. Although the initial decision is not enforceable, by rejecting the creditor's request for a definitive amount, the courts virtually invalidate any previously established obligation as a penalty due on each day of delay.

Reading art. 2528 para. (2) Code of Civil Procedure, we note that the provisions of par. (1) of the same article shall also apply to undue payment. Thus, according to art. 2528 para. (1) Code of Civil Procedure, "the prescription of the right to action in repairing a damage (...) begins from the date when the damaged party knew or must know both the damage and the person responsible for it". Thus, the debtor does not know the nature of the damages, therefore the undue payment, nor the one who is responsible for it, until the moment when the creditor's request for fixing a definitive amount is rejected by the courts of justice.

Moreover, we also note the Decision no. 39/2021 pronounced by the HCCJ, Panel for resolving legal issues, which expressly states in para. 71 that: "The opinion of the court is limited to the specification that art. 906 para. (4) of the Code of Civil Procedure is likely to be interpreted in the sense that it is possible to fix the definitive amount due to the creditor as a penalty, if the debtor fulfills the obligation provided in the writ of execution prior to the end of 3 months".

3. Conclusions

By Decision no. 16/2017, the Panel for resolving legal issues within the HCCJ clarified the fact that the decisions based on art. 906 para. (2) Code of Civil Procedure are not enforceable in any way and, practically, do not represent anything other than an ultimatum granted to the debtor for the fulfillment of his obligations.

Until the publication of the Decision no. 39/2021, pronounced by the Panel for resolving legal issues within the HCCJ, the abovementioned Decision no. 16/2017 could have been interpreted in the sense that the debtor would not be obliged to pay the delay penalties, in the definitive amount, if he fulfills his obligations deriving from the enforceable title within 3 months from the communication of the decision based on art. 906 par. (2) Code of Civil Procedure. However, the HCCJ has correctly clarified this situation, in the sense that the courts of justice have the possibility to impose on the debtor penalties for delay, if it deems it necessary, even if he completes his obligations in the 3 months period. We strongly consider that such an interpretation is more than welcome, precisely because the debtor should have fulfilled his obligations much earlier, ideally, but by the passivity he showed, it is likely that he harmed the creditor, at least by the fact that it forced him to resort to all these legal proceedings.

References

- Decision no. 16/2017, pronounced by the HCCJ, the Panel for resolving legal issues;
- Decision no. 39/2021, pronounced by the HCCJ, the Panel for resolving legal issues;
- Law no. 134/2010 on the Civil Procedure Code, with subsequent amendments;
- Law no. 287/2009 on the Civil Code, with subsequent amendments;
- https://scj.ro/.

SECURING PUBLIC CLAIMS ACCORDING TO THE TAX AND SOCIAL INSURANCE PROCEDURE CODE OF THE REPUBLIC OF BULGARIA

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Abstract

When we speak about securing public claims we should first explain the methods for collecting public claims. In order to ensure the payment of public claims, the legislation regulates legal institutions through which effective collection of claims is achieved. Guarantees are legal instruments that the state creates and uses to ensure the collection of its claims. According to the Tax and Social Insurance Procedure Code of the Republic of Bulgaria, public claim proceedings are regulated as independent proceedings together with the proceedings for collecting public claims.

The present publication is focused on the guarantees for the enforcement of public claims, securing public claims, competent authorities and instruments, precautionary measures and their effect.

Keywords: *Tax law, public claims, securing, precautionary measures.*

1. Introduction

The effective collection of public claims is achieved through the legal institutions introduced in the legislation, which ensure their payment. Guarantees are legal means that the state creates and uses to secure its claims. In the legal literature, there is a distinction between guarantees in the broad sense and guarantees in the narrow sense.[1]

2. Content

Guarantees in a broad sense are regulated by current legislation and their main purpose is preventive - state coercion has not yet been implemented, although in some cases the obligations have become liquid and exigible. Guarantees in the narrow sense are understood as legal institutions established in connection with the enforcement proceedings themselves - the institutions of privileges and precautionary proceedings.[2] Guarantees in a broad sense are considered to be financial automatisms (obligation of third parties to withhold public claims without issuing an act for their establishment; advance payment of fees before the service is performed by a state body; submission of declarations, liability for another person's financial debt; joint liability, Offsetting, Extinctive Prescription, coercive enforcement).

The privileges of the state in the enforcement process are considered as guarantees in the narrow sense. The term privileges used in art. 136 of the Obligations and Contracts Act (OCA) and art. 721, para. 1 of the Commerce Act (CA), reveals the possibility recognized by law that a claim be satisfied with preference by the entire property of the debtor or by a specific object of the debtor. It is about the preference of the state for its public claims before other creditors of the debtor. According to the provisions of art. 136 of the OCA and art. 722 CA, the state is not in first place among the creditors of the debtor.

Art. 133 OCA provides that the entire property of the debtor shall serve as general security for his creditors who shall have equal right to be satisfied by it provided there are no legal grounds for privileges. In the legal regulation concerning privileges in art. 136 of the OCA there are two types of privileges – special privileges in relation to specific items of the debtor (art. 136, para. 1, items 1-4 of the OCA) and general privileges applied to all the debtor's property. The order of the privileges specified in art. 136 of the OCA gives priority to the special privileges.

In the case of special privileges, claims of the state on taxes on a certain property or on a motor vehicle (art. 136, para. 1, item 2 of the OCA) are preceded by the claims on costs for securing and forcible execution. These are local taxes, which are public municipal claims. The privilege applies only to local taxes and not to fees. After the claims for local taxes come other special privileges - claims secured by a pledge or mortgage - out of the value of the pledged or mortgaged properties; (art. 136, para. 1, item 3 of the OCA), claims for which the right of retention is exercised - out of the value of the retained property; should this claim arise from costs for maintenance or improvement of the retained property, it shall be satisfied before the claims under item 3 (art. 136, para. 1, item 4 of the OCA).

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[1] S. Penov, *Financial Law, General Part*, Sofia, University Press „Sv. Kliment Ohridski", 2021, p. 286.

[2] G. Petkanov, *Tax Process*, Sofia. Tilia OOD, 1996, p. 139.

Under the general privileges, claims of the state other than fines (art. 136, para. 1, item 6 of the OCA), are preceded by the maintenance claims, as they are satisfied preferentially from the entire property of the debtor. State claims should be understood as state and municipal claims with different origin, and not only public state and municipal claims within the meaning of art. 162, para. 2 of the Tax and Social Insurance Procedure Code (TSIPC).

Upon distribution of the liquidated property in the bankruptcy proceedings according to art. 722, para. 1, item 6 of the CA, public-law receivables of the State and the municipalities such as taxes, customs duties, fees, mandatory social-security contributions and others, which have arisen prior to the date of the decision on initiation of bankruptcy proceedings are in sixth place in the order of payment of claims.

2.1. Legal regulation of the precautionary proceedings

The function of the precautionary proceedings is to preserve the debtor's property so that the public claim can be collected by the procedure established for coercive enforcement in case the debtor fails to comply voluntarily. In the TSIPC, an entire chapter called "Security Interests" is devoted to precautionary proceedings. Also, in art. 1 of the TSIPC, the proceedings for securing public claims are regulated as an independent proceeding, together with the proceedings for collection of public claims. The essence of the precautionary proceedings is that the persons are deprived of the physical and legal opportunity to perform actions with which to make changes in their property sphere.[3]

The legal framework of the TSIPC distinguishes 6 types of precautionary proceedings:

- Proceedings for imposition of preliminary precautionary measures, regulated in art. 121 of the TSIPC during the audit;

- Proceedings for preliminary precautions in case of fiscal control on the movement of goods of high fiscal risk - art. 121a of the TSIPC;

- Proceedings for imposition of precautionary measures in order to stay the enforcement of the audit instrument under art. 153 and art. 157 TSIPC, whose function is to suspend the preliminary implementation of the audit instrument when appealing them administratively or judicially;

- Proceedings for imposition of precautionary measures upon notification of dissolution, transfer and transformation of enterprise under art. 77 of the TSIPC and upon notification of adjudication in bankruptcy under art. 78 of the TSIPC in conjunction with art. 195, para. 5 TSIPC;

- Precautionary proceedings regulated in Chapter 24 of the TSIPC;

- Precautionary proceedings in the phase of coercive enforcement under art. 221, para. 4 of the TSIPC (in cases where no precautionary measures have been imposed, the coercive enforcement against claims of the debtor and against corporeal movables and immovables thereof shall commence by the imposition of a garnishment or, respectively, by recording of a preventive attachment, acting on a warrant issued by the public enforcement agent.)

All types of precautionary proceedings under the TSIPC are developed on the basis of the principles of tax law, namely the principle of legality (art. 2 of the TSIPC), objectivity (art. 3 of the TSIPC), autonomy and independence (art. 4 of the TSIPC), *ex officio* Principle (art. 5 TSIPC), good faith and right to defense (art. 6 TSIPC), as well as the principle of the *pro rata basis* in the imposition of precautionary measures.

In this publication we will consider the precautionary proceeding provided for in Chapter 24 of the TSIPC, as it applies in principle to all public claims, unless otherwise provided in special legislation.

2.2. Authorities and Documents in precautionary proceedings

State authorities with explicitly assigned competence participate in the precautionary proceedings - these are public enforcement agents. According to art. 167, para. 1 of the TSIPC, the public enforcement agent shall be a coercive enforcement authority and shall perform the steps for securing and coercive enforcement of public claims according to the procedure established by this Code. Public enforcement agents are authorities of the National Revenue Agency. When it comes to secure public municipal claims from local taxes and fees, the TSIPC applies, and the rights and obligations of public enforcement agents belong to the employees of the municipal administration, determined by an order of the mayor of the municipality.

The documents issued by the public enforcement agent when imposing precautionary measures are called warrant (art. 195, para. 3 TSIPC). The content of the warrant is regulated in art. 196, para. 1 of the TSIPC and it must contain the name and position of the authority which issues the said warrant; the title of the instrument, the number and date of issuance; the grounds of fact and law for the issuance thereof; the designation, identification number, mailing address and permanent address or, respectively, the registered office and address of the place of management of the debtor; the amount of the public obligation and the interest; the type of the precautionary measure and the

[3] S. Penov, *Financial Law, General Part*, Sofia, University Press Sv. Kliment Ohridski", 2021, p. 294.

property whereon the said measure is imposed; an injunction on disposition of the property whereon the precautionary measure is imposed; the authority before whom the warrant is appealable and the time limit for appeal; the date of issuance of the warrant and the signature of the issuing authority, with an indication of the position thereof. The lack of some of the mandatory elements of the content may lead to the issued act being found legally non-conforming . According to art. 196, para. 2 of the TSIPC, a copy of the warrant shall be sent to the debtor and to the third parties affected by the actions for imposition of precautionary measures.

According to art. 195, para. 1 of the TSIPC, the preconditions for initiating the precautionary proceedings are that the public claim be ascertained and exigible. The public claim shall be assessed in terms of grounds and amount by a law at the time of the act for its establishment.

The law allows the debtor to request from the public enforcement agents the replacement of precautionary measures, provided that he offers an equivalent security interest.

The legislator has also provided the possibility of appealing the warrant imposing precautionary measures. The procedure for this is specified in Art. 197 TSIPC. An obligatory administrative appeal is envisaged before the territorial director of the National Revenue Agency (NRA), respectively, for public municipal claims - the head of the unit for local taxes and fees in the respective municipality. The second phase of the appeal is in court before the administrative court exercising jurisdiction over the permanent address or the registered office of the appellant. The deadline for filing a complaint is 7 days and is preclusive. The administrative authority shall issue a reasoned decision within fourteen days, which shall be subject to appeal within seven days from the service of the decision. The court assesses the legal conformity of the act by which the precautionary measure was imposed. The court shall revoke the precautionary measure if the debtor provides security in the form of cash, an irrevocable and unconditional bank guarantee or government securities, if an enforcement title does not exist. According to art. 197, para. 6 of the TSIPC, the appeal by administrative and judicial order does not suspend the execution of the warrant for imposition of a precautionary measure, *i.e.* the appeal has no suspensive effect.

The public enforcement agent also has the competence to revoke the security interest at the request of the debtor or *ex officio*. A precondition for this is extinguishment of the public debt, in case of significant disproportion of the imposed precautionary measures, as well as in case of amnesty of the public debt imposed by law.

2.3. Types of Precautionary Measures

In art. 198, para. 1 of the TSIPC are indicated the types of precautionary measures. They may be imposed together or separately in compliance with the principle of proportionality, and the total amount of security interest must not exceed the amount of the claims. The precautionary measures are:

- preventive attachment of a corporeal immovable or a ship;
- garnishment of corporeal movables and claims of the debtor;
- garnishment of the bank accounts of the debtor;
- garnishment of goods of the debtor in circulation.

The legislator explicitly prohibits the imposition of precautionary measures on the non-sequestrable property of the debtor under art. 213 TSIPC. An act of the public enforcement agent that does not comply with this legal prohibition is illegal.

According to art. 200 of the TSIPC, a garnishment shall be imposed by the public enforcement agent by means of a security interest warrant. This method applies to corporeal movables and claims of the debtor.

2.3.1. Garnishment of Corporeal Movables

Upon garnishment of a corporeal movable, the public enforcement agent shall draw up an inventory, shall value and shall deliver the item of property for safe-keeping to the debtor or to a third party, or shall impound and store the items of property, and a garnishment mark (sticker) may be placed on the item of property (art. 201 para. 1 TSIPC).

In the cases where a motor vehicle is garnished, a notice of the garnishment imposed shall be transmitted to the authorities of the Ministry of Interior. A change of registration shall not be admitted before the lifting of the garnishment (art. 201 para. 3 TSIPC).

In the cases where a civil aircraft is garnished, a notice of the garnishment imposed shall be transmitted to the Directorate General of Civil Aviation Administration for entry into the civil aircraft register. The transfer of the right of ownership, the creation and transfer of rights in rem and the creation of encumbrances in respect of the aircraft, effected after receipt of the notice of the garnishment imposed, shall have no effect in respect of the public execution creditor (art. 201 para. 4 TSIPC).

In the cases where the garnishment is imposed on agricultural or forestry machinery subject to registration according to the procedure established by art. 11 of the Agricultural and Forestry Machinery Registration and Control Act, a notice of the garnishment imposed shall be sent to the relevant Regional Directorate for Agriculture in the register of which the garnished agricultural or forestry machinery

is subject to registration. Any transfer of the right of ownership, creation and transfer of rights in rem and creation of encumbrances of agricultural or forestry machinery, effected after receipt of the communication on a garnishment imposed, shall have no effect in respect of the public execution creditor (art. 201 para. 5 TSIPC).

2.3.2. Garnishment of Debtor's claims from a third party

Garnishment of Debtor's claims may be differentiated in view of the debtor's obligation to the debtor. Such third parties may be banks or other natural or legal persons.

According to art. 202, para. 1 TSIPC, claims of the debtor to banks shall be garnished by means of service on the banks of a garnishment notice, and the garnishment shall be considered imposed as from the time on the day of service on the bank of the garnishment notice. All types of bank accounts, deposit accounts, as well as items of property deposited in safe-deposit vaults, including the content of safe-deposit boxes and amounts delivered by the debtor for trust management, shall be subject to garnishment.

Electronic garnishment of accounts receivable by the debtor into a bank account shall be imposed by a public enforcement agent under the terms and according to the procedure established by art. 450a of the Code of Civil Procedure and for the purposes of collecting public claims, the State and municipalities shall be exempt from the payment of fees and other costs for access to the Single Environment for Exchange of Electronic Garnishments referred to in art. 450a of the Code of Civil Procedure.

Garnishment of the debtor’s claims on a payment account opened with a payment service provider other than a bank shall be carried out by serving a garnishment notice on the payment service provider and the garnishment shall be considered imposed at the time on the day of serving the garnishment notice on the payment service provider (art. 202, para. 7 TSIPC).

Garnishment of a liquid or exigible claim of the debtor from a third party shall be imposed by means of a garnishment notice which shall be transmitted to the debtor, to the taxable person and to the banks wherewith the garnishee holds accounts and garnishment shall be considered imposed in respect of the garnishee and the banks as from the day and time of receipt of the garnishment notice (art. 202, para. 2 and 3 TSIPC).

Claims under writs of execution shall be garnished by means of drawing up an inventory and impounding by the public enforcement agent, who shall deliver the said writs for safe-keeping at a bank. A memorandum shall be drawn up on the impoundment and delivery of the writs of execution to a bank (art. 202, para. 4 TSIPC).

If a garnished claim is secured by a pledge, the pledgee shall be ordered not to deliver the item of property pledged to the debtor and to surrender the said item to the public enforcement agent (art. 202, para. 5 TSIPC).

If the garnished claim is secured by a mortgage, the garnishment shall be noted in the relevant book at the Recording Service (art. 202, para. 6 TSIPC).

2.3.3. Garnishment of Securities and Participating Interests

This type of garnishment covers all property rights under the security.

Physical securities shall be garnished by means of drawing up an inventory and impounding by the public enforcement agent, who shall deliver the said securities for safe-keeping at a bank. A memorandum shall be drawn up on the impoundment and delivery of the physical securities at a bank. Upon garnishment of physical registered shares or bonds, the public enforcement agent shall notify the company of this. The garnishment shall have effect in respect of the company as from the receipt of the garnishment notice (art. 203, para. 2 TSIPC).

Garnishment of dematerialised securities shall be imposed by means of dispatch of a garnishment notice to the Central Securities Register, simultaneously notifying the company. The central securities register shall immediately notify the relevant central securities depository with which the securities have been registered and the relevant regulated market of the garnishment imposed (art. 203, para. 3 TSIPC). Garnishment shall take effect as from the time of service of the garnishment notice.

Garnishment of government securities shall be imposed by means of dispatch of a garnishment notice to the person keeping a register of government securities (art. 203, para. 4 TSIPC).

Garnishment of an equity interest in a commercial corporation shall be imposed by means of dispatch of a garnishment notice to the Registry Agency. The garnishment shall be recorded according to the procedure applicable to the recording of a pledge on an equity interest in a commercial corporation and shall take effect as from the recording. The Registry Agency shall notify the company of the recorded garnishment (art. 203, para. 8 TSIPC).

2.3.4. Garnishment of Cash

Cash held by the debtor in national or foreign currency until otherwise proven and such found on the person thereof, at the residence thereof or in other premises, means of transport, offices, safes or safe-deposit boxes owned or rented thereby shall be

garnished herein by means of drawing up an inventory, impounding and depositing the cash on the account of the public enforcement agent (art. 204 TSIPC).

2.3.5. Garnishment of Goods in Circulation

Goods in circulation shall be garnished by means of drawing up an inventory. The goods in circulation shall be delivered for safe-keeping to the debtor and to the financially accountable executive officers who dispose of the said goods. The sale of goods in circulation and the purchase of the necessary raw and prime materials, as well as the payment of the costs of production and distribution, may be effected only after a prior written consent of the public enforcement agent who has created the security interest and under conditions determined thereby (art. 207 TSIPC).

2.3.6. Preventive Attachment

As a type of security interest, the preventive attachment is aimed at a corporeal immovable or a ship owned by the debtor.

A corporeal immovable shall be attached by means of recording the warrant at the order of the competent recording magistrate according to the procedure for recording. The recordation judge shall send a notification to the debtor of the fact of recordation (art. 205, para.1 TSIPC).

The legal effect of the preventive attachment arises from its registration. The procedure for recording preventive attachment on corporeal immovable is regulated in the Rules for entries, which exhaustively list the required data on the foreclosed corporeal immovable, data on the creditor, the debtor, with the aim to individualize the corporeal immovable.

A ship shall be attached by means of recording the warrant in the relevant ship registers of the Maritime Administration Executive Agency. The Maritime Administration Executive Agency shall send a notification to the debtor of the fact of recordation. Any transfer of the right of ownership, creation and transfer of rights in rem and creation of encumbrances in respect of the ship, effected after receipt of the garnishment warrant, shall have no effect in respect of the public execution creditor (art. 205, para. 2 TSIPC).

3. Conclusions

From the above, we can conclude that the procedure for securing public claims occupies a central place in the tax enforcement process. By their legal nature, precautionary measures are a form of administrative procedural coercion aimed at successfully ensuring the future enforcement process.

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SPACE DEBRIS, ANOTHER ENVIRONMENTAL ISSUE

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Abstract

Space debris is defunct artificial objects in space which no longer serve a useful function (nonfunctional spacecraft and abandoned launch vehicle stages, mission-related debris, and particularly numerous in Earth orbit, fragmentation debris from the breakup of derelict rocket bodies and spacecraft; solidified liquids expelled from spacecraft, and unburned particles from solid rocket motors) and represents a risk to spacecraft and also for the Earth. Collisions with debris have become a hazard to spacecraft; the smallest objects cause damage especially to solar panels and optics like telescopes or star trackers that cannot easily be protected by a ballistic shield. It is theorized that a sufficiently large collision of spacecraft could potentially lead to a cascade effect or even make some particular low Earth orbits effectively unusable for long term use by orbiting satellites, a phenomenon known as the „Kessler Syndrome". The accumulation of space debris has become an irreversible process since and it is a fact that the space debris began to accumulate in Earth orbit immediately with the first launch of an artificial satellite, Sputnik 1, into orbit, in October 1957. Even there is no international treaty minimizing space debris, limiting the amount of space debris, by all possible means, it is now a duty, with the basic provisions in the existing international space law, particularly in the Outer Space Treaty (1967) and the Liability Convention (1972).

Keywords: *space debris, space objects, international space law, Outer Space Treaty, Liability Convention, absolute liability, fault-based liability, Kessler Syndrome.*

1. Introduction

Pieces of satellites, rockets and other space vehicles orbit the planet and endanger future launches, equipment in working order or may cause damages to the Earth's surface. The provisions of art. 2 of the Convention on International Liability for Damage Caused by Space Objects (1971)[1] (*hereafter: the Liability Convention*) were actually applied in 1979, when the Soviet satellite „Cosmos 954" disintegrated in the Canadian atmospheric space, with radioactive debris spreading across Canada[2]. The largest are the size of a bus and represent the remains of rockets that carried capsules or satellites into space[3].

A study made by the company RS Components shows which countries are responsible for this problem[4]. According to the Space-Track.org, there are 30,000 rubbish in space, with a diameter of more than 10 cm, and, according to NASA, up to 500,000 smaller objects. As Space-Track.org has noted, in first place is Russia with 14,403 pieces of space garbage, followed by the USA (8,734 pieces), China (4,688 pieces), France (994 pieces), India (517 pieces) and other countries (538 pieces).

Unfortunately, this amount of junk space, even the smallest pieces, can cause serious damages. In 2016, a small object from space made a hole of 40 cm in the European Space Agency's satellite (*hereafter: the ESA*), Sentinel-1A.

Some space debris re-enters the atmosphere and burns or falls on the surface of the ground or in the oceans, but others remain and must be removed somehow in the future. Garbage was discovered even in the deepest place on Earth, the Marianas Trench. Due to the fact that it is such an isolated place, Nemo Point is a spaceship „cemetery". Between 1971 and 2016, at least 260 spacecraft were thrown there. Also there, at a depth of 3,2 kilometers, are the MIR Space Station (1986-2001), 140 Russian capsules and even a Space X rocket.[5]

Many technologies have been proposed in order to neutralize this garbage, from powerful lasers to claw-equipped satellites.

More than an environmental problem, some legal issues are important to be noted in the following, namely certain legal aspects related to space debris, by reference to the provisions of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other

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[1] Available at *https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html*, *https://www.unoosa.org/pdf/gares/ARES_26_2777E.pdf*, last time consulted on 6.04.2022.

[2] See M. Diaconu, *On the international responsibility of states in the environmental law*, in Journal of Legal Sciences no. 12/2005, at *https://drept.ucv.ro/RSJ/images/articole/2005/RSJ12/0108Diaconu.pdf*, last time consulted on 11.03.2022.

[3] See A. Popa, *Space junk is becoming a big issue. Top polluting countries*, 2020, at *https://wwwgo4it.ro/content/stiinta/gunoiul-spatial-devine-o-mare-problema-tarile-tarilor-care-au-poluat-cel-mai-mult-191449481/*, last time consulted on 11.03.2022.

[4] See *https://uk.rs-online.com/web/generalDisplay.html?id=space-junk*, last time consulted on 11.03.2022.

[5] See *https:// wwwgo4it.ro/content/stiinta/punctul-nemo-cel-mai-izolat-loc-de-pe-planeta-este-si-el-poluat-cu-plastic-17225147/*, last time consulted on 11.03.2022.

Celestial Bodies from 1967[6] (*hereafter: the OST*) and the Liability Convention from 1971.

From another point of view[7], the OST „has kept any military activity in space from developing into a full-blown face-off between the United States and the Soviet Union". As the author noted in the article, „in signing this treaty, both countries agreed not to place any nuclear weapons or weapons of mass destruction into Earth orbit, on the moon, on any other celestial body, or install them on any orbiting space station. In fact, no nation could make exploring other planets into a military endeavor – there could be no military bases established in orbit or on any celestial bodies, no fortifications of any kinds built in space, and neither country could build any weapons testing facilities or conduct military activities on any planets or in space".

2. Overview of what space debris means. Some aspects regarding space debris's history, characterization and sources. „Kessler Syndrome"

2.1. History and characterization. „Kessler Syndrome"

Also known as space junk, space trash, space pollution or space garbage, space debris is defunct artificial objects in space (principally in Earth orbit) which no longer serve a useful function.

Space debris represents a risk to spacecraft and is typically a negative externality, it creates an external cost on others from the initial action to launch or use a spacecraft in near-Earth orbit, a cost that is not taken into account nor fully accounted for in the cost by the launcher or payload owner. The measurement mitigation and potential removal of debris are conducted by some participants in the space industry[8].

Space debris began to accumulate in Earth orbit immediately with the first launch of an artificial satellite Sputnik 1 into orbit, in October 1957.

Debris history in particular years[9]:

a) as of 2009, 19,000 debris over 5 cm were tracked by United States Space Surveillance Network;

b) as of July 2013, estimates of more than 170 million debris smaller than 1 cm, about 670,000 debris 1-10 cm, and approximately 29,000 larger pieces of debris are in orbit;

c) as of July 2016, nearly 18,000 artificial objects are orbiting above Earth, including 1,419 operational satellites;

d) as of October 2019, nearly 20,000 artificial objects in orbit above the Earth, including 2,218 operational satellites.

Both space objects and space debris are carefully monitored by government agencies and space objects are placed in orbits that are intended to avoid potential collisions with other space objects. But avoidance is not always possible due to the sheer amount of space debris. More than 21,000 orbital debris larger than 10 cm are known to exists. The estimated population of particles between 1 and 10 cm in diameter is approximately 500,000. The number of particles smaller than 1 cm exceeds 100 million, according to NASA.[10] Even small pieces of debris can cause significant damage, as the average impact speed of space debris with a space object is 10 km/s, with maximums reaching above 14 km/s due to Orbital eccentricity.

As a result, space objects must constantly analyze potential collisions and, if necessary, conduct avoidance procedures. The International Space Station must conduct such avoidance procedure approximately once per year, as NASA stated[11].

This debris crosses many other orbits and increases debris collision risk. It is theorized that a sufficiently large collision of spacecraft could potentially lead to a cascade effect or even make some particular low Earth orbits effectively unusable for long

[6] Available at *https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html#a7*, last time consulted on 6.04.2022.

[7] „Of course, at the time the treaty was signed, both the United States and the Soviet Union had military satellites in orbit. And the language of the OST didn't penalize this; it didn't call for the disarmament of space but rather focused on the non-aggressive use of space. The OST didn't prohibit non-aggressive military activity like reconnaissance satellites gathering intelligence, and it didn't expressly prohibit dual-purpose satellites like communications satellites that can transfer both civilian and military information. The treaty also didn't prohibit military personnel from participating in any space-based activities so long as their being in space develops for scientific research or for any other peaceful purposes. But, in this instance, research was a vague term; the treaty didn't directly prohibit either nation from testing individual systems or hardware that might be used as part of a space weapons system. This deficient, insufficient, imperfect expression of the OST's provisions were exploited to varying degrees by both countries with spy satellites, military spaceplanes like the Air Force's X-37B program, and even NASA's partnership with the Department of Defense in building the space shuttle, which in turn spurred the Soviet Union into building its own shuttle Buran. And throughout the Cold War, the agreed non-aggressive use of space didn't entirely quell fears of a possible nuclear war in orbit with bombs raining down from space." See A. Shira-Teitel, *The Outer Space Treaty Promised Peace in Space*, 2013, at *www.seeker.com/the-outer-space-treaty-promised-peace-in-space-1767936768.html*, last time consulted on 4.04.2022.

[8] Space debris by the numbers, archived 6 March 2109 at the Wayback Machine ESA, January 2019. Retrieved 5 March 2019, on *Space debris – Wikipedia*, at *https://en.wikipedia.org/wiki/Space_debris*, last time consulted on 11.03.2022.

[9] *Idem*, 1, 1.1. Debris growth.

[10] See S. Kerr, *Liability for space debris collisions and the Kessler Syndrome (part 1)*, endnote 15, in The Space Review, 2017, at *https://thespacereview.com/article/338711*, last time consulted on 11.03.2022.

[11] *Idem*, endnotes 16 and 17.

term use by orbiting satellites, a phenomenon known as the „Kessler Syndrome".[12]

The „Kessler Syndrome", proposed by NASA Scientist Donald J. Kessler in 1978, is a theoretical scenario in which the density of objects in *low Earth orbit (hereafter: LEO)* is high enough that collisions between objects could cause a cascade effect where each collision generates space debris that increases the likelihood of further collisions. He further theorized that one implication if this were to occur is that the distribution of debris in orbit could render space activities and the use of satellites in specific orbital ranges economically impractical for many generations.

Despite the efforts to reduce risk, spacecraft collisions have occurred. The ESA's telcom satellite Olympus-1 was struck by a meteoroid on August 11, 1993, and eventually moved to a graveyard orbit. On March 29, 2006, the Russian Express-AM11 communications satellite was struck by an unknown object and rendered inoperable; its engineers had enough contact time with the satellite to send it into a graveyard orbit.[13]

On February 10, 2009, a Russian military satellite and a private communications satellite owned by an United States-based company collided in orbit, at a closing speed of 11,7 km/s, creating over 2,000 large debris fragments. The Russian satellite had been defunct since 1995, while the United States' satellite was still operational. Following the unfortunate event of 2009, both satellites were destroyed.[14]

2.2. Sources of debris

Sources of space debris include, among others, dead spacecraft, lost equipment, boosters and weapons.

A. Dead spacecraft

In 1958, the United States launched Vanguard I into a medium Earth orbit. As of October 2009, it and the upper stage of its launch rocket were the oldest surviving artificial space objects still in orbit.[15] In a catalog of known launches until July 2009, the Union of Concerned Scientists listed 902 operational satellites[16] from a known population of 19,000 large objects and about 30,000 objects launched.

In February 2015, the USAF Defense Meteorological Satellite Program Flight 13 (DMSP-F13) exploded on orbit, creating at least 149 debris objects, which were expected to remain in orbit for decades.[17]

Another example of additional derelict satellite debris is the remains of the 1970's / 1980's Soviet naval surveillance satellite program. Orbiting satellites have been deliberately destroyed. The United States and the Soviet Union / Russia have conducted over 30 and 27 ASAT tests, respectively, followed by 10 from China and one from India.

B. Lost equipment

Space debris includes, among others: a glove lost by the astronaut Ed White on the first American space-walk (*extravehicular activity – EVA*), a camera lost by Michael Collins near Gemini 10, a thermal blanket lost during STS-88 (*Space Transportation System – STS*), garbage bags jettisoned by Soviet cosmonauts during MIR's 15 year life, a pair of pliers lost during an STS-120 EVA to reinforce a torn solar and a briefcase sized tool bag in an STS-126 EVA.[18]

C. Boosters

On March 11, 2000, a Chinese Long March 4 CBERS-1 upper stage exploded in orbit, creating a debris cloud.

Seven years away, a Russian Briz-M booster stage exploded in orbit over South Australia on February, 19, 2007. Launched on February 28, 2006, carrying an Arabast-4A communications satellite, it malfunctioned before it could use up its propellant. Although the explosion was captured on film by astronomers, due to the orbit path, the debris cloud has been difficult to measure with radar. By February 21, 2007, over 1,000 fragments were identified.[19]

A long March 7 rocket booster created a fireball visible from portions of Utah, Nevada, Colorado, Idaho and California on the evening of July 27, 2016; its disintegration was widely reported on social media.[20]

In December 2020, scientists confirmed that a previously detected near Earth object, 2020SO, was a

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[12] See also Donald J. Kessler, Burton G. Cour-Palais (1978), *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, Journal of Geophysical Research, at *Space debris – Wikipedia, op. cit.*, last time consulted on 15.03.2022.

[13] See *Space debris – Wikipedia, op. cit.*, 2.3., last time consulted on 15.03.2022.

[14] See S. Kerr, *op. cit.*, endnote 18.

[15] See *Space debris – Wikipedia, op. cit.*, 2.3., last time consulted on 15.03.2022.

[16] UCS Satellite Database, Archived 3 June 2010 at the Wayback Machine Union of Concerned Scientists, 16 July 2009, cited on *Space debris – Wikipedia, op. cit.*, 3.1., last time consulted on 16.03.2022.

[17] M. Gruss, *DMSP-F13 Debris To Stay on Orbit for Decades*, at *https://www.space.com/dmsp-f13-debris-to-stay-on-orbit-for-decades*, 2015, last time consulted on 16.03.2022.

[18] For more examples, see *Space debris – Wikipedia, op. cit.*, 3.2., last time consulted on 16.03.2022.

[19] See K. Than, *Rocket Explodes over Australia, Showers Space with Debris*, 2007, at *https://www.space.com/3493-rocket-explodes-over-australia-showers-space-debris.html*, last time consulted on 16.03.2022.

[20] See M. Wall, *Amazing Fireball over Western US Caused by Chinese Space Junk*, 2016, at *https://www.space.com/33581-amazing-fireball-from-chinese-rocket-space-junk-viedo.html*, last time consulted on 16.03.2022.

rocket booster space junk launched in 1966 orbiting Earth and the Sun (Centaur Rocket Booster).[21]

D. Weapons

A past debris source was the testing of *anti-satellite weapons (ASATs)* by the United States and the Soviet Union during the 1960s and 1970s. By the time the debris problem was understood, widespread ASAT testing had ended; the United States Program 437 was shut down in 1975.[22] Despite that, in the 1980s, the United States restarted their ASAT programs with the Vought ASM-135-ASAT. A 1985 test destroyed a 1 tonne satellite orbiting at 525 km, creating thousands of debris larger than 1 cm. Due to the altitude, atmospheric drag decayed the orbit of most debris within a decade.

China's government was condemned for the military implications and the amount of debris from the 2007 anti-satellite missile test, the largest single space debris incident in history, creating over 2,300 pieces golf-ball size or larger, over 35,000 1 cm or larger and one million pieces 1 mm or larger.[23]

On March 27, 2019, Indian Prime Minister announced that India shot down one of its own LEO satellite with a ground-based missile, announcing that the operation, part of Mission Shakti, would defend the country's interests in space. Afterwards, US Air Force Command announced they were tracking 270 new pieces of debris but expected the number to grow as data collection continues, but the International Space Station was not at risk.[24]

Russia destroyed, on November 15, 2021, Kosmos 1408 orbiting at around 450 km above the Earth, creating over 1,500 pieces of trackable debris and hundreds of thousands of pieces of untrackable debris, according to the US State Department.[25]

2.3. Hazards and dealing with debris

Space debris can be a hazard to active satellites, to uncrewed[26] or crewed[27] spacecraft and to the Earth itself and the Earth orbit could even become impassable if the risk of collision grows. Although spacecraft are typically protected by Whipple shields, solar panels, which are exposed to the Sun, wear from low-mass impacts. Even small impacts can produce a cloud of plasma which is an electrical risk to the panels.

Some notable examples[28] of space junk falling to Earth and impacting human life are highlighted below:

- 1969 – five sailors on a Japanese ship were injured when space debris from what was believed to be a Soviet spacecraft struck the deck of their boat;
- 2001 – the upper-stage rocket for NAVSTAR 32, a GPS satellite launched in 1993, re-entered the atmosphere after a catastrophic orbital decay, crashing in the Saudi Arabian desert;
- 2002 – Wu Jie, a six-year-old boy, became the first person to be injured by direct impact from space debris, suffering a fractured toe and a swelling on his forehead after a block of aluminum, 80 cm by 50 cm and weighing 10 kg, from the outer shell of the Resource Second satellite struck him as he sat beneath a persimmon tree in the Shaanxi province of China;
- 2003 – on February, the space shuttle Columbia broke apart during its re-entry into Earth's atmosphere after sustaining damage during its launch; the resulting loss of control led to Columbia's disintegration over the state of Texas (more than 84,000 pieces, along with the remains of the seven STS-107 crew members);[29]

[21] For more details, see *https://nasa.gov/feature/new-data-confirm-2020-so-to-be-the-upper-centaur-rocket-booster-from-the-1960-s*, last time consulted on 16.03.2022.

[22] See Chun Clayton, *Shooting Down a Star: America's Thor Program 437, Nuclear ASAT and Copycat Killers*, Maxewell AFB Base, AL Air University Press, 1999, cited at *Space debris – Wikipedia, op. cit.*, last time consulted on 16.03.2022.

[23] The targed satellite orbited between 850 km and 882 km, the portion of near-Earth space most densely populated with satellites. Since atmospheric drag is low at that altitude, the debris is slow to return to Earth, and in June 2007 NASA's Terra environmental spacecraft maneuvered to avoid impact from the debris. An U.S. Air Force officer and Secure World Foundation staff member has noted that the 2007 Chinese satellite explosion created an orbital debris of more than 3,000 separate objects that then required tracking. For more information about this incident, see *Space debris – Wikipedia, op. cit.*, and also *Space week: Is Space junk Cluttering Up the Final Frontier?*, 2020, at *https://www.npr.org./2020/09/02/908772331/space-week-is-space-junk-cluttering-up-the-final-frontier*, last time consulted on 16.03.2022.

[24] See N. Chavez, S. Pokharel, CNN, *India conducts successful anti-satellite missile operation, Prime minister says*, 2019, at *https://edition.cnn.com/2019/03/27/india/india-modi-satellite-missile-mission/index.html*, last time consulted on 16.03.2022.

[25] See E. Berger, *Russia acknowledges anti-satellite test, but says it's no big deal*, 2021, at *https://arstechnica.com/science/2021/11/russia-acknowledges-anti-satellite-test-but-says-its-no-big-deal* and Eric Berger, *Russia may have just shot down its own satellite, creating a huge debris cloud*, updated November 15, 2021, at *https://arstechnica.com/science/2021/11/debris-from-a-satellite-shot-down-by-the-russians-appears-to-threaten-the-iss/*, last time consulted on 6.04.2022.

[26] The first major satellite collision occurred on February 10, 2009. The 950 kg Russian derelict satellite Kosmos 2251 and the operational 560 kg Iridium 33 collided, 800 km over northern Siberia. Both satellites were destroyed and thousands of pieces of new smaller debris were created, with legal and political liability issues unresolved even years later. On January 22, 2013, a Russian laser-ranging satellite was struck by debris suspected to be from the 2007 Chinese anti-satellite missile test, changing both its orbit and rotation rate. In January 2017, the *European Space Agency (ESA)* decided to alter orbit of one of its three Swarm mission spacecraft, based on data from the US Joint Space Operations Center, to lower the risk of collision from Cosmos-375, a derelict Russian satellite. See *Space debris – Wikipedia, op. cit.*, 4.1., last time consulted on 30.03.2022.

[27] It was the case of the Soviet Space Station MIR since it remained in space for long time with its original solar module panels. Debris impacts on MIR's solar panels degraded their performance. See *Space debris – Wikipedia, op. cit.*, 4.1., last time consulted on 30.03.2022.

[28] For more details, see *Space debris – Wikipedia, op. cit.*, 4.2., last time consulted on 30.03.2022.

[29] See also R.Z. Pearlman, *Debris from Fallen Space Shuttle Columbia Has New Mission 15 Years after Tragedy*, 2018, at *https://www.space.com/39565-columbia-debris-teaches-after-15-years.html*, last time consulted on 6.04.2022.

•2020 – the empty core stage of a Long March-5B rocket made an uncontrolled re-entry (the largest object to do so since the Soviet Union's 39-ton Salyut 7 space station in 1991) over Africa and the Atlantic Ocean and a 12-meter-long pipe originating from the rocket crashed into the village of Mahounou in Côte d'Ivoire;

•2021 – the Falcon 9 rocket made an uncontrolled re-entry over Washington State on March 25, producing a widely seen „light show" and a composite-overwrapped pressure vessel survived the re-entry and landed on a farm field in eastern Washington State[30].

Dealing with debris requires several methods for their removal, such as growth mitigation, self-removal and external removal, the use of remotely controlled vehicles, laser methods, nets or harpoon.[31]

3. Legal issues regarding space debris

3.1. Definition of space debris

What is the legal definition of the space debris? Are we facing a misinterpretation of the very large meaning of the notion of „object", perhaps mistaken with spacecraft or vehicle? If every space object is not a space debris, every space debris is a space object? There are some interesting and important questions that we intend to clarify in the following lines, compared to the opinions that have been retained in the matter that interests us, taking into consideration also that there is no legal definition on space debris, generally accepted or regulated as such in a treaty, convention or other instrument.[32] So, even the OST is considered[33] to be the „Magna Carta" of the space law, its provisions are too generic to deal with the complex problems of space debris.

First of all, a classical definition[34] of debris is „the remains of anything broken down or destroyed".

Secondly, some of the authors retained that the term „space debris" refers to the debris from the mass of defunct, artificially created objects in space, especially Earth orbit, including old satellites and spent rocket stages, as well as the fragments from their disintegration and collisions[35], or even naturally occurring objects such as asteroids or meteors[36].

As it was retained[37], a misinterpretation may come from a disputable wording of the „component part" of a space object within the Liability Convention from 1971[38]: « (d) The term „space object" includes component parts of a space object as well as its launch vehicle and parts thereof. ». The author mentioned propose also a legal definition of space debris as „a useless man-launched object in outer space".[39]

While there is yet to be an acceptable legal definition of what space debris means, there have been proposals for defining space debris but mostly in the context of legally binding treaties and liability for space debris. Perhaps the closest definition[40] we have, *which I personally agree with*, is that space debris constitutes any man-made object that is all man-made objects including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional. This concept covers fragments and component parts of space objects, as well as decommissioned or failed spacecraft and spent upper stages of launchers.

A similar definition, a little bit more detailed, was proposed by Joseph S. Imburgia[41], a definition that could be used in a legally binding treaty: „(…) space debris (*must*) include all man-made objects, including fragments and elements thereof, in Earth orbit or reentering the atmosphere, that are non-functional, regardless of whether the debris is created accidently or intentionally; the term includes but is not limited to, fragments of older satellites and rocket boosters resulting from explosions or collisions, as well as any non-functional space object, such as dead satellites, spent rocket stages or other launch vehicles, or components thereof".

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[30] See also *https://phys.org/news/2021-04-piece-spacex-rocket-debris-washington.html*, last time consulted on 30.03.2022.

[31] See *Space debris – Wikipedia, op. cit.*, 6., last time consulted on 30.03.2022.

[32] See: A. Kerrest, *Space debris, remarks on current legal issues*, in Proceedings of the Third European Conference on Space Debris, 19-21 March 2001, Darmstadt, Germany, at *https://conference.sdo.esoc.esa.int/proceedings/sdc3/paper/3/SDC3-paper3.pdf*, last time consulted on 6.03.2022; S. Kerr, *op. cit., loc. cit.*; T. Robinson, *Space debris: The legal issues*, 2014, at *https://www.aerosociety.com/news/space-debris-the-legal-issues/*, last time consulted on 16.03.2022; E. Morozova, A. Laurenava, *International Liability for Commercial Space Activities and Related Issues of Debris*, 2021, at *https://oxfordre.com/planetaryscience/view/10.1093/acrefore/9780190647926.001.0001/acrefore-9780190647926-e-63*, last time consulted on 16.03.2022; L. de Gouvon Matignon, *The legal status of space debris*, 2019, on Space Legal Issues, at *https://www.spacelegalissues.com/the-legal-status-of-space-debris/*, last time consulted on 15.03.2022; M. Mejia-Kaiser, *Space Law and Hazardous Space Debris*, 2020, at https://doi.org/10.1093/acrefore/9780190647926.013.70, last time consulted on 5.04.2022; M. Listner, *Legal issues surrounding space debris remediation*, 2012, at *https://www.thespacereview.com/article/2130/1*, last time consulted on 6.03.2022.

[33] See T. Robinson, *op. cit., loc. cit.* and the OST, *op. cit., loc. cit.*

[34] See *https://www.dictionary.com/browse/debris*, last time consulted on 30.03.2022.

[35] See L. de Gouvon Matignon, *op. cit., loc. cit.*

[36] See M. Listner, *op. cit., loc. cit.*

[37] See A. Kerrest, *op. cit., loc. cit.*, p. 869 and p. 873 note 1.

[38] The Liability Convention, cited *supra*, *op. cit., loc. cit.*, art. I, letter (d).

[39] See A. Kerrest, *op. cit., loc. cit.*, p. 870.

[40] See: T. Robinson, *op. cit., loc. cit.*; S. Kerr, *op. cit., loc. cit.*

[41] See M. Listner, *op. cit., loc. cit.*

3.2. Applicable law. Liability. The determination of the liable launching State

The applicable law related to the space activities was developed and enshrined in two legally binding instruments: the OST (1967) and the Liability Convention (1971).

The most proeminent issue surrounding cleanup of orbital space debris rests with art. VIII of the OST[42], in which space objects, including non-functioning satellites and other space debris, continue to belong to the country or countries that launched them.

The Liability Convention was seen[43] as the other legal pillar and *lex specialis* to the OST, elaborating on the liability regime, providing two types of liability, absolute and fault-based, as follows.

Art. II of the Liability Convention specifies that a launching state is absolutely liable to pay compensation for damages caused by its space object on the surface of the Earth or to aircraft in flight (*absolute liability*).

Under art. III of the Liability Convention, in the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible (*fault-based liability*).

Several scenarios have been made[44] regarding the implementation of art. II and III of the Liability Convention.

First, if a State were to launch a normal operation (such as placing a satellite in orbit) but intentionally and unnecessarily released space debris in the process, that State would be in violation of *Guideline 1. Limit debris released during normal operations*[45]. If that space debris were to cause damage to Earth or aircraft, the question of liability is simple, meaning that the launching State would be liable for damage under art. II of the Liability Convention, which imposes *absolute liability*. However, if the space debris were to remain in space and collide with another state's orbiting satellite, launching State would be liable under art. III of the Liability Convention, which requires fault-based liability. The answer must be affirmative because the launching State caused damage (collision with another satellite) through an intentional act (releasing space debris) and the *fault-based liability* is established. The fact that the act was not in compliance with Guideline 1 is immaterial to establishing fault-based liability.

Secondly, the author proposed an example in relation to *Guideline 3. Limit the probability of accidental collision in orbit*[46]. If a State launched a space object (such as a satellite) and later abandoned it due to completion of its mission or failure of its systems, Guideline 3 suggests that the launching State should analyze available orbital data to predict potential collisions and limit the probability of a collision. But what if the launching State analyzes the available orbital data, is aware of a potential collision, but chooses not to utilize avoidance procedures? In that case, the launching State would be liable under Article III of the Liability Convention, which requires *fault-based liability* because he caused damage (collision with another satellite) through an intentional omission (failing to limit the potential collision) and so the fault-based liability is established and the fact that the state was not in compliance with Guideline 3 is immaterial to establishing fault-based liability.

Continuing this second scenario, the author raises another question and makes the third scenario. What if the State B has also analyzed orbital data and realizes there is a potential collision in the future (maybe in one year from the present date) and no damage has yet occurred. However, the launching State is unable to utilize avoidance procedures, either because of a systems malfunction or a lack of fuel. As a result of this potential collision, State B utilizes a significant amount

[42] See the OST, *supra*, *op. cit.*, *loc. cit.*, art. VIII („A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.").

[43] See E. Morozova, A. Laurenava, *op. cit.*, *loc. cit.*

[44] See S. Kerr, *op. cit.*, *loc. cit.*, referring to the Resolution no. 62/217, adopted by the United Nations General Assembly, which endorsed the Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space (the „Space Debris Resolution"). These scenarios will be rendered in their entirety, as their author imagined them, because their cutting or reinterpretation could make difficult to pass on their basic ideas.

[45] *Ibidem.* „Guideline 1: Space systems should be designed not to release debris during normal operations. If this is not feasible, the effect of any release of debris on the outer space environment should be minimized.

During the early decades of the space age, launch vehicle and spacecraft designers permitted the intentional release of numerous mission-related objects into Earth orbit, including, among other things, sensor covers, separation mechanisms and deployment articles. Dedicated design efforts, prompted by the recognition of the threat posed by such objects, have proved effective in reducing this source of space debris."

[46] *Ibidem.* „Guideline 3: In developing the design and mission profile of spacecraft and launch vehicle stages, the probability of accidental collision with known objects during the system's launch phase and orbital lifetime should be estimated and limited. If available orbital data indicate a potential collision, adjustment of the launch time or an on-orbit avoidance manoeuvre should be considered.

Some accidental collisions have already been identified. Numerous studies indicate that, as the number and mass of space debris increase, the primary source of new space debris is likely to be from collisions. Collision avoidance procedures have already been adopted by some member States and international organizations."

of fuel to modify its own satellite's orbital altitude. Can State B claim damages (for fuel costs and lost satellite productivity) against the launching State for non-compliance? Is the launching state at fault? No, because the launching State indeed caused damage to State B (fuel costs and lost satellite productivity) due to non-compliance (failing to limit the potential collision), but that non-compliance was not intentional. If it were, then it would be considered an intentional act or omission, and non-compliance would be immaterial. The author takes the discussion further to the point of establishing that, in fact, the heart of the issue rests with the analysis of whether an intentional act or omission occurred that caused the damage, not whether the intentional act or omission was in compliance with United Nations General Assembly Resolutions and even an intentional act or omission that is in compliance with such Resolutions could lead to fault-based liability.[47]

Since art. II of the Liability Convention, which does not require proof of the fault of the conduct that causes damage in order to claim compensation and refers to this type of liability as absolute, reads similarly to art. VII of the OST[48], the latter is also generally considered an example of *absolute liability*. We consider, together with other authors[49], that this means that damage caused as a result of fault-free conduct is subject to compensation in accordance with both art. VII of the OST and art. II of the Liability Convention.

Art. IV (1)(b) and (2) together address situations where two or more states' property causes damage to a third-party state's property. In such a situation, the Liability Convention imposes also *fault-based liability*, stating that all states whose property caused damage to a third-party state's property, and are found to be at fault for such damage, are jointly and severally liable for that damage. Notably, the legal scheme referred to above only apply to damage that occurs within space, which is commonly considered to begin at 100 km above the Earth's surface.

In contrast, art. IV (1)(a) imposes *absolute liability* for such damage that occurs on the surface of the Earth or in the air.[50]

Where *fault-based liability* is required, the Liability Convention clearly delineates „causation" and „fault" as separate tests. Fault-based liability requires an intentional act or omission. Therefore, while a state may cause damage, the state is only liable if it was their intentional act or omission caused the damage.

So, one question was raised[51]: why are different standards of liability required (*absolute liability* for land-and-air-based damages and *fault-based liability* for space-based damages)? It seems likely that *absolute liability* is imposed where the loss of life or private property (on the Earth and in the air), in order to ensure protection of private citizens. However, space is changing and is increasingly becoming the realm of private citizens and corporations (such as SpaceX) and perhaps the presumed justification for imposing absolute liability (the protection of private citizens and corporations) should be extended to space as well.

Only damage caused by a space object is subject to compensation under the liability regime of international space law and the Liability Convention makes a fundamental distinction according to the location of the damage: damage caused on Earth and damage caused in Outer Space. Then according to the OST and to the Liability Convention, the launching State of a space object is liable for damage it may cause and, of course, it should be proven to be the launching State of that object[52]. So, we are facing with another issue (or maybe the same issue that we discussed previously when we tried to establish a legal definition of space debris): space debris are not always known „by their father's or mother's name"[53].

For this real problem for damage caused in outer space, when it is not possible to know the origin of the debris, it was stated[54] that maybe it should be possible to create an international fund to pay for damage caused by unknown debris. And, once accepted, if the contribution to this fund is made according to the creation of debris it may be a good incentive to mitigate their creation.

4. Conclusions

When the Soviet Union launched Sputnik in 1957 (the first successful space craft), the United States began to fear and the question was simple enough: if the Soviet Union could launch such a craft, then it would be easy also to send off a nuclear weapon in

[47] *Ibidem.*

[48] See the OST, *supra*, *op. cit., loc. cit.*, art. VII („Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air or in outer space, including the moon and other celestial bodies.").

[49] See E. Morozova, A. Laurenova, *op. cit., loc. cit.*

[50] See S. Kerr, *op. cit., loc. cit.*

[51] *Ibidem.*

[52] An important distinction was made between *where* the space object launched from and *who* is launching the space object. For more details, see S. Kerr, *Liability for space debris collisions and the Kessler Syndrome (part 2)*, 2017, at *https://thespacereview.com/article/3392/1*, last time consulted on 6.04.2022.

[53] See A. Kerrest, *op. cit., loc. cit.*, p. 870, point 2.2. Liability / The determination of the liable launching State.

[54] *Ibidem.*

space that could destroy the United States? Because no one knew how space would be exploited and protected, or what rights and responsibilities would arise related to the exploration of the space.

So, in 1962, the United States and the Soviet Union realized that there was a need for a new treaty, and that was, a few years later, the OST, designed to ensure that ongoing exploration of the space will be a peaceful attempt for all nations.

The OST was not about seeking to prove technological or political dominance but establishing political and legal guidelines to ensure that the man's expansion into space would be done for the benefit of all nations irrespective of economic wealth or scientific development.

There is no doubt that fundamental principles of general international law are fully applicable to all spheres of international relations, including outer space activities. At the same time, some principles of outer space law are applicable only to international relations in the process of the exploration and uses of outer space. For example, the exploration and use of outer space for the benefit and in the interests of all countries (art. I of the OST) and State responsibility for all national activities in outer space (art. VI of the OST).

For years, many legal experts have been drawing attention to the fact that an important gap exists in the OST and in the other UN space treaties (for example, in the Liability Convention), due to *the lack of definition of „outer space"*, notwithstanding that the UN space documents use the term of „outer space", „space activities", „space objects" and so on, and attach to these terms important legal consequences.

Another issue of great importance is one of the space debris. It should be noted *the lack of enough regulation in reference to the liability for the damages caused by space debris*. The OST and the Liability Convention established the international liability of launching States for the damages caused by space objects or its component parts on Earth, air space or outer space. So, space debris are part of space objects and it can be applied the liability regime of the OST and the Liability Convention. But the most difficult task is to identify the origin of a component part of a space object. It is necessary then to count on a more precise regulation that should define the concept of space debris, to set certain guidelines in order to avoid the production of debris and to establish measures to reduce its growth.

The problem is how to define and identify space debris. We believe that it should be supported the proposal of creating a world-wide monitoring entity or an international guarantee fund with the main and proportional contribution of those who use and take benefits/ profits from space activities, and according to the danger they create and their frequency.

The accumulation of space debris has become an irreversible process and limiting the amount of space debris, by all possible means, it is not only a must, but is a duty. And now there is no justification for delaying and wasting time, obviously with a strong impulse of political will… We do believe that we already have the necessary basic provisions in the existing international space law, particularly in the OST and in the Liability Convention, with all the gaps these documents have. Indeed, the OST at present is way too general (for instance in providing definitions), but, nevertheless these space treaties do provide us a framework and some important basic starting points. Obviously, we need clearer answers and we also need to admit that a specific situation calls for a specific legal regime and some special rules appear more than necessary, for example with regard to liability.

We must stop that the space around us becomes, sooner or later, a junk yard or a cemetery, with dramatic consequences on Earth itself.

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THE NORMATIVE PUSH TOWARDS INCLUSION IN THE LEGAL AND ADMINISTRATIVE LANGUAGE WITHIN THE EU, ITS UNDERLYING PREMISES AND POTENTIAL HAZARDS

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Abstract

At the end of October 2021, the European Commissioner for Equality issued a highly controversial document with internal guidelines for all future communications, oral or written, of the European Commission. What triggered the public outcry and led to the withdrawal of these guidelines under the pretext they were a mere work in progress, was the use of hotly debated, contentious notions such as systemic racism, gender neutrality or preferred pronouns. This case is but one of the most recent examples of what we consider to be a normative push to change values and mentalities in the EU, by altering the language used in official communications and legislative drafting.

The present article explores the underlying premises of this normative push through soft and hard law instruments, in connection to the core values of the European Union, centered on the protection of human rights, and currently shaped by the sociopolitical developments coming from the USA. After a brief overview of these new ideological trends, in addition to the matter of the European Commissioner's guidelines, several cases illustrating the national response to these trends from individual Member States will be analyzed as well. The final section of the paper will highlight several potential risks in introducing such value-charged notions without public debate and public consensus, even if it is all done in the name of equality and inclusiveness.

Keywords: *The European Commission, soft law, legislation, human rights, equality, inclusion, gender-neutral language.*

1. Introductory considerations

"What's in a name? That which we call a rose
By any other name would smell as sweet."[1]

Or would it? Do names alter the substance of things so much, as to warrant their change, codified in law? The immortal words of Shakespeare may still speak to our hearts today, but they certainly do not to our legalistic minds.

A visible trend to use legal instruments to modify the established values and standards which regulate human behavior has been on the march in the EU, especially after the coming into force of the Lisbon Treaty and the EU Charta of Fundamental Rights in 2009. The avowed goals? To achieve a wider protection of human rights, by fostering inclusion and equality, particularly in areas which fall under the competences of the national jurisdictions, such as the regulation of same-sex marriages or civil partnerships, children and youth education and, related to this, the teaching of sex education in school, to name but a few.

The approach taken by the EU institutions to implement such goals involves a hefty use of "soft law" instruments, which, by their very nature, circumvent the public debate and consensus building, inherent to the concept of democratic decision-making. As we shall outline in this article, the complex legislative process within the EU and its interplay with the national sources of law is further complicated by the action of a fundamental EU principle: the principle of subsidiarity. This constitutes, in our opinion, both an underlying premise and an enabling feature of the EU legal system, which helps this normative push towards inclusion.

The above mentioned analysis of the underlying premises will also take into account the ideological factors that drive it, with reference to current gender theories, which hold that gender is a social construct, to Critical Race Theory, widespread in the USA today, which postulates that the Western world is inherently racist, and to the European culture of human rights (or, as some critics disparagingly say, the religion of human rights[2]), which dominates the public discourse within the EU.

The use of soft law to effect de facto legal changes in the EU has been analyzed by many a scholar, largely in relation to policies concerning business regulations, fiscal duties or environmental protection. Though challenging, the technical nature of these themes is unlikely to trigger massive public interest, unless they directly impact considerable sections of the population. Other issues, more overtly value-charged, such as immigration or the anti-Covid

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[1] Shakespeare, William, *Romeo and Juliet* (The New Cambridge Shakespeare), Cambridge University Press, 2003, p. 107.

[2] Tettenborn, Andrew, *The religion of human rights*, 14 December 2020, article written in connection to the UK government's Independent Human Rights Act Review, available online at: https://thecritic.co.uk/the-religion-of-human-rights/.

19 vaccination policies, have sparked of late the interest in the use of soft law by the EU Commission and other EU bodies. One recent example comes from the European Commissioner for Equality, who, in October 2021, issued what turned out to be highly controversial internal guidelines for all future communications, oral or written, of the European Commission. The document, hastily retracted as a mere work in progress, included direct references to contentious notions such as systemic racism, gender neutrality or preferred pronouns, as we will show in the section dedicated to its analysis.

These controversial measures by the EU public bodies have triggered what we deem to be an asymmetrical response at the national level, materialized in the use of hard law instruments. The legislation adopted by the national parliaments and the re-evaluation of the boundaries of national sovereignty were employed by some EU Member States (by Hungary or Poland, for instance), in an effort to counter ideological trends seen as an aggressive attack on the foundational values of their society.

These issues are outlined in a separate section, which precedes the final part of the paper, focused on the assessment of the potential risks which accompany the introduction of contested, value-charged normative standards, without public debate and public consensus, even if it is all done for a perceived (but not agreed upon) greater good.

2. *The formal enablers* - underlying legal premises for the normative push towards equity and inclusion

2.1. Is the EU soft law the root of all evil?

A serious answer to an admittedly flippant question depends mostly on the point of view of the enquirer and starts with the definition of what at present is not formally defined, namely what constitutes the EU soft law. The subsequent step is to ascertain what legal force it possesses in relation to the traditional hard law.

The widespread opinion in the academic doctrine is that the ***EU soft law*** instruments fall into a distinct category, namely the "complementary law" or "sources of law lacking (in principle, at least) legally binding force."[3] A non-exhaustive list of these instruments might include: recommendations, guidelines, preparatory instruments (Green Papers, White Papers), action programmes (or action plans, as they are frequently called), codes of conduct, communications (of various types, ranging from institutional to individual).[4] This bewildering diversity led some scholars to apply the familiar, positivist concepts of obligation and enforcement, in their efforts to delineate the EU soft law from the hard law, in spite of the marked "fluidity of the notion."[5] The success of this approach is, in our opinion, debatable, because of its failure to explain the legal effects of non-binding, mostly political instruments. The matter is further complicated by the jurisprudence of The European Court of Justice related to these complementary sources of law.

If a formal definition of the EU soft law is still absent, there are a number of working definitions which draw on the similarities with the international law. Perhaps the best known, albeit succinct, is the one put forth by Professor Snyder. It describes soft law instruments as "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects."[6] For the purpose of this article, we prefer the definition of soft law proposed by Professor Linda Senden, because it properly underlines the *animus* to produce legal results: "Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, **and that are aimed at and may produce practical effects.**"[7] *(emphasis added)*

Almost all scholars and legal practitioners agree on the disadvantages attached to the frequent use of such legal instruments by the EU bodies: the normative force of the law is subverted; the certainty of the law (a core principle of the EU legal framework, recognized as such since 1960s in its jurisprudence by the European Court of Justice) is equally undermined. The heterogeneous use of soft law instruments was repeatedly pointed out as yet another drawback - the reason why in some cases the Commission might use a communication and not a resolution, for instance, is anybody's good guess.[8] More importantly, there is the practical issue of enforcing soft law instruments, if a Member State chooses to oppose their intended political and legal consequences.

Though not having legally binding force according to art. 288 TFEU ("To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and

[3] Dumitrașcu Augustina, *Dreptul Uniunii Europe I*, Universul Juridic Publishing House, Bucharest, 2021, p. 273 (*my translation)*.
[4] Senden, Linda, *Soft Law in European Community Law*, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 124-137.
[5] Terpan, Fabien, *Soft Law in the European Union - The Changing Nature of EU Law*, European Law Journal, vol. 21, Issue 1, pp. 77-78, 2015; https://doi.org/10.1111/eulj.12090.
[6] Snyder, Francis, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, Modern Law Review 56, 1993, p. 32.
[7] Senden, Linda, *op. cit.*, p. 112.
[8] *Idem*, p. 116.

opinions"[9]), the soft law instruments are nevertheless regarded as producing legal effects ever since the seminal 1989 *Grimaldi* judgement.[10] As such, the impact of soft law on individual Member States should not to be underestimated, its legitimacy claims should be carefully assessed and, preferably, the specific use of various instruments should be regulated by hard law provisions.

2.2. A second underlying premise or legal enabler of the normative push towards inclusion is the action of the *subsidiarity principle* into the framework of ***EU hard law***. The subsidiarity principle, upon which the entire EU legal construction is built, is expressly mentioned in the art. 5 of the Treaty of the European Union (TEU), together with the principle of proportionality. It impacts the balance between the exclusive and the shared competences within the EU. "Though the European Union does not consider itself a federal state, because no Member State would, in fact, accept such a status at present"[11], the function of the subsidiarity principle in the EU is similar to that of a federal structure, guiding the way the allocation of competences between the central structure and the individual Member States works in practice.

The protection of human rights is enshrined both in the EU foundational documents and in the national legislation. This complicated legal architecture is further complicated by the European Convention of Human Rights (ECHR), to which all EU Member States are signatories. The importance of the ECHR for the subsequent development of the human rights protection in Europe cannot be overstated, neither is the range of technical legal issues raised by the later adoption of the European Charta of Human Rights. The established view in the legal doctrine holds that the Charta was not meant as a replica to the Convention, but "as a mean to enshrine in a single legal document, in a legislative *corpus*, accessible to all, ordinary citizens included, (...) the fundamental human rights previously guaranteed by the CJEU jurisprudence and/or the provisions of the primary and/or secondary EU law."[12] As noted in an in-depth examination of this subject, the effectiveness of the human rights protection in the EU "seems inevitably linked to a *multiple subsidiarity*"[13] and is ensured by a three-tiered structure of jurisdictions, involving the national courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (the ECtHT). The same study points to the lack of precision of the terms *subsidiarity* and *effectiveness* as used in the various EU legal instruments, which leads to a *de facto* "transfer of the normative power from the authority which legitimately holds it towards the courts which interpret the legal instruments."[14] In our opinion, the profusion of legal documents protecting the human rights and the competing court jurisdictions have two major drawbacks: on one hand, the effect of confusing the citizens in their quest to obtain remedies through courts against human rights violations, and, on the other hand, the effect of diluting the legitimacy of the hard law instruments, by expanding their scope through binding judiciary interpretation, without the safeguards of public debate and political responsibility.

A close study focused on the complexities of the decision-making process within the European Union observed that the very legitimacy of this process stems from "the existence and the cumulated action of several levels of representation."[15] The growing body of binding court decisions peels away at the layered structure of this representation, and may lead - as it already happened in the case of Poland and Hungary, mentioned before - to a rift between the national legislative bodies and the EU institutions, exposing the shallow depth of the European consensus on several key EU policies.

The formal enablers to the current normative push to change the legal and administrative language within the EU receive their impetus from what we consider to be the informal, yet powerful enablers – the underlying ideological trends.

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[9] Art. 288 TFEU, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT;

[10] Case C-322/88 Grimaldi [1989] ECR I-4407, at (18) and (19): *"However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions."*(emphasis added); https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61988CJ0322&from=EN. For further analusis, see also Stefan, Oana, *European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects*, The Modern Law Review, 75(5), pp. 879-893; doi:10.1111/j.1468-2230.2012.009.

[11] Dumitrașcu Augustina, Salomia, Oana-Mihaela, *Dreptul Uniunii Europene II*, Universul Juridic Publishing House, Bucharest, 2022, p. 19, *(my translation*).

[12] Salomia, Oana-Mihaela, *Instrumente juridice de protecție a drepturilor fundamentale la nivelul Uniunii Europene*, (*Legal instruments for the protection of the human rights at EU level*), C.H. Beck Publishing House, București, 2019, p. 59, *(my translation*).

[13] Achimescu, Carmen-Gina, *Principiul subsidiarității în domeniul protecției europene a drepturilor omului* (*The principle of subsidiarity in the European protection of human rights*), C.H. Beck Publishing House, Bucharest, 2015, p. 147, (*my translation*).

[14] *Ibidem.*

[15] Bantaș, Dragoș-Adrian, *The role of national parliaments in verifying the compliance with the principles of proportionality and subsidiarity*, CKS 2018 E-book, p. 410, http://cks.univnt.ro/download/cks_2018_articles%252F3_public_law%252FCKS_2018_public_law_006.pdf.

3. The informal enablers - ideological factors which drive the current normative push towards inclusion

It is a common place of the legal theory that the enactment of a particular legislation reflects, as a rule, the specificity of any given geographical and cultural space. In the US, for instance, the drive for equality and inclusion has always been characterised by a bottom-up approach. At its root lies the Civil Rights Movement started after the end of WWII, which eventually led to the adoption of the Civil Rights Act of 1964, outlawing any form of discrimination on the basis of race, sex, religion, colour, or national origin. The historical context is important, highlighting the struggle to end racial discrimination in the US.

The latest avatar of the movement for social justice brings together scholars and activists from all walks of life, united in their belief that traditional American policies and institutions, from courts of law and schools to business enterprises, suffer from a systemic racial bias, advancing the interests of white people to the expense of other racial groups.[16] Some proposals put forth by the supporters of this Critical Race Theory (CRT), in order to combat the pervasive discrimination against people of colour, require public policies centred on affirmative action, social programming to make people aware of their biases, racial or otherwise, and the introduction of CRT as a mandatory subject taught in school. The determined CRT activism sparked a likewise determined reaction from the American conservatives, who view the main tenets of the CRT as promoting, not fighting racial discrimination, and prompted several states to adopt anti-CRT legislation (Florida and Texas, for instance).

Equally divisive, but on a much larger scale, not limited to US states only, are the new spin-offs from the traditional gender studies, which explore the ways concepts like masculinity and femininity are defined, influenced by and reflected into the social context. The gender identity theory postulates that gender is a social construct rather than a biological reality, that it is a fluid state and it should be defined by a person's own choice and preferences. It is linked to the LGBT+ activists' efforts to achieve the mainstreaming of their sexual orientation and identity into the society, in all areas traditionally reserved for heterosexuals: marriage, adoptions, representation in popular culture etc.[17]

The gender identity and LGBT+ movement provoked a strong backlash from several American and European states, with deep-seated conservative beliefs, which passed restrictive legislation, often at odds with the assumed (though not necessarily debated or agreed upon) EU policies on diversity and inclusion. The next section will consider some of these instances of opposing ideologies at national and Union level.

In the EU, the protection of human rights has been regulated and implemented mostly in a top-down manner. The historical context is, again, illuminating: after the second world war, Europe has emerged with a fractured identity, split between the communist block and the democratic Western Europe. Its cultural integrity, too, was severely wounded, marred by the atrocities the Nazis perpetrated against the Jewish and other ethnic minorities. With the avowed goal to establish "a European federation indispensable to the preservation of peace"[18], a programmatic movement towards the reunification of Europe and the creation of a single supranational entity, protecting individual rights and freedoms, began with the Schuman Declaration in 1950, based on the proposal of the French foreign minister Robert Schuman. This proposal was acted upon, resulting in the adoption of the Europe Declaration (the Charter of the Community) in l951. The lengthy political process gradually led to the current legal architecture of the EU, with the protection of human rights at its heart, as stated in the art. 2 TEU: "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*."[19] Art. 3 (2) TEU emphasises the importance of non-discrimination and the aims of the Union, stating that: "*It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.*"

It is beyond the scope of this article to trace the rich history of the non-discrimination principle in Europe. Our analysis is limited to the latest developments, as they might be discerned from recent documents issued by the EU institutions.

Equality, inclusion should not be controversial - it is so implied by the mission statement of the EU primary law and constantly affirmed by countless court decisions, at national and Union level. But the case of

[16] *Explainer: What 'critical race theory' means and why it's igniting debate*, by Gabriella Borter, September 22, 2021, online at: https://www.reuters.com/legal/government/what-critical-race-theory-means-why-its-igniting-debate-2021-09-21/ ; see also online resources of the University of Birmingham, at https://www.birmingham.ac.uk/research/crre/critical-race-theory/index.aspx.

[17] Morrow, Deana F., and Lori Messinger, eds. *Sexual Orientation and Gender Expression in Social Work Practice: Working with Gay, Lesbian, Bisexual, and Transgender People*, Columbia University Press, 2006, http://www.jstor.org/stable/10.7312/morr12728, pp. 6-7.

[18] https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en.

[19] TEU, https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&f;ormat=PDF.

the European Commission Guidelines for Inclusive Communication proves otherwise.

4. A case in point: The European Commission Guidelines for Inclusive Communication

The complex interplay between the formal and the informal enablers examined in the two previous sections can be clearly observed in the short-lived, but hotly debated case of the European Commission Guidelines for Inclusive Communication.

Released at the end of October 2021 by Helena Dalli, the EU Commissioner for Equality, the Guidelines were withdrawn after only a month of public scrutiny, or rather, public mutiny. The media, mostly, but not exclusively the right leaning outlets, had a field day, releasing dramatic titles such as: "EU accused of trying to cancel Christmas!"[20], "Pope compares EU to dictatorship for attempts to ban Christmas. Pope warns the EU not to take the 'path of ideological colonisation'"[21] etc.

What triggered the public outcry? If one seeks to be accurate, one might say *consistency*: *consistency of substance*, because the guidelines are in step with other documents released by the EU institutions, listing measures and actions to foster inclusion and equality; *consistency of form*, since the guidelines are not hard law, but a soft law instrument which, nevertheless, carries legal effects, as mentioned in Section 3 above. The aim of the Guidelines was to help "deliver inclusive communication at all times, thus ensuring that everyone is valued and recognised in all our material regardless of their gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[22] A tall order, if ever was one! The standards, concerning both the public and the private communications of the Commission, were designed to avoid "deep-rooted stereotypes and biases" affecting individual and collective behaviours. Listed below are some specific recommendations:

"When asking about gender, do not offer only male/female options, add 'other' and 'prefers not to say'. (...) Never address an audience as 'ladies and gentlemen' but use expressions such as 'Dear colleagues' (...) When addressing trans people, always respect self-identification."

The guidelines undertake without reservations the mission to impose onto all Commissioners, irrespective of their own beliefs, the LGBTIQ ideology, pushing for a top-down change of normative values regarding gender, family and religion. *"Avoid using language that devalues some*

relationships and only recognises the existence of traditional heterosexual families. Expressions such as 'partner', 'parents', 'relationship', 'in a relationship' are examples of LGBTIQ inclusive language."[23] The colourful media reports and the remarks coming from the Pope were prompted by the recommendations included in the "Cultures, lifestyles or beliefs" section: "*Avoid assuming that everyone is Christian. Not everyone celebrates the Christian holidays, and not all Christians celebrate them on the same dates. Be sensitive about the fact that people have different religious traditions and calendars."* Instead of saying "*Christmas time can be stressful*", the recommended form is "*Holiday time can be stressful.*"

As I mentioned before, the only major flaw one might find to these Guidelines is their consistency. The legal framework facilitating the adoption of such measures has long been put in place at EU and national level, without eliciting much attention or discontent.

For instance, the European Parliament homepage lists several key objectives of the EU in the area of protecting and advancing human rights. These objectives have been set forth in yet another soft law instrument, namely the ***EU Action Plan on Human Rights and Democracy 2020 – 2024***. This ambitious policy statement mentions in Section 1.1. (l) the fight to end discrimination against LGBTI (*I stands for Intersex*) persons, including "hate speech and hate crimes."[24]

Another (stronger) case in point:

After the conservative political forces in Poland and Hungary have adopted what was deemed - by the EU officials and by many NGOs – to be legislative measures discriminating against the LGBT+ persons, the European Parliament issued the resolution of 11 March 2021 on the ***Declaration of the EU as an LGBTIQ Freedom Zone.***[25] This Declaration lists at least 10 soft law instruments concerning LGBT+ rights (resolutions, guidelines, communications etc.), yet none of the few hard law sources mentioned applies

[20] *EU accused of trying to cancel Christmas! Advice on inclusive language dropped after criticism*, by Maïa de La Baume, 30 November 2021, online at: https://www.politico.eu/article/european-commission-cancel-christmas-inclusive-language-lgbtq/.

[21] *Pope compares EU to dictatorship for attempts to ban Christmas. Pope warns the EU not to take the 'path of ideological colonisation*, by Nick Squires, 6 December 2021, https://www.telegraph.co.uk/world-news/2021/12/06/pope-compares-eu-dictatorship-attempts-ban-christmas/.

[22] Archived Report, available at: https://archive.org/details/guidelines-for-Inclusive-communication-withdrawn/page/n5/mode/2up; p. 5.

[23] *Idem*, p. 13.

[24] https://www.consilium.europa.eu/media/46838/st12848-en20.pdf; see also https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights.

[25] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html.

directly to LGBT+ rights, other than a handful of court decisions.

The normative push towards changing values and traditional institutions is not limited to the EU level, but is taking place at **the national level** as well. France changed its laws to reflect the legalisation of same-sex marriages: an amendment was passed to the national education act, changing the terms on the forms used for school enrolment, from "Mother" and "Father" to "Parent 1" and "Parent 2", to accommodate children coming from same sex-marriages[26]. The criticism of this change, stemming from the right side of the political spectrum, was without effect, since the amendment was passed in the National Assembly, through democratic process.

5. Conclusions

The growing importance of the EU soft law and its far-reaching consequences on the life of ordinary EU citizens have forced academics, various think tanks and advisory government bodies to begin in earnest its study and to put forward suggestions for the clarification of its status. For instance, the Meijers Committee, an advisory think tank of legal experts to the Dutch parliament and to various EU institutions has issued in 2018 a Note in which it warned about the flaws in the adoption procedure of the soft legal instruments, noticing that: "There are no guarantees that Member States are systematically involved in the adoption process. The same applies to the involvement of the European Parliament and national parliaments. Moreover, there is no consultation foreseen of interested parties."[27] The case of Poland and Hungary, countries who challenged with their domestic policies the official EU narrative on LGBT+ rights, illustrate the steep price tag attached to exercising the prerogatives of national sovereignty with disregard to such soft law instruments. The EU funds for various local projects were suspended, infringement proceedings against the two "erring" states were initiated, penalties applied etc.

As I attempted to show in this paper, the use of soft legal instruments by the EU is increasingly aimed at effecting legal change without the disadvantages of a lengthy and difficult process of popular consultation. In spite of their ambiguous, non-legally binding status, they do influence the way national states manage the expectations of their citizens and regulate their behaviour.

Therefore, it is necessary, in our opinion, an immediate clarification, codified in a primary legal document, of the status, the hierarchy and the potential means for judicial review of such instruments.

The failure to do so and the disregard of specific traditions, cultural and religious beliefs of the citizens from the more traditional EU Member States will only result in a backlash – legal or otherwise – against the very group of people the EU legislation is trying to protect. The top-down legislative approach taken by the EU institutions, to impose values, change behaviour norms and mainstream others, will be unlikely to engineer the desired social change. Many of the EU policy action plans are motivated by the urgency to act for the future. Perhaps in this case, a softer, less militant and more transparent approach to legislation, which respects the rich national diversity of the EU Member States, would work for the best.

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[26] " 'Mother' and 'Father' Replaced With 'Parent 1' and 'Parent 2' in French Schools Under Same-Sex Amendment", by Callum Paton, 2/15/19, online at: https://www.newsweek.com/mother-and-father-replaced-parent-1-and-parent-2-french-schools-under-same-1332748.

[27] https://www.commissie-meijers.nl/comment/note-on-the-use-of-soft-law-instruments-under-eu-law-in-particular-in-the-area-of-freedom-security-and-justice-and-its-impact-on-fundamental-rights-democracy-and-the-rule-of-law/ ; Note published on 9 April 2018.

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(GENERAL ASPECTS CONCERNING) THE LEGAL REGIME OF FOREIGNERS IN INTERNATIONAL LAW, ACCESSIBLE TO EVERYONE

Roxana-Mariana POPESCU[*]

Abstract

Given the freedom of movement of people, in general, the regime of foreigners in international law has been recently acquiring a very special importance. This importance will inevitably increase if we relate our existence to the natural tendencies of such freedom. It is the normality that presupposes the evolution of interpersonal relations, with overcoming formal, non-spiritual boundaries. Additionally, there are, however, the unwanted situations that refer to certain categories of foreigners, such as asylum seekers, but especially refugees, and that are stimulated, consciously or not, with or without permission, by exceptional cases such as conflicts, catastrophes or, as we see happening more and more often, by wars, closer or farther away from us.

Keywords: *foreigner – notion, legal regime, international law, extradition, expulsion.*

1. Notion. Conceptual limitations

As far as we are concerned, we consider that the person who is in the territory of a state without having its citizenship is considered a "foreigner". From the study of the specialized doctrine, from the country, but especially from abroad, it results that, not infrequently, the concept of citizenship is assimilated to that of nationality. Undoubtedly, "the two concepts refer to the condition or status of the natural or legal person in his/her relationship with the state. Often, the two notions are used as having the same meaning, even if, in Romania, nationality represents the identification element of the legal person, next to the headquarters, as opposed to the citizenship which is assigned to the natural person, as an identification element, next to the domicile"[1].

The status of "foreigner" may change during a person's lifetime, as long as he or she can obtain the nationality of the "host" state.

Pursuant to art. 2 para. a) of the GEO no. 194/2002 on the regime of foreigners in Romania, republished[2], with subsequent amendments and completions, *foreigner* is "a person who does not have Romanian citizenship, the citizenship of another Member State of the European Union or the European Economic Area or the citizenship of the Swiss Confederation". A foreigner who is at one particular moment in the territory of a state, may have the citizenship of another state or may have the status of stateless[3] person or refugee[4].

Upon careful analysis, we have found that, during the stay in the territory of the host state, the foreigner enjoys a number of rights, but at the same time, their correlative obligations are also opposed to them, according to the domestic law of that state. "As underlined in the legal doctrine "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings", therefore all individuals have the right to complain if the domestic authorities, natural or legal persons violate their individual rights under the Convention in certain conditions"[5].

Foreigners legally residing in Romania benefit from the general protection of persons and property, as guaranteed by the Constitution and other laws, as well as by the rights provided in the international treaties to which Romania is a party. At the same time, they can move freely[6] and can establish their residence or, as the case may be, their domicile anywhere in Romania. Also, if the foreigners have their residence or domicile in Romania, they benefit from social protection measures from the state, under the same conditions as the Romanian citizens. Foreigners included in all levels

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[1] Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 193.

[2] Official Gazette of Romania, Part I, no. 421 of 5 June, 2008.

[3] Pursuant to art. 1 para. (1) of the Convention relating to the Status of Stateless Persons, adopted in New York on 28 September 1954, *a stateless person* "is a person who is not considered a citizen of any state under its national law".

[4] The term *refugee* is defined in the Convention relating to the Status of Refugees, concluded in Geneva on 28 July 1951, but also in the Protocol on the Status of Refugees, concluded in New York on 31 January 1967.

[5] Laura-Cristiana Spătaru-Negură, *Human beings trafficking in the European Court of Human Rights case-law*, LESIJ - Lex ET Scientia International Journal, no. 2/2017, p. 96.

[6] "Man is born free, this is a universally valid truth, it does not need to be argued, no matter which way you choose to prove this truth" - Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 19.

of education have unrestricted access to school and training activities in society[7].

During their stay in Romania, foreigners are compelled to comply with the Romanian legislation, regarding all the correlative rights they enjoy.

2. The main legal regimes granted to foreigners

If in the Middle Ages, at the creation of the Romanian feudal states, "foreigners had a special legal regime, (...), characterized by tolerance, especially if they were Christians"[8], now, at international level, the following legal regimes granted to foreigners are regulated:

a. *The national regime*. Under this regime, foreigners are granted all the rights of the citizens of the state in which territory they are, except for their political rights. The doctrine states that the phrase "national regime" is ambiguous, as long as it is considered that "foreigners should enjoy all the rights granted to nationals"[9]. It is true that the only rights that foreigners cannot enjoy under this regime are the political rights, but it should be noted that "their access to certain professions and industries remains restricted. The doctrine of the national regime considers, first of all, the obligations of a foreigner towards a host state, not the rights granted by the host state. It has been characterized as a means of protecting a state from a foreigner, rather than protecting a foreigner from acts or omissions attributable to a state"[10].

b. *The special regime or reciprocity regime*. Under this regime, the host state grants certain rights to foreigners on grounds of reciprocity;

c. *The regime of the most-favoured-nation clause*. According to the International Court of Justice, "(...) the purpose of the most-favoured-nation clause was to establish and maintain at all times, a fundamental equality without discrimination[11] between all the countries concerned"[12]. The right of all persons to equality before the law and to protection against discrimination is a fundamental right recognized by the Universal Convention, the Universal Declaration of Human Rights, by the United Nations through a number of conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women or the International Convention on the Elimination of All Forms of Racial Discrimination, etc.[13] The regime of the most-favoured-nation clause presupposes that a State extends to the nationals of another State, rights at least equal to those granted to the national of any third State, pursuant to international agreements. In other words, a most-favoured-nation clause is a provision of a treaty whereby one State undertakes to grant to another state, the most-favoured-nation treatment in an agreed field of relations. The fields that may be the subject of the clause are: customs duties, transit, imports and exports, the regime of natural and legal persons, copyright, the regime of diplomatic and consular missions, etc[14].

Pursuant to art. 5 of the *Draft Articles on the Most-Favoured-Nation Clauses*[15], drafted by the International Law Commission in 1978, "the most-favoured-nation treatment is the treatment granted by the State granting the aid to the beneficiary State or to persons or property in a particular relationship with that State which is no less favourable than the treatment granted by the State granting the aid to a third State; persons or property in the same relationship with the third State concerned".

d. *The mixed regime*. This type of regime is a combination between the national regime and the most-favoured-nation clause regime, often encountered in international law relations.

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[7] Pursuant to art. 3 of GEO no. 194/2002, republished, with subsequent amendments and completions.

[8] Cornelia Ene-Dinu, *Istoria statului şi dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, p. 101. According to the Law of the Land, foreigners had the right to live in fairs and cities, to trade, to organize in their own communities, and to have their own churches. Foreigners could take roots by "becoming boyar" (granting the title of boyar), as a result of services rendered to the state, or by marrying a native woman ("earthling"), after having previously converted to the religion of their future wives. After having taken roots, foreigners acquired all civil and political rights" (Cornelia Ene-Dinu, *op. cit*.).

[9] Jean-Pierre Laviec, *Protection et promotion des investissements. Étude de droit international économique*, Graduate Institute Publications, Genève, 2015, pp. 79-115 (available at https://books.openedition.org/iheid/4195#ftn4, accessed on March 25, 2022).

[10] *Ibidem.*

[11] In terms of the normative definition of "discrimination", we hereby state that both the national law maker, and the community law maker defined "discrimination" as representing "different treatment applied to individuals in a comparable situation". In other words, to discriminate means to make a difference or distinction, to distinguish, reject or apply arbitrary or unequal treatment, in an unjustified way, between two persons or situations in comparable positions. Furthermore, differences, restrictions, exclusions or preferences related to an individual's characteristics are discriminatory if their purpose or effect is the reduction or exclusion of rights, opportunities or freedoms" (Marta Claudia Cliza, *What means discrimination in a normal society with clear rules*?, LESIJ no. XXV, vol. 1/2018, p. 90).

[12] *Affaire relative aux droits des ressortissants des États-Unis d'Amérique au Maroc*, Judgment of August 27, 1952, C.I.J. Recueil 1952, p. 192.

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[14] Alexandru Burian, Oleg Bălan, Olga Dorul (editors-coordinators), *Drept internațional public*, 5th ed., revised and added, Chisinau, 2021, p. 184.

[15] Available at https://legal.un.org/ilc/texts/instruments/french/commentaries/1_3_1978.pdf (accessed on March 25, 2022).

3. Expulsion and extradition

The interruption of the stay of foreigners in the territory of the host state can be accomplished in different ways. This is the case for *expulsion* or *extradition.*

a. *Expulsion* is "the act whereby a state compels one or more foreigners found in its territory to leave it, when they become undesirable, for committing acts of violation of the law or of the interests of the host state"[16]. The institution of expulsion has the following characteristics:

- it is a discretionary act of the state which has no obligation to justify it. In practice, however, the host state having adopted that measure, shall inform the state of which the foreigner is a national, of the reasons for which he/she was compelled to leave its territory;
- it is a coercive measure;
- through expulsion, the stay of a foreigner in the territory of a state is forcibly terminated, by forcing him/her (regardless of whether he/she is a foreign national or stateless) to leave the territory of the state that took that measure;
- the foreigner to whom this measure applies, must be declared undesirable for violating the law or the interests of the host state;
- leaving the territory must be done as soon as possible.

The measure of expulsion concerns only the foreigner who committed an act provided by the criminal law, but not his family. Expulsion is usually done to the country of which one is a citizen or, in the case of a stateless person, to the country where one is domiciled.

The measure of expulsion is usually taken for an indefinite period. There are also situations when it can be taken for a certain period, "when the cessation of the state of danger is related to a future event that is going to lead to the disappearance of circumstances that made the presence of"[17] the foreigner on the territory of the host state to be considered a state of danger".

Pursuant to art. 1 of Protocol no. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[18], a foreigner who has "his/her lawful residence in the territory of a state may be expelled only on grounds of the enforcement of a sentence given by law and must be able to: present the reasons supporting the pleading against his/her expulsion; request an examination of his/her case and request that he/she is represented for that purpose before the competent authorities or by one or more persons designated by that authority".

The Convention relating to the Status of Refugees, concluded in Geneva on July 28, 1951[19], provides, in art. 38, that "contracting States may expel a refugee who is lawfully in their territory only for reasons of national security or public order".

Pursuant to art. 4 of Protocol no. 4 in addition to the European Convention for the Protection of Human Rights and Fundamental Freedoms[20], "collective expulsions are prohibited".

b. *Extradition* is "the act by which a state delivers[21], at the request of another state and under certain conditions, a person in its territory who is presumed to be the perpetrator of a crime, to be on trial or to serve a sentence for which he/she has been previously convicted"[22].

The characteristics of extradition are the following: it is carried out pursuant to the agreement of free will expressed by each state involved, "respecting its sovereignty and independence"[23]; it is a bilateral, conventional act; it is a judicial act.

Depending on the role of the states involved in this procedure, extradition may be *active* - when requested or *passive* - if granted.

Depending on the position of the person whose extradition is requested, extradition may be *voluntary* - when the requested person agrees to the extradition or *forced* - when the extradition decision is taken despite the opposition of the extradited person[24].

Extradition is required under a multilateral or bilateral convention. It should be noted that, at EU

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[16] Dumitra Popescu, Felicia Maxim, *Drept internațional public*, vol. 1, Renaissance Publishing House, Bucharest, 2011, p. 100.

[17] Aurel Teodor Moldovan, *Expulzarea, extrădarea și readmisia în dreptul internațional*, 2nd ed., revised and added, Hamangiu Publishing House, Bucharest, 2021, p. 131.

[18] Signed in Strasbourg, on November 22, 1984. Romania became a party to the protocol, by Law no. 30/1994 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Additional Protocols to this Convention, published in the Official Gazette of Romania, Part I, no. 135 of May 31, 1994.

[19] Romania became a party to the Convention, by Law no. 46/1991 for the accession of Romania to the Convention on the Status of Refugees, as well as to the Protocol on the Status of Refugees, published in the Official Gazette of Romania, Part I, no. 148 of July 17, 1991.

[20] Signed in Strasbourg, September 16, 1963. Romania became a party to the Protocol, by Law no. 30/1994 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Additional Protocols to this Convention, published in the Official Gazette of Romania, Part I, no. 135 of May 31, 1994.

[21] At European Union level, surrender procedures between Member States are based on the Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States. "The decision improves and simplifies judicial procedures to speed up the return from another EU Member State of persons who have committed a serious crime" (Alina Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, pp. 96-97).

[22] Dumitra Popescu, Felicia Maxim, *op. cit.*, p. 100.

[23] Aurel Teodor Moldovan, *op. cit.*, p. 201.

[24] Dan Lupașcu, Mihai Mareș, *Extrădarea pasivă. Aspecte teoretice și practice*, Universul Juridic Premium no. 10/2017 (https://www.universuljuridic.ro/extradarea-pasiva-aspecte-teoretice-si-practice/, accessed on October 20, 2021).

level, "the European arrest warrant replaces the extradition system. Under this, each national judicial authority has the obligation to recognize and act, with a minimum of formalities and within a certain timeframe, following requests made by the judicial authority of another Member State of the European Union"[25].

In order for a person, located on the territory of Romania, to be extradited to the state requesting extradition for the purpose of criminal prosecution, trial or execution of a sentence, it is necessary to meet the conditions provided by Law no. 302/2004 on international judicial cooperation in criminal matters[26], republished with subsequent amendments and completions.

Romanian citizens can only be extradited if the following conditions are met:

- there must be a multilateral international convention, to which Romania is a party and on grounds of reciprocity, if at least one of the following conditions is met: the extraditable person resides in the territory of the requesting state at the date of the extradition request; the extraditable person also has the nationality of the requesting state; the extraditable person committed the act in the territory or against a national of a Member State of the European Union, if the requesting State is a member of the European Union;

- if the extraditable person resides in the territory of the requesting State at the time of the extradition request or the extradited person committed the act in the territory or against a national of a Member State of the European Union, if the requesting State is a member of the European Union and extradition is requested in order to be prosecuted or on trial, an additional condition is that the requesting State provides sufficient assurance that, if convicted of a custodial sentence by a final judgment, the extradited person will be transferred for the execution of the sentence in Romania.

Romanian citizens may also be extradited under the provisions of bilateral treaties and on grounds of reciprocity.

4. The right to asylum

The right to asylum is "the right of a sovereign state to grant entry and establishment in its territory of foreigners, pursued in their country for political, scientific, religious activities (which are not in accordance with the rule of law of that state)"[27]. The right to seek and enjoy asylum cannot be invoked by persons for whom there are serious grounds for believing that they have committed a crime against peace, a war crime or a crime against humanity, within the meaning of international legal instruments developed in this direction[28].

Art. 14 para. 1 of the Universal Declaration of Human Rights of 1948 proclaims the right of any person who is a victim of persecution "to seek asylum and to enjoy asylum in other states".

"The kind of ambiguous wording of the article (because receiving the right to asylum is not in question) is the result of a compromise between the states that considered this form of protection as an aspect of their territorial sovereignty and those that supported the idea that people had the right to be granted asylum"[29].

Therefore, the right of the state to grant asylum in its territory, to foreigners who are politically, racially or religiously persecuted in their country of origin derives from the exclusive character of its territorial jurisdiction, which means that *we are not in the presence of a person's right to claim asylum protection or of a proper obligation on States to grant asylum.*

The asylum is different from the refugee status, as the former is the institution of protection, while the latter refers to one of the categories of persons, among others, who benefit from such protection.

In international law, a distinction is made between *territorial asylum* and *diplomatic asylum.*

a. *Territorial asylum* - is the form of asylum by which a state grants to a person, under certain conditions, protection in its territory. Granting asylum is tantamount to refusing to extradite the person to whom it is granted.

In 1967, the UN General Assembly adopted the *Declaration on Territorial Asylum*[30]. The preamble to the Declaration states that the granting of asylum by a state is "a peaceful and humanitarian act and, as such, cannot be regarded as "an unfriendly act, unfavourable to another state. The 4 articles of the Declaration constitute as many features of the territorial asylum. Thus:

- granting asylum is a manifestation of the sovereignty of the state, and its decision must be complied with by all other states;

[25] Alina Mihaela Conea, *op. cit.*, pp. 96-97.
[26] Published in the Official Gazette of Romania, Part I, no. 594 of July 1, 2004.
[27] Adrian Năstase, Bogdan Aurescu, *Drept international public. Sinteze*, 9th ed., C.H. Beck Publishing House, Bucharest, 2018, p. 154.
[28] Pursuant to art. 1 para. 2 of the *Declaration / Projet de Convention sur l'asile territorial* (available at https://www.unhcr.org/en/4f5f12929.pdf, accessed on January 4, 2022).
[29] According to Guy S. Goodwin-Gill, Directeur de recherche et professeur de droit international des réfugiés (All Souls College, Oxford), *Déclaration de 1967 sur l'asile territorial*, available at https://legal.un.org/avl/pdf/ha/dta/dta_f.pdf; accessed on January 4, 2022).
[30] Adopted by UN General Assembly Resolution no. 2312 (XXII) of December 14, 1967.

- asylum cannot be granted to persons prosecuted, "for ordinary crimes or crimes against humanity, within the meaning of international instruments drawn up for the prosecution of such crimes"[31];

- each state has the power to determine, by internal rules, the reasons for granting asylum;

- in the event that a state "encounters difficulties in granting or continuing to grant asylum, states shall consider, individually or jointly or through the United Nations, the measures to be taken, in a spirit of international solidarity, to ease the task on this state"[32];

- the person to whom asylum has been granted, "may not be the subject of measures such as refusal of entry at the border or, if he/she has already entered the territory in which he/she has applied for asylum, of measures of expulsion or deportation in any state where there is a risk of persecution"[33]. Exceptions may be admitted only for exceptional reasons of national security or for the protection of the population or in the event of a "massive influx of persons"[34];

- "states granting asylum must not allow asylum seekers to engage in activities contrary to the purposes and principles of the United Nations"[35].

b. *Diplomatic asylum* - consists in the reception and protection granted in the premises of embassies or consular offices in a state, of some citizens of this state pursued by their own authorities or whose lives are in danger due to internal events. Although diplomatic asylum is not recognized as a legal institution in international law, it "has been practiced, as a local custom or pursuant to international conventions, between some Latin American states"[36].

In this regard, we mention the Asylum Convention, concluded in Caracas on March 28, 1954. It entered into force on December 29, 1954, with the deposit of the second instrument of ratification with the General Secretariat of the Organization of American States. The Convention regulates the possibility of granting asylum in "any headquarters of a diplomatic mission, in the residence of the Heads of Mission and in the spaces which they have allocated for the accommodation of asylum seekers when their number exceeds the normal capacity of asylum seekers. According to the Convention, each state has the discretionary right to grant asylum, without being obliged to grant it or to explain why it refused it. Pursuant to art. 3, asylum cannot be granted "to persons who, at the time of application, are charged or prosecuted for common law offenses or who have been convicted by the competent courts and have not served their sentence".

The Havana Pan American Convention on the Right to Asylum[37] also stipulates that, under certain conditions, asylum may be granted in foreign embassies to a political refugee who is a national of the territorial state. In this regard, for example, we draw attention to the ruling of the International Court of Justice in the *Colombian-Peruvian Asylum Case*[38]: in this case, the Colombian Embassy in Lima granted to Mr. Haya de la Torre - a Peruvian citizen, diplomatic asylum. He was a politician accused of provoking a military rebellion. The dispute between Peru and Colombia was settled by the ICJ. The dispute focused on the question whether the State of Colombia, as a State granting asylum, had the right to "qualify" by itself, obligatorily for the territorial State, the nature of the refugee's offense, that is, to determine whether the offense was of political nature or of common law. In addition, the Court was called upon to decide whether or not the territorial state was obliged to provide the necessary guarantees to allow the refugee to leave the country, safely. In its judgment of November 20, 1950, the Court answered those two questions in a negative manner, stating at the same time that Peru had not proved that Mr. Haya de la Torre was a common law offender. It finally accepted a counterclaim from Peru, alleging that Mr. Haya de la Torre had been granted asylum in violation of the Havana Convention. The day after the ruling of November 20, 1950, Peru asked Colombia to hand over Mr. Haya de la Torre. Colombia refused to do so, arguing that neither the law in force nor the Court's ruling required to hand over the refugee to the Peruvian authorities. The Court upheld that argument in its judgment of June 13, 1951. The Court found that the issue was new and that, while the Havana Convention expressly required the surrender of common law offenders to local authorities, there was no obligation whatsoever for political criminals. Although it confirmed that the diplomatic asylum had been granted irregularly and that Peru was therefore justified in seeking its cessation, the Court stated that the State of Colombia was not obliged to surrender the refugee. These two conclusions that the Court stated,

[31] Art. 1 para. (2).
[32] Art. 2 para. (2).
[33] Art. 3 para. (1).
[34] Art. 3 para. (2).
[35] Art. 4.
[36] Adrian Năstase, Bogdan Aurescu, *op. cit.*, p. 155.
[37] Adopted at Havana, on February 20, 1928, and entered into force on May 21, 1929.
[38] Judgment of November 20, 1950, C.I.J. Recueil 1950, p. 266.

are not contradictory, because there are also other ways to end asylum than handing over the refugee[39].

5. Conclusions

The importance and significance of the legal regime for foreigners, in domestic and international law, is constantly being strengthened. It is permanently related to the evolutions registered, both by the domestic society, but also, necessarily correlatively, by the international society. Therefore, it is expected that such a consolidation will materialize in the approach of new dimensions in which man occupies the central position, with all the inevitable technical-scientific developments.

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[39] ICJ judgment in the *Haya de la Torre case*, June 13, 1951 : C.I.J. Recueil 1951, p. 7.

REQUIREMENTS REGARDING THE QUALITY OF THE LAWS HIGHLIGHTED IN THE RECENT JURISPRUDENCE OF THE CCR

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Abstract

The quality of the laws represents a requirement that derives from the principle of legality, enshrined at the constitutional level, thus representing a reference norm in the constitutionality review. The recent jurisprudence of the CCR reveals a frequent approach consisting in examining the constitutionality of legal provisions in relation to the constitutional provisions that establish the obligation to observe the laws in the rule of law. The study proposes an analysis from the perspective of the recent jurisprudential guidelines in the matter, addressing mainly the situations in which the CCR has sanctioned the lack of precision, clarity, predictability or accessibility of some legal norms. Through the a priori constitutionality review, the prevention of the entry into force of some deficient legal provisions was achieved, the considerations of the Court being a real benchmark for the primary legislator. Through the a posteriori constitutionality review, it resulted that, in some cases, legal provisions in the field of criminal law, civil law, administrative law or labour law or in the field of legislative technique rules etc. contained deficient norms, contrary to the constitutional rules and which, through their content, created real obstacles in their understanding and application, creating difficulties for their recipients to adopt an appropriate behaviour.

The role of the CCR as guarantor of the supremacy of the Constitution is thus highlighted, with concrete consequences in terms of defending fundamental rights and freedoms, as well as ensuring loyal cooperation between public authorities and institutions.

Keywords: *quality of the laws, rule of law, legal security, constitutional review, fundamental rights and freedoms.*

1. Introduction

Consecrating the character of the rule of law, which capitalizes on the historical idea according to which the rulers must submit to legal rules, the Romanian Constitution establishes in art. 1 one of the fundamental principles, the principle of legality, which imposes, through para. (5) the obligation to respect the Constitution, its supremacy and the laws. The obligation established by the constitutional text has an *erga omnes* character, targeting both citizens and public authorities. Thus, the "*rule of law*" becomes a legal feature of the rule of law, implying the priority of law over the state, through a series of legal and political mechanisms capable of limiting and eliminating any discretionary conduct, which must be manifests exclusively within the limits of a law that expresses the general will.

As noted in the literature, the notion of "law" has two meanings. In a broad sense (*lato sensu*), the law designates any legal act that includes binding rules, legal norms, which must be carried out voluntarily, or, in case of refusal, by the coercive force of the state. In a narrow sense (*stricto sensu*), the law is identified exclusively with the legal act adopted by the Parliament, as the only legislative authority, elaborated in accordance with the Constitution, adopted according to a pre-established procedure, clearly defined, and regulating the most important and general social relations[1].

Compliance with the law is mandatory, while a subject of law cannot be required to comply with a law that is not clear, precise and predictable, as he cannot adapt his conduct according to the normative hypothesis of the law. Therefore, the constitutional rigor requires the primary legislator, the Parliament, and the delegate, the Government, to pay special attention to the adoption of normative acts (laws, ordinances and emergency ordinances), so that their application does not allow arbitrary or abusive conducts. Normative acts that respect the criteria of clarity, precision and predictability is more necessary, as the law benefits from supremacy over the rest of the law (obviously with the exception of the Constitution). Consequently, the legal rules developed in the application and enforcement of laws would themselves be deficient if the law under which they were adopted did not comply with those requirements.

In detailing the constitutional norms, Law no. 24/2000 regarding the norms of legislative technique for the elaboration of normative acts[2], establishes a series of technical rules regarding the drafting style, special regulations and derogations and the avoidance

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[1] See I. Muraru, E.S. Tănăsescu, *Constitutional Law and Political Institutions*, vol. II, 14th ed., C.H. Beck Publishing House, Bucharest, p. 210.

[2] Republished in the Official Gazette of Romania, Part I, no. 260 of April 21, 2010.

of parallelisms. Thus, "*the legislative text must be formulated clearly, fluently and intelligibly, without syntactic difficulties and obscure or equivocal passages. Affective terms are not used. The form and aesthetics of the expression must not prejudice the legal style, the precision and the clarity of the provisions* "(art. 8 para. 4 of the law). "The *regulation is derogatory if the legislative solutions regarding a certain determined situation contain different norms in relation to the framework regulation in the matter, the latter keeping its general character obligatory for all other cases*." (art. 15 paragraph 3 of the law) . "*In the legislative process, it is forbidden to establish the same regulations in several articles or paragraphs of the same normative act or in two or more normative acts. The reference norm is used to underline some legislative connections* "(art. 16 paragraph 1 of the law). Of particular relevance is the opinion of the Legislative Council, a specialized body of the Parliament, having role in systematizing, unifying and coordinating the entire legislation.

Regarding the interpretation and application of the laws in the process of justice administration, art. 5 para. (2) of the Code of Civil Procedure states that "*No judge may refuse to judge on the grounds that the law does not provide, is unclear or incomplete*."

The topic of the fundamental principle of legality from the perspective of the quality standards of the law is highlighted by the numerous cases in which the provisions of art. 1 para. (5) of the Constitution were invoked as reference norms, both in the *a priori* and *a posteriori* constitutionality review. A brief look at the jurisprudence in the matter of the CCR in 2021 reveals over 300 cases in which the authors of the notifications of unconstitutionality invoked the violation of the provisions of art. 1 para. (5) of the Constitution, from different perspectives, for example: the unclear nature of the norms, the lack of request by the initiators of normative acts of the opinions of some bodies, such as the Legislative Council, the Economic and Social Council, the Fiscal Council, the passivity of the legislator Constitution of the legal norms found to be unconstitutional.

In cases settled by the CCR in 2021, which are to be considered as examples, in this study, the CCR sanctioned provisions contained in laws and ordinances of the Government, finding that they do not meet the quality standards of the law and they are thus contrary to the constitutional norms previously mentioned.

2. Paper content

The approach of the principle of legality in the recent jurisprudence of the CCR reveals a series of considerations on this principle based on which the CCR developed legal reasoning to support the conclusion of violation of art. 1 para. (5) of the Constitution, or, on the contrary, compliance with these constitutional norms.

The Court, in its jurisprudence, has ruled that "the supremacy of the Constitution and the obligation to comply with the law constitute an essential feature of the rule of law"[3] and that "the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all normative acts with it"[4] which means that it "implies, as a matter of priority, compliance with the law, and the democratic state is par excellence a state in which the rule of law is manifested"[5]. At the same time, "the principle of security of civil legal relations constitutes a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of art. 1 para. (3) of the Constitution" [6].

The Court also stated that "the principle of legality is one of constitutional rank"[7], so that the immediate consequence of the law violation is the disregard of art. 1 para. (5) of the Constitution, which provides that the compliance with the law is mandatory. Violation of this constitutional obligation implicitly affects the principle of the rule of law, enshrined in art. 1 para. (3) of the Constitution"[8].

The Court emphasized that one of the requirements of the principle of compliance with the law is the quality of normative acts. In this regard, the Court found that "any normative act must meet certain qualitative conditions, including predictability, which presupposes that it must be sufficiently clear and precise to be enforceable; thus, the wording with sufficient precision of the normative act allows the interested persons - who can call, if necessary, on the advice of a specialist - to foresee to a reasonable extent, in the circumstances of the case, the consequences that may result from a certain act. Of course, it can be difficult to draft laws of total precision and certain

[3] See, to that effect, Decision no. 232 of 5 July 2001, Official Gazette of Romania no. 727 of 15 November 2001, Decision no. 234 of 5 July 2001, Official Gazette of Romania no. 558 of 7 September 2001, or Decision no. 53 of 25 January 2011, Official Gazette of Romania no. 90 of 3 February, 2011.

[4] Decision no. 22 of 27 January 2004, Official Gazette of Romania no. 233 of 17March 2004.

[5] Decision no. 13 din 9 February 1999, Official Gazette of Romania no. 178 of 26 April, 1999.

[6] In this sense, Decision no. 570 of 29 May 2012, Official Gazette of Romania no. 404 of 18 June 2012, Decision no. 615 of 12 June 2012, Official Gazette of Romania no. 454 of 6 July 2012, Decisions no. 980 and no. 981 of 22 November 2012, Official Gazette of Romania no. 57 and, respectively, no. 58 of 25 January 2013).

[7] See Decision no. 901 of 17 June 2009, Official Gazette of Romania no. 503 of 21 July 2009.

[8] Decision no. 783 of 26 September 2012, Official Gazette of Romania no. 684 of 3 October 2012.

flexibility may even prove desirable, which does not affect the predictability of the law"[9]

Regarding the incidence of the norms of legislative technique within the constitutionality control, the Court also showed that although they "have no constitutional value, [...] by regulating them the legislator imposed a series of mandatory criteria for the adoption of any normative act, whose compliance is necessary to ensure the systematization, unification and coordination of legislation, as well as the appropriate content and legal form for each normative act. Thus, compliance with these rules contributes to ensuring legislation that respects the principle of security of legal relations, having the necessary clarity and predictability "[10]. Therefore, "non-compliance with the norms of legislative technique determines the appearance of situations of incoherence and instability, contrary to the principle of security of legal relations in its component regarding the clarity and predictability of the law" [11].

Through its jurisprudence, the CCR has capitalized on the jurisprudence of the ECtHR and the CJEU, which addressed the notions of "clarity of law" and "security of legal relations".

Thus, the ECtHR has ruled that the phrase "provided by law" means not only a certain legal basis in domestic law, but also the quality of the law in question: thus, it must be accessible and predictable[12]. The Court has also held, in accordance with its settled case-law, that the phrases "prescribed by law [...] relate [...] to the quality of that law: they require that it be made accessible to allows them, with the advice of wise advice, to foresee, at a reasonable level in the circumstances of the case, the consequences that could result from a certain action"[13].

The jurisprudence of the ECtHR has also established that "the principle of security of legal relations derives implicitly from the Convention for the Protection of Human Rights and Fundamental Freedoms and is one of the fundamental principles of the rule of law"[14].

The ECtHR has also ruled that "once the state adopts a solution, it must be implemented with reasonable clarity and consistency in order to avoid as far as possible legal uncertainty and uncertainty"[15]

Similarly, the case law of the CJEU has implicitly recognized the need to comply with the legitimate expectations of citizens subject to legal regulation[16].

In relation to these considerations of principle, it was concluded that compliance with the law is a "fundamental obligation in the rule of law, and any action by public authorities must be subject to this objective". Moreover, the CCR has consistently ruled that "the principle of the supremacy of the Constitution and the principle of legality are the essence of the requirements of the rule of law, within the meaning of the constitutional provisions of art. 16 para. (2), according to which "*No one is above the law*"[17].

In order to highlight in a concrete way the recent jurisprudence of the CCR has approached the principle of legality, including in terms of the quality requirements of the law, some of the cases solved in the field of criminal, civil, financial, labour law or in the area of legislative technique are to be presented.

In the area of criminal law

On the occasion of resolving the exception of unconstitutionality of the provisions of the second sentence of art. 136 (2) and art. 137 (3) of the Criminal Code[18], the Court found that the phrase "turnover", to which these provisions refer, does not meet the quality requirements of the law deriving from art. 1 para. (5) of the Constitution. In addition, in criminal matters, art. 23 para. (12) of the Basic Law enshrines the rule according to which "*No punishment may be established or applied except under the conditions and under the law*" (Decision no. 265 of 6 May 2014, published in the Official Gazette of Romania, Part I, no. 372 of May 20, 2014, paragraph 20). Thus, the principle of legality applies to criminality (*nullum crimen sine lege*), sanction (*nulla poena sine lege*) and liability (*nullum judicium sine lege*). In order to reach this solution, the Court noted that, in Title X - Meaning of some terms or

[9] In this regard, Decision no. 903 of 6 July 2010, Official Gazette of Romania no. 584 of 17 August 2010, Decision no. 743 of 2 June 2011, Official Gazette of Romania no. 579 of 16 August 2011, Decision no. 1 of 11 January 2012, Official Gazette of Romania no. 53 of 23 January 2012, or Decision no. 447 of 29 October 2013, Official Gazette of Romania no. 674 of 1 November 2013.

[10] Decision no. 26 of 18 January 2012, Decision no. 681 of 27 June 2012, Official Gazette of Romania no. 477 of 12 July 2012, Decision no. 448 of 29 October 2013, Official Gazette of Romania no. 5 of 7 January 2014.

[11] Decision no. 26 of 18 January 2012 and Decision no. 448 of 29 October 2013, previously cited.

[12] Judgment of 4 May 2000, delivered in the Rotaru v. Romania case, para. 55, Judgment of 16 February 2000, in the Amann v. Switzerland case, para. 50.

[13] Judgment of 8 June 2006, in the Lupşa v. Romania case, para. 32.

[14] Judgments of 6 December 2007, 2 July 2009, 2 November 2010, 20 October 2011 or 16 July 2013 in Beian v. Romania (no. 1), para. 39, Jordan Iordanov and Others v. Bulgaria, para. 47 , Ştefănică and Others v. Romania, para. 31, Nejdet Şahin and Perihan Şahin v. Turkey, para. 56, and Remuszko v. Poland, para. 92.

[15] Judgment of 1 December 2005 in Păduraru v. Romania, para. 92, Judgment of 6 December 2007 in Beian v. Romania (no. 1), para. 33.

[16] *E.g.* Case C-459/02 Willy Gerekens and Others. Procol Agricultural Association for the promotion of the marketing of dairy products against the Grand Duchy of Luxembourg, para. 23 and 24, or the judgment of 29 June 2010 in Case C-550/09 - Criminal proceedings against E. and F., para. 59.

[17] Decision no. 53 of 25 January 2011, precited.

[18] Decision no. 708 of 28 October 2021, Official Gazette of Romania no. 1160 of 7 December 2021.

expressions in the criminal law, of the General Part of the Criminal Code, the definition of the phrase "turnover" is not found. Therefore, the criminal law in force does not establish the meaning of the phrase "turnover" in relation to which the court determines the amount corresponding to a fine day in the case of setting a fine for a for-profit legal entity. Even if the definitions of "turnover" are established by extra-criminal, tax and competition law, they have limited applicability and their translation in criminal matters is contrary to the principle of legality.

At the same time, the Court found that the criminal rule criticized is deficient in terms of determining / withholding, from a temporal point of view, the turnover of the for-profit legal entity in relation to which the court determines the amount corresponding to a fine day. In these circumstances, the Court found that the provisions of the second sentence of art. 137 (3), as regards the phrase "turnover", do not comply with the constitutional requirements regarding the quality of the law, respectively do not meet the conditions of clarity, precision and predictability, being contrary to the provisions of art. 1 para. (5) of the Constitution.

In solving the exception of unconstitutionality of art. 346 para. (3) letter b) of the Code of Criminal Procedure[19], in connection with the invocation of the violation of art. 1 para. (5) of the Constitution, the Constitutional Court addressed the issue of passivity of the legislator, who did not act in the sense of reconciling the provisions declared unconstitutional with the provisions of the Constitution, as established by the Court by a previous decision (Decision no. 22 of January 18, 2018, published in the Official Gazette of Romania, Part I, no. 177 of February 26, 2018).

The Court emphasized that the passivity of the legislator may lead to inconsistencies and instability, contrary to the principle of security of legal relations in its component regarding the clarity and predictability of the law (see, Decision no. 392 of 6 June 2017, published in Official Gazette of Romania, Part I, no. 504 of June 30, 2017, para. 51, 56 and 57, and Decision no. 163 of May 26, 2020, published in the Official Gazette of Romania, Part I, Part I, no. 729 of August 12, 2020). However, the Constitutional Court does not have the power to fulfil the normative defect invoked by the authors, in the sense of pronouncing a new decision of unconstitutionality, as it would exceed its legal attributions, acting in the exclusive sphere of competence of the legislator, so that the exception of unconstitutionality of the provisions of art. 346 para. (3) letter b) of the Code of Criminal Procedure was rejected as inadmissible.

During the *a priori* constitutional review, before the promulgation of the law[20], the Court found that the amendment of art. 369 of Law no. 286/2009 on the Criminal Code, which regulates the crime of inciting violence, hatred or discrimination, lacks clarity, precision and predictability, which represents a problematic aspect and from the perspective of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as from the perspective of other fundamental requirements of the rule of law, this wording being the premise of arbitrary interpretations and applications. However, the consequences of the application of criminal law are among the most serious, so that the establishment of guarantees against arbitrariness by regulating clear and predictable rules is mandatory.

Thus, by amending the provisions of art. 369 of the Criminal Code, the legislator is limited to completing the scope of dangers on which the active subject of the crime incites the public (adding violence) and the scope of passive subjects of the crime (adding the person who is part of the a certain category/group), without limiting the existence of the material element of the crime of incitement to violence, hatred or discrimination to certain criteria, so without operating an express circumstance of the grounds that may lead to violence, hatred or discrimination.

The lack of circumstances regarding the material element and the immediate prosecution of the crime of incitement to violence, hatred or discrimination make it difficult and sometimes impossible to delimit criminal liability from other forms of legal liability, with the consequence of opening criminal investigation proceedings, prosecution and conviction of persons inciting the public, by any means, to violence, hatred or discrimination against a particular person or against a person on the grounds that he or she belongs to a certain category of person, regardless of the reason for the discrimination or the extent of the harm.

In these circumstances, emphasizing that in exercising the power to legislate in criminal matters, the legislator must take into account the principle according to which the criminalization of a deed must intervene as a last resort in protecting a social value, guided by the principle of *ultima ratio*, and its action has to be supported by a certain degree of intensity, gravity of the deed, which would justify the criminal sanction. The Court found that the criticized provisions, by allowing the configuration of the material element of the objective side of the offense of inciting violence, hatred or discrimination through the activity of bodies other than the legislature (Parliament), pursuant to art. 73 para. 1) of the Constitution, or the Government,

[19] Decision no. 637 of 19 October 2021, Official Gazette of Romania no. 1155 of 6 December 2021.
[20] Decision no. 561 of 15 September 2021, Official Gazette of Romania no. 1076 of 10 November 2021.

based on the legislative delegation provided by art.115 of the Constitution, are lacking in clarity, precision and predictability and contravene the principle of legality of incrimination, provided by art. 1 of the Criminal Code and art. 7 of the Convention for the Protection of Human rights and Fundamental Freedoms, and, consequently, the provisions of art. 1 para. (5) of the Constitution, which refers to the quality of the law, as well as of art. 23 of the Constitution, regarding individual freedom.

Solving the exception of unconstitutionality of the provisions of art. 11 para. (3) of the GEO no. 78/2016 for the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism[21], as well as for amending and supplementing some normative acts, Constitutional Court highlighted that the imprecise formulation of the special norm of criminal procedural law, which establishes rules regarding the competence to carry out criminal prosecution, affects the right to a fair trial, enshrined in art. 21 para. (3) of the Constitution and of art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The criticized legal provisions according to which "*In case he orders the disjunction during the criminal investigation, the prosecutor from the Directorate for the Investigation of Organized Crime and Terrorism Crimes may continue to carry out the criminal investigation in the disjointed case as well*." introduce the arbitrary in the application of the criminal procedural provisions that regulate the competence of the criminal investigation bodies. The criticized norm leaves at the disposal of the prosecutor within the Directorate for the Investigation of Organized Crime and Terrorism the assumption or not on the competence to carry out the criminal investigation in each case that falls within the hypothesis of the criticized norm. Therefore, according to the criticized text, the subjective assessment of the prosecutor from the Directorate for the Investigation of Organized Crime and Terrorism regarding the maintenance of the disjointed case for resolution or its referral to the competent prosecutor's office according to the provisions of the Code of Criminal Procedure, lead to the conclusion that the legal provisions subject to control are unpredictable. The defendant in question, even using the services of a lawyer, is not able to understand the manner in which the settlement of the criminal case in which he has the aforementioned quality will be carried out. The lack of predictability of the criticized text of law determines the violation of the right to a fair trial, as it is regulated in art. 21 para. (3) of the Constitution and art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutional requirements of art. 1 para. (5).

An identical solution was pronounced by the Court regarding a similar legislative solution contained in the provisions of art. 13 para. (5) of the GEO no. 43/2002[22].

Solving the exception of unconstitutionality of the provisions of art. 52 para. (3) of the Code of Criminal Procedure[23], according to which "Final decisions of courts other than criminal ones on a preliminary issue in criminal proceedings have the authority before the criminal court, except for the circumstances regarding the existence of the crime.", the Court found that the phrase "except for the circumstances regarding the existence of the crime " is contrary to the provisions of art. 1 (3) and (5) of the Constitution, the provisions of art. 6 of the Convention and the provisions of art. 21 (3) of the Constitution on the right to a fair trial. In essence, the Court held that the phrase "except for the circumstances regarding the existence of the crime" in the provisions of art. 52 para. (3) of the Code of Criminal Procedure allows the criminal court to resume the trial on some aspects of the criminal case settled, definitively, by other courts and, thus, to become a court of judicial control over the final decisions of other courts on matters relating to the existence of the crime. In this way, the criminal court can pronounce opposite solutions to the final ones, affecting the principle of *res judicata*, which is a guarantee of the right to a fair trial. In relation to the quality standards of the law, the mentioned phrase lacks clarity, precision and predictability, because the scope of its incidence cannot be determined, correctly and uniformly, by the courts, when solving criminal cases, and, even more, by the other recipients of the law, even if they would benefit from specialized advice.

In the area of civil law

Resolving the objection of unconstitutionality of the Law on Consumer Protection against Excessive Interest[24], the Court sanctioned the defective manner in which the legislator used the technique of reference rules, which would have created the risk that the interpreter of the law would become a legislator himself, as he would establish the rule that he considers most appropriate, which is obviously inadmissible.

In essence, noting that the components of the definition of the Effective Annual Interest Rate resulting from the Consumer Protection Act against excessive interest cannot be harmonized, the Court found this definition unclear ("Effective Annual

[21] Decision no. 280 of 8 June 2021, Official Gazette of Romania no. 977 of 13 October 2021.
[22] Decision no. 231 of 6 April 2021, Official Gazette of Romania no. 613 of 22 June 2021.
[23] Decision no.102 of 17 February 2021, Official Gazette of Romania no. 357 of 7 April 2021.
[24] Decision no. 69 of 28 January 2021, Official Gazette of Romania no. 492 of 12 May 2021.

Interest Rate is the difference between the total cost of credit and the amount actually borrowed") and noted that the inaccuracy of the definition given makes it impossible for the recipients of the law, especially financial institutions, to understand the provisions of substantive law contained therein, in particular those concerning the prohibition of inserting excessive interest in contracts. Consequently, because the law subject to control imposed obligations that do not have an intelligible content, the Court found a violation of art. 1 para. (5) of the Constitution, in the component regarding the quality of the law.

In the area of labour law

Examining the criticism of the authors of the exception regarding the lack of clarity and predictability of the regulation of art. 111, of art. 120, of art. 121, of art. 122 para. (1), of art. 123 and of art. 229 para. (4) of Law no. 53/2003 - Labour Code[25], claiming that the courts are not unitary in interpreting the notions of "work" and "additional work", the Court held that art. 111 of Law no. 53/2003 - The Labour Code defines "working time" as any period during which the employee performs work, is available to the employer and performs his duties and responsibilities, according to the provisions of the individual employment contract, the applicable collective labour agreement and/or legislation in force. A similar regulation is found in the content of art. 2 point 1 of Directive 2003/88/EC, according to which working time "means any period during which the worker is at work, at the employer's disposal and carries out his activity or functions in accordance with national laws and practices".

In relation to these legal landmarks, the Court found that both the parties to the employment relationship and the courts have sufficient information to establish unequivocally the meaning of the texts of the law subject to constitutional review and to foresee the consequences of applying these legal rules. Consequently, the arguments of the authors of the exception concerning the unconstitutionality of the criticized rules were unfounded.

Examining the exception of unconstitutionality of some provisions contained in the Law no. 153/2017 on the remuneration of staff paid from public funds[26], the Court found that there was a legislative parallelism concerning the remuneration of staff in performance in concert institutions. Thus, Court noticed that two separate regulations on separate categories of staff from the occupational family "culture" include the same legislative solution. Thus, the phrase "other institutions of performances or concerts" is regulated both in point I and in point II of Chapter I of annex no. 3 to the Framework Law no. 153/2017. However, the two points, I and II, establish different values in terms of the basic salary for the year 2022 and different coefficients, (point I regulating higher values), which highlights the legislator's option to establish distinct categories of staff in the budget sector employed in performance and concert institutions, in respect of which the pay rules are different.

Due to its lack of clarity, precision and predictability, the phrase "other institutions of performances or concerts" contained in point I of Chapter I of Annex No. III to Framework Law no. 153/2017 created the normative premise that the establishment of basic salaries for staff in the budget sector employed in "other performance or concert institutions" to involve arbitrary procedures, which may lead, contrary to art. 16 of the Constitution, to establish equal legal treatment for different objective situations or different legal treatment for identical situations.

Thus, the Court found that the phrase "other institutions of performances or concerts" contained in point I of Chapter I of Annex no. III to the Framework Law no. 153/2017 violates art. 1 para. (5) of the Constitution in the component regarding the quality of the law, the recipients of the norm not having the objective possibility to adapt their conduct to the hypothesis of the analyzed legal norm.

Within the *a priori* constitutional review over the Law on some temporary measures regarding the competition for admission to the National Institute of Magistracy, the initial professional training of judges and prosecutors, the graduation exam of the National Institute of Magistracy, the internship and capacity examination of judges and prosecutors trainees, as well as in the competition for admission to the magistracy[27], the Constitutional Court sanctioned as unpredictable the legal provision contained in art. 18 of the law which does not establish the criteria and possibly the cases in which the person does not benefit from a "good reputation" and consequently, he/she cannot access the position of judge/ prosecutor.

Resolving the objection of unconstitutionality of the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and amending Law no. 304/2004 on the organization of the judiciary[28], the Court sanctioned legislative inconsistency consisting in regulating the conditions regarding the effective seniority of 7 years in the position of prosecutor or judge for the appointment in the position of prosecutor of the Directorate for the

[25] Decision no. 730 of 2 November 2021, Official Gazette of Romania no. 1153 of 3 December 2021.
[26] Decision no. 413 of 10 June 2021, Official Gazette of Romania no. 687 of 12 July 2021.
[27] Decision no. 187 of 17 March 2021, Official Gazette of Romania no. 478 of 7 May 2021.
[28] Decision no. 514 of 14 July 2021, Official Gazette of Romania no. 728 of 26 July 2021.

Investigation of Organized Crime and Terrorism Crimes or of the National Anticorruption Directorate, which are organised under the Prosecutor's Office attached to the High Court of Cassation and Justice. The Court stated that the benchmark for regulating the seniority required for access to the position of prosecutor in the specialized directorates is the one established by law for promotion to the position of prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice, namely 10 years of effective seniority, so that in no case can the standard of appointment be inferior to that of promotion to the aforesaid level.

The criticized text of the law departed from this legal orientation, which proved that it created an element of legislative inconsistency and did not integrate into all legislation. Hence, as it did not meet the quality requirements of the law, it violates the art. 1 para. 5 of the Constitution.

In the area of financial law

Resolving the objection of unconstitutionality of the provisions of art. I points 1-6, 8 and 9 of the Law for the approval of the GEO no. 135/2020 budgetary measures[29], by reference to the provisions of art. 1 para. (5) of the Constitution, the CCR approached an issue concerning the emergence of a regulatory vacuum: the abrogation by the law approving an emergency ordinance of a provision contained in the emergency ordinance (art. 42 of the GEO no. 135/2020) by which the Government modifies the value of the point of pension, in the sense of regulating a value lower than the one initially established by the Parliament.

Regarding this aspect, the Court specified that the abrogation of art. 42 of the GEO no. 135/2020 determines a state of legal insecurity, contrary to art. 1 para. (5) of the Constitution which enshrines the "legal security of the person, a concept that is defined as a complex of guarantees of a nature or with constitutional values inherent in the rule of law, in view of which the legislator has a constitutional obligation to ensure both natural and legal stability and the capitalization in optimal conditions of fundamental rights and freedoms". This abrogation would have created a legislative vacuum, since the abrogation of the Government amendment does not reinstate the initial rule of law.

In terms of legislative technique

Resolving the objection of unconstitutionality of the Law for amending and supplementing Law no. 24/2000 on the norms of legislative technique for drafting normative acts and amending Law no. 202/1998 on the organization of the Official Gazette of Romania[30], the CCR observed the existence of a legislative parallelism with regarding the operation of republishing the normative acts. Consequently, the Court found the violation of art. 1 para. (5) of the Constitution in its dimension regarding the quality of the law.

On the occasion of solving the exception of unconstitutionality of Law no. 161/2019 for amending and supplementing the GEO no. 24/2008 on access to its own file and exposing the Security[31], the CCR made a distinct analysis in relation to art. 1 para. (5) of the Constitution regarding the statement of reasons of the law, as an instrument of presentation and motivation, imposed by art. 30 para. (1) letter a) of Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts.

The Court stated that, in principle, it did not have the power to control the wording of the statement of reasons of the various laws adopted. The statement of reasons of the law has no constitutional significance. The fact that the statement of reasons is not sufficiently precise or does not clarify all the content aspects of the rule does not in itself lead to the conclusion that the rule itself is unconstitutional for that reason,

The unclear / imprecise / unpredictable character of a normative text cannot be a direct consequence of the incomplete / unclear / discordant character of the statement of reasons of the law. Therefore, the quality requirements of the law and the wording of the statement of reasons of the law are two different issues between which no causal relationship can be established. Instead, there is a functional relationship between them, in the sense that the statement of reasons of the law can help to better understand the normative provisions, especially the technical ones, which, by their nature, have a more difficult language to access. However, it is not the role of the Constitutional Court to analyze the consistency of this functional relationship in the light of the wording of the explanatory memorandum.

3. Conclusions

Given the multiple legal implications, the issue of the quality of normative acts from the perspective of constitutional requirements remains a permanent topic for the attention of state authorities, especially those involved in the complex legislative process (*e.g.* Parliament, Government, Legislative Council), of the authorities with a role in the interpretation and application of the law (the HCCJ and the other courts), as well as of the CCR, in its capacity as guarantor of the supremacy of the Constitution. Undoubtedly, the

[29] Decision no. 1 of 13 January 2021, Official Gazette of Romania no. 77 of 25 January 2021.
[30] Decision no. 78 of 10 February 2021, Official Gazette of Romania no. 186 of 24 February 2021.
[31] Decision no. 794 of 23 November 2021, Official Gazette of Romania no. 1198 of 17 December 2021.

supremacy of the Constitution and the laws is an essential feature of the democratic rule of law, which must be ensured by effective mechanisms for the correlation of all normative acts with the Basic Law.

The examples selected in the study show how problems related to aspects of legislative technique that have constitutional relevance, can be solved, so that, permanently, the supremacy of the Constitution subsists. Hence the importance and usefulness of the constitutional review mechanism exercised by the CCR, given that, as has been pointed out, legislative inaccuracy generates the violation of fundamental rights and freedoms. Or, in a state governed by the rule of law, such a situation is inadmissible, being absolutely necessary to correct it. "Errors in drafting normative acts must not be perpetuated in the sense of becoming a precedent in the legislative activity themselves"[32]

Highlighting the cases in which the Constitutional Court sanctioned the violation of the quality requirements of the law, as they derive from the provisions of art. 1 para. (5) and art. 23 para. (12) of the Constitution, as well as from the jurisprudence of the CCR, the ECtHR and the CJEU is, at the same time, an argument in support of upholding the principle of constitutional loyalty, circumscribed by art. 1 para. 5) of the Constitution, corroborated with the principle of good faith provided in art. 57 of the Constitution, considering that within the state activity, the proper functioning of public authorities, the principles of separation and balance of power, without any institutional blockages is essential.

Therefore, an effective constitutional review control mechanism to check the quality of laws, and to correct possible deviations, makes that the general desire to have good and fair laws a become a reality, for the benefit of all participants in state life.

Of course, there are no perfect laws, and "the relationship between what should be allowed in a democratic society and what should be forbidden is ordered by the common good."[33]

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[32] Decision no. 390 of 2 July 2014, Official Gazette of Romania, no. 532 of 17 July 2014, para. 32.

[33] See Marian Enache and Ştefan Deaconu, *Adopting the 1991 Constitution and Revising 2003, in the Constitution Day Tribute Volume, Messages and Reflections on the 30th Anniversary*, Coordinators Valer Dorneanu and Claudia-Margareta Krupenschi, Hamangiu Publishing House, 2022, p. 59.

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THE CHALLENGES AND DILEMMAS OF PhD STUDENTS IN DOCTORAL RESEARCH

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Abstract

This study aims to analyse, through a transitional justice approach, the reparations granted by the Romanian state to the victims of the communist regime. The paper will examine the role of reparations in transitional justice programs, the main sources of international law and legal doctrine regarding reparations, as well as the evolution of the Romanian legislation on compensations for the abuses caused by the communist dictatorship. Eventually, we will try to assess the significance of reparations for the legal order of Romania. The present paper intends to present a series of moral dilemmas that can be lived throughout the period in which PhD students are elaborating their PhD thesis. To this end, the first part of the paper, which is based on documentation, will present a series of nuances that are subtended by the concept of moral dilemma, offering a series of examples such as Plato's dilemma, the student's dilemma, as presented by Sartre or Sophie's dilemma. In the second part, the differences that exist between the evaluation grids proposed by ethical theories and the manner in which they can generate various types of moral dilemmas in the lived life of individuals will be mentioned. In the last part, examples of moral dilemmas that can be lived through by PhD students throughout their doctoral programme will be presented following direct observation and self-observation.

Keywords: *doctoral research, PhD students, moral dilemmas, ethics, deontology.*

1. Introduction

James Rosenau[1] states that while elaborating a PhD thesis, PhD students start on a search for *certainty* only to find that it resides in expressions such as "*apparently*", "*probably*", "*it seems that*". Throughout this research endeavour they will understand that these expressions are goods that are much more valuable than the title of doctor that will accompany their name because they reflect *self-discipline*, *modesty* and *integrity*. These traits cannot be easily attained, since, in fact, they are acquisitions that differentiate adults from children and that mark professional and personal maturity. In this process of maturing, PhD students are confronted by a series of questions such as: how to do good? how to act right? how to make it so that my moral principles are in agreement with my choices? how to behave so that my actions do not generate negative effects on others, so that I have the feeling that I did what was right to do?

These questions put the PhD students in the position of choosing between two contradictory obligations. The present paper intends to present a series of moral dilemmas that can be lived throughout the period in which PhD students are elaborating their PhD thesis. The paper represents an incursion into the analysis of certain ethical nuances, which are not very debated but are essential since they contribute to the re-evaluation of the responsibilities that the PhD students undertake throughout their doctoral programmes.

2. What are moral dilemmas?

The moral dilemma is that situation in which a person, found before *two contradictory actions*, is in the impossibility of accomplishing both, although they have moral reasons to fulfil each one of them.[2] The two contradictory actions represent moral obligations – requirements – that are identically stringent[3]. What are the particularities of a moral dilemma? Firstly, the person is asked to give course to each of the two actions (or with more contradictory actions). Secondly, the person can accomplish each of the actions *but* they cannot accomplish both or all actions at the same time.

The supporters of moral dilemmas appeal to arguments that are *phenomenological* in nature in order to sustain their explicative theoretical models. The phenomenological nature[4] considers as relevant the *feelings* of the person who experiences the conflictual situation generated by the existence of certain contradictory moral obligations. These feelings that follow the decision to act in a certain manner, to give course to one of the two moral obligations are called by

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[1] *Telephone Interview with James Rosenau, Teaching Political Science*, 1974, 1(2), pp. 266-280.

[2] Cecilia Tohăneanu, *Etică politică. Note de curs*, D.Cantemir University, Bucharest 2014, pp. 18-25; Ricardo de Oliveira-Souza & Jorge Moll, *Moral conduct and social behavior*, in Mark D' Esposito & Jordan H. Grafman, Handbook of Clinical Neurology, Elsevier, Amsterdam, 2019, vol. 163, pp. 295-315; Philippa Foot, Moral Realism and Moral Dilemma, The Journal of Philosophy, 1983, 80(7), pp. 379-398.

[3] Cecilia Tohăneanu, *Etică politică. Note de curs. …. op. cit.*, p. 18.

[4] Horgan, Terry & Mark Timmons, *Moral Phenomenology and Moral Theory*, Philosophical Issues, 2005, 15, pp. 56-77.

ethicists *residues or moral leftovers*.[5] The feelings that arise from the decision can be of the most diverse sort, so that the person can feel regret, guilt for having done something wrong or for not having done what they considered they should have done or ought to have done, according to context and all of the variables involved. In what follows, I will refer to two moral dilemmas when, *in the same situation, more than one moral principle would apply*. For instance, Plato considers that *justice* presupposes *telling the truth* and *settling one's debts, keeping their promises*.[6] Socrates nuances this perspective, adding that the rule regarding settling one's debts is debatable and depends on context, on the actors involved: returning a weapon borrowed by a friend with mental illness could be a risk for the community as a result of the unpredictable actions that can result from their illness.[7] Which moral prevails? Settling one's debts or protecting others from harm? In the present situation, the two moral norms are in conflict.

Sartre[8] presents the case of a student who lost his brother in the German offensive of 1940. The student lived with his mother, being her support, as the only son left. The student wished to avenge the death of his brother. Sartre describes him as being torn between two types of morality. On the one hand, there is *the personal devotion* towards his mother, the expression of a restricted –but certain-, morality and, on the other hand, *the attempt to contribute to the defeat of an unjust aggressor*, which translates a more vast –but uncertain- morality.

In other situations, the same moral principle represents the source of certain contradictory obligations.

Such a case that exemplifies the manner in which the same moral percept generates contradictory obligations is presented by William Styron, in *Sophie's Choice*.[9] Styron tells that Sophie and her two children were in a Nazi concentration camp. A guard tells Sophie that *one* of her two children will be left alive while the other will be killed; the guard asks Sophie to *decide which child will be killed*. Sophie can prevent the death of either of her children, but only by condemning the other to death. Moreover, Sophie is told that *if she doesn't choose, both her children would be killed*. Sophie *has a strong moral motivation to choose one of her children* and *just as strong a motivation to save them both*.

From what has been mentioned thus far, it can be deduced that moral dilemmas are situations in which a person, found before two contradictory obligations, does not know what to decide which of the two obligations is prevalent, which one they should fulfil. In most cases, moral dilemmas such as the ones previously mentioned are negated by utilitarians.[10] They consider that the obligation in such situations is to choose the best variant. Sophie thus *must* act to save one of her children, since this is the single and best choice in the given situation. However, reality's nuances are multiple, considering that individuals live in communities and are in a permanent exchange of information with their peers, in order to fulfil their daily tasks both personally, professionally and socially.

3. Possible explanations for moral dilemmas

Duty-based ethics -also called deontology- is based on the imperative of respecting norms, *virtue ethics* is based on moral valences that define a *good character*, while *utilitarians*, based on the selfish scope of individuals, consider actions that maximize pleasure as moral. By comparison to *duty-based ethics* which *a priori* established what is right/moral, utilitarians advance the idea that there is no right *as such*, it being dependant on each single individual. *Virtue ethics* - Aristotle- proposes a more balanced perspective, considering that individuals have the freedom to judge, in each given situation, those behavioural traits that make it relevant from a moral point of view. However, this judgement is shaped through processes of socialization and through the influence that the main moral agents have over individuals, throughout their lives.

These ethical systems (duty-based ethics - deontology-, virtue ethics, and utilitarianism) define morality and, namely, what is *good*, *right*, *proper*. Thus, they propose a set of norms that guide people's behaviour and activity: how they should behave, what to do to do good and not harm, etc. Moreover, these normative grids proposed by the ethical systems represent standards according to which individuals' activities are evaluated. According to these grids

[5] Georgiana Morley et al., *What is 'moral distress'? A narrative synthesis of the literature*, Nursing Ethics, 2019, 26(3), pp. 646-662.

[6] Terrance McConnell, *Moral Dilemmas*, în Edward Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, (CA: Stanford University, 2018), available at la https://plato.stanford.edu/entries/moral-dilemmas/, accessed April 2022.

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[8] Nigel Warburton, *A student's guide to Jean-Paul Sartre's Existentialism and Humanism*, available at*:* https://philosophynow.org/issues/15/A_students_guide_to_Jean-Paul_Sartres_Existentialism_and_Humanism, accessed April 2022.

[9] Carolyn Durham, *William Styron's Sophie's Choice: The Structure of Oppression*, *Twentieth Century Literature*, 1984, 30(4), pp. 448-464.

[10] Cecilia Tohăneanu, *Etică politică … op. cit.*, Daniel M. Bartels & David A. Pizarro, *The mismeasure of morals: Antisocial personality traits predict utilitarian responses to moral dilemmas*, *Cognition*, 2011, 121(1), pp. 154-161.

proposed by ethical theories, human behaviours are considered *moral* or *immoral*. *Moral dilemmas* are generated as a result of the interactions between the grids for ethical evaluation and individual personality structures.

Duty-based ethics (*deont* – duty; *logos* – discourse, science) is an ethics based on "duty" or "obligation": human beings act in a certain way because they have the duty to act that way. Kant, as a central figure of duty-based ethics, considers that to be normal means to act according to duty (*deont*) or obligations: "act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means."[11] Kantian ethics[12] established *a priori* what is right/moral, in other words, the two concepts are *precursor to the experience* of individuals and *independent* proposing *a universal code of norms* for moral behaviour. Human behaviour conforms to a universal standard, to certain rules that need to be followed in any circumstance: "act always so that you respect every human."[13]

Ross, considered a representative of contemporary duty-based ethics, proposes a more flexible, pluralist perspective, namely, a set of duties considered as fundamental and to which human behaviour conforms. Thus, Ross[14] proposes the following duties: *benevolence* -the duty to help others-, *to do no harm* -the duty to avoid doing harm to others-, *justice* -the duty to guarantee people that they can obtain what they deserve-, *moral self-perfection, rewarding* -the duty of rewarding a fellow person if one did them wrong-, *gratitude* -the duty to do good to those who did good by us-, *keeping promises* -the duty to act according to explicit or implicit promises, including the implicit promise of telling the truth-. Unlike the Kantian monist deontology, the pluralist deontology allows a hierarchy of duties, human behaviour being guided by the *duties/obligations* listed by Ross. If the palette of duties is multiple, Ross proposes for individuals to act on the basis of the one considered as more important in the given situation. However, individuals have different system about good and evil, about long-term and short-term consequences of actions on others and themselves. This perspective is different from what Kant proposes and namely pre-established, exogenous, a priori notions about good and evil, beyond the experiences accumulated at the individual level and the personal value filters.

Virtue ethics is centred on the agents of the actions and has Aristotel[15] as a main representative, who considers that virtue is a character trait useful for human beings to feel fulfilled. In the Aristotelian conception, the individuals who possess virtues become good people. However, it is important to notice the nuances. Even though individuals are possessors of certain virtues, this does not guarantee as well their moral behaviour. In order to act morally they need judgement and practical wisdom. The latter represents the capacity of acting right in a given *particular situation*. Thus, it can be deduced that, unlike Kantian deontology, the Aristotelian virtue ethics does not offer pre-made moral criteria, but rather favours the freedom space for individuals to *judge,* according to the given situation, those behavioural traits that make it relevant from a moral point of view. It can be noticed that virtue is found on one side, judgement or practical wisdom on the other, while last but not least Aristotle mentions the state of happiness or fulfilment. However, this last one can be reached only if judgement, which works on virtues to produce a moral behaviour, is used.

The virtue ethics proposes a set of moral rules, called *V Rules.*[16] However, v is not just the first letter of the word virtue but also the first letter of the word vice. This means that every virtue contains in itself an impulse that indicates to *a virtuous agent* characterized by judgement what they need to do in particular situations: *do what is right*. Furthermore, each vice contains, similar to an annex, also an interdiction that mentions to a virtuous agent who judges what to *not* do, in a particular situation: *do not do what is not right.* These impulses can be articulated even in an indirect manner and could supply a guide for behaviour as well.[17]

Utilitarians consider that our actions are guided by pain and pleasure. [18] Jeremy Bentham, as a main representative of utilitarianism, mentions that humanity's inclination is to maximise pleasure and diminish suffering and pain. As a result, people who conform to this principle are considered to act rational,

[11] Immanuel Kant, *Bazele metafizicii moravurilor*, Antet Publishing House, Bucharest, 1994, pp. 52, 47.

[12] Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, în Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Stanford: Stanford University, Metaphysics Research Lab, 2021), available at https://plato.stanford.edu/entries/kant-moral/, accessed April 2022.

[13] Frankena William, *The Ethics of Respect for Persons*, Philosophical Topics, 1986, 14(2), pp. 149-167.

[14] Internet Encyclopedia of Philosophy, A Peer Reviewed Academic Resources, *William David Ross*, available at https://iep.utm.edu/ross-wd/, accessed April 2022.

[15] Andrew Fisher & Mark Dimmock, *Aristotelian Virtue Ethics*, *Unit 4: How One Should Live*, available at https://open.library.okstate.edu/introphilosophy/chapter/virtue-ethics/, accessed April 2022.

[16] Cecilia Tohăneanu, *Etică politică … op. cit.*, p. 50.

[17] Rosalind Hursthouse & Glen Pettigrove, *Virtue Ethics*, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, (Stanford: Stanford University, Metaphysics Research Lab, 2018).

[18] Internet Encyclopedia of Philosophy, A Peer Reviewed Academic Resources, Jeremy Bentham, available at https://iep.utm.edu/bentham/, accessed April 2022.

meaning *moral*. The utilitarian tradition places at its center the notion of *good*, to the detriment of that which is right, thus considering that the notions of just and unjust do not exist *per se*, but are rather dependent on individuals. Through the utilitarian lens, individuals have the freedom to define their own good. Utilitarians rest on the natural sources of actions, on the selfish nature of human interests, which are considered to regulate behaviours in the moral direction.

Rawls[19] sanctions as incorrect the utilitarian reasoning, since the principle of choice, which is valid at the individual level, cannot be applied at the societal level. Moreover, maximising personal pleasure can produce injustice at a systemic level (at the level of communities and/or societies). For instance, the desire to obtain as many material benefits as possible can affect the medium or freedom of choice for other members of society.

4. PhD students meeting with moral dilemmas

As it can be deduced from the theoretical part, what is defining for moral dilemmas is the acting agent's belief of not having successfully accomplished what they thought they *had* to do or the feeling of behaving in disaccord with their own principles. The case of the student presented by Sartre is one of the *obligation dilemmas* while Sophie's case is an *interdiction dilemma*. *The obligation dilemmas* impose the imperative to choose more than one possible action, while interdiction dilemmas are situations in which all the possible actions are forbidden.

In what follows I will present a series of moral dilemmas that can be lived throughout the doctoral programme by PhD students, referring, for a better understanding, to the theoretical framework presented.

#a. Will PhD students respect the rigours imposed by the university deontology and ethics codes in regard to copyrights, plagiarism, self-plagiarism, data fabrication or will they voluntarily renounce them?

Bob Ives, researcher at University of Nevada, carried out in 2016 a research entitled *Patterns and predictors of academic dishonesty in Romanian university students* together with a group of Romanian researchers. Of the 1127 Romanian students interviewed, 95% stated that they were involved in one or more acts that implied a lack of academic honesty.[20] This percentage is higher by comparison to students from other countries in the area.

Plagiarius, in Latin, mean *he who steals*. The reasons why some PhD students resort to acts of plagiarism, self-plagiarism or data fabrication are diverse, so that independent research can be carried out. The present paper does not intend to analyse these reasons. However, some PhD students often find themselves in the situation of rendering entire texts, of paraphrasing ideas or fragments without correctly indicating the source, of presenting data without the author's permission, of appropriating tables, figures, without sending to the original source, etc.

This is an example of an *interdiction dilemma* since all of the possible actions are forbidden. The Deontology and Ethics Code of the Nicolae Titulescu University brings clear specifications regarding the quality indicators of a scientific work, the academic standards, and the originality of scientific works. In what follows I will attempt some reasoning.

A research endeavour imposes a detailed, rigorous, structured process with well-organised and articulated stages. PhD theses do not represent fragments gathered by chance or various bibliographical materials put together without a clear purpose; they do not, under any circumstance, represent a report. PhD theses presuppose an original research endeavour, with working hypotheses and a vast documentation. Moreover, during the past few years, due to some detailed investigations done by independent professionals and to the putting in place of certain anti-plagiarism programmes, it was determined that a high number of PhD theses do not respect the current academic norms, despite the moral standards and the legislation that sanctions these practices.

To this end I will mention some normative and legislative reference points. The *University Ethical and Management Council*[21] is an advisory body, not a legal entity, established on the basis of the National Education Law no. 1/2011, with its subsequent changes and additions, as part of the structure of the Ministry of National Education. It has the role to guide universities in formulating and implementing policies of academic ethics and integrity. On the other hand, on the basis of the *Ministerial Order no. 3.131/2018*,[22] there were compulsory classes in ethics and academic integrity - 14 hours, starting with the 2018-2019 university year- introduced at the level of master's and doctoral programmes. The aim of these normative bases (laws, orders, decrees) is to consolidate the organizational

[19] David Lyons, *Rawls Versus Utilitarianism*, *The Journal of Philosophy*, 1972, 69 (18), pp. 535-545.

[20] Bob Ives et al., "Patterns and predictors of academic dishonesty in Romanian university students", *Higher Education*, 2017, 74 (5), pp. 815-831.

[21] Obiectiv CEMU, available at http://www.cemu.ro, accessed April 2022.

[22] Order no. 3131 from 30 January 2018 regarding the inclusion of ethics and academic integrity courses in all education plans, for all the universitarian study programmes, organised in superior education institutions of the national education system, available at https://www.edu.ro/sites/default/files/ordin%203131-2018docx.pdf, accesed April 2022.

culture of universities and to socialise their members (professors, students, researchers) with academic practices. The university institutional culture is based on norms and values that promote intellectual honesty, justice, responsibility, and sanctions obtaining academic advantages through means lacking probity.

The right to intellectual property is a right belonging to the category of property rights and it allows the author to benefit from their work and investment. *Art. 27 para. 2 of the Universal Declaration of Human Rights* mentions that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[23] *Article 7 from Law no. 8/1996*, which protects copyrights and related right in Romanian legislation, mentions that: "it constitutes the object of copyright original works of intellectual creation in the literary, artistic or scientific field, no matter the manner of creation, the manner or form of expression and independent from their value and destination…".[24] According to *art. 17 para. 1 of the University Deontology and Ethics Code* from *the Nicolae Titulescu University:*[25] "the manner of expression and the content of the work are protected by copyright. Taking parts from previous works is allowed only with permission from the author or by using the correct use of the right of citation, as it is regulated by the copyright law." The same Code defines plagiarism in *art. 18 para. 1* as "the action of a person who appropriates, without right, entirely or partially, the work of another author and presents it as a personal intellectual creation", and self-plagiarism, in *art. 19 para. 1* as: "using in a written work or oral communication, including electronic versions, of texts, expressions, demonstrations, data, hypotheses, theories, results or scientific methods, extracted from written works, including electronic versions, of the same author(s) without mentioning this and without citing the original sources."

PhD students become members of the academic community the moment they were admitted into the Doctoral School. What does this entail? The members of an academic community recognise and respect their scientific works. As it can be deduced from what was previously mentioned, violations of intellectual property rights, and thus of copyright, can result in legal proceedings. Together with the judicial responsibility there is a moral responsibility as well, deduced from the ethics codes of universities. Thus, each doctoral school has the right to evaluate and sanction plagiarism, self-plagiarism, and data-falsification in doctoral research, if necessary.

PhD students who voluntarily renounce ethics codes and academic honesty, are found in the middle of a *moral dilemma: will they voluntarily and dishonestly appropriate the works of other authors to add content to their own thesis/research or will they violate the principles of the community they are a part of and, also, lose the legal and moral legitimacy of their status as PhD students?* Both possibilities are, at a theoretical level, forbidden, reason for which this type of dilemma is an example of an interdiction dilemma.

#b. Will PhD students choose to allocate sums of money to acquire scientific materials, to participate in national/international conferences or to buy medication for a very close family member to save their life?

Access to qualitative scientific articles that can be found in academic databases such as Scopus, Web of Science, Elsevier, DOAJ, Sage, Springer, Jstor, is done through a subscription or via payment per article. Participating in certain conferences is done based on paying certain taxes; various other costs are added in relation to publishing some peer-reviewed articles, for certain specialised translations or corrections in English. PhD students engage in a research endeavour that cannot be accomplished without access to international databases. Furthermore, the papers presented in conferences and scientific publications represent a compulsory obligation for them. Both tasks necessitate access to certain financial resources besides will and determination.

In the case where PhD students are unexpectedly confronted with an unfortunate situation in their own family, when their children, husband, wife, or parents necessitate an expensive treatment, any financial resource becomes very important in saving the life of that family member.

Let us assume that PhD students have a limited amount of money at their disposition.

They are found caught in a *moral dilemma: will they invest the money in the resources necessary for their doctoral programme or will they allocate the money to the treatment necessary to save the life of the family member?* Both responsibilities are important but, in this case, the PhD students must choose only one of them. Ross, as a representative of the pluralist deontology, proposes several duties, as it can be observed in the theoretical section of the paper. The first is *benevolence* -the duty to help others-, so that, *keeping promises* -the duty to act according to explicit

[23] *Declarația universală a drepturilor omului*, available at https://legislatie.just.ro/Public/DetaliiDocumentAfis/22751 accessed April 2022.
[24] Legea nr. 8 din 14 martie 1996 (*republicată*) privind dreptul de autor și drepturile conexe*), available at http://legislatie.just.ro/Public/DetaliiDocument/7816, accessed April 2022.
[25] Universitatea "Nicolae Titulescu", București, Codul de Etică și Deontologie Universitară, available at https://www.univnt.ro/index.php/comisia-de-etica/, accessed April 2022.

and implicit promises- is placed a position lower. PhD students could resort to a hierarchisation of duties, according to their importance. According to their judgement, they will become virtuous agents and will transform virtues in moral behaviours.

#c. Will PhD students choose to invest time to advance in their research endeavour or to exercise their professional and family tasks?

PhD students can fulfil multiple roles that correspond to the constellation of statuses that they have in their personal and professional life. Thus, they can be parents, husbands, wives, they can have soliciting professional tasks, etc. It is not rare for social and professional roles to enter in conflict. For instance, in certain situations and life periods, professional roles can have a central position obscuring the other roles. The moment PhD students have decided to engage in the elaboration of a PhD thesis and, as a result, in an elaborate research endeavour, they have voluntarily chosen to add to the constellation of personal and professionals roles and statuses another role that corresponds to the status of PhD student: to study, to research, to elaborate, to operationalise, to compare, to reflect, to analyse, to participate in various scientific manifestations, to conceive academic studies, etc. Moreover, this new role involves a redistribution of personal resources and of the tasks that PhD students had accomplished until they were admitted to their doctoral programmes, but also an allocation of time for doctoral research, in other words, a reorganization of the time of the former ones.

In one of the meetings I had with a family of professors in Portugal, the man recounted that in their youth, in order to work on her doctoral research, his wife had to stay for nine months in an unsanitary room in Paris, although they had a comfortable apartment in Portugal. Moreover, in the nine months they very rarely saw each other, since the doctoral research was very demanding.

The dilemma in which the PhD students will find themselves is the following: *will they reduce the time spent with their family/at work in order to advance their doctoral research projects or will they not accomplish the research duties, risking expulsion since they did not allocate enough time to them?*

Not fulfilling their doctoral duties involves not respecting the promise towards the advisor, but also towards the entire faculty of the Doctoral School, thus a behaviour lacking deontology. Doctoral Schools are periodically evaluated according to the scientific activity of the PhD students. In the case where one PhD student does not fulfil their obligations, they not only create a certain vulnerability in their own status, but they also affect the prestige of the Doctoral School.

On the other hand, a reduction in the time spent with their family or at the workplace, involves taking on another way of managing family and professional duties. Since the decision of doing doctoral research was voluntary, it is presumed that PhD students have a strong motivation to invest time in their doctoral research.

In the Aristotelian perspective, in order to act morally, PhD students would need judgement also called *practical wisdom*, meaning the capacity to act right as long as they have assumed the status and role of PhD students. They have the freedom *to judge* according to this new role those behavioural traits that make it relevant from a moral point of view. In other words, it would be moral for them to accomplish their duties. The accomplishment that Aristotle speaks of could be associated with finalizing the doctoral research. However, this can only take place if the virtues of the PhD students are transformed in moral behaviours under their judgement.

#d. Will PhD students accept duties related to their doctoral programmes (teaching or administrative activities, etc.) or will they prefer to ignore them, thus causing disparities in regards to the distribution of responsibilities among the group of PhD students?

Let us assume that PhD students are asked to report their scientific activity in view of the evaluation of the Doctoral School or that they are asked to carry out teaching activities, such as seminars or other duties related to their doctoral programme. For instance, their lack of collaboration in reporting the situation regarding their scientific activity will disrupt the evaluation process; as a result, other individuals - colleagues or administrative personnel- will have to accomplish this duty. In case they will ignore the activities that were attributed to, they will not only not accomplish their duties, but they will also disrupt the learning process itself, other colleagues having to get involved in the teaching activity, supplementing their teaching load.

The dilemma in which they are found is the following: *they either ignore their doctoral duties, or they show moral responsibility and, as a result, they do their duty -they fulfil the duties that they were attributed within the doctoral programme-.*

I will attempt an explanation from the perspective of deontological ethics (that of duty), of the utilitarian one, and of virtue ethics. I would like to restate that these ethical systems propose behavioural rules according to which individuals' behaviours are considered as moral or immoral.

If we were to relate to the model proposed by the *utilitarian ethics*, the individuals have the freedom to define their own good, meaning to maximise pleasure and diminish suffering and pain. The selfish nature of human interests is considered to be the one that regulates individuals' behaviours. However, when their

personal actions are not completely independent -as it is in many life situations-, the selfish nature of personal actions can affect those around them, whether they are colleagues or partners in various projects. This maximisation of personal pleasure, considered as moral by utilitarians, could have an unfavourable impact over the professional group of which PhD students are a part.

In the pluralist *deontic ethics* perspective promoted by Ross, the duty to help others takes first place. Moreover, Kant's *duty-based ethics* (deontology: *deont* – duty*;* logos – discourse, science) is an ethics based on duty/obligation. PhD students have the duty to respect their tasks, *have the duty* to behave so as to consider humanity both in their person and that of others, *always as an end and never simply as a means*.[26] Kant considers that treating humanity with respect means conforming to universal rule standards.

Virtue ethics, as a balanced space between the aforementioned two, focuses on the capacity to act right in a given situation. In other words, PhD students can use their practical wisdom, judgement to be moral. *The moral V rules* proposed by the virtue ethics indicate to PhD students, as virtuous agents, how to act right on the one hand, and what not to do so that their behaviour is not unjust on the other hand.

#e. Will PhD students constantly manifest their commitment towards their advisor honouring their initial promise towards them or will they abandon this given promise, in order to honour other promises?

A key element of the doctoral endeavour is the advisors – PhD students relation. This professional relation can fundamentally mark the direction of the research endeavour but also the manner in which PhD students will mature academically and personally. Advisors do not represent only an important resource of information and scientific guiding, but can also build models of academic integrity and honesty. The professional advisors – PhD students relation can be similar to a melting pot where ideas and principles intersect, where new knowledge tracks are outlined, as a result of intellectual emulation, where PhD students are challenged to think, reflect, surpass their intellectual limits by accumulating new knowledge, to create based on the information accumulated.

It is not rare for short-circuits to happen in this relation. If at the beginning stage, PhD students undertake a commitment to respect the duties they have towards their advisors, these promises are sometimes abandoned along the way. When I refer to abandoned promises, I think about a series of indicators, namely: PhD students do not present in time the promised materials, they do not respect the indications from the advisors, they do not respect the principles that ensure the scientific quality of materials, they interrupt communication with advisors over longer periods of time, etc. When these behaviours are repeated, they become constitutive behavioural norms.

The moral dilemma in this case is: *they either behave right/moral meaning they fulfil the promises made towards their advisors, or they choose to fulfil other promises and to get involved in other activities that they consider as more important, thus affecting both their professional relation with their advisor and the scientific quality of their doctoral research.*

PhD students are found before *two contradictory actions*, since they cannot carry out both, although they have moral reasons to accomplish each one of them.

However, the erosion of the relation with the PhD advisor takes place only through a repetitive behaviour. In other words, PhD students abandon the promise made initially in countless situations, choosing to honour other promises (personal, professional, or social). I will refer back to the theoretical framework to give arguments.

Plato considers that acting right/moral entails *telling the truth* and *fulfilling your duties, keeping promises*. Otherwise, the behaviour is not right.

In the monist Kantian deontology, to be moral means to act according to duty (*deont*) or obligation. In other words, the rules must be followed in all circumstances. In this case, the famous Kant quotation "always treat humanity with respect"[27] could be adapted as follows: *always treat PhD advisors with respect*. Otherwise, immorality results as a lack of fulfilling the duties that PhD students undertook at the beginning of their doctoral programmes.

Assuming that Kant's deontology is too rigorous, I will take as a standard the list of *duties/obligations* proposed by Ross'pluralist deontology, which is considered as having a more flexible approach. However, PhD students do not honour a series of important obligations proposed by the author here either:

- to not do harm -the duty to avoid doing harm onto others -: through their behaviour of not respecting their undertakings, PhD students can do harm onto their advisors by putting them in a delicate situation;
- justice -the duty to guarantee people that they get what they deserve-: advisors deserve respect and seriousness from behalf of the PhD students; in the case where PhD students manifest disengagement and do not fulfil their obligations, the duty to be right/moral is not fulfilled;
- gratitude -the duty to do good onto others who did

[26] Immanuel Kant, *Bazele metafizicii moravurilor ...op. cit.*
[27] Frankena, William, *The Ethics of Respect for Persons*, Philosophical Topics, 1986, 14(2), pp. 149-167.

good by us-: advisors who organise work meetings, distribute materials, give comments on texts, etc. offer a real support to PhD students, in other words, they do much good by them; in the case where PhD students do not respond in kind, they do not fulfil their obligation of manifesting gratitude;

- keeping promises -the duty to act according to explicit and implicit promises, including the implicit promise of telling the truth-: in the case where PhD students do not present their materials, do not honour their work meetings, do not create materials that respect scientific criteria, etc. it can be concluded that their obligation of keeping their promises was not respected.

5. Conclusions

A series of conclusions can be drawn from the present study.

Ethics, as a normative discipline, prescribes rules, norms, and universals at the general level. The theories of ethics propose rules of behaviour to individuals: how they must act, what is indicated to do, not do, etc. Moral dilemmas appear as a result of the interactions between the codes of conduct proposed by the theoretical models and the value structures of individuals/the manner in which individuals live the codes of norms; moral dilemmas challenge individuals to choose between two or more contradictory moral obligations, without being able to give course to both or all of them.

Despite promoting university ethics and deontology within higher education institutions, unethical behaviours are frequently encountered with students (see the study by Bob Ives, 2016).

The doctoral programme can represent a stage in the personal and professional maturing of PhD students. As mentioned by Rosenau, PhD students have the possibility to acquire goods such as integrity, modesty, or self-discipline. This process of transformation does not however come by itself, but it rather represents a succession of stages, among which the students' confrontation with a series of moral dilemmas: they find themselves in the situation of choosing to either invest time and resources to give course to other personal, social, or professional obligations, or to fulfil their research obligations strictly, taking into consideration the promises made and the responsibilities they have as PhD students.

Finally, I would formulate a hypothesis that was shaped during the present study: between realizing the work related to their research endeavour at scientific standards and ethical principles there is a determinist relation, namely: the more correct, involved and sincere the PhD students are towards the promises made, the higher the chances for the research endeavour to be adjusted and improved. And the vice-versa could be valid as well but, as mentioned, this is just a hypothesis.

This hypothesis could be developed in future research.

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JUDICIAL ADVANCES IN COMBATING SYSTEMATIC AND GENERALISED ABUSES ON HUMAN RIGHTS

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Abstract

Managing systematic and generalised abuses on human rights continues to animate the academic world, practitioners, the civil society but also the public at large. People have resorted to amnesty, to criminal trials specific to the classic/traditional justice, to instruments of transitional justice such as Truth and Reconciliation Commissions, focusing on the rehabilitation of victims, on reparation policies, on reconciliation.

The present paper, based on desk research, intends to show the manner in which international practices in the field of criminal justice and that of transitional justice regarding managing abuses perpetrated by certain political regimes have evolved. Thus, it will be observable how the retributive practices of criminal justice, focused on the punishment of those guilty, have been complemented by the restorative practices of transitional justice, which offer a particular attention to the victims. In the initial stages, military/international tribunals and international criminal courts that focused on retributive measures were established. Subsequently, the creation of the International Criminal Court shows how managing past abuses demands conjugated, complementary solutions, namely both consolidating the classic/traditional act of justice and applying the instruments of transitional justice. To this end, art. 75 of the Rome Stature introduces the notion of compensation as a reparatory measure and art. 79 establishes the creation of the Trust fund in support of victims. Hybrid tribunals (Lebanon and Cambodia) consolidate the path opened by the International Criminal Court giving a central role to victim reparations, to consolidating justice and national reconciliation.

Keywords: *transitional justice, restorative justice, International Criminal Court, Inter-American Court of Human Rights, International military tribunals, International criminal courts, Hybrid tribunals, Amnesty.*

1. Introduction

As the change in political regimes and, as a result, of the transitional processes intensified at the international level, restorative mechanisms, specific to *transitional justice*, have developed as well alongside the criminal instruments specific to retributive justice. Together with traditional justice, which sanctions the everyday, a transitional justice (TJ) that sanctions the exceptional[1] has developed as well over the past decades. If the former is easily identifiable, the same cannot be stated about the latter.

In the report of the UN's secretary general, *transitional justice* is defined as encompassing the various processes and mechanisms put into practice by a society in order to cope with the abuses *committed in the past with the purpose of establishing the responsible parties, to administer justice and to allow for reconciliation*.[2] In the present paper it is considered that transitional justice is a type of justice adapted to the unique conditions of societies that are in the process of transformation and that have lived through systematic and widely spread abuse of human rights. Most of the problems that result from past abuses are often very complex. Transitional justice proposes a set of punitive, reparatory, historic, administrative, and constitutional measures whose function is to delegitimize at all levels the leadership from the old regime and to legitimize the new one, which takes on the changing and democratization of societies.

A first observation refers to the purpose of the mechanisms of transitional justice, namely: punishment of the guilty parties, recognition of abuses, reconciliation between the sides previously in conflict, proposal of programmes for reparations, public apologies, memorials, building democratic institutions for the prevention of such abuses, etc. No matter the targeted purpose, these aforementioned mechanisms have the same aim: activating and mobilizing resources existing at the level of the social and political systems in order to build a new type of society. According to Pablo de Greiff, *the criminal justice represents an endeavour against those guilty, without directly focusing on the victim.* This is the novelty element of the transitional justice, focusing on victims and proposing a set of measures for reparations of a material and/or symbolic nature. Moreover, transitional justice is characterised by flexibility, which implies an adaptation according to the socio-historic context, proposes meetings between victims and oppressors, public hearings, in order to practice forgiveness.

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[1] Christine Bell, *The "New Law" of Transitional Justice*, paper presented at *Building a Future on Peace and Justice* Conference, Nuremberg, 25-27 Juin 2007.

[2] UN Secretary General," The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", S/2004/616, p. 4.

Transitional justice is based on the presumption that finding the truth about the abuses committed and recognising it at the official and public level lead to the rehabilitation of the victim.

The second observation targets the relation between the classic/traditional justice and the transitional one. In certain cases, especially after the founding of the International Criminal Court, confusions can be created regarding the role that each of the two types of justice exercise during *periods of transition*. Both the classic criminal justice and the transitional one (especially the Truth and Reconciliation Commissions) carry out investigations on the actors responsible for the abuses committed during the old regime, thus contributing to the recognition of the sufferings and losses perpetrated on the victims. Furthermore, they intend to prevent and block similar abuses from being committed, they propose reparation packages for the victims and have as a desideratum the accomplishment of reconciliation. It could be believed that the line between the two types of justice is not clear and, thus, there could be overlaps in accomplishing the tasks by public institutions.

For more clarity, a position can be mentioned, namely that of Claude Jorda, the former president of the International Criminal Court, who argues, in one of his interventions in the Hague in 2001, in favour of founding a transitional justice mechanism, namely a Truth and Reconciliation Commission in Bosnia Herzegovina. Jorda states that the actions of such a commission could *complement* and even *consolidate* the actions of the International Criminal Court in its mission of accomplishing reconciliation.[3] The Truth and Reconciliation Commission could be, according to Jordan, a setting where those who resorted to reprehensible acts could be interrogated and they could confess to the abuses committed, which would mean a step forward in them recognizing the sufferings of the victims. Moreover, the Truth and Reconciliation Commission represents a setting where, based on the victims' testimonies, reparations are proposed for the losses they suffered, a setting where the pattern of past violent actions, the historic, political, sociological and economic causes of systematic and generalised abuses could be analysed so that to prevent the repetition of similar situations. Last but not least, the Truth and Reconciliation Commission represent a setting for dialogue and collective debates that generate information for configuring the conflict's memory.

2. Argument

2.1. Amnesty

A first approach[4] in managing systematic and generalised past abuses focused on amnesty and amnesia, the practice of forgetting being the proposal for repairing the abuses committed by certain repressive regimes. *Recalling the crimes committed as well as their perpetrators was considered as damaging for the objective of national unity*.[5] Despite that, during the last decades, the international system has equipped itself with a legal basis and mechanisms against impunity, researchers have found a tendency to increase the number of amnesty acts at a global level. This is deduced from the information presented in the database regarding amnesties (Amnesty Law Database 2017) created by Louise Mallinder, where it can be observed that the approximate number of amnesties after World War II had a tendency to increase reaching 600 such laws in the past years.[6] Amnesty was and still is considered by some newly installed governments as the condition to start "a new page in the national history". In certain cases, taking responsibility and/or the criminal prosecution of those responsible of past abuses were not even brought into discussion. To this end, it is worth mentioning the former military dictatorships of Latin America – Peru, Chile, Argentina, Uruguay – which, in the context of the transition towards democracy, adopted amnesty laws, thus choosing the path of impunity. Professor Louise Mallinder also coordinates, together with his colleague Tom Hadeen, the project entitled *Belfast Guidelines*.[7] This guide examines the legality and legitimacy of amnesties in states that went through periods of transition either from a certain type of regimes - authoritarian, totalitarian- to a democratic one, either from periods marked by armed conflicts and humanitarian crises to political and social stability.[8]

However, the jurisprudence of the Inter-American Court of Human Rights (IACHR) acted as a

[3] *Le Tribunal Pénal International et la Commission vérité et conciliation en Bosnie-Herzégovine*, Communiqué de presse, available at http://www.icty.org/fr/press/le-tribunal-pénal-international-et-la-commission-vérité-et-conciliation-en-bosnie-herzégovine, accessed March 2022.

[4] William Rasch, *Justice, Amnesty and the strange lessons of 1945*, Ethics & Global Politics, 2010, 3(3), pp. 239-254.

[5] Pierre Hazan, *Les dilemmes de la justice transitionnelle*, Mouvements, 2008, 1 (53), pp. 41-47.

[6] Louise Mallinder, *Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?*, Paper Series, 09/2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051142, accessed March 2022.

[7] University of Ulster, Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability*, available at https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf, accessed March 2022.

[8] In order to get a different perspective on the subject, it can be consulted Elena E. Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public, 2017, 4, pp. 95-10.

regulatory system. For instance, the *Barrios Altos*[9] and *La Cantuta*[10] cases against Peru make reference to the massacres from 1991 and 1992, respectively, ordered by the then acting president, Fujimori, and executed by paramilitary groups. Despite the fact that the enforcers and the coordinators resorted to acts of torture, to arbitrary executions, they were exonerated from responsibility, on the basis of the Amnesty Laws no. 26479 and no. 26492 adopted in 1995. In the case of *Barrios Altos v. Peru*, the Inter-American Court of Human Rights considered that the adoption of the Amnesty Laws is incompatible with its spirit and principles, with the legal obligations on the part of the Republic of Peru according to art. 1 (1) and 2 of the American Convention on Human Rights (ACHR).[11] The Court also decided that the rights of the victims were violated as follows: *the right to life* according to art. 4, *the right to humane treatment* according to art. 25, *the right to judiciary assistance and protection* according to art. 25, *the right to truth* according to art. 8 and 25. [12] Thus, the IACHR concluded that the amnesty laws adopted in 1995 *do not have judicial effects* and, as a result, they cannot obstruct the investigations, the identification and the punishment of those responsible in this case. [13] In the *La Cantuta v. Peru* case, the Court considered that the state consecutively violated the victims' right to juridical personality according to art. 3, to life according to art. 4, to humane treatment according to art. 5 (1), to personal freedom according to art. 7, to an equitable trial according to art. 8 (1), to judicial protection according to art. 25 of the Convention.[14] On the basis of art. 63 (1) of the ACHR, the Court decided a set of material and symbolic reparatory measures for the families and descendants of the victims: the payment of the sums of money according to para. 214, 215, 246, 248, 250, 252; free access to health services and other necessary treatments, including psychological ones; the publishing of the results and the dissemination of the truth regarding the abuses committed within 6 months from the publications of the Court's reasoning, public apologies towards the victims' families, celerity in the unfolding of criminal proceedings.[15]

In the *Almonacid Arellano et al v. The Republic of Chile* case,[16] the Court found that the killing, in 1973, of the professor who was a supporter of the Communist Party by the police forces of the Pinochet regime, is a crime against humanity. The Court showed that not starting the criminal prosecution of the perpetrators proved the state's failure in fulfilling its responsibilities stipulated in art. 1(1) and art. 2 from the ACHR. As a result of implementing the Amnesty Law no. 2191/1978, the state *violated* the right of victims to judicial guarantees according to art. 8 (1), to judicial protection according to art. 25 from the ACHR.[17] The Court found that the Amnesty Law *lacks judicial effects* and *decided on the giving of reparations* according to paragraph 164, the publishing of the acts and the operative part of the decision in a widely circulated newspaper so that they would be known to the public, the continuation of investigations and criminal prosecution of those who are guilty of committing the acts.[18]

In Argentina, the Amnesty Laws 23492/1986 and 23521/1987, respectively, have blocked for many years the investigation of crimes and abuses committed between 1976 -1983 during the military dictatorship. Uruguay, in turn, adopted the Amnesty Law no. 15848/1986 with the purpose of exonerating those responsible of committing abuses, arbitrary executions during the military dictatorship between 1973-1985. The IACHR drew the attention of the two countries onto the evident inconsistency between the Amnesty Laws and the states' obligations to respect human rights.[19] In 2005, the Supreme Court in Argentina annulled the Amnesty Laws, thus marking a victory against impunity. To this end, Miquel Vivanco, the director of the Human Rights Watch in the region, concluded that: *no matter how much time passes, the laws that block the act of justice in the cases of severe abuses of human rights represent a barrier in the path of any democratic government.*[20] Despite the shy

[9] *Case of Barrios Altos v. Peru*, Inter-American Court of Human Rights, Judgment of March 14, 2001, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf, accessed March 2022.

[10] *Case of La Cantuta v. Perú*, Inter-American Court of Human Rights, Judgment of November 29, 2006, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf, acccessed March 2022.

[11] *American Convention On Human Rights*, Adopted at The Inter-American Specialized Conference On Human Rights, San José, Costa Rica, 22 November 1969, available at Https://Www.Cidh.Oas.Org/Basicos/English/Basic3.American%20convention.Htm, accessed March 2022.

[12] *Case of Barrios Altos v. Peru*, *op. cit.*, pp. 13-14.

[13] *Ibidem.*

[14] *Case of La Cantuta v. Perú*, *op. cit.*

[15] *Ibidem.*

[16] Case of Almonacid-Arellano *et al v.* Chile, Inter-American Court of Human Rights, Judgment of September 26, 2006, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf, accessed March 2022.

[17] *Ibidem.*

[18] *Ibidem.*

[19] *Inter American Court of Human Rights*, Report 29/92, Uruguay, https://www.cidh.oas.org/annualrep/92eng/Uruguay10.029.htm, consultat martie 2022; Report 28/92 Argentina, available at https://www.cidh.oas.org/annualrep/92eng/Argentina10.147.htm, accessed March 2022.

[20] *Argentina: Amnesty Laws Struck Down, Supreme Court's Long-Awaited Ruling Allows Prosecution of 'Dirty War' Crimes*, available at https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down, accessed March 2022.

efforts at the official level, Uruguay still continues the *path* of impunity, with over 50% of the population voting against in the two referendums -1989 and 2009- organised to revise the Amnesty Laws.[21]

In Europe, Spain, for instance, adopted in 1977 the Amnesty Law with the initial purpose of refining former political detainees from the Franco governing period. In its final form however the law became an instrument that offered immunity to all perpetrators of abuses on human rights before 1976. Since the law is still in use, it has blocked the legal investigations into the abuses widely committed during the civil war (1936-1939) and under the dictatorial regime led by General Franco (1939-1975). The complexity of the situation comes from the fact that the Amnesty Law was and still is considered an indispensable step, useful in the transition process of a country towards a democratic system.[22] Spain was invited by human rights organizations, by the UN Human Rights Committee, to revise its Amnesty Law and *to respect* the treaties it has adhered to.[23] In 1977, Spain ratified the International Covenant on Civil and Political Rights, which states in art. 2(3) that *each State Party undertakes to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy*.[24] The UN Human Rights Committee has solicited Spain in 2008 to abrogate the amnesty law underlying in paragraph 9 *that the statute of limitation does not apply to crimes against humanity*.[25] Based on art. 3 of the Convention, the ECHR supports, as a general principle,[26] that *no one should be subjected to torture or to inhuman or degrading treatment or punishment*.[27] Victims' organizations, the civil society, *third generation* Spaniards familiarised with human rights and international law norms[28] are joining, in turn, the trend regarding the revision of the Amnesty Law.

Starting with the 2000s, there have been a series of -quite fragmented- attempts to reposition the traumatic past and to offer victims rightful reparations. Although without satisfying results for victims' associations regarding its implementation, *Law 52/2007*,[29] known also as the *Collective Memory Law*, has been the most encompassing attempt to approach the repressive past by bringing to the forefront the reparations, the exhumation of collective burial grounds, the removal of Francoist symbols, and the access to archives. In 2011, following the approval of the Exhumation Protocol, the descendants have the right to receive financial support to this end. In 2018, the new government announced that it would take responsibility for the victims of the dictatorship and of the civil war, and it launched a plan for the creation of a Truth and Reconciliation Commission, whose central purpose will be to investigate the crimes against humanity committed during the Franco regime.[30]

2.2. International military tribunals

Another step in managing serious abuses of human rights was the creation of International Military Tribunals. The Nuremberg Tribunal has as a legal basis the *Nuremberg Charter* (The Charter of the International Military Tribunal) and it was created at the initiative of the allied countries from World War II, in 1945, in a historic context that demanded the punishment of war crimes. Thus, the Nuremberg Tribunal intended to punish those who committed

[21] Daniel Soltman, *Applauding Uruguay's Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law no. 15.848*, Washington Global Studies Law Review, 2013, 12(4), pp. 829-848.

[22] Paloma Aguilar & Clara Ramírez-Barat, *Past Injustices, Memory Politics And Transitional Justice In Spain*, Institut Europeu de la Mediterrania, in Monografia *The Arab Transitions in a Changing Word*, Barcelona, 2016, available at https://www.iemed.org/publicacions/historic-de-publicacions/monografies/sumaris-fotos-monografies/memory-politics-transitional-justice-aguilar-paloma-ramirez-barat-clara.pdf, accessed March 2022, p. 70.

[23] Natalia Junquera, *The government should withdraw the Amnesty Law*, United Nations Special Rapporteur Pablo de Greiff discusses his findings after visiting Spain, 04.02.2014, available at https://english.elpais.com/elpais/2014/02/04/inenglish/1391516749_219836.html, accessed March 2022.

[24] *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with art. 49, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, accessed March 2022.

[25] United Nations Human Rights Committee, Nineteen fourth session, 2008, *Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant, Concluding observations of the Human Rights Committee Spain*, CCPR/C/ESP/CO/5 5 January 2009, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FESP%2FCO%2F5&Lang=en, accessed March 2022.

[26] Elena Ștefan deals also with the notion of principle in the paper: Elena E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

[27] European Convention on Human Rights, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed March 2022; Yasha Maccanico, ECtHR: Spain guilty of not investigating allegations of torture in incommunicado detention, available at https://www.statewatch.org/analyses/no-272-echr-spain.pdf, accessed March 2022.

[28] Paloma Aguilar & Clara Ramírez-Barat, *Past Injustices*, *op. cit.*

[29] Ministerio de Justicia, Ley de la Memoria Historica, Ley 52-2007, available at http://www.exteriores.gob.es/Consulados/MIAMI/es/ServiciosConsulares/Paginas/Preguntas-frecuentes---Ley-.aspx, accessed March 2022; *Law 52/2007, of December 26th, to recognise and broaden rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship*, available at http://learning-from-history.de/sites/default/files/book/attach/ley-de-la-memoria-historica.pdf, accessed March 2022.

[30] Stephen Burgen, *Spain launches truth commission to probe Franco-era crimes*, available at https://www.theguardian.com/world/2018/jul/12/spain-to-establish-truth-commission-for-franco-era-crimes, accessed March 2022.

crimes against peace, war crimes, and crimes against humanity defined according to the Charter,[31] and also known as *delicta juris gentium*. Moreover, in January 1946, having as a legal basis the *Charter for the International Tribunal for the Far East,*[32] the Tokyo Tribunal, also known as the International Military Tribunal for the Far East, was established. The main purpose was the punishment of those guilty of crimes against peace in the Far East, whether individually or as member of some organizations.

The trials that took place in these ad-hoc military tribunals fulfilled on the one hand the classic functions of criminal law such as punishing the guilty, consolidating the respect for the law, preventing other similar acts in the future, and, on the other hand, they had as an effect a tendency to "judicialise the past". *A first aspect* addressed in the international literature as a result of the Nuremberg and Tokyo trials can be found in the question: *after which law should those responsible of crimes be judged*? For some researchers, among which is Fuller Lon,[33] the law in effect at the moment when the acts were committed is not legally binding since it lacks a moral foundation. On the other hand, Hart Herbert,[34] following the thesis of legal positivism, opposes this perspective, stating that *the order of law* implies as well *the recognition of the previous law*. The history of the Nuremberg and Tokyo tribunals raises issues regarding both the principle of the retroactivity of the law and the one entitled *nulla poena sine lege -no penalty without law-*. *A second aspect* is related to the difficulty in establishing the hierarchical chain of responsibilities, as well as the lack of bureaucratic resources that make it impossible to try all those who participated in abuses and massive violations of human rights. Under these conditions, the selection of the acts to judge is considered by some researchers as being arbitrary and unjust. On the other hand, *judicial inaction* would disqualify the very idea of *the order of law* and it would undermine *the judicial culture*.

The activity of the two tribunals did not focus on the victims, on reparatory measure, on reconciliation or on the national socio-political particularities. This means that this type of justice does not have the characteristics of a restorative justice specific to transitional justice. In fact, the moment these tribunals were created, there was no notion of transitional justice. Restorative justice addresses the victims in the social context, it is oriented towards the community, towards the reconstruction of societies through reconciliation, while retributive justice focuses especially on trials and punishing the guilty.[35]

2.3. International Criminal Tribunals

An evident progress of international criminal justice is the establishment of International Criminal Tribunals. In 1993, the UN Security Council decides to establish the Tribunal for the former Yugoslavia. *The International Criminal Tribunal for the former Yugoslavia* (ICTY) was created as a result of the UN Security Council's 1993 Resolution 827, in accordance with Chapter VII of the UN Charter, with the purpose of "punishing those responsible for serious violations of the international humanitarian law, committed in former Yugoslavia."[36] On the basis of *ratione loci* and *ratione temporis* competences (art. 8 from the Statute), the ICTY takes upon itself to judge the acts that took place on the former Socialist Federal Republic of Yugoslavia's land, air, or territorial waters, starting with January 1991. In 1991, as the dissolution of Yugoslavia happened, the states' intentions to attain independence resulted in wars, acts of torture and serious violence, arbitrary executions, significant losses of human lives, the creation of concentration camps, as well as systematic and organised actions to eliminate ethnic groups.[37]

The statute[38] mentions that the ICTY had the jurisdiction to investigate, indict and judge according to art. 2 the individuals who resorted to serious infractions according to the Geneva Convention,[39] who violated war laws and practices (according to art. 5). According

[31] *Nuremberg Charter* (Charter of the International Military Tribunal), 08.08.1945, London, available at https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf, accessed March 2022.

[32] *Charter for International Military Tribunal for Far East*, 19.01.1946, available at https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.3_1946%20Tokyo%20Charter.pdf, accessed March 2022.

[33] Stephanie Paton, *The Inner Morality of Law: An Analysis of Lon L. Fuller's Theory*, Glasgow University Law Society, available at https://unilaglss.wordpress.com/2015/03/10/the-inner-morality-of-law-an-analysis-of-lon-l-fullers-theory/, accessed March 2022.

[34] Hart Herbert, *Law, Liberty and Morality*, Oxford University Press, 1963; *Positivism and the Separation of Law and Morals*, Harvard Law Review, 1958, 71(4), pp. 593-629.

[35] Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparation*s, Thomas Jefferson Law Review, 2007, 29(2), pp. 189-219.

[36] United Nations Security Council, Resolution 827, adopted by the Security Council at its 3217th meeting, on S/RES/827 (1993) 25 May 1993, available at http://unscr.com/en/resolutions/827, accessed March 2022.

[37] Juliya Bogoeva, *The War in Yugoslavia in ICTY. Judgements: The Goals of the Warring Parties and Nature of the Conflict*, FICHL Occasional Paper Series, Torkel Opsahl Academic E Publicher, Brussels, available at http://www.toaep.org/ops-pdf/5-bogoeva, accessed March 2022.

[38] *Updated Statute Of The International Criminal Tribunal For The Former Yugoslavia*, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, accessed March 2022.

[39] *Geneva Convention Relative To The Treatment Of Prisoners Of War Of 12 August 1949*, availble at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf, accessed March 2022.

to the information supplied by the ICTY official website, until it was officially closed in December 2017, there were over 1000 people interrogated and 136 sentenced within the ICTY.[40] In the case of Radislav Krstic,[41] the Court decided, for the first time in Europe, the conviction of the accused for genocide and complicity to commit genocide in Srebrenica where, in 2005, over 7000 Muslim Bosnian boys and men were executed by Bosnian Serbs.[42] Starting with 2003, the ICTY has intensified its cooperation with local judges and courts from former Yugoslavia.

The International Criminal Tribunal for Rwanda (ICTR) was created based on Resolution 955, adopted by the UN Security Council, in November 1994, at the request of the Rwandan government.[43] The Security Council decided the establishment of the ICTR as a result of the genocide that took place between April-July 1994, when the forces of the Hutu ethnic majority instigated, resorted to acts of extreme violence and killed 800.000 Tutsi ethnic individuals but also Hutu civilians who opposed the cruelty acts.[44] According to art. 1 from the ICTR Statute, the main purpose was to punish those responsible for the genocide and for other serious violations of the international humanitarian law committed on Rwandan territory and in the surrounding areas, between 1 January 1994 and 31 December 1994.[45] Moreover, the ICTR had the jurisdiction to investigate, indict, and convict people who committed genocide as defined in art. 2 from the Statute, crimes against humanity according to art. 3, violations of art. 3 from the Geneva Convention according to art. 4 from the Statute. Until it officially closed in 2015, 93 individuals were indicted under its jurisdiction of which 62 were convicted.[46]

A first observation would be that establishing ad-hoc tribunals proved to be the adequate response in areas where the flawed political leadership and/or conflicts destabilized the justice system and the resources necessary to the independent carrying out of its activities. The functioning of the two ad-hoc international criminal tribunals for the former Yugoslavia and Rwanda marked a progress of the criminal justice in combating impunity and in discouraging some similar behaviours and acts. The doctrine itself points out that: "The need for normative regulation of behaviors is undoubtedly a social imperative (…)."[47]

Second of all, it is noticed that the activity of the tribunals focused on establishing the impartial, judicial truth, based on material evidence, on a selection of relevant acts with the purpose of establishing criminal responsibility and punishing those guilty.

It is well-known that the role of a criminal court is not to establish social truth, historic, sociological, or political causes that are at the basis of conflicts and abuses. Leaning towards this *social truth* represents a prevention measure for such acts to not be repeated, but also an important factor in the rehabilitation of victims and in the reconciliation process.

All of the above show that the activity of ad-hoc tribunals concentrated especially on punishing those guilty. The resolutions/statutes that were at the basis of the functioning of the ad-hoc tribunals for the former Yugoslavia and Rwanda do not contain references to reparatory measures for the victims or to the reconciliation of the sides found in conflict.

2.4. The International Criminal Court (ICC)

Unlike the previously presented ad-hoc courts, the *International Criminal Court* (ICC) represents the states' decision to create a permanent international criminal court. The ICC began its activity in 2002, once its founding document, *The Rome Statute* of the ICC (RSICC), which was approved by the UN General Assembly in Rome, 1998, came into effect.[48] Art. 4 of the Statute mentions that the ICC *must have the judicial and legal capacity to exercise its functions and to fulfil its objectives*. On the basis of the *Nulla poena sine lege* principle (art. 23) the person convicted by the ICC can be punished only in accordance with the Rome Statute. The ICC's jurisprudence is limited according to art. 5 to *the most serious crimes of concern for the international community as a whole*; genocide as defined by art. 6, crimes against humanity as defined by art. 7, war crimes as defined by art. 8, crimes of aggression as defined by art. 8 bis.

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[40] United Nations, International Criminal Tribunal for the Former Yougoslavia, available at http://www.icty.org, accessed March 2022.

[41] ICCY, *Prosecutor v. Radislav Krstic*, Judgement 19.08.2004, availble at http://www.icty.org/x/cases/krstic/acjug/en/, accessed March 2022.

[42] Juliya Bogoeva, *The War in Yugoslavia op. cit.*, pp. 14, 62; ICTY Remembers: The Strebrenica Genocide 1995-2015, available at https://www.irmct.org/specials/srebrenica20/, accessed March 2022.

[43] Resolution 955 (1994), *Establishment of an International Tribunal and Adoption of the Statute of the Tribunal*, S/RES/955(1994), adopted by the Security Council at its 3453rd meeting, availble at http://unscr.com/en/resolutions/955, accessed March 2022.

[44] Human Rights Watch, *Numbers*, available at https://www.hrw.org/reports/1999/rwanda/Geno1-3-04.htm, accessed March 2022.

[45] United Nations, *Statute of the International Criminal Tribunal for Rwanda*, available at https://www.legal-tools.org/doc/8732d6/pdf/, accessed March 2022.

[46] Unuted Nations, International Residual Mechanism for Criminal Tribunals, The ICTR in Brief, available at https://unictr.irmct.org/en/tribunal, accessed March 2022.

[47] Elena E.Ştefan, *Aspecte de drept comparat privind jurământul şefului de stat*, Revista de Drept Public, 2020, 3-4, p. 91.

[48] International Criminal Court, *Rome Statute of the International Criminal Court*, available at https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf, accessed March 2022.

The Rome Statute was signed by 137 states, but only 118 of them ratified it.[49] For instance, Burundi decided to withdraw in 2017 as a result of the ICC's proposal for the investigation of the repressive manner in which the government responded to the opposition protests that began in 2015. In 2019, the Philippines resorted to the same strategy as a result of the ICC's intention to investigate the governmental abuses in the war they had declared to the drug cartels. On the basis of *art. 75* of the RSICC, the Court is authorized to dispose reparations for the victims. After consulting the statistics, it can be observed that in four of the 27 cases judged by the ICC since it was established,[50] reparations have been proposed for the victims: the Al Mahdi case (Mali),[51] the Katanga case (Democratic Republic of Congo),[52] the Lubanga case (Democratic Republic of Congo),[53] the Gombo et al. case (Central African Republic).[54]

The ICC materialises the effort of the international community to continue combating impunity. Moreover, its permanent nature sends to the idea of a code of conduct for states and invites the redefinition of a new international ethic. Relevant for the present study is the manner in which the ICC has chosen to position itself in relation to victims' rehabilitation.

A first observation would be that the ICC legislates a limited series of crimes found under its jurisdiction, generically called serious infractions that affect communities as a whole: genocide, crimes against humanity, war crimes and aggression. At the community level however, the local population confronts itself with an entire series of other infractions.[55] For instance, even though the victims of sexual abuses gave testimonies before the Court, these types of convictions are few due to a lack of conclusive evidence and as a result of the strict selection of the accusations.[56] According to statistics,[57] it can be observed that only in the Bemba case were convictions for crimes against humanity made for murder and rape, war crimes of murder, rape and acts of dilapidation done between October 2002 and March 2003, by the Movement for the liberation of Congo, whose commander he was. In 2018, the ICC's Appeal Court annulled the decision as a first conviction by the Trial Chamber III from 2016, acquitting Jean Pierre Bemba Gombo of accusations of war crimes and crimes against humanity.[58]

A second observation refers to the novelty element that the Court proposes. Art. 75 from the ICC Statute makes reference to *reparations* in favour of victims, reparations that can take the form of restorations, compensations or rehabilitations. The victims are defined, according to art. 85 from the ICC Statute, as individuals who have suffered a prejudice as a result of the commission of any infraction that is under the Court's jurisdiction. The Court has the jurisdiction to establish the prejudice caused and it can also pronounce a rule that indicates reparation against a person who has been convicted. In para. 2 it is mentioned that in case of need, the compensation allocated from the *Trust fund in support of victims* provided in art. 79. *The Trust fund in support of victims* is mandated by the Rome Statute, art. 79 and created in 2004 by the assembly of member states. The fund has a mandate to implement reparatory programmes for the victims of infractions under the *ratione materiae* jurisdiction of the Court and it also offers the material, psychological, and physical support for victims and their families. The resources come from fines, confiscated goods, and voluntary donations from member states or from non-state actors. The criticism is related to the ambiguities of both the Statute and the Procedure Regulation regarding reparations' processing, structural deficiencies, and legal gaps that affect the revendication claims from the victims and the implementation of reparations.[59] In regards to the supplementation for the Fund for victims, it is

[49] *United Nations Treaty Collection*, Chapter XVIII, Penal Matters, available at https://internationalcriminalcourtnashie.weebly.com/signatories-of-the-rome-statute.html, accessed March 2022.

[50] International Criminal Court, Cases, available at https://www.icc-cpi.int/cases, accessed March 2022.

[51] ICC, Situation In The Republic Of Mali In The Case Of The Prosecutor V. Ahmad Al Faqi Al Mahdi, No.: ICC-01/12-01/15, available at https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF, accessed March 2022.

[52] *Situation In The Democratic Republic Of The Congo In The Case Of The Prosecutor V. Germain Katanga*, Case No.: ICC-01/04-01/07, available at https://www.icc-cpi.int/CourtRecords/CR2017_05121.PDF, accessed March 2022.

[53] Situation in the Republic Democratic of the Congo, The Prosecutor v. Thomas Lubango Dyilo, 01/04-01/06, available at https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf, accessed March 2022.

[54] ICC, *Situation In The Central African Republic In The Case Of The Prosecutor V. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, FidèLe Babala, Wandu And Narcisse Arido*, No.: ICC-01/05-01/13, available at https://www.icc-cpi.int/CourtRecords/CR2016_18527.PDF, accessed March 2022.

[55] See also Elena E. Ştefan, *Delimitarea dintre infracţiune şi contravenţie în lumina noilor modificări legislative*, in Dreptul, 2015, 6, pp. 143-160.

[56] Luke Moffett, *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*, Criminal Law Forum, 26(2) (2015), pp. 255-289.

[57] International Criminal Court, Cases, *op. cit.*

[58] International Criminal Court, Situation in central African Republic, The prosecutor v. Jean Pierre Bemba Gombo, case Information Sheet, ICC-01/05-01/08, available at https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf, accessed March 2022.

[59] Marc Henzelin, Veijo Heiskanen & Guenael Mettruax, *Reparations to victims before the International Criminal Court: Lessons from international mass claim processes*, Criminal Law Forum, 2006, 17(3-4), pp. 317-344.

considered as uncertain the procedure of recovery of goods from those convicted and, in addition, the idea according to which sums for multiple victims could be covered from the conviction of only one person is unsustainable.[60]

However, what is relevant for the present study is that both the Rome Statute and the creation of the ICC represent progress in pacing the concept of reparatory justice. In other words, recognizing the sufferings and losses the victims were subjected to, their participation in the trial to find the truth, and in the one to obtain reparations, the reparations in themselves, the creation of the Trust fund for victims, all of these represent an approach different from the previous mechanisms of international criminal justice. The ICC thus combines classic, retributive justice with the reparatory, restorative one, marking a step toward victims' rehabilitation, by proposing reparatory measures.

2.5. Hybrid tribunals

Another stage in trying to manage abuses was the creation of hybrid tribunals. A first category of such tribunals are the ones that function as independent jurisdictions and that operate outside the internal justice system. To this end, it is worth mentioning the *Tribunal for Sierra Leone*, which functioned between 2002 and 2013 as a result of the adoption of the UN Security Council Resolution no. 1315/2007.[61] According to the statute,[62] the Tribunal had the jurisdiction to punish the individuals responsible for serious violations of international humanitarian law and of internal law, starting with 1996 and during the civil war that took place between 1991 and 2002. A novelty was that it functioned in the very country where the abuses took place and it also distinguished itself through its fieldwork.[63]

Another such hybrid court is the *Special Tribunal for Lebanon*, created after Resolution 1757/2007[64] of the UN Security Council, with its headquarters in Leidschendam, The Netherlands and its fieldwork bureau in Lebanon. Its jurisdiction according to the statute[65] consists in investigating and punishing those responsible for the 2005 killing of former Prime Minister Hariri and other 21 persons.[66] According to art. 2 from the Statute, the Tribunal implements the criminal investigation and punishment of terrorist acts, infractions against life and personal integrity, etc.

Another category of hybrid tribunals is that of those integrated in the national justice system, but with international personnel. *The War Crimes Chambers in Bosnia* were founded through the Court's Law in 2002[67] and started functioning starting with 2005. They are parts of the criminal division of the State Court in Bosnia and Herzegovina and have as a purpose the investigation of serious violations of international humanitarian law on national territory (the defendants who were not judged by the International Criminal Tribunal for former Yugoslavia), the reconstruction of the Bosnian judicial system, as well as post-war reconciliation.[68]

In turn, the *Extraordinary Chambers in the Courts of Cambodia* (also called the Khmer Rouge Tribunal or the Cambodia Tribunal) function on the basis of an accord between the UN and the Cambodian government.[69] This hybrid tribunal where Cambodian and international judges are active was created in 2003 and has exclusive jurisdiction on judging crimes committed by the Khmer Rouge communist regime between 1975 and 1979 when over 1,7 million people lost their lives as a result of reprisals, torture, executions, or lack of food.[70]

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[60] Luke Moffett, *Reparations for victims at the International Criminal Court: A New Way Forward?*, The International Journal of Human Rights, 2017, 21 (9), pp. 1204-1222.

[61] United Nations Security Council, Resolution 1315, S/RES/1315(2000), adopted by the Security Council at its 4186th meeting, on 14 August 2000, available at http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf, accessed March 2022.

[62] Legal Tools Database, *Statute Of The Special Court For Sierra Leone*, available at https://www.legal-tools.org/en/doc/aa0e20/, accessed March 2022.

[63] Rachel Kerr & Jessica Lincoln, *The Special Court for Sierra Leone Outreach, Legacy and Impact*, Final Report, 2008, p. 16, War Crimes Research Group, Department of War Studies, King College London, available at http://www.rscsl.org/Documents/slfinalreport.pdf, accessed March 2022.

[64] United Nations Security Council, *Resolution 1757 (2007)*, S/RES/1757 (2007), adopted by the Security Council at its 5685th meeting, on 30 May 2007, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SRES%201757.pdf, accessed March 2022.

[65] Attachment at the S/RES/1757 (2007), Statute of the Special Tribunal for Lebanon, available at https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon___English.pdf, accessed March 2022.

[66] Attachment at the S/RES/1757 (2007), *Statute … op. cit.*

[67] *Law On Court Of Bosnia And Herzegovina*, consolidated Version, Official Gazette of Bosnia and Herzegovina, 49/09, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.48_Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf, accessed March 2022.

[68] *Law On Court Of Bosnia And Herzegovina … op. cit.*

[69] *Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea*, available at *https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf*, accessed March 2022.

[70] Extraordinary chambers in The Courts of Cambodgia, Introduction to the ECCC, available at https://www.eccc.gov.kh/en/introduction-eccc, accessed March 2022.

A first aspect is related to the fact that the activity of such courts "moves" the judicial process and the uncovering of the truth from the international level to the local communities. As arguments for this there are: the integration of these hybrid courts in the national law systems; the trials taking place at the national level; inserting laws in their statutes as they are defined in national systems; focusing on the desiderata such as consolidating judicial systems and reconciliation. This *movement* towards national settings represents a plus on behalf of hybrids courts in comparison to the ICC, whose international procedure was not conceived to correspond to national courts of the states where its investigations were taking place. *Another relevant aspect* aims to encourage the victims' participation in the trial, which leads to the idea that the victim becomes a subject whose values and interests can contribute to obtaining conclusive results. According to art. 17 of the Statute of the Lebanon Court, the victims/legal representatives have the right to be present throughout the trials in order to express their points of view, in the case where their interests are affected.[71] In turn, the Extraordinary Chambers in Cambodia do not abandon the desiderata stipulated in the founding accord, namely justice for the victims, consolidating justice and national reconciliation. To this end, the victims have an important role in the legal proceedings: they can file complaints with the prosecutors that take their interests into consideration; they can bring a civil action to obtain collective and moral reparations.[72]

3. Conclusions

Managing abuses on human rights imposes on the one hand, measures at the international community level and, on the other hand, measures at the state level. If they choose the path of impunity, the states *do not guarantee* the material and moral reparation of the victims for the prejudices created. Furthermore, they do not guarantee prevention methods that would have the role to combat the reappearance of similar abuses.

In addition, the present study has shown how, at the international level, there were a series of retributive and/or restorative justice mechanisms that were applied, which are part of an ample effort to end impunity. The mechanisms that promote traditional retributive justice focus on the punishment of those guilty, on imposing punishments proportional with the seriousness and nature of the infractions committed. In this perspective, justice is done when the perpetrators are appropriately punished, since they violated the laws that ensure judicial order. On the other hand, restorative justice complements retributive justice since it focuses on exceptional situations when communities suffered from systematic and generalised abuses. These abuses cannot be reduced *only* to the punishment of perpetrators. Such justice proposes equally focusing on reparatory measures for the victims and on the public recognition of the sufferings to which they were subjected, since the abuses committed in the past caused social fractures and have affected the moral unity of the society. The reparation for those affected has multiple forms: the *return* to the situation previous to the abuse, *compensation* for the material losses and the suffered pain, medical, psychological, legal, and social *rehabilitation*, as well as *insuring the moral guarantee* that violations of human rights will not be repeated.

Even though, as the present study shows, the legislation and practices in the field have been consolidated at the international level, the reparatory measures for the victims are/should be the result of the initiatives adopted by executive and legislative powers of governments, which often comes together with delays in being established and implemented.

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[71] Attachment at the S/RES/1757 (2007), *Statute … op. cit.*

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STRATEGIES FOR COUNTERING TERRORISM IN THE MODERN WORLD

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Abstract

In the public consciousness, the essence of terrorism is revealed through the deliberate use or threat of using various types of violence against civilians through a non-state entity (individual or group of people) for political or religious purposes. Terrorism continues to be a serious threat, and the task of taking decisive countermeasures is therefore urgent. The question is what strategies and rules should be applied in the fight against terrorism and who should check compliance with these rules.

Keywords: *international public law, terrorism, fight against terrorism.*

1. Introduction

In the European Union, since the adoption of the Security Strategy in 2003, the problem of terrorism has been raised to a priority level, while expanding the counter-terrorism policy that has existed since the mid-1980s and intensifying anti-terrorist ties with the United States. There are currently three main approaches to combating terrorism, which relate to three different perspectives on this issue.

The first approach is based on policing and investigation. This is the most common method in Europe. It reflects the concept of terrorism, based on the criminal approach, according to which terrorism is a recurring phenomenon that cannot be eliminated, but can be prosecuted and punished by certain methods of law enforcement.

The second approach views terrorism as a social disease and therefore seeks to identify its root causes, such as the environment in which terrorist groups develop and from which they receive support. This approach includes the development of long-term strategies aimed at eliminating or correcting social imbalances.

The third approach is to look at terrorism through the prism of military analogy, which involves the use of force, preemptive strikes (including against countries believed to host or defend terrorist organizations) and the physical removal of its leadership. In the most extreme cases, such as global terror, this approach can mean large-scale war. However, in a number of global and regional cases, the laws of war are the most appropriate as a basis for defining and combating terrorism, as this phenomenon is a coercive measure aimed at achieving political goals, often using pseudo-war methods of work.

2. Content

As noted earlier, terrorist acts are designed to achieve different political goals and can therefore be considered more serious acts than crimes. In addition, criminal law alone can be too weak a "weapon" to fight terrorism, as the destruction of terrorist infrastructure and networks requires diplomacy, the use of force, a wide range of social, informational, cultural and economic measures, and criminal law. Restrictions on criminal justice make sense in civil society, where deterrence is a factor, but this may not be the case for a high-tech terrorist organization. Terrorism can therefore be seen as a very dangerous phenomenon, as it is more prone than crime to pursuing its goals, even sacrificing itself in certain situations. At the same time, criminal law alone cannot serve as an appropriate platform for combating terrorism.

Therefore, based on the definition of terrorism within the existing system of norms and laws already included in international conventions and adopted by most countries around the world, the community must reach a new level of international cooperation as a key tool in the joint fight against terrorism. It is clear from this that terrorism has become a key aspect of the security debate. This raises a number of problems, first of all with regard to the possible combination of threats (terrorist attacks on networks such as energy networks and energy suppliers such as nuclear power plants, the use of computers etc.). And secondly, with regard to forms of cooperation in the fight against terrorism. Different approaches to this issue will lead to different actors addressing it differently, but it is clear that a particular policy on this security threat is a necessary component of the overall security strategy.

The measures must be objective, embedded in the system of international law and at the same time quite specific. These are:

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a) policy measures - reaching a compromise on globalization processes, including; formalization of the multipolar world system, development of a system for its legal strengthening, development of mechanisms for more rational civilization development, resource balance;

b) legal - development of international arbitration systems for resolving global and regional socio-political conflicts;

c) development of a system for information and psychological security, which prevents indirect mechanisms of information and psychological wars; application of flexible criteria for arms trafficking control (including nuclear, by formalizing the ban on the threat of nuclear weapons as a factor in promoting political interests);

d) the elimination of economic preconditions by eliminating the channels for indirect financing of terrorist organizations and their allies.

It is also advisable to include the formation of an international and national agenda aimed at eliminating the causes and preconditions for the use of terrorism in influencing social and political processes; avoiding "double" standards when assessing the possibility of using terrorist methods; continuous global and regional monitoring of terrorism; centralized control of forces and assets in complex interaction with civil society; the ratio of the strength of counter-terrorism to its destructive potential; development of a system for preventive diplomacy and mediation.

Threats of socio-political instability are associated not only with countries that openly threaten existing political relations, but also with those in which there is rapid economic growth. Given the perspectives of the theory of the democratic world and liberal institutionalism, the potential to challenge international and national security today depends mainly not only on the sustainability of their economic or military spheres, but also on the legitimacy and focus of their existing forms of government. In other words, in order to disrupt security parity, the growing power of the state requires not only economic and military potential, but also an alternative vision of world reality and a desire to put its vision into practice. It is this approach that forms the concept of state terrorism as a specific form of terrorist activity in cases where terrorist means are used to achieve an alternative model.

In this regard, the issue of corruption, which is a factor and prerequisite for terrorist activity, should also be emphasized. Efforts to reform the fight against terrorism are aimed at resolving this large-scale problem. In fact, corruption today is one of the main obstacles to progress, and not just in the Islamic world. Greater rigor is needed in overseeing the distribution of financial and material assistance. The aim is to take into account any aid that could be used as a terrorist trigger. Centuries-old bribery schemes and the impunity of corrupt civil servants are as dangerous to politics as terrorism, especially when they complement each other.

The world community has already clearly realized that the war on terror does not mean a local victory in full at a certain chronological point. In this sense, terror can never be completely eliminated. That is why the nature of this war is practically beyond any clear framework definition. However, in the modern world we can talk about two main directions of its development: strengthening protection against terrorism and preventing and desynchronizing terrorist attacks. The first includes not only increasing the number of police forces, anti-terrorist barriers and the effectiveness of intelligence, but also taking measures to prevent catastrophic consequences in the global and national economy in the event of a terrorist attack.

Another important component is the desynchronization of terrorist attacks. One of the reasons why the 9/11 attacks or the Beslan tragedy have become so significant on a large scale is the fact that terrorists have managed to hijack planes, attack three known sites - in the first case and in the second - to attack a civilian site, such as they have previously made serious preparations to achieve this goal. Although even such an incident would be tragic, the complexity and complexity of the attacks multiply their emotional impact.

It is therefore necessary to identify the military, law enforcement, diplomatic, economic and cultural objectives that correspond to this form, when they must include the destruction or neutralization of known terrorists, their facilities and bases. It is possible to destroy only what is known, so such sites require reliable and consistent intelligence operations to detect, identify and track, which is clearly shown in the fight against terrorists in Syria. At the same time, the main task that must now become part of the overall anti-terrorist strategy is to combat the proliferation of weapons of mass destruction.

It is generally acknowledged that the most dangerous potential threat stems from the combination of terrorism and weapons of mass destruction. Terrorist groups are actively seeking to produce or acquire weapons of mass destruction. If they prove that they have reached the capacity to deploy such weapons, their ability to blackmail or otherwise undermine the activities of opposing states will increase dramatically. Weapons of mass destruction will also contribute to the formation of wider operations, as they can potentially resolve tactical dilemmas that hinder the ideological justification of terrorist activities - the difficulty of achieving impressive results, on the one hand, or inaction, on the other.

Many analysts believe that the absence (or relatively small number) of large-scale attacks on the territories of the world's leading countries indicates a loss of potential (and therefore confidence in it) by the terrorist movement. According to this interpretation, it is extremely important for the opponent to achieve noticeable tactical success in order to show his viability. In this case, we must agree that conventional weapons require several coordinated strikes in order to have a global shock effect. As domestic defense increases in Russia, the United States, or China, a number of terrorist attacks have become problematic. Thus, only weapons of mass destruction can solve this problem by allowing terrorists to achieve ultra-high results through a single attack. These strategic goals are in line with the model of rational education, especially for senior management, in particular for ISIL.

Nevertheless, it must be acknowledged that even so far the global war on terrorism clearly has no single goal. This is not surprising, since, starting with the terrorist attacks of 11 September 2001, which became a strategic surprise, any subsequent terrorist act requires (for political, social, law enforcement and military reasons) an immediate response.

As the war on terror continues, the initial desire for action against terrorism must lead to a specific goal or set of goals. Such a war, without purpose, is perhaps the greatest mistake a nation can make. In this regard, we must note the US National Security Strategy of 2002, which explicitly declared one of the main goals of the war on terror - to bring democracy and freedom to the Islamic world. One of the goals of this war is the creation of democratic governments from abroad, combined with the constitutional protection of citizens. This approach of the administration of J. Bush is clearly idealistic, but he has caused many innocent civilian casualties. In this context, democracy is becoming the root cause of the global war on terror. But at the same time, it is becoming another contentious point that constantly requires careful research and flexibility as a means of countering terrorism.

Weaknesses in most countries' foreign and domestic policies include the inability to make effective use of counter-terrorism propaganda, a concept that has an insidious connotation in a multinational culture. It should be noted that the Muslim world is flooded with anti-American propaganda, which expels the Muslim media, populist politicians, madrassas and mosques. But the deification of facts and truths in the Western world is of little importance in Muslim societies in the Middle East. Much more important is what people want to believe.

3. Conclusions

"The fight against terrorism" is still a legally vague term, but it has become a unifying force among states bound by the understanding that no country is immune to the scourge of "terrorism" and that terrorism is not defined by any race, religion or culture. This unanimous support is best illustrated by the numerous resolutions on counter-terrorism adopted by the Security Council and the UN General Assembly in recent years. But the most important fact against the existence of a coherent and unified legal regime against terrorism is the lack of a generally accepted definition of terrorism and a comprehensive international counter-terrorism treaty. Instead, limiting the demand to counter-terrorism instruments at the global level, most countries rely on the 19 universal treaties and regulatory frameworks established by the UN Security Council since the events of September 11, 2001. Undoubtedly, the way out of this situation is to avoid attempts at unification and to define "terrorism" as a qualifier for various destructive processes.

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THE CONSTITUTIONAL PERSPECTIVE ON THE PROCEDURE OF WITHDRAWAL, RESPECTIVELY OF RENUNCIATION OF THE TITLE OF DOCTOR

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Abstract

The purpose of this article is to address the issues arising from the regulation of the procedure for withdrawing the doctoral degree, respectively the one on establishing the right to voluntarily renounce this quality, in the context of the provisions found in the National Education Law no. 1/2011.

The first part of this study begins with the treatment of the particular hypothesis of the withdrawal of the doctoral degree following the verifications performed by CNATDCU and the proposal made in this regard to the Ministry of Education. As we will see, the way in which such a procedure was regulated raises numerous questions regarding its constitutionality in relation to those retained in the Constitutional Court Decision no. 624/2016. Following analysis of the legal provisions in force, we will identify the hypotheses that may arise in practice, formulating some proposals de lege ferenda to ensure, on the one hand, compliance with those retained by the Court in the aforementioned decision, and, on the other hand, to establish a certain coherence and predictability regarding the mechanism for withdrawing the doctoral degree.

The second part concerns a thorough look at the hypothesis of voluntary renunciation of the title of doctor, as a result of which we bring to attention, among other things, the creation of a working variant that supports the fairness of such a mechanism conceived by the Romanian legislator, but which, above all, supports the constitutionality of the future regulation, taking into account also the considerations illustrated by the Court in the same decision.

Keywords: *diploma, withdrawal, CNATDCU, waiver, order.*

1. Introduction

This article aims to treat the issues resulting from the way of regulating the procedure for withdrawing the PhD title, respectively the one regarding the establishment of the right to voluntarily renounce the same quality, in the context of the provisions found in the Law on National Education no. 1/2011, with the amendments and additions subsequently made by GEO no. 94/2014 and GEO no. 4/2016 and, in particular, of the intervention of the CCR Decision no. 624 of 26 October 2016.

The first part of this study begins with the treatment of the particular hypothesis of the withdrawal of the doctoral degree following the verifications performed by the National Council for Attestation of University Degrees, Diplomas and Certificates (hereinafter, CNATDCU) and the proposal made in this regard to the Ministry of Education. First of all, given the distinct legal regime of nullity compared to revocation, which operates in the field of administrative acts, we consider that it is necessary to achieve a natural delimitation between the two hypotheses, so that the rule benefits from an increase of „clarity in its application. It is also necessary to analyze carefully whether the act that really needs to be annulled by the court is the doctor's degree, as provided by the current provisions of art. 146^1 of the National Education Law no. 1/2011 (hereinafter, Law no. 1/2011) or, possibly, the ministerial order ordering the withdrawal of the doctor's degree.

The second part, which aims at an in-depth look at the hypothesis of voluntary renunciation of the title of doctor, begins with the analysis of this right established by the legislator delegated by GEO no. 94/2014, starting from its very nature and continuing with any interference resulting from its exercise. In this context, we intend to show, among other things, the possible effects produced by the manifestation of the will of the doctoral holder in relation to the legal regime of nullity, especially considering the role of CNATDCU in investigating possible violations of ethical standards in scientific research. Alternatively, we also draw attention to the creation of a working variant that could support, from a certain perspective, the fairness of such a mechanism conceived by the Romanian legislator, taking into account the considerations illustrated by the CCR in Decision no. 624/2016.

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2. The particular hypothesis of the withdrawal of the doctoral degree

2.1. Preliminary analysis of incidental legal provisions

In the context of studying the legal liability of the doctoral student or the doctoral supervisor for violating the deontological norms in the research and preparation of doctoral theses, an issue that caught my attention was the procedure related to the withdrawal of doctor's title in the context of entry into force of Law no. 139/2019 for the approval of the GEO no. 4/2016 on amending and supplementing the National Education Law no. 1/2011(hereinafter, Law no. 1/2011)[1].

Specifically, according to art. 146[1], newly introduced in the content of Law no. 1/2011: *„The title of doctor shall cease to have legal effect from the moment of communication of the order of its withdrawal."* Also, according to art. 146[2] which was also introduced by the same emergency ordinance: *„(1) The doctor's diploma shall be revoked or canceled by final judgment of a court. (2) By way of derogation from the provisions of paragraph (6) of Article 1 of the Law on administrative litigation no. 554/2004, as subsequently amended and supplemented, the issuing institution shall bring the action within one year from the date of the provision to withdraw the doctor's title."*

Regarding art. 146[1] of Law no. 1/2011, we mention that it aims at communicating the disposition of withdrawal of the doctoral title contained at the end of the ministerial order, as a rule, provided in art. 2 of the order and having the following wording: *„The General Directorate of Higher Education within the Ministry of National Education and Scientific Research communicates this order to institution X, which will carry it out, and to the person nominated in art. 1."* We appreciate that by introducing this article in the Law no. 1/2011, there is no structural change of the moment from which the withdrawal of the PhD. produces legal effects, thus not abandoning the principle of form symmetry[2].

Applying this principle to the above situation, CNATDCU is the body that, following the validation of the decision of the doctoral dissertation commission, proposes granting the doctorate to the Ministry of Education and Research and on the basis of this the ministerial order is issued by which the title of doctor is conferred. Similarly, in the conditions in which it is concluded that the doctoral thesis does not comply with the ethical standards of scientific research, CNATDCU proposes to the ministry the withdrawal of the doctoral degree, based on the provisions of art. 170 para. (1) lit. b) of Law no. 1/2011. Following the issuance of the legal opinion by the specialized directorate within the ministry, by order of the minister, the doctoral degree is withdrawn.

Instead, art. 146[2], newly introduced in the content of Law no. 1/2011, brings a substantial change in the matter by the fact that the legislator creates, impermissibly, a dichotomy between the title of doctor, which is granted by order of the minister, and the proof of having such a quality, which is done through the diploma doctoral certificate issued by the university organizing doctoral studies[3]. Specifically, as we saw above, the order to withdraw the title of doctor is communicated both to the person concerned and to the university organizing the doctoral studies, in order to carry it out. The latter approach was involving, among other things, the obligation of the university to proceed administratively with the abolition of the doctoral degree. However, according to the new amendments, this can no longer be done by the university in a purely administrative process, but it is necessary to initiate a jurisdictional mechanism, to notify the court with an action to annul the diploma, within a year from the date of the order to withdraw the title of doctor (date of the ministerial order).

Such a provision poses real problems from the perspective of the legal relationship between an administrative act - the ministerial order by which the title of doctor was withdrawn - and the decision of the court - a judicial act. First of all, the question naturally arises as to what happens if the university, on the basis of the university autonomy that it could invoke in favor, understands not to introduce such an action in time?

Related to this aspect, as formulated in art. 146[2] of the National Education Law: *„(2) By derogation from the provisions of par. (6) in art. 1 of the Law on administrative litigation no. 554/2004, with the subsequent amendments and completions, the issuing institution introduces the action in annulment of the diploma, within one year from the date of the disposition of the withdrawal of the title of doctor."* by reference to the provisions of art. 6 para. (1) of the Law administrative litigation no. 554/2004 (hereinafter, Law no. 554/2004)[4]: *„Special administrative jurisdictions are optional and free of charge."*, it follows that the intention of the legislature was to impose an obligation on the issuing institutions to bring such an action.

However, if they choose not to introduce such an action in time, given that art. 146[1] of Law no. 1/2011

[1] Published in the Official Gazette of Romania, Part I no. 592 of July 18, 2019.

[2] On the contrary, see the opinions expressed in the article on amendments to the National Education Law no. 1/2011 by Law no. 139/2019, available at: https://pressone.ro/legea-de-conservare-a-diplomei-plagiatorului, accessed on 05.03.2022.

[3] In the same vein, ibidem.

[4] Published in the Official Gazette of Romania, Part I no. 1154 of December 7, 2004.

stipulates that the title of doctor ceases to produce legal effects from the moment of communication of the disposition of its withdrawal, such an omission cannot produce legal consequences regarding the ministerial order that continues to produce its effects based on its executory character[5].

On the other hand, even if the diploma has not been annulled by the court, it remains, at first sight, an administrative act attesting/proving a previously acquired right also by means of an administrative act, this time constituting rights - the ministerial order granting the title of doctor. By extrapolating and applying this reasoning to the field of road traffic, it can be said that if the right to drive a vehicle is acquired after passing a written exam and a practical test, this being the constitutive moment of the right, the subsequent issuance of the driving license is made exclusively for the purpose of proving the existence of such a right (in fact, between these two moments the driver benefits from a provisional proof of the right to drive, valid for a certain period of time until the moment of taking possession of the driving license).

Therefore, the diploma of the Ministerial Order (the latter having both a constitutive role and a probative force of law) is nothing but an act that contributes to the proof of the doctoral degree, therefore an exclusive act with probative force. Being considered an accessory document of the original ministerial order, under the conditions of operating an implicit abrogation by the new order, such a diploma cannot prove a thing that is no longer in existence, being devoid of any legal force and, implicitly, probative.

Drawing a parallel this time with the regime of weapons and ammunition, we mention that according to art. 45 of Law no. 295/2004 on the regime of weapons and ammunition[6]: *„(1) The annulment of the right to carry and use lethal weapons shall be ordered by the competent bodies if the holder of the right is in one of the following situations: (...) (2) cancellation of the right to carry and use weapons,* ***the weapon permit is withdrawn by the police body that ordered the measure****, and the weapons and the entire amount of ammunition held are immediately deposited with a gunsmith authorized for this purpose, unless which are raised by the police."* Therefore, the cancellation of the right to carry and use lethal weapons is ordered by the competent bodies for one of the situations set out in the law, but the weapon permit is withdrawn by the police body that ordered the cancellation (as an administrative measure). For example, applying the new amendments to this situation would mean that the police body, although having ordered the cancellation of the right to carry and use lethal weapons, would be required to notify the court in order to withdraw the weapon permit, which would be totally absurd. Therefore, returning to our hypothesis, I consider that it would have been preferable for the abolition of the diploma to remain a purely administrative step, in the competence of the institution organizing the doctoral studies.

The question remains, however, what happens if an action is taken to annul the diploma, but the court rejects the application for annulment? Can it be considered that the intention of the legislator by introducing this provision was that in which the court in its analysis acquires, implicitly, the possibility of censoring the ministerial order by which the doctor's degree was withdrawn?

I believe that the answer to these issues could come only from the analysis and understanding of the causes, but also from the way in which such a legislative solution was reached.

2.2. The evolution of the legislative process

First of all, we must start from the fact that the text of the emergency ordinance on amending and supplementing the Law no. 1/2011 specified that the doctoral degree ceases to produce legal effects from the moment of communication of the disposition of withdrawal of the title. And in this case it can be easily seen an amalgamation, which could lead to confusion. In particular, it is not the diploma that ceases to produce legal effects as a result of the withdrawal order, but the very title of doctor granted by the initial ministerial order. As I mentioned earlier, by operating a tacit repeal by the new order, the cessation of legal effects can only concern the constitutive act of rights and not an act that serves as proof of a right. Therefore, I appreciate that such a mention was completely useless, creating more confusion.

Further, the *Draft Law for the approval of the GEO no. 4/2016 regarding the amendment and completion of the National Education Law no. 1/2011 (PL-x no. 66/2016)*, adopted by the Chamber of Deputies, provided in art. 146^1 that the certificates and diplomas of bachelor, master and/or doctor cease to produce legal effects, from the moment of communication of the disposition of their withdrawal. Practically, we proceed to an extension of the category of documents, adding in addition to the doctoral and bachelor's or master's degrees, otherwise no other changes are made, which is why we appreciate that the arguments presented above are valid in this new context.

A similar form was adopted by the Romanian Senate, as a decision-making chamber, providing that

[5] With the mention that, as we will see later, this poses serious problems from the perspective of the binding nature of those retained by the Constitutional Court in the Decision no. 624/2016.

[6] Republished in the Official Gazette of Romania, Part I no. 425 of June 10, 2014.

the administrative act establishing the scientific title is annulled from the date of issuance of the revocation act and produces consequences only for the future[7]. As can be easily seen, the legislator also creates here, impermissibly, a derogation from the legal regime of nullity (which provides for the *ex nunc* effect of the operation of nullity), stating that the annulment of the act establishing the scientific title of doctor produces effects only for the future, practically, the completed documents or the benefits obtained as a result of obtaining the doctor's degree remain unaffected. Or, according to art. 1254 of the Civil Code: *„(1) A contract which is absolutely null or may be annulled is deemed never to have been concluded. (2) The termination of the contract entails, under the conditions laid down by law, the termination of the subsequent acts concluded on the basis of the contract. (3) If the contract is terminated, each part must return to the other, in kind or in equivalent, the received prestations, accordance with art. 1639-1647, even if they were received successively or were continuous."* Therefore, the annulment of an act (even an administrative one) can, in principle, only produce retroactive effects, from the moment of its conclusion and, by no means, for the future[8].

However, it must be taken into account that according to art. 1 para. (6) of the Law no. 554/2004: *„The public authority issuing an illegal unilateral administrative act may request the court to annul it, in case the act can no longer be revoked because it entered the civil circuit and produced legal effects. If the action is admitted, the court shall rule, if it has been notified by the summons, on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action may be brought within one year of the date of issue of the act."*

In this regard, we note that following the notification of unconstitutionality from both the Romanian Government and a group of parliamentarians, the Romanian Constitutional Court, in control prior to the promulgation of the law, admitted the objection of unconstitutionality and found that the *Law for approval of the GEO no. 4/2016 on amending and supplementing the National Education Law no. 1/2011* is unconstitutional, as a whole.

2.3. The considerations set out in Decision no. 624/2016 and the manner of its transposition by the legislator

In upholding the unconstitutionality of the law as a whole, the Court held in its Decision no. 624/2016[9] that: „50. In this constitutional and legal context, the amending provisions of art. 168 para. (72) of Law no. 1/2011, according to which **"the administrative act establishing the scientific title is annulled from the date of issuance of the revocation act and produces effects only for the future" constitutes a violation of the principle of irrevocability of individual administrative acts, with serious consequences on subjective rights born as a result of entry in the civil circuit of the respective act. The possibility of revoking the administrative act by the issuing authority violates the principle of stability of legal relations, introduces insecurity in the civil circuit and leaves to the subjective disposal of the issuing authority the existence of certain rights of the person who acquired the scientific title**."

Therefore, in order to ensure some stability, without any abuse by the body issuing the act, the CCR has stated that: „if there are suspicions of non-compliance with procedures or standards of quality or professional ethics, (...) the administrative act may be subject to the control of an entity independent of the entity that issued the doctoral degree, with specific competencies in this field, which may take sanctioning measures regarding the withdrawal of the title in question. However, if the legislator's option is for the revocation or annulment of the administrative act, it can operate only under the conditions stipulated by law, respectively the measure can only be ordered by a court, in compliance with the provisions of Law no. 554/2004. Moreover, this is the solution enshrined in the jurisprudence of the HCCJ (see Decision no. 3068 of 19 June 2012 or Decision no. 4288 of 23 October 2012), according to which the provisions of Law no. 1/2011 does not constitute exceptions from the rule of irrevocability of individual administrative acts, regulated by the common law in the matter, respectively by Law no. 554/2004."

Hereinafter, as regards the legal regime applicable to the sanction of nullity, as we also stated above: „52. The Court notes that the amending law operates with autonomous notions, the legal regime of

[7] https://www.senat.ro/legis/PDF/2016/16L207FS.PDF, accessed on 05.03.2022.

[8] We say "*in principle*" because in civil matters, for example, there may be situations where certain legal effects produced by the null and void legal act are recognized and maintained in order to preserve other principles of law that conflict with retroactivity (eg best interests of the child). In this context, the following exceptions can be listed: the case of putative marriage [art. 304 para. (1) of the Civil Code], the situation of children from an annulled marriage [art. 305 para. (1) of the new Civil Code], the case of the minor in good faith at the conclusion of the marriage, who retains the full capacity to exercise acquired as an effect of the conclusion of that marriage and subsequent annulment of the marriage [art. 39 para. (2) the new Civil Code] etc.

[9] Regarding the admission of the objection of unconstitutionality of the provisions of the Law for the approval of the GEO no. 4/2016 on amending and supplementing the National Education Law no. 1/2011, published in the Official Gazette of Romania, Part I no. 937 of November 22, 2016.

which obviously differs. Thus, the legislative solutions adopted are likely to create difficulties of application, as they lead to contradictory effects by using contrary legal institutions in the case of the provisions according to which "the administrative act establishing the scientific title is annulled from the date of issuance of the revocation act for the future "or those according to which" IOSUD cancels the diploma "based on the" order of the minister of withdrawal of the title "of doctor / certificate of habilitation. Thus, according to the legal provisions, an act of revocation "cancels" an administrative act ascertaining the scientific title, and the annulment of the diploma is made on the basis of an act by which the title is withdrawn. **Beyond the inaccuracy of the hypotheses of the incidence of the law, given that the institution of revocation / withdrawal has effects for the future, and that of annulment also has effects for the past, the Court finds that these provisions, confusing and without legal rigor, generate uncertainty unitary application of the law, a circumstance likely to infringe the principle of legal certainty, a principle which requires that the rules be clear, coherent and unequivocal, and in order to be correctly interpreted and applied, the terminology used must be certain and sufficiently predictable. 53. The Court therefore finds that the provisions under which "the administrative act establishing the scientific title shall be annulled from the date of issue of the act of revocation and shall take effect only for the future" and those according to which "IOSUD cancels the diploma" withdrawal of the title of doctor / certificate of habilitation, included in the provisions of the sole article points 13 and 17, contravene the principle of legality, provided by art. 1 para. (5) of the Constitution**."

Following this Court decision, the Romanian Senate in the re-examination procedure eliminated most of the provisions of the law challenged in Court (this also after finding the violation of the principle of bicameralism), retaining in its content only the two provisions: art. 146^1: „The title of doctor ceases to produce legal effects from the moment of communication of the order of its withdrawal.", respectively art. 146^2: "(1) The doctoral diploma is revoked or annulled by the final decision of a court. (2) By way of derogation from the provisions of para. (6) of art. 1 of the Law on Administrative Litigation no. 554/2004, as subsequently amended and supplemented, the issuing institution shall bring the action for annulment of the diploma within one year from the date of the disposition of the withdrawal of the title of doctor."

In view of these arguments retained by the Court in Decision no. 624/2016, it can be said that in the process of transposing this decision the intention of the legislator was, at least prima facie, to submit, implicitly, to judicial review and the act ordering the withdrawal of the title of doctor, respectively the ministerial order. I say this because even if it is expressly provided that only the diploma is the act subject to judicial review, naturally, in case of dismissal of the action for annulment, the ministerial order ordering the withdrawal of the title would continue to produce legal effects as a result of its maintenance in the civil circuit, which would leave empty the content of art. 146^2 of Law no. 1/2011. On the other hand, a contrary interpretation could even contradict those held by the Court as regards the need to comply with the principle of the stability of legal relations, assuming that the existence of the rights of the person acquiring a scientific title is made subjectively available to the issuing authority.

Furthermore, it can be noted that by his choice, the legislator chooses to transpose the Court's decision by unjustifiably retaining some elements of the legislation prior to the amendment, but which could ultimately lead to a diversion of the binding effect of the court's decision, as well as to an impermissible removal from the rules governing the contentious procedure. In view of this situation, in the following we will analyze the existing options regarding the concrete application of the current legal framework, taking into consideration those retained by the Court in the aforementioned decision.

2.4. Application of the provisions *de lege lata*

Prior to this, we specify that according to art. 1 para. (6) of Law no. 554/2004[10]: „The public authority issuing an illegal unilateral administrative act may request the court to annul it, in case the act can no longer be revoked because it entered the civil circuit and produced legal effects. If the action is admitted, the court shall rule, if it has been notified by the summons, on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action may be brought within one year of the date of issue of the act."

As can be seen, the second sentence of this paragraph concerns, in essence, the possibility for the court, on the basis of the principle of availability, to rule on the annulment of all legal acts concluded on the basis of the illegal administrative act (in our case, the diploma) to rule on all legal effects produced by these acts. This means that the court may proceed with the annulment of all acts that are closely related to this

[10] In the conditions in which the derogation from the content of art. 146^2 para. (2) of Law no. 1/2011 refers only to the provisions contained in the third thesis of para. (6) in art. 1, the provisions found in the other theses being applied accordingly.

administrative act, practically the acts concluded between the moment of issuing the diploma by the institution organizing the doctoral studies and the moment of communicating the disposition to withdraw the title of doctor- accessory end (*e.g.*: return of salary increases received as a result of obtaining a doctorate).

In this context, we remind that the action for annulment can be exercised even if the court rejects the action of the issuing institution, but the one who has the quality of doctor requests by counterclaim the annulment of the ministerial order by which it was decided to withdraw the doctorate. This working hypothesis can be met practically if this order entered the legal circuit, producing legal effects subsequent to the disposition of the withdrawal of the doctoral degree.

In the event that it has not had legal effect, the issuing institution (Ministry of Education) will be able to proceed directly with its revocation, in which case if the court is notified, however, with an action for annulment, it will be able to order its rejection as not being within the jurisdiction of the courts. In such a case, but also in the hypothesis when the annulment by counterclaim was not requested, I appreciate that the interested party will then be able to invoke the court decision rejecting the action in annulment of the diploma directly before the Ministry of Education, for administrative revocation of the order concerning the withdrawal of doctoral degree.

Returning to the hypothesis of rejecting the action for annulment, insofar as the interested party requested the annulment of the order to withdraw the doctor's degree, the court will be required to rule on its validity, the order being considered an act that is closely related to the diploma conferring the title of doctor (although strictly formal it cannot be considered that this is an act issued on the basis of the diploma). Such a conclusion is also required by the fact that, logically, the diploma cannot continue to exist in the conditions in which this order, based on its enforceability, continues to produce legal effects.

Of course, in the event that the interested party did not request such annulment by counterclaim, invoking the invalidity of the order only as a mere defense of substance, the court will not be able to proceed with the annulment of the administrative act, although in the considerations it will be possible to show Minister was issued in violation of legal provisions. However, on the basis of such a decision, the interested party may subsequently bring an action for annulment of the Minister's order ordering the withdrawal of the doctor's degree.

Therefore, even in the hypothesis of the existence of two articles uncorrelated with all the legislation, provisions that can create more confusion than clarity in practice, we appreciate that the courts, until new legislative interventions, by virtue of the mandatory nature provided by art. 147 para. (4) of the Romanian Constitution, republished, will be required to ensure a consistent interpretation of the provisions previously mentioned with those retained by the CCR in the content of Decision no. 624/2016.

2.5. Proposals *de lege ferenda*

First of all, starting from the provisions of art. 1 para. (6) of Law no. 554/2004[11] and of art. 146^1 and 146^2 of Law no. 1/2011, corroborated with those ruled by the constitutional court in the aforementioned decision, it can be seen that the ministerial order granting the doctoral degree is the administrative act (constituting rights) that produced concrete legal effects in favor of the one who has acquired the quality of doctor (salary benefits, hierarchical advancement, obtaining grants, etc.) and, therefore, the one who needs to be subject to judicial control, the diploma certifying only the existence of such a right. Moreover, taking into account the fact that the issuing institution brings an action for annulment[12], it is not possible to speak at the same time of the revocation of an administrative act following a legal action, the revocation remaining the exclusive attribute of the issuing body and not of the courts.

Secondly, regarding art. 146^1 of Law no. 1/2011: *„The title of doctor ceases to produce legal effects from the moment of communication of the disposition of its withdrawal."* it can be seen, in this new context, that the article becomes partially applicable, and the situation when the action concerns an action for annulment is not covered. Therefore, in order not to create confusion about the moment from which the doctoral degree ceases to produce legal effects, I consider it necessary to achieve in this context a delimitation between the two working hypotheses that may arise (revocation, respectively annulment of the administrative act).

Therefore, in order to comply with the binding effect of Decision no. 624/2016, but also in order to ensure a certain legislative coherence, I appreciate that the form of the text provided in art. 146^1 of Law no. 1/2011 could be the following: *„(1) The Ministerial Order granting the doctoral degree is revoked by the issuing institution in case it has not entered the civil circuit, no legal effects being produced. Otherwise, it can only be set aside by a final judgment of a court. (2)*

[11] *„The public authority issuing an illegal unilateral administrative act may request the court to annul it, in case the act can no longer be revoked because it has entered the civil circuit and produced legal effects. If the action is admitted, the court shall rule, if it has been notified by the summons, on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action may be brought within one year of the date of issue of the act."*

[12] According to art. 146^2 para. (2) newly introduced, but also by reference to the provisions of art. 1 para. (6) of Law no. 554/2004.

By derogation from the provisions of para. (6) in art. 1 of the Law on administrative litigation no. 554/2004, with the subsequent amendments and completions, the issuing institution introduces the action in annulment of the order, within one year from the date of the disposition to withdraw the doctoral title. (3) The title of doctor ceases to produce legal effects from the moment of communication of the order / disposition of its withdrawal / communication of the revocation order or, as the case may be, of the finality of the court decision."

Firstly, given the importance of complying with the rules of legislative technique, we have chosen for a single article covering both issues, since the statement concerning the production of legal effects (in a separate article) cannot be located, in our view, before the article which regulates the procedure itself of revocation, respectively annulment of the administrative act.

Further, we went on the idea of achieving a clear delimitation between the legal regime applicable to the revocation, respectively the annulment of the ministerial order, nuanced and the fact that the action for annulment cannot target anything other than the ministerial order granting the doctorate. Hence, the need to maintain the derogation provided by *de lege lata* from the provisions of para. (6) in art. 1 of the Law no. 554/2004, in which the term for introducing the action for annulment starts to run from the date of the disposition to withdraw the doctoral degree / the date of the order of withdrawal of the doctoral degree. Naturally, the court, based on the principle of availability, will be able to proceed, among other things, with the abolition of the doctoral degree, given that the latter act was issued on the basis of the order granting the doctoral degree. Last but not least, we proceeded to the realization of two working variants, the phrase *„from the date / date of communication of the order of withdrawal of the title of doctor"* being able to present an extra clarity and predictability compared to the phrase "*from the date / date of communication the disposition to withdraw the title of doctor."*

3. The particular hypothesis of voluntary renunciation of the title of doctor

3.1. Preliminary aspects

Another issue that caught my attention in the context of the analysis of the doctoral student's responsibility for violating the norms of deontology is the one related to his possibility to request the renunciation of the doctor's degree.

According to the provisions of art. 168 para. (7^1) of Law no. 1/2011 introduced by the GEO no. 94/2014: *„The holder of a scientific degree may request the Ministry of Education and Scientific Research to renounce the title in question. In this case, the Ministry of Education and Scientific Research takes note of the waiver by a revocation order issued for this purpose."* Also, in accordance with the provisions of par. (7^2) of the same article*: "The administrative act establishing the scientific title shall be annulled from the date of issuance of the revocation order. The procedure for renouncing the title, as well as the one regarding the annulment of the administrative act ascertaining the scientific title shall be approved by order of the Minister of Education and Research."*

Analyzing the merits of the regulation, it can be seen that the legislator (delegate) does not establish what happens to the legal acts concluded or to the effects produced between the moment of granting the doctoral title and the one of issuing the revocation order. We mention that related to this, the CCR by Decision no. 624/2016 established that: ***„by the additions brought to the sole article points 11 and 13 of the criticized law, together with the renunciation of the doctoral degree, the legislator does not establish the status of the doctoral dissertation they will produce in terms of legal (labor) relations, as a result of the unilateral act of renunciation.*** *Also, the additions brought by the sole article point 17 of the criticized law regarding the withdrawal of the doctoral title / cancellation of the diploma do not foresee the legal effects of the applied civil sanction. 55. In this context, the Court notes that the holding of a doctoral degree may be a condition for access to a post, for the acquisition of a professional quality, for a professional status, and sometimes has implications including patrimonial, where the legislator has understood to reward the person who holds the title of doctor with salary increases corresponding to this scientific training. However, the new legal provisions fail to establish the extent to which the legal relations concluded by the person concerned as a doctor are affected, limiting themselves to ruling on the effects of the "act of revocation annulling the administrative act establishing the scientific title" which will occur "only for the future." Non-regulation of the effects of the unilateral act of renunciation or withdrawal of the doctoral degree, as the case may be, raises the risk that the former holder of the doctoral degree will continue to benefit from those rights acquired under the title, although no longer meets the quality.* ***The legal treatment thus regulated legitimizes the infringement of the intellectual property right of the original author, in the conditions in which plagiarism has patrimonial consequences, on the one hand, and creates the possibility for the person who has deviated from the observance of professional ethics standards to enjoy continued by the result of his fraud, on the other hand. However, the Court considers that such a***

purpose of the law is unacceptable from a legal and social point of view, as it encourages illicit behavior and eliminates the punitive and preventive character of the sanction of withdrawal of the doctor's degree."

Consequently, the renunciation of the title of doctor cannot be corroborated in any way with the legal regime governing the revocability of the individual administrative act, an institution which can operate only *ex nunc*. If the renunciation, as configured by the legislature, leads to the idea of producing effects strictly for the future, then this only contradicts the idea of maintaining the effects already produced on the basis of obtaining the title of doctor. Therefore, in order to cover this vice, the waiver must be linked to the institution of annulment of the individual administrative act (which has produced legal effects), an institution which by its nature can operate only *ex tunc*.

Moreover, the CCR went further with its reasoning, ruling that the very regulation of such an option in favor of the holder of a doctor's degree, without expressly providing for the effects of renouncing the doctorate, does not meet the conditions regarding the clarity and predictability of the norm, enshrined in art. 1 para. (5) of the Romanian Constitution, republished. Also, in the Court's view, the regulation of such a right in favor of those holding the title of doctor in conjunction with the fact that the administrative act establishing the scientific title (in this case, the doctor's degree) is annulled from the date of issuance of the revocation order and not at another time (practically the revocation order acquiring an enforceable character) leads to an impediment or even termination of the investigation procedure of the way in which the doctoral title was obtained**. Therefore, this, coupled with the fact that the withdrawal of the doctor's degree operates as a sanction for violating the ethical standards of scientific research, makes the provision of the possibility of giving up the doctor's degree lead in the future even to an encouragement of plagiarism, which contradicts the very reason and manner of conducting doctoral studies.**

3.2. Proposals *de lege ferenda*

Considering these aspects, we appreciate that it is necessary to analyze **two working variants**:

I. A first option that is perhaps closest to the nature of the research activity carried out by doctoral students, as well as to those retained by the court of constitutional contentious in its jurisprudence is the very abolition of such a possibility[13]. In fact, if we look closely at what might be the reason why a person decides to exercise such a right, we can only imagine, at least at first glance, that it could be related to possible violations of the ethical rules specific to the research activity. In this context, it can be difficult to explain what could lead a person who has made a sustained (long-term) effort to make the decision to give up all the sacrifices that have been behind obtaining a scientific degree.

A variant that we imagined and that could justify, at least theoretically, such an option is the one in which the holder of the doctoral degree, for various reasons, no longer wants to associate his name with the doctoral school / IOSUD. Thus, the maintenance of the title would lead to the possibility of implicitly causing possible image damage to the right holder. But even so, given that the title of doctor is obtained through an individual effort made by each individual researcher, it cannot be argued that it may be influenced by some causes external to his research and creation activity. It is true that some of these can seriously damage the image of an institution and thus create a shadow of a doubt about the results obtained by other people within the same institution, but, nevertheless, we must start from the premise that in this field, up to on the contrary, the work done by each doctoral student is unique and must enjoy a related recognition in terms of energy, time and effort in carrying out this activity. In conclusion, we do not exclude that particular situations can be imagined that would determine the existence of such a right, but they must be viewed with some caution, so as not to divert the very purpose pursued by its establishment.

a. Returning to the elimination *de plano* of the exercise of such a right, we appreciate that in the analysis of this variant we must start from the very nature of this right (waiver) established by the legislator.

According to Professor Beleiu, subjective civil law is the possibility recognized by civil law to the active subject - natural or legal person - by virtue of which he may, within the limits of law and morality, have a certain conduct, to claim appropriate conduct - to give, to do or not to do something - from the passive subject, and to ask for the help of the coercive force of the state, in case of need[14]. Similarly, it has been defined as the legal possibility of the holder of a right to engage, within the limits of the law, in a certain

[13] In this sense, we mention that at the level of the Chamber of Deputies (the decision-making chamber being the Senate) there is already registered a Legislative Proposal for the abrogation of par. (7^1) and (7^2) of art. 168 of the National Education Law no. 1/2011 (Pl-x no. 572/2021), being sent for report and opinions to the specialized commissions, project available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam= 2 & idp = 19688, accessed on 05.03.2022.

[14] Gh. Beleiu, *Romanian Civil Law, Introduction to Civil Law. Subjects of civil law*, 11th ed., revised and added by M. Nicolae, P. Truşcă, Universul Juridic Publishing House, Bucharest, 2007, p. 75.

conduct, by virtue of which he may claim the person obliged to behave appropriately, which may be imposed, in case of necessity, by the coercive force of the state[15].

On the other hand, the existence of a subjective right must not be confused with its exercise, so that the legal possibility is not similar to the materialized possibility (that is to say, the actual enhancement of the legal possibility)[16]. In this sense, the objective law ensures the respect of the subjective right, but the protection provided by the objective law is not unlimited, absolute, which makes the objective law a limit and a control for the subjective right[17].

It can be stated that the exercise of a right may be limited, *inter alia*, by the exercise of the right in good faith, by the observance of public order and good morals (art. 14 of the Civil Code), by the observance of the law and the purpose for which that right is recognized by law, finally, by the non-existence of an abuse in the exercise of that right. In the light of the foregoing, the compatibility of those limitations with the right to renounce the scientific title of doctor is called into question.

b. As a preliminary point, it is important to note that the abuse of law involves the exercise of subjective civil law beyond its internal (not external) limits, for a purpose other than that for which it was instituted. In this sense, according to art. 15 of the Civil Code: *„No right may be exercised with the intent of causing harm or damage to another person or in an excessive and unreasonable manner, and therefore contrary to good faith."* In order to ensure compliance with its internal limits, according to art. 1353 of the Civil Code: *„A person who causes damage by the very exercise of their rights does not have the obligation to make reparations for the damage, unless the right is exercised abusively."*

Therefore, the classification of abuse of law may be based either on a subjective element, that of intent to harm or damage, or on a more objective element, namely the existence of excessive and unreasonable conduct which makes it contrary to good faith. Analyzing the operation of the exercise of the right to renounce the doctoral degree, it is found that the affectation of at least two competing rights / interests belonging to different persons can be questioned.

b.1. First of all, by exercising this right, the copyright of the person whose work was plagiarized may be infringed. As is well known, one of the conditions for exercising the right of summons is that it should not be prejudicial to the person from whose work it was taken. Such situations may arise when taking large quotations (and not for the purpose of criticism, analysis, commentary, etc., but in support of a certain point of view stated by the author himself) so that for the reader it becomes uninteresting to read anymore the work from which it was quoted. By such conduct, contrary to the exercise of the right of citation in good faith, the owner of the work may suffer certain damages, including property damage (e.g. reduction of the sales circulation of the book from which it was taken), which will eventually lead to an infringement of his right to property.

However, as is clear from the settled case-law of the ECtHR, the State has a positive obligation to provide the legal framework to prevent violations of the rights established in the ECHR, including property rights (in this case an intellectual creation). In that context, A. Clapham[18] and A. Mowbray[19] classify positive obligations in five categories as regards the category of positive obligations of the Member States of the Convention: the obligation to ensure the legal framework, the obligation to prevent infringements of the rights set out in the Convention, the obligation to provide relevant information and advice on violations of rights, the obligation to respond to violations (*e.g.* by conducting an investigation) and the obligation to provide resources to persons to prevent violations. Clapham concludes that the most visible type of positive obligation (also confirmed in Mowbray's study) is the obligation to protect human rights under the Convention from violations by non-state actors.

Therefore, in addition to the criminal liability that operates in case of violation of the right to property (*e.g.* the crime of destruction), the state may resort to other ways of liability to ensure the desire for doctoral studies, an example of this being given by administrative liability -disciplinary, liability that results in specific sanctions (withdrawal of the plagiarized article, withdrawal of the doctor's degree, withdrawal of the quality of doctoral supervisor etc.).

b.2. Secondly, by exercising this right in bad faith, the exercise of another right / prerogative is infringed, the one belonging to CNATDCU in the investigation of possible violations of deontological norms in the drafting of doctoral theses. As this right is

[15] T. Pop, *Civil Legal Report, in Civil Law Treaty, vol. I, General Part*, Academy Publishing House, Bucharest, 1989, pp. 70-71.
[16] Gh. Beleiu, *op. cit.*, p. 76.
[17] O. Ungureanu, C. Ungureanu, *Civil law. The general part*, 2nd ed., revised and added by Cornelia Munteanu, Universul Juridic Publishing House, Bucharest, 2017, p. 134.
[18] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford, 2006), p. 524, *apud* C. Aalbers, N. Vîlcu, *Positive obligations of the state in the jurisprudence of the European Court of Human Rights in the field of domestic violence, Handbook for practitioners in the justice sector to ensure access to justice for victims of domestic violence*, Chisinau, 2019, p. 16.
[19] Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004), p. 5, apud C. Aalbers, N. Vîlcu, *op. cit.*, p. 16.

currently configured, it seems to suggest that its exercise would lead to an effective blockade of an investigation that could be initiated in the event of a notification of deviations from the rules of ethics.

This was also signaled by the CCR in the content of Decision no. 624/2016, where it was stated that: ***„voluntary renunciation of the doctoral degree leaves without object the legal provisions regarding the activity of the bodies empowered to analyze suspicions regarding non-compliance with procedures or standards of quality or professional ethics, as the unilateral manifestation of will in the meaning of renouncing the title gives up the activity of investigating the bodies that may order the sanction of withdrawal of the title. Thus, the fulfillment of a purely optional condition, respectively the request of the person holding the quality of doctor to take note of his renunciation of the title, prevents the initiation of an investigation procedure of the way in which the title was obtained or, in the situation where such a procedure it is in progress, it ends arbitrarily.*** *It is obvious that the law creates the premises as persons suspected of obtaining a doctorate by fraud of legal proceedings to prevent the application of a sanction by voluntarily renouncing the title. The illicit conduct of the acquisition, in whole or in part, of a scientific work, the creation of another person, and presented as a personal creation, which determines legal effects both in employment relationships and in relationships arising from intellectual property rights, will remain, therefore, not sanctioned by virtue of the legal provisions that provide for the voluntary renunciation of the title.* ***Thus, given that the law provides for the withdrawal of the doctor's degree as a sanction for non-compliance with the standards provided for its development, including plagiarism, in case of voluntary renunciation of the doctorate, the new provisions do nothing but encourage dishonest, illegal behavior. -a field that should be characterized by rigor, professionalism and ethical probity****."*

However, as we have seen above, no right can be exercised in order to harm or damage another, in which case one can naturally speak of an exercise in bad faith of him. The state through its legal / infralegal regulations has the obligation to ensure an effective protection of the property right, regardless of the methods of liability that may operate (civil, administrative-disciplinary or criminal, but in all cases respecting the principle of proportionality of legal liability). Therefore, it can be seen that by the unconditional exercise of this right, the premises of an institutional blockade are created regarding the investigation of possible deviations from the deontological norms in the elaboration of doctoral theses. This implicitly leads to the lack of an effective remedy for the protection of the copyright of the author of a literary, artistic or scientific work, as well as for other works of intellectual creation.

c. Moreover, as has been well noted in the doctrine, the use by the legislator of the word *„purpose"*, from the content of art. 15 of the Civil Code, refers to the finality of the right, to its social purpose, which makes it possible to be considered as an abuse of law and an antisocial exercise of the right[20]. In this context, the possibility that the perpetrator of the infringement of intellectual property rights will go unpunished will even lead to an encouragement of the phenomenon of committing such antisocial acts for the field of scientific research, which, in our opinion, contradicts the very purpose of doctoral studies. It is as if the legislator instituted a case of impunity in the case of crimes against property in the situation when the perpetrator subsequently repairs the damage caused. For example, a person who wishes to commit a crime against property knows that, if caught, he will benefit from a case of impunity anyway if he returns the property or repairs the damage. Clearly, such regulation can only encourage the commission of such offenses as long as their perpetrators are practically at risk. This will ultimately lead to the removal of both the deterrent effect of sanctions and the exemplary function that the sanctioning system must have in criminal matters, which can only lead to a violation of the constitutional provisions contained in art. 1 para. (3) and (5) of the Romanian Constitution, republished.

As a matter of fact, as noted in the CCR Decision no. 224/2017: *„(...) the provisions of art. 1 para. (3) of the Constitution, according to which "Romania is a rule of law [...]", imposes on the legislator the obligation to take measures in order to defend public order and safety, by adopting the necessary legal instruments in order to prevent the state of danger and the phenomenon criminal law, excluding any regulations likely to encourage this phenomenon."*

Although the above aims to prevent and stop the criminal phenomenon, the same considerations apply *mutatis mutandis* to the prevention and sanctioning of the plagiarism phenomenon, which is, in fact, an activity similar to the acquisition, without right, of another's property, but which manifests in the field of intellectual property. Therefore, the state cannot adopt regulations that would lead to an encouragement of these phenomena, but, on the contrary, it must adopt firm measures to repress such reprehensible conduct.

d. Nor can it be argued that the waiver of a doctor's degree is a strictly private matter, which concerns exclusively the beneficiary of that right, which requires, in a correlative manner, the existence

[20] O. Ungureanu, C. Ungureanu, *op. cit.*, p. 161.

of an unconditional obligation on the competent body to issue the scientific title. This may be the case when the public interest does not overlap with the private interest. However, insofar as an individual right / interest competes with a general one, the waiver can no longer operate under the same conditions, as it has to borrow certain characteristics specific to the public policy regime. In fact, the French doctrine[21] also showed that: *„Even if the waiver is provided by law, it does not allow all waivers and the question of their legality is necessarily raised. In this respect, the doctrine agrees that public policy may oppose the existence of a waiver or prohibit early waivers."*

An example that we can mention in such a situation is the one given by the provisions regarding the crime of destruction [art. 253 para. (3)-(5) Criminal Code]. Specifically, criminal liability may be incurred for an offense of destruction even if the property belongs to the perpetrator, but at the same time the property is part of the cultural heritage or if the act of destruction, degradation or misuse of their property, committed by fire, explosion or any other such means, is likely to endanger other persons or property. Obviously, the limitation of the attributes of the right to property (especially that of disposition) is justified by the need to protect the rights of citizens (in other cases, public order, health or morals, national security, etc.) practically by the existence of an interest (public) superior to the one of private order and which is in close correlation with the provisions of art. 53 of the Fundamental Law. Therefore, the disposition of these goods will no longer be a strictly private matter, restricted to the sphere of civil law, but through the intervention of the general interest a justified (proportional) limitation of the exercise of the property right will be attracted.

Similarly, such reasoning applies to the waiver of a doctorate. Considering the content of the obligations of doctoral students during doctoral studies (presentation of topics in national conferences, publication of articles in specialized journals etc.), any sanctions that may be applied by CNECSDTI (body under the Ministry of National Education), the procedure for publicly defending the doctoral thesis, the procedure for granting the doctoral degree, the procedure for withdrawing it, in which CNATDCU has an essential role - an independent body subordinated to the Ministry of National Education, respectively, the procedure for challenging the order withdrawal in administrative litigation etc., it cannot be argued that the exercise of the right to renounce the title of doctor concerns exclusively the sphere of private relations of the holder of the title of doctor. Therefore, such a waiver, borrowing elements specific to the general interest, correlatively attracts a number of natural limitations to the exercise of this right.

As a matter of fact, part of the judicial practice[22] has ruled in the same direction, stating that: *„the granting of the doctoral degree and the complex content of the rights and obligations incumbent on the holder are not purely private, personal, naturally acquired matters and to which, in correlation, the renunciation of the doctoral degree would represent a right of a private nature. The way of obtaining the scientific title of doctor, following the completion of the third cycle of the university study program according to art. 158 of Law no. 1/2011, is a first argument why the right claimed by the plaintiff is not "unconditional", in the expression used in the summons, because the legal nature of the right waived is a complex one, and the incidental interests are not are of a purely private nature, which concerns exclusively the holder of the doctoral degree, but also public interests.[23]"*

Therefore, we can conclude that, given its nature, the waiver of such a right can be made *in extremis* (as we will see below), only with the fulfillment of certain conditions (preliminary procedures) in order to protect, on the one hand, part of the competing rights (*e.g.* of the copyright), but also of the institutional prerogatives granted by the legislator to some key institutions in managing the issue of plagiarism in Romania.

e. Last but not least, if we also analyze from the perspective of comparative law, it can be found that such a solution is not provided for in the legislations of other European states[24]. The natural reasoning behind the lack of such a right is, as we have seen above, the one that restricts the possibility of initiating

[21] G. Jèze, *Les principes généraux du droit administratif*, T. 1 p. 14, rééd. Dalloz 2005; Cl. Blumann, *La renonciation en droit administratif français*, LGDJ 1974 *apud* S. THÉRON,.*"Le renoncement en droit public: tentative de délimitation*". Jacquinot, Nathalie. *Le renoncement en droit public*. Université Toulouse 1 Capitole: Presses de l'Université Toulouse 1 Capitole, 2021. (pp. 7-21) Web. <http://books.openedition.org/putc/14532>.

[22] Sentence no. 2286/2019 of 18.09.2019, pronounced by the Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, available at: www.sintact.ro, accessed on 05.03.2022; Sentence no. 27/2020 of 05.03.2020, pronounced by the Galati Court of Appeal, Administrative and Fiscal Litigation Section, available at: www.sintact.ro, accessed on 05.03.2022.

[23] In the sense that *„the subjective right constituted by the above legal text is an unconditional one (the limitation targeting only the sphere of the addressees, respectively the persons holding a scientific title), it being born directly in the patrimony of the addressees of the law, while the conditions for exercising the right, the only condition is a manifestation of will of the right holder materialized in a request addressed to the Ministry of Education and Scientific Research."*, see Sentence no. 3589/2016 of 16.11.2016, pronounced by the Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, available at: www.sintact.ro, accessed on 05.03.2022.

[24] For a more detailed analysis of this issue, see: Sentence no. 2286/2019 of 18.09.2019, pronounced by the Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, available at: www.sintact.ro, accessed on 05.03.2022.

investigations by universities that have awarded a doctorate. Related to this[25], it is well known that in most European countries the main role in granting and withdrawing the doctorate belongs to the universities organizing doctoral studies and less to the ministries of education and research or other bodies under their authority[26]. Therefore, presumably granting such a possibility, implicitly, the prerogative of withdrawing the diploma after finding the violation of deontological norms would become ineffective (sanctioning), the role of universities becoming rather illusory in this mechanism, which would lead to an impermissible impairment of university autonomy (as it has crystallized over time in these European states).

II. Alternative

Subsidiarily, if however, it is desired to maintain such a right at the legislative level (taking into account the arguments put forward in support of the unconditional nature of the exercise of the right), I consider that it would be necessary to mitigate the temporal enforceability of the revocation order issued following the waiver statement. Specifically, such a thing could be done by stipulating a deadline (from the date of issuance of the revocation order) within which the CNATDCU should be required to launch its own investigation into possible breaches of ethical standards in scientific research. In that case, the enforceability would have been suspended for the duration of the investigation pending a decision to that effect.

To the extent that no violations are found, then the revocation minister's order will be consolidated, thus becoming enforceable (for the unlikely hypothesis that could arise in practice and which I have previously set out). However, in such a context, in order to maintain the fairness of the procedure, one can also imagine the situation when the holder of the doctoral degree can withdraw his declaration of renunciation, in which case the issuing institution will be able to revoke the order by which the request for waiver was noted, as this order has not yet taken effect.

In case of violations, the director general of CNATDCU will be the one who will propose to the minister of education and research the revocation of the previous order (the one by which the waiver was taken). Similarly, taking into account that this order has not yet produced legal effects (its enforceability being extended), the issuing institution will be able to proceed with its revocation, without the need to notify the court. Therefore, the Ministry of Education will proceed to revoke this order, ordering, at the same time, the notification of the court with action in annulment of the diploma / ministerial order ordering the granting of the doctoral degree, of course, in cases where he entered the circuit civil law, producing legal effects[27]. Subsequently, it will be applied the regime described in the proposals *de lege ferenda*, made on the occasion of the analysis of art. 146^1 and 146^2 of Law no. 1/2011.

Also, in the event that an investigation is initiated by CNATDCU and, at the same time, a declaration of resignation is submitted, we consider that a provision (even infralegal) would be necessary to provide that the issuance of the ministerial order is postponed until upon completion of the research by CNATDCU. A possible issuance of the order during it would empty of content the very role of this institution in discovering the facts of plagiarism in the writing of doctoral theses.

One last mention we want to make is the one related to the application of art. 168 para. (7^1) thesis II of Law no. 1/2011 which stipulates that: *„The procedure for renouncing the title, as well as the one regarding the annulment of the administrative act ascertaining the scientific title shall be approved by order of the Minister of Education and Research."* From the investigations carried out so far, no ministerial order could be found to provide a detail of the two procedures, which means that, in principle, the rule may not be applicable[28]. However, in judicial practice[29], it has been shown that the person concerned, even in the absence of such a methodology, given the nature and manner in which this right was created by the legislator, may request the administrative court to oblige the Ministry of Education to issue the revocation order, which takes note of the applicant's renunciation of the doctor's degree.

In view of such a hypothesis, we are of the opinion that, if it is chosen to maintain such a variant, it would be necessary to provide a case of suspension of the trial insofar as a parallel investigation by

[25] For a detailed analysis, see: G. Bocșan, *Responsibility of the doctoral student, the doctoral supervisor and the members of the commission for public defense of doctoral theses for violating the rules of ethics in the thesis preparation activity*, in the Romanian Journal of Intellectual Property Law no. 2/2018, pp. 16 et seq.

[26] O astfel de soluție poate părea justificată, ținând cont de avansul acestor state europene în materia cercetării științifice. Fără a ne propune să dezvoltăm acest subiect, apreciem că rolul CNATDCU (un organism independent și format din specialiști pe domenii de cercetare), astfel cum a fost acesta configurat de legiuitorul român, este unul esențial în ansamblul architectural al acordării și retragerii titlului de doctor, mai ales, în acest stadiu în care se află ciclul studiilor doctorale din țara noastră. Bineînțeles, pe viitor poate fi imaginată și ipoteza în care IOSUD-urile pot decide retragerea titlului de doctor, în urma unor anchete interne, astfel cum regăsim, în prezent, și pe teritoriul celorlalte state membre, însă o astfel de soluție necesită timp și o anumită pregătire în vederea asigurării unei implementări eficiente, care să ofere garanții solide.

[27] This second variant will be applied in the context of the amendments previously proposed in art. 146 of the National Education Law no. 1/2011.

[28] For the list of ministerial orders issued by the Minister of Education, see: https: //www.edu.ro/legisla%C8%9Bie-ordine-de-ministru, accessed on 08.03.2022.

[29] Sentence no. 3589/2016 of 16.11.2016, pronounced by the Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, available at: www.sintact.ro, accessed on 05.03.2022.

CNATDCU was launched, until when pronouncing a solution in this regard (but not more than a certain interval). It should be noted that such a solution requires a correlation with the situation when, following the finding of violation of deontological norms, the interested party introduces a contentious action challenging the veracity of those retained by CNATDCU in the analysis report.

4. Conclusions

This article aimed to address issues from a constitutional perspective resulting from the regulation of the procedure for withdrawing the doctoral degree, respectively the one on establishing the right to voluntarily renounce this quality, in the context of the provisions of the National Education Law no. 1/2011.

In the context of the analysis of the particular hypothesis of the withdrawal of the PhD title, we have identified a series of problems that may arise in practice, formulating in this respect also some proposals *de lege ferenda* by which to ensure, on the one hand, the observance of those retained by the CCR in the content of Decision no. 624/2016 and, on the other hand, to establish a certain coherence and predictability with regard to the mechanism for withdrawing the doctorate title.

First of all, given the distinct legal regime of nullity compared to the revocation operating in the matter of administrative acts, it was necessary to achieve a natural delimitation between the two hypotheses, so that the norm would benefit from an extra clarity in its application. I also appreciated, among other things, that the act that really needs to be annulled by the court is the ministerial order ordering the withdrawal of the doctoral degree and not the diploma, which is basically nothing more than an act of probative value, this approach may also remain within the competence of the issuing body.

In the context of the analysis of the hypothesis of voluntary renunciation of the doctorate, I have pointed out, initially, that on the basis of its legal nature, the exercise of such a right cannot be carried out unconditionally, since it naturally borrows some characteristics of the public policy regime. That is why, in addition to the option of eliminating such a possibility, we have also proposed the creation of a working variant (apparently administrative)[30] to support the constitutionality of the future regulation, taking into account those retained by the constitutional court in the content of Decision no. 624/2016, but, especially, the probity characteristic of doctoral studies.

This option could imply a temporal attenuation of the enforceability of the revocation order that is issued following the declaration of waiver, by stipulating a time limit (to run from the date of issuance of the revocation order) in which the CNATDCU is to be held to initiate its own investigation into the possible violation of ethical standards in scientific research, in which case, the enforceability will be suspended for the duration of the investigation, until a decision to that effect has been taken. In so far as it is found that no violations have occurred, then the order of the minister of revocation will be strengthened, becoming enforceable. However, in such a situation, in order to retain fairness, I have shown that it is also possible to imagine the situation where the person holding the title of doctor can withdraw his declaration of waiver, in which case the issuing institution will be able to proceed to the revocation of the order by which the request for withdrawal was taken into account, in view of the fact that the order did not have legal effect.

Finally, in the event that an investigation was launched by CNATDCU and, at the same time, a waiver is submitted, I considered that a provision would be necessary to provide that the issuance of the ministerial order is postponed until the completion of the investigation by CNATDCU. In the event that an action is brought in administrative litigation in order to oblige the Ministry of Education to issue the revocation order, for identity reasons it is necessary to provide a case of suspension of the trial, insofar as a CNATDCU investigation was launched in parallel, until when pronouncing a solution in this regard.

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VALUE ADDED TAX ON ARBITRATION FEES

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Abstract

Private alternative jurisdiction (as defined in art. 541 of the Romanian Code of Civil Procedure) arbitration is not free of charge. Those who judge a dispute, being chosen and empowered to do so by the parties by their arbitration agreement, provide a service. In principle, this service can also be free of charge, but as a rule it is a service provided by professionals (in the sense of recognized specialists in law and possibly in the field in which the dispute in question arose) who, although they do it occasionally, do not do it for free, as they are remunerated for their work through a so-called "fee". To this must be added the costs of litigation which relate to administrative matters, administration of evidence, experts' and lawyers' fees, etc. In the case of institutional arbitration, a significant part of the costs is represented by the so-called "administrative fees" which cover the costs of premises, logistics, archives and the payment of staff responsible for the administration of cases. As a supply of services within the meaning of the tax law, it falls within the scope of VAT (art. 268 of the Tax Code). In the case of institutional arbitration, several questions arise in relation to the tax debtor and the tax debt consisting of VAT collected to the budget.

Keywords: *court, arbitration, stamp duty, arbitration fees, value added tax, obligation to pay VAT, obligation to pay VAT collected to the budget.*

1. Introduction. On state court fees and arbitration fees

Justice, whether state justice, to which free access is guaranteed by the Constitution, or private justice, to which access is determined by and through arbitration agreement, *i.e.* by the act of will of the parties, is not free. It never was. Justice, be it public or private, has consumed time and eaten money. The state justice, even twice. Once, because we all pay taxes, and taxes are paid to make it possible for state institutions to function. Including the public service of justice. Secondly, because all those who have "**free access to justice**", as proclaimed by art. 21 of the Constitution, if they want to go to court, must, as a rule, pay a "**judicial stamp duty**"[1] (regulated by GEO no. 80/2013) to benefit from this public service to which "access is free". And the CCR and the anemic and money-, time- and hope-eating ECtHR, which sells vain illusions, have decided, with their "bible" on the table (laws, constitution, convention) that free access to justice does not necessarily mean free of charge. Hence the sad conclusion that freedom can be prized and that it sometimes costs money to have it. But what can be measured and valued in money is not true freedom.

From within the state justice system, court fees seem small in relation to the time spent by judges and staff on the business of trying a case, the workload involved in administering the trial and trying the case. From the outside, legal fees seem huge, and for some, prohibitive. And not infrequently, people who have been 'told the law' find that the fee they pay for the justice services they have used is not at all proportionate to the quantity and quality of the public service provided. And some come to the bitter conclusion that the court fee is not only in the eyes of the state but also of some judges, a punishment. We believe, moreover, that it is not wrong to qualify the judicial tax as a tax of order (*i.e.* to discourage the use of judicial services), even if there are no pure taxes and taxes of order, because even when such taxes or taxes of order are introduced, the state aims, firstly, to obtain revenue, however immoral the process may be, and only secondly, the order it seeks (reducing the consumption of a good, reducing the consumption of a public utility, etc.). Moreover, taxation and morality are, as is well known, in an antagonistic relationship[2].

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[1] "Judicial stamp duty" is improperly so called. Tax stamps have been used and are still used to collect taxes as a simple, efficient and convenient means of payment. They are issued by the executive authority (government) to be "bought" and used, when a tax or duty (usually a small amount) is due, by attaching it to the items being taxed or levied, to the form requesting a service, etc., the presence of the tax stamp being proof that the tax or duty has been paid. They began to be used in 1694, and their use was greatly increased after 1840, when postage stamps were introduced as a means of payment for postal services (tax). With computerization and the use of electronic means of payment, stamps (both postal and tax stamps, which have also been used in place of each other) are increasingly losing their former usefulness. As for court fees, they were not and are not "stamp duty", even though some justice services are still paid for by affixing tax stamps to the application requesting the service.

[2] "Political economy is by definition amoral; how would taxation, which is one aspect of it (the distribution of a share of national income), be moral?" Apud D.D. Şaguna, *Drept financiar şi fiscal. Tratat*, All Beck Publishing House, Bucharest, 2000, p. 608.

In this context, it must be said that if we look at this obligation to pay (stamp duty) from a purely fiscal point of view, we see that in reality, by paying it, we are faced with a phenomenon of double taxation. In its rush for money (which we know from Vespasian has no smell[3]), the state (not just ours, an American author famous in his own country for his victories in legal battles with the state, for the principles he promoted and the books he wrote, named Lysander Spooner[4], said that "the state is the greatest robber") rips off anything, anytime, anyhow, or anyone. Exceptions, exemptions, facilities (our Ministry of Finance has long and officially had in its structure a "service of the scallywags", but even today the country has many exempted from the duties that should be general and mandatory for all[5]) only confirm the rule. The judicial tax is double taxation because the taxes we pay are intended to ensure the functioning of the state authorities, and therefore also the public service of justice. In other words, when a litigant goes to the courts and asks them to judge his case, the provider of this service has already been paid. The court fee they have to pay to benefit from this service appears to us as a surcharge and a penalty. A tax on order!

But is arbitral justice very different from state justice? Some say yes, some say no. According to some, arbitral justice is too judicialized, in the sense that it is too formalistic and too much like state justice. According to others, who wanted and still want to control the arbitration process with an iron fist, ignoring the fact that this is not what people expect from the judges they elect, arbitral justice is too relaxed, too informal and too contractual. Too close to the parties and too sympathetic to them.

If we look carefully at "**arbitration fees**", then arbitral justice is almost no different from state justice, because in order to be tried in arbitration, payment of arbitration costs in advance is a condition without which the arbitral tribunal cannot be constituted. Moreover, foreign doctrine has noted, and rightly so, that through the fees it charges, arbitral justice tends to become a luxury justice. That is, justice too expensive to be afforded by all those who need it. This is also true for us and is often reproached to us by the judiciary. We are afraid that for the sake of the purse, the woes of the judged are sometimes ignored and they are denied the opportunity to be judged, forgetting the chain of weakness (not infrequently caused by a single weak link in an economic chain that starts with the producer/supplier of raw materials and ends with the final consumer) that pushes entrepreneurs to the brink of bankruptcy and in which the state is largely to blame. Because not infrequently, the weak link is the state itself, which is also a bad payer when it is in debt. The worst of debtors and the only one truly protected. It is forgotten or ignored that justice is done primarily for the sake of justice and people. And we are not aware of any arbitrator (or judge) having done justice just for the sake of justice (nor do we believe that the justiciable expect justice from a judge who is not properly paid for what he does) but that does not mean it does not exist! It is known, however, that since the institution of the judge in the chair, the professional and paid judge, came into being (this happened for the first time in ancient Greece), the number of trials has continually increased, and this also applies to prosecutors and public prosecutors. Or especially for them.

Of course, between quantity and value, on the one hand, and the work of arbitrators, on the other, the right ratio must be found. The ratio that makes arbitration attractive to the parties and for which arbitrators agree to be judges chosen by the parties. We believe that litigants should not feel that arbitration fees are a burden and that if these fees are to be comparable to those of state justice set for disputes that are assessable in money (large as they are, but they can be a benchmark), arbitration has on its side many other arguments for being preferred to state justice.

How much should these fees be? It's hard to say! There are many who have complained about the past as well as the current ones under the word that they are great. But there are also litigants who, having been

[3] Emperor Vespasian, who came to the throne in 70, found the treasury empty after Nero's catastrophic reign. He rebuilt the Empire's finances by broadening the tax base through both economic and political measures. Among the taxes he imposed was that on the use of public toilets, derisively referred to by the Romans as vespasians, and entered the history of taxation for the answer the Emperor gave to his son, who questioned him after they had been placed in the streets of Rome to make money (probably not to the level expected and above all, needed) and not (necessarily) for reasons of public hygiene: ***"pecunia non olet"***, meaning ***"money has no smell"***.

[4] Lysander Spooner (January 19, 1808 - May 14, 1887), a philosopher, pamphleteer, abolitionist activist, lawyer and entrepreneur, one of the most important figures in the history of American anarchism because of the concordance between the principles defended in writing and the values manifested in action. He gained fame after he won the repeal of a regulation barring him from the bar because he had not graduated from law school, and after an unequal battle with the US Postal Office, which has a legal monopoly on postal services in the US, succeeding in bankrupting the company he created and in getting the US Congress to lower postal rates several times. He was also noted for his belief in the primacy of natural law over man-made laws, for being an opponent of slavery, and for gratuitously defending runaway slaves, his paper *"The Unconstitutionality of Slavery"* having aroused the admiration of both opponents of slavery and its defenders for the clarity and thoroughness with which he demonstrated that slavery was incompatible with the Constitution of the United States.

[5] For example, the church. And researching history, we find that modern Romania, by exempting the church from taxes, went back in time to somewhere before Cuza secularized the monastery estates which we give back today. It is true that there are two countries in Europe where the church does not pay taxes. The measure was taken by Hitler in Germany to ensure that the church would not get involved in politics. It was later extended to Austria. In the time of Al.I. Cuza, and for a long time after him, the Ministry of Finance had a "*scutelnic* (exempted from tax) servants department" within its structure. The name needs no comment.

judged in arbitrations organized by permanent arbitration institutions in other countries, have found these fees to be low in relation to the time spent, the degree of novelty and complexity of the issues before the arbitrators, and their documentation needs.

Arbitration fees have another problematic component. Here we will discuss only one of those that has to do with the tax authorities, value added tax. At a later stage, we will try to clarify other things related to administrative charges.

2. The sin of tradition and the correct designation of "arbitration fees"

It must first be said that the name "**fees**" for the payment of services in and for the arbitration procedure is badly chosen, as it is potentially confusing as to its very nature. This is because the term **fees**, as is well known, designates in our (fiscal) law[6] payments due (compulsory levies, the law says) for services provided by public authorities or institutions for the benefit of the payers, whereas arbitration, whether institutionalized or ad hoc, is not in the nature of a public service (even if it is in the public interest), as is the public service of state justice and for which the name of fees as the price of the services provided is not wrong.

We believe, therefore, that for legal accuracy we should refer to the amounts paid by litigants in arbitration proceedings as "arbitration expenses" or "arbitration costs", the term "fees", which has the tradition and the advantage of convenience, having the major defect of the risk of perceiving arbitral justice as a real state justice. And it is not! And the tradition regarding the name, fees, is a sinful one, because it is derived from the former state arbitration[7], abolished by Decree no. 81/1985, arbitration in which the payment of "arbitration fees" was justified since that arbitration was state arbitration! But international commercial arbitration, which also operated under the old regime, shares with the former state arbitration only the name and the fact that in both arbitrations had less formal rules than those in common law, the two legal institutions being otherwise distinct, with different powers and competences. In state arbitration, economic disputes between enterprises (all state-owned) were settled; in international commercial arbitration, disputes between foreign entities and state enterprises were judged. International commercial arbitration also functioned then as private justice, and now it is the continuation of that arbitration (which, it must be said, has been appreciated all over the world thanks to the quality, reputation and renown of the arbitrators and the quality of their decisions).

The term "arbitration fees" used in the Rules of the Court of Arbitration now includes: "**administrative fee and arbitrators' fees**", which together make up the "**arbitration fee**" and "**registration fee**". These would represent, according to art. 1 of the Rules, "remuneration for services rendered by the Court of Arbitration". In reality, however, this is not the case, because these "fees" represent **separate payments for services of a different nature** and which, in the case of institutional arbitration are provided by **different legal entities, namely:**

1. **registration fees** for requests to initiate arbitration proceedings. The registration fees represent the costs necessary for registration, formation of files, correspondence and communication to the parties of the information required for the constitution of the arbitral tribunal, establishment and communication of the costs of the arbitration, etc. This service is provided by the permanent institution (the Chamber of Commerce of Romania, in our case);

2. **administrative fees** which are collected and represent income of the institution organizing the permanent arbitration. The "administrative fee" is intended to cover the expenses of the permanent arbitration institution for the provision of the space necessary for the conduct of the arbitration and the utilities (properly equipped rooms, payment of the staff contributing to the conduct of the arbitration, staff equipment etc.). This "administrative fee" is therefore not the consideration for any service provided by the Court of Arbitration, but by the institution organizing the arbitration, which provides the space and utilities necessary for the arbitration to take place. And in our case, and probably everywhere else in institutional arbitrations, these "administrative fees" represent income of the institution organizing the permanent arbitration.

3. an amount representing the **arbitrators' fees**, the latter also referred to in our Rules as the "arbitration fee" (and for simplicity, we will not distinguish according to whether the arbitral tribunal is collegial or uninominal).

4. To these amounts, which are paid, as a rule, in advance, are added **other costs**, such as those for expert reports, travel, lawyer's fees, which are the responsibility of the parties who make them, but are added to the costs of the arbitration borne by the party

[6] In the bad tradition of our legislator, the word "tax" is defined (as is the tax, by the way) in the Fiscal Procedure Code, and not in the Fiscal Code which "establishes the legal framework on taxes, duties and contributions (...)". The Tax Procedure Code, which deals with the administration of tax claims, defines a tax as "a compulsory levy, by whatever name, imposed by law **on the provision of services by public institutions or authorities, without there being an equivalent between the amount of the tax and the value of the service"**.

[7] See Decree no. 259/1949 on the establishment and organization of the State Arbitration, Law no. 5/1954 on the organization and functioning of the State Arbitration and GD no. 466/1968 on some measures for the reorganization of the State Arbitration.

that falls under the claims, costs established by the judgment given on the merits.

For comparison, the ICC Arbitration Rules speak of "**arbitration expenses**" which include "the fees and expenses of the arbitrators", "*the fees and costs of experts appointed by the tribunal, and the reasonable expenses incurred by the parties for their defence*" (see art. 2 and 36 of the Rules of Arbitration of the International Chamber of Commerce).

3. On what basis were arbitration costs determined and paid?

The applicable legal texts for the proposal by the College of the Court of Arbitration and the approval of arbitration costs by the Governing Board of the National Chamber and for their payment, to us, are as follows:

Art. 616 of the Code of Civil Procedure ("Notion") which provides:

(1) Institutionalized arbitration is that form of arbitral jurisdiction which is constituted and functions on a permanent basis ***within a domestic or international organization or institution or as a public interest non-governmental organization in its own right****, under the terms of the law, on the basis of its own rules applicable to all disputes submitted to it for settlement under an arbitration agreement.* ***The activity of institutional arbitration is not economic and does not aim to make a profit.***

(2) In the regulation and conduct of jurisdictional activity, ***institutional arbitration shall be autonomous from the institution that established it.*** *It will establish the necessary measures to guarantee autonomy.*

Art. 29 (1) and art. 30 of Law no. 335/2007 on Chambers of Commerce in Romania, which provide:

Art. 29 - (1) The Court of International Commercial Arbitration is a permanent arbitration institution ***without legal personality*** *and operates under the National Chamber.*

……

Art. 30 - (1) ***The rules on arbitration fees and arbitrators' fees are approved by the Governing Board of the National Chamber, on the proposal of the College of the Court of International Commercial Arbitration.***

(2) ***Arbitral fees are intended to cover expenses related to the dispute resolution activity, the payment of arbitrators' fees and their documentation, secretarial and other expenses necessary for the functioning of the Court of International Commercial Arbitration.***

Art. 1(1) of the Schedules of arbitral fees and expenses of the Court of International Commercial Arbitration by the CCIR, which provides that: ***"in order to remunerate the arbitration services rendered by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, (...) there will be charged a registration fee of Euros 150 (...), as well as an arbitration fee (our emphasis) consisting of an administrative fee and arbitrators' fee".***

We have neither to comment nor to criticize the legal provisions mentioned above, even if they suffer from a certain lack of clarity, because as they stand they allow the Court of Arbitration and the Chamber to name them correctly and to fix them in the amount necessary to cover the expenses of the institution organizing the permanent arbitration, without being able to pursue profit-making, and within limits that make arbitration attractive for both litigants and arbitrators. But they must also be determined and collected in accordance with the provisions of the tax laws, and when arbitrators decide on final costs, they must also apply the tax laws correctly.

4. Arbitration fees and value added tax in arbitration

As taxation is in everything[8], it could not miss the arbitration. Taxation is the soul of the state, which is why it is omnipresent. In the country that in the 13th century created the first coherent tax system (we called it England), one of the authors who wrote a textbook by which law is still taught today, Henry of Bracton[9], said that the taxman was like God and that taxation was a strange combination of the divine and the earthly. And yes, tax is as much a part of our lives as day and night, light and dark, cold and heat, good and evil. The authorities would, of course, want it written into our genes, and they would if they could. Taxation is long gone and more than the idea of property part of our education. A person without property or income is not and cannot be punished for not having property, for not

[8] The tax department does have a *scutelnic* (exempted from tax) servant in our system: the church. And looking at history, we find that modern Romania, by exempting the church from taxes, has gone back in time to somewhere before Cuza who secularized the monastery estates that we give back today. It is true that there are two countries in Europe where the church does not pay taxes. The measure was taken by Hitler in Germany to ensure that the church would not get involved in politics. It was later extended to Austria. In the time of Al.I. Cuza, and for a long time after him, the Ministry of Finance had a "*scutelnic* (exempted from tax) servants department" within its structure. The name needs no comment.

[9] Henry of Bracton (1210-1268), English theologian and jurist, author of a famous work: "*De Legibus et Consuetudinibus Angliae*" ("On the Law and Customs of England"), used for the study of English law (common law).

working or for not earning income unless he/she obtains it through theft. But there is no escape for those who do not pay their taxes: he/she will be pursued by the tax department beyond death. Taxes were repealed by the French revolutionaries because they emanated from the king (who was also of divine essence, and the French revolutionaries, and among them Danton in particular, were also enemies of the church[10], not just of the God's anointed). But these same revolutionaries not only quickly reintroduced taxes and described them as an "honorable obligation", they also multiplied them. And since then, even atheists no longer dispute them. Nor could they, because without them there can be no state. Since then, taxes have regained their value in the eyes of everyone as a symbol of state power and of the relationship of allegiance between taxpayers and the state to which they belong.

Since then, no taxable matter escapes taxation. Not even arbitration. Interestingly, the value-added tax is also the invention of a Frenchman named Maurice Lauré, and the French, proud of their new tax, its efficiency and especially the fact that it is quasi-generalized, say that while Elvis Presley was recording his famous song That`s All Right in 1954, they were giving the state a money-making machine. They say that the VAT is "a French invention copied everywhere"[11]. The truth is that Maurice Lauré, who was a famous polytechnical and inventor of a turbine model, but ended up as head of taxation in the French Ministry of Finance, half-heartedly supported his bill for the new tax which he considered burdensome for businesses and it passed through Parliament in a political barter, with great difficulty, after being rejected several times. Maurice Lauré passed away in 2001, a year before his death, in one of his rare interviews saying that he hated to be reminded of his invention.

VAT exists and is widespread in EU countries. It is for non-member aspirants a condition of membership. This indirect tax was harmonized by Directive 2006/112/EC on the common system of value added tax (former Directive 77/388/EC of 17 May 1977) and implemented in Romanian law. It is the only truly harmonized tax at the level of EU Member States, the harmonization achieved allowing the internal market to function without serious distortions. We will also have to harmonize it in the arbitral practice of our Court, which is why we need to see its shortcomings in application now.

First of all, however, we must say that we do not have and do not propose solutions. We are just inviting a debate on this issue in order to find together a solution to a problem that does not have, at this moment, we believe, a correct solution. And we believe that it is not correctly resolved either with reference to lawyers' fees, when VAT is added to them.

5. First question: is VAT due for dispute resolution activity in arbitration? If yes, who is the service provider?

Let's take a simple example to make the demonstration easier. We have a plaintiff and a defendant sued in arbitration who agree that the tribunal shall consist of a single arbitrator, the plaintiff being the one who bears the arbitration fees in advance. He will pay:

- 150 euros plus 20% registration fee. Let's admit, for the sake of simplicity, that he paid 675 lei registration fee and 135 lei VAT.
- 50,000 lei administrative fee;
- 50,000 lei the arbitrator’s fee.
- If the two are added together (administrative fee and arbitrator's fee), the result is an arbitration fee of 100,000 lei plus 20,000 lei VAT. The same amount is arrived at if VAT is calculated separately (for administrative fee and arbitrator's fee).
- The plaintiff will also pay the lawyer's fees which, in the hypothetical case presented, we admit is 100,000 lei plus VAT of 20,000 lei.

The answer to the question of whether VAT is due must be sought in the legal texts governing the activity of institutional arbitration (art. 616 of the Code of Civil Procedure, art. 28-30 of Law no. 335/2007 on Chambers of Commerce) and in art. 266 and art. 269 of the Tax Code. We have mentioned the former above and recall that according to art. 616 of the Code of Civil Procedure "***The activity of institutional arbitration is not economic in nature and does not aim to make a profit".***

Those in the Tax Code are listed here. Thus:

1. In accordance with art. 266 (meaning of certain terms), item 21 of the Tax Code: "**taxable person**" has the meaning of art. 269 para. (1) and means the natural person, group of persons, public institution, legal person and **any entity capable of carrying out an economic activity**;"

2. According to art. 269 of the Tax Code, which defines the **taxable person and the economic activity**, "(1) **A taxable person is considered** any person who carries out, independently and regardless of location, **economic activities** of the nature referred to in para. (2), **whatever the purpose or result of such activity**.

3. According to art. 269(2), for the purposes of the (...CF), **economic activities** comprise **the activities**

[10] Hostility to the church was the most baffling and incomprehensible phenomenon of the Great Terror. In 1793, when the Great Terror began, all Christian cults were banned in France. During the Revolution there were at least 3,000 priests and they died.

[11] M. Cozian, *Précis de fiscalité des entreprises*, Lexis Nexis, Paris, 2007, p. 277.

of producers, traders or providers of services, including mining and quarrying, agricultural activities and activities of **the liberal professions or activities treated as such.** The exploitation of tangible or intangible property for the purpose of obtaining income on a continuing basis also constitutes an economic activity".

We recall here that arbitration activity is qualified in contract law as the provision of services and that the Tax Code only refers to arbitration activity as income "from other sources" declared taxable (art. 114(2)(d) of the Tax Code).

There is no doubt that the legal provisions are insufficiently clear: some (art. 616 of the Code of Civil Procedure) which exclude from the scope of taxation the activity of institutional arbitration, others, which say nothing about it, but from which it is understood, however, that the activity of arbitration is an activity of supply of services for which VAT is due.

In order to answer the question posed, however, we need to establish **which provisions should be applied as a matter of priority.** And for this we need to identify, or establish, which provisions are special and which are common law.

It is undisputed that **both the Code of Civil Procedure and the Tax Code are common law in the matters they regulate.** However, arbitration is exceptional and has a **special regulation**, even if it is contained in a law which is the common law of court.

The arguments to the effect that **arbitration is governed by special rules**, derogating from ordinary law, are manifold and so obvious that we do not believe they need to be developed here. Nor do we believe that there is any controversy about the fact that in the Code of Civil Procedure we have both general (predominant) rules and special rules. However, the HCCJ has also ruled in decisions in appeals in the interest of the law that the law of civil procedure contains general rules and special rules, the latter applying only to matters specifically provided for by law (see Decision no. 13 of 12 November 2012 and Decision no. 11 of 18 April 2016, the latter concerning the law applicable in the case of contestation of claims with which ANAF is registered in insolvency proceedings).

In conclusion, we believe that we must admit that the provisions of art. 616 of the Code of Civil Procedure are a special rule, and it expressly provides that "***The activity of institutional arbitration is not of an economic nature and does not seek to make a profit***."

For its part, **the Tax Code is the common law** on taxes, duties and contributions **(but it also contains numerous special provisions)** and where a law provides otherwise than a special law, even if the law providing otherwise is earlier, that special law must be applied with priority, in accordance with the principles of ***specialia generalibus derogant*** *and* ***generalia specialibus non derogant.***

It is true that art. 502, para. 16 of the Tax Code adopted in 2015 provides that **any other provisions contrary to the Tax Code are repealed**, inter alia, and that even under the previous regulation **the Chamber charged VAT on arbitration fees**. But it has long been well established in case law that **a special rule can only be expressly repealed.** Whenever the legislator wishes to repeal a piece of legislation, the repeal must be express. The requirement is even greater in the case of special rules derogating from the ordinary law. It requires the express repeal of art. 17 of Law no. 24/2000 on the rules of legislative technique for the drafting of normative acts, a text which, under the marginal heading 'cleaning up legislation', stipulates that '*in order to clean up active legislation, in the process of drafting normative acts, the express repeal of legal provisions which have entered desuetude or which are contradictory to the planned regulation shall be sought*'.

Admitting that a doubt might exist regarding the law (although, in our opinion, things are clear), the doubt, the unclearness of the law, cannot benefit the tax authorities, the principle of interpretation enshrined in the case law of the ECtHR, the CJEU and after them also of the Romanian legislator being "***in dubio pro libertate civium***" or "***in dubio contra fiscum***". The HCCJ - Administrative and Tax Litigation Division, by Decision no. 4349/2011, ruled that the principle of interpretation ***in dubio contra fiscum*** applies in tax law, according to which uncertain legal provisions are interpreted against the tax authorities".

However, does the Tax Code provide otherwise than the Code of Civil Procedure in art. 616? The answer seems obvious, no! This is because art. 266, para. 21 of the Tax Code states that: *"**taxable person**" has the meaning of art. 269 para. (1) and means the natural person, group of persons, public institution, legal person and **any entity capable of carrying out an economic activity**".* In other words, in order to be a taxable person with VAT **you must have the capacity to carry out an economic activity**, or the special law, according to which the institutional arbitration is carried out, expressly declares it in art. 616: ***The activity of institutional arbitration is not economic and does not aim to make a profit.***

In another vein, it should be noted that the "***domestic or international organization or institution or as a non-governmental organization of public interest in its own right***" on which the Court of Arbitration operates (this is the Chamber of Commerce and Industry of Romania) is defined by Law no. 335/2007 (art. 1 and 24) *as an autonomous, non-governmental,* ***without a patrimonial purpose (non-profit in the case of CCIR), of public utility*** *(....).* It is

a provision which supplements that of art. 616 of the Code of Civil Procedure. In fact, the purpose of the County Chambers and the National Chamber is also to defend, represent and support the interests of their members and business communities. So not lucrative!

Regardless of these provisions of Law no. 335/2007 and art. 616 of the Code of Civil Procedure, it should be noted that even in light of the Tax Code, **the Chamber is not a "*taxable person*" within the meaning of art. 269 para. (1), because it does not have the capacity to carry out "an economic activity."**

As a hypothesis to be analyzed only, can we still admit that **the Chamber of Commerce and Industry of Romania would carry out economic activity?** The answer seems to us to be no, and the facts prove it: **The Chamber has companies, or shareholdings, but cannot itself carry out economic activities.**

The National Chamber could, however, be a taxable person, but only exceptionally, under art. 269 para. (7) and if we assimilate it to public institutions which are liable to pay VAT for several activities, including trade fairs and exhibitions. We do not know if the fairs are organized by the Chamber or Romexpo, but we don't see how the Chamber could carry out "an economic activity" within the meaning of art. 269 of the Tax Code, making it a "taxable person", **since the law does not allow it.**

Irrespective of the answer to this question which concerns the Chamber, it is worth noting the argument which derives from the law: **the arbitration activity is not economic!** It is therefore not a supply of services taxable with VAT within the meaning of art. 271 of the Fiscal Code, which considers as "supply of services any transaction which does not constitute a supply of goods as defined in art. 270" (of the Fiscal Code). On the other hand, it should be noted that **the Chamber does not carry out the arbitration activity!**

If, however, the National Chamber **is a VAT payer**, then we believe that **it can be a VAT payer at most for the registration fee and the administrative fee, and not for the arbitrators' fees.** It, the Chamber, does not take part in the provision of services by arbitrators and cannot be considered to have provided the service itself in order to fall within the hypothesis covered by art. 271 para. (2) of the Fiscal Code ("*Where a taxable person acting in his own name but on behalf of another person takes part in the provision of a service, he shall be deemed to have received and provided the service himself*").

However, the actual arbitration activity is carried out by the arbitrators, not by the Chamber, the arbitrators do not have a contractual relationship with the Chamber, **and the withholding rule does not apply to VAT anyway.** This means that the Chamber cannot pay VAT for the service provided by persons who have no contractual relationship with the Chamber.

As far as foreign arbitrators are concerned, we remind you that since it is qualified as supply of services, the activity of EU or EEA arbitrators is not subject to VAT, just as our services for beneficiaries in EU countries are not subject to VAT.

6. Conclusions: what is the VAT regime in the settlement of the dispute in terms of expenses?

If we accept that VAT is due, then what is the fate of the VAT paid by the parties in determining the costs of the arbitration to be borne by the losing party and ordered to be paid? Who is the end consumer who has to pay in the end and how does the payer recover the VAT paid for the services provided by arbitration?

The Chamber of Commerce, admitting that it is a taxable person with VAT within the meaning of art. 266 of the Fiscal Code, can only be a VAT collector for its services. That is for the registration fee and the administrative fee.

Arbitrators constituted in arbitral tribunals for each individual case do not provide services on behalf of the Chamber or even the Court of Arbitration. The relationship between them and the litigants is one mediated by the Chamber through the Court of Arbitration (*sui-generis* entity, which can sit in court, according to art. 56 para. 2 Civil Procedure Code, but which is not a taxable person), but the relationship is established between the arbitrators and the parties in dispute. In adjudicating a dispute, arbitrators perform a service for the benefit of the parties, and this service is provided by them, not by the Chamber or the Court.

It is true, the beneficiary of arbitration services is not interested in the person who, for this service, collects VAT to pay it to the budget. But can this VAT payer recover VAT paid other than by exercising the right to deduct VAT? Can the VAT payer for the arbitration service recover VAT by way of legal costs?

Such a recovery seems to us impossible because if the arbitration costs (court costs) awarded include VAT paid, this means that the payer can recover VAT paid other than by exercising the right to deduct VAT. It means that he does not pay VAT for the service rendered or that he can recover VAT both by exercising the right to deduct and by way of court costs.

It seems to us not unimportant that in the Rules of Arbitration of the International Court of Arbitration the issue of VAT is considered to be of exclusive interest to litigants and arbitrators (see art. 36-37 of the Rules and Annex III).

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HOW DO THE EUROPEAN COMMISSION, MEMBER STATES AND CITIZENS INTERACT IN ENFORCING INTERNAL MARKET RULES?

Oana-Mihaela SALOMIA[*]

Abstract

The Internal Market is the main element of European economic integration, the achievement of which was provided for in the Treaty establishing the European Economic Community (Rome, 1957).

The implementation of the four fundamental freedoms of movement for the benefit of the citizens of the Member States was one of the major objectives of the Internal Market and led to the adoption of specific European rules, the respect of which is ensured by the Member States under the supervision of the European Commission.

Currently, the Treaty on European Union mentions, among the Union objectives, the establishment of the Internal Market, and the Treaty on the Functioning of the European Union provides for the shared competence of the European Union with the Member States in the field of the Internal Market.

The rules adopted at Union level for the achievement of the freedoms of movement must be implemented by the authorities of the Member States for the advantage of the citizens of the Member States and of undertakings. In the situation of non-compliance with these rules, the European Commission may bring the Member State concerned before the Court of Justice of the European Union.

Thus, the completion of the Internal Market depends on the way in which the three actors interact - the European Commission, the Member States and the citizens according to their specific interests.

In conclusion, the full completion of the Internal Market area requires a balanced and effective action carried out by the European Commission, the Member States and their citizens, based on a transparent and collaborative approach.

Keywords: *Internal Market, enforcement, free movement, European Commission, European citizens.*

1. Introduction

European integration was a necessity and a plan for the reconstruction of Western Europe after the Second World War which contributed to raising the well-being of its peoples and to the economic ranking in the world by unifying the economic and social interests of the European states which wanted to develop harmoniously their economy and maintain peace.

The Treaty establishing the European Economic Community, Rome, 1957 mentioned, since art. 2, the central objectives as the establishment of the common market, the high level of employment and social protection[1], and solidarity between Member States.

In the doctrine, it has been pointed out that „European construction also faces a delicate issue: reconciling national sovereignty with supranational integration[2], the two realities being found within the European Union with the three pillars, existing in this form until 1 December 2009[3] and which continue, from certain views, and after this date. After more than five decades of European integration, through the drafting of treaties, their amendments, criticisms, compromises, uncertainties, crises and failures, there are undoubtedly, according to O. Bibere, many achievements in the EU: freedom of movement, common policies, single currency, institutions, budget, own resources, legal order, anthem, flag, common currency, European citizenship, European initiatives, economic aid, humanitarian aid, etc."[4]

Currently, art. 3 para. (2) of the Treaty on European Union (TEU) provides as a general objective of the European Union - an international intergovernmental organization endowed with legal personality - to promote the well-being of its peoples which can be achieved by achieving other specific objectives such as: the establishment of an area of freedom, security and justice without internal frontiers;

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[1] Mihail Vladimir Poenaru, *Considerații cu privire la regimul juridic al pensiilor ocupaționale din sistemul de drept român în a doua decadă a secolului XXI*, in Hic et Nunc: Alexandru Athanasiu, ed. Facultatea de Drept. Centrul de Drept Social Comparat, C.H. Beck Publishing House, Bucharest, 2020, p. 448.

[2] See: Roxana-Mariana Popescu, *Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court*, in Challenges of the Knowledge Society, (Bucharest, 17th - 18th May 2019, 13th ed.) http://cks.univnt.ro/articles/14.html.

[3] At that date the Lisbon Treaty has entered into force.

[4] Mihaela-Augustina Dumitrașcu and Oana-Mihaela Salomia, *Dreptul Uniunii Europene II*, Universul Juridic Publishing House, Bucharest, 2020, pp. 154-171.

the continuous development of the Internal Market[5]; the balanced economic growth and price stability, a highly competitive social market economy; the social justice and protection, equality between women and men, solidarity between generations.

The Union institutions have the task of pursuing these objectives[6] in accordance with the principles of conferral of competence and the sincere cooperation, which are clearly reflected in the legislative and budgetary procedure; in particular, the European Commission shall oversee the application of Union law under the control of the Court of Justice of the European Union.

In this context, the answer to the question: *How do the European Commission, Member States and citizens interact in enforcing Internal Market rules?* could identify different reactions between these actors which will have an impact of the EU competences and the EU institutions tasks. The Internal Market has been created for the wellbeing of the European citizens but the Member States would need EU flexible mechanisms and the support of their citizens for implementing all obligations in this regard.

2. Internal Market - general issues

The Internal Market, which succeeds the Common Market and the Single Market[7], is an area of shared competence according to para. 2 of the art. 4 of the Treaty on the Functioning of the European Union (TFEU), for the implementation of which the Union adopts legislative acts, binding for Member States which can no longer legislate unless the Union has exercised its competence or if the Union has decided to cease exercising its competence.

Regarding the content of this concept, it is interesting to note that its regulation is very brief, respectively Part III of the TFEU begins with Title I entitled the Internal Market which includes only two articles, the second paragraph of art. 26 defining the field of the Internal Market: ”The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”[8].

Thus, in the architecture of the Treaty, Title II regulates the free movement of goods[9], and Title IV regulates the free movement of persons, services and capital. Therefore, according to the Treaty, it would seem that the internal market is limited to the four fundamental freedoms, provided for by the Treaty of Rome and gradually developed throughout the Community / Union construction for the benefit of citizens, but their content has expanded to new complex areas (standardization for goods, public procurement).

Naturally, the Internal Market is one of the main domains addressed by the green and digital transitions[10], and the measures taken to do so are aimed at implementing the four fundamental freedoms, and Member States are working together to find appropriate ways to meet European obligations.

Regarding the regulation in this field, two main categories of acts can be observed:

1. legislative acts adopted pursuant to the TFEU to implement the freedoms of movement; and

2. soft law acts adopted by the European Commission covering the whole area of the Internal Market and its development[11].

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[5] CJEC, 5 May 1982, *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, case 15/81, ECLI: ECLI:EU:C:1982:135, 33: “The concept of a common market as defined by the court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market . It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market”.

[6] See Oana-Mihaela Salomia, *La théorie de l'apparence en droit de l'Union européenne. Confiance des citoyens des États membres dans les institutions de l'Union*, in *In honorem Flavius Antoniu Baias. Aparenta în drept. The appearance in law. L’apparence en droit* II, ed. Adriana Almășan, Ioana Vârsta, Cristina Elisabeta Zamșa, Hamangiu Publishing House, Bucharest, 2021.

[7] Simon Usherwood and John Pinder, *Uniunea Europeană. O foarte scurtă introducere*, Litera Publishing House, Bucharest, 2020, p. 76: “Therefore, as the European economies developed, the initial project of the EEC, focused on the abolition of tariffs in a customs union, was in the 1980s through the single market program, then in the 1990s through the single currency”.

[8] See: Oana-Mihaela Salomia, Dragoș-Adrian Bantaș, *Aspecte generale privind competența Uniunii Europene în domeniul achizițiilor publice, Achiziții publice. Idei noi, practici vechi*, Ecaterina-Milica Dobrotă, Dumitru-Viorel Pârvu (coord.), Universitară Publishing House, Bucharest, 2020, pp. 228-230.

[9] See: Augustin Fuerea, *Funcționarea pieței interne pe baza liberei circulații a mărfurilor*, (non-official translation: Functionning of the Internal Market on the basis of the free movement of goods), in *Dreptul Uniunii Europene - principii, actiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 184-186.

[10] See: Elena Lazăr, Nicolae Dragos Costescu, *Dreptul european al internetului*, Hamangiu Publishing House, Bucharest, 2021, pp. 18-36; Alina-Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, pp. 193-194; Oana-Mihaela Salomia, *European legal instruments for green and digital transitions*, Challenges of the Knowledge Society, (Bucharest, May 21st 2021, 14th ed.), pp. 487-492, http://cks.univnt.ro/articles/15.html.

[11] https://ec.europa.eu/growth/single-market/single-market-act_en

”The Single Market Act presented by the Commission in April 2011 set out twelve levers to boost growth and strengthen confidence in the economy” and

”In October 2012, the Commission proposed a second set of actions to further develop the single market and exploit its untapped potential as an engine for growth”.

https://ec.europa.eu/growth/single-market/single-market-strategy_en

At the institutional level, it should be noted that the current European Commission includes a portfolio dedicated to the Internal Market, as well as other portfolios that manage aspects of the impact on the Internal Market – Economy, Jobs and Social Rights[12] and An Economy that Works for People, and to ensure that the rules in this area are followed, it was set up the Single Market Enforcement Task Force (SMET) under the Action plan for better implementation and enforcement of single market rules Search adopted in March 2020 as part of the European industrial strategy, "as a high-level forum where the Commission and EU countries work together"[13]; SMET inform the Competiveness Council and the European Parliament's Internal Market and Consumer Protection Committee on the progress made.

3. Benefits of the Internal Market for the citizens of the Member States

The evolution of the fundamental freedoms of movement within the concept of the Internal Market has been carried out in parallel with the economic and social trends that have marked the world economies, with the evolution of human society so that, nowadays, such as: Single market for goods, Single market for services, European standards , Public procurement or Single digital gateway ; the aspects regarding the competition rules[14] fall within the exclusive competence of the European Union according to art. 3 para. 1 letter b) of the TFEU.

At the heart of these actions are the nationals of the Member States whose authorities are responsible for transposing or applying directly the rules adopted by the institutions of the Union in order to achieve the general objectives of the Internal Market. Examples include achievements in the free movement of services which was facilitated by the adoption of a legislative act only in 2006 - *Directive 2006/123/EC on services in the internal market*, although the Treaty of Rome established this freedom which could only be conceived, at that date, in relation to the free movement of persons. At present, services occupy an important place in European economic development, focusing on retail services, business services or construction services. „As one of the largest service sectors, business services contribute to 11% of EU GDP" and "they range from technical services such as engineering, architecture and IT, to other professional services such as legal services, employment services and facility management"[15].

This Directive obliges the Member States to establish the Points of Single Contact (PSCs) which "are e-government portals that allow service providers to get the information they need and complete administrative procedures online"[16]. In Romania the PSC was created by the National Authority for Digitalization[17] and it is used for different administrative procedures as recognition of professional qualifications for the regulated professions, customs authorization, urbanism certification, construction, consumer protection and others. Nowadays the Member States must also implement the *Regulation (EU) 2018/1724 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services* which "will facilitate online access to the information, key administrative procedures and assistance and problem-solving services that citizens and businesses may wish to contact if they encounter problems when exercising their internal market rights while living in or doing business in another EU country"[18]. The same Romanian National Authority for Digitalization has the task to make functional the Single Digital Gateway where all the public authorities, universities or professional bodies will provide with online

"On 28 October 2015, the European Commission presented a new single market strategy to deliver a deeper and fairer single market that will benefit both consumers and businesses".

[12] The General Directorate which is under the responsibility of the European Commissioner for Internal Market has been renamed last year DG Grow.

DG Grow is "responsible for responsible for:

- completing the internal market for goods and services
- helping turn the EU into a smart, sustainable, and inclusive economy
- fostering entrepreneurship and growth by reducing the administrative burden on small businesses; facilitating access to funding for small and medium-sized enterprises (SMEs); and supporting access to global markets for EU companies. All of these actions are encapsulated in the small business act
- generating policy on the protection and enforcement of industrial property rights
- coordinating the EU position and negotiations in the international intellectual property rights (IPR) system, and assisting innovators on how to effectively use IP rights"

https://ec.europa.eu/growth/about-us_en.

[13] https://ec.europa.eu/growth/single-market/single-market-enforcement-taskforce_en.

[14] See: Adriana Almășan, Ștefan Bogrea, *Harmonization of Romanian Law to EU Competition Law*, Analele Universităţii din Bucureşti, Seria Drept, 2015.

[15] https://ec.europa.eu/growth/single-market/single-market-services/business-services_en.

[16] https://ec.europa.eu/growth/single-market/single-market-services/services-directive/practice/points-single-contact_nl.

[17] https://edirect.e-guvernare.ro/SitePages/landingpage.aspx.

[18] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4374365.

information and online procedures for the European citizens.

In fact, digitization remains one of the most useful tools created in the internal market for the benefit of citizens, which is regulated by binding acts for Member States.

4. Monitoring of the Internal Market's rules by the European Commission

According with the art. 17 para. 1 of the TEU and art. 258 of TFEU, the European Commission monitors the application of EU law and can launch infringement proceedings against EU countries that do not comply.

As mentioned, the European Commission has created SMET which "is composed of EU countries and of the Commission. EU countries have nominated a SMET contact point from the competent national authorities with direct responsibility for single market issues, in the majority of the cases the ministries for economic affairs"[19]. In Romania, the Ministry of Economy is represented within SMET and collaborates with all Ministries having competences in the field of Internal Market[20].

The SMET will complement a cooperation network to be set up between national enforcement coordinators, making use of the existing Internal Market Advisory Committee (IMAC) framework.

In the meantime, in order to succeed and to keep the momentum in the implementation, the Single Market Scoreboard will provide both Member States and the Commission with a useful performance-monitoring tool on the application of single market rules

However, not only can the European Commission be notified, but it can also be notified by citizens or other Member States that a Member State is not complying with Internal Market rules.

Thus, the question arises as to whether the citizens of a State are not required to turn against their own State which, for various reasons, does not implement the rules of the Internal Market, although it has an obligation to do so. What are the reasons why a Member State does not comply with these rules? Are there justified situations?

"Member States must ensure compliance with single market law if the rights of individuals or businesses are to be protected. This must start at the stage of designing national legislation, and be carried through to individual judicial or administrative decisions. The Commission has the task to support Member States in preventing the creation of new barriers to the single market, in the transposition and application of EU law and to initiate remedial action where necessary"[21].

In accordance with the EU law, the European Commission has established the following "Tasks and responsibilities for the implementation and enforcement of single market rules:

Member States - Transpose EU law timely and accurately, refraining from unjustified "gold plating", and ensure a level playing field

Commission - Assist Member States in transposing EU law correctly, fully and on time

Member States - Ensure that national legislation is proportionate and non-discriminatory

Commission - Assist Member States in applying EU law

Member States - Ensure sufficient and proportionate administrative checks and controls so that any breaches are identified

Commission - Check the transposition and monitor the application of EU law

Member States - Avoid any national measures that contradict or hamper the application of EU law

Commission - Act against breaches of EU Law and take formal infringement action if needed

Member States and Commission and - Cooperate effectively to ensure compliance with EU law"[22].

These tasks that fall to the European Commission and the Member States have as legal basis the fundamental principle of sincere cooperation[23] between Union and Member States provided for the art. 4 para. 3 of the TUE where it is laid down that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

The question arises on that topic is whether there is real and active support of the European Commission's services for the authorities of the Member States during the transposition period of a

[19] https://ec.europa.eu/growth/single-market/single-market-enforcement-taskforce_en.

[20] http://www.economie.gov.ro/eliminarea-barierelor-de-pe-piata-unica-instituite-in-contextul-pandemiei-covid-19-dezbatuta-in-cadrul-reuniunii-smet.

[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2020) 94 final, Long term action plan for better implementation and enforcement of single market rules, https://ec.europa.eu/info/sites/default/files/communication-enforcement-implementation-single-market-rules_en_0.pdf.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2020) 94 final, Long term action plan for better implementation and enforcement of single market rules https://ec.europa.eu/info/sites/default/files/communication-enforcement-implementation-single-market-rules_en_0.pdf

[23] See: Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, *Principiul cooperării loiale – principiu constituțional în dreptul Uniunii Europene*, in *In Honorem Ioan Muraru. Despre Constituție în mileniul III*, Ștefan Deaconu, Elena Simina Tănăsescu (coord.), Hamangiu Publishing House, Bucharest, 2019.

directive. How can it be explained that there are directives that have not been correctly and completely transposed by a large number of Member States? Is it the fault of the Member States or do most Member States have a different view of the Commission as regards the transposition of that Directive? For example, for three Directives with o very high impact for the free movement of professionals an important number of Member States have received reasoned opinion or letter of formal notice from the European:

- on the 7 March 2019, the Commission has sent reasoned opinions to **24 Member States** (Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) and complementary letters of formal notice **to 2 Member States** (Estonia and Latvia) regarding the non-compliance of their national legislation and legal practice with EU rules on the recognition of professional qualifications - Directive 2005/36/EC as amended by Directive 2013/55/EU[24] ,

- in June 2019, the Commission sent letters of formal notice to all EU Member States, requesting them to comply with the Services Directive and improve their Points of Single Contact. The letters covered several aspects of the PSCs, including calls on Member States to: provide user-friendly one-stop shops for service providers and professionals; help service providers overcome administrative hurdles in the access to service activity; address issues related to online availability and quality of information on requirements and procedures; and ensure ability to access and complete procedures online through the PSCs, including from other Member States (with reference to the importance of complying with Regulation (EU)910/2014 on electronic identification)[25] and

- on the 9 February 2022, the Commission has decided to open infringement proceedings against **Latvia and Spain** for not having properly transposed the EU rules on a proportionality test before adoption of new regulation of professions - Directive (EU) 2018/958. This decision follows the opening of infringement proceedings **against 18 Member States** in December 2021[26].

The infringement procedure is described very clear on the website of the European Commission according with the art. 258-260 of TFEU[27]: "If the EU country concerned fails to communicate measures that fully transpose the provisions of directives, or doesn't rectify the suspected violation of EU law, the Commission may launch a formal infringement procedure. The procedure follows a number of steps laid out in the EU treaties, each ending with a formal decision:

1. The Commission sends a letter of formal notice requesting further information to the country concerned, which must send a detailed reply within a specified period, usually 2 months.

2. If the Commission concludes that the country is failing to fulfil its obligations under EU law, it may send a reasoned opinion: a formal request to comply with EU law. It explains why the Commission considers that the country is breaching EU law. It also requests that the country inform the Commission of the measures taken, within a specified period, usually 2 months.

3. If the country still doesn't comply, the Commission may decide to refer the matter to the Court of Justice. Most cases are settled before being referred to the court.

4. If an EU country fails to communicate measures that implement the provisions of a directive in time, the Commission may ask the court to impose penalties"[28].

It is obvious that the European Commission has a discretionary power to issue the letter of formal notice, the reasoned opinion or to take the Member States to Court of Justice. "Workload pressures and political considerations each play a part in deciding which infringements to pursue. (…) Art. 258 TFEU operates at the level of inter-institutional relations, with the Commission fulfilling a politically sensitive role in policing and implementation of EU law by the Member States and it is not mechanically applied to all violations"[29].

The Court of Justice of the European Union has pronounced last year in the case… that: "As regards **the seriousness of the infringement**, it must be borne in mind that the obligation to adopt national measures for the purposes of ensuring that a directive is transposed in full and the obligation to notify those measures to the

[24] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1479.

[25] Erik Dahlberg et al., *Legal obstacles in Member States to Single Market rules*, Study Requested by the IMCO committee, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, November 2020, p. 80 (https://www.bruegel.org/wp-content/uploads/2020/11/IPOL_STU2020658189_EN.pdf).

[26] https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601.

[27] This primary legal basis does not provide with a detailed infringement procedure but only the main steps. The deadlines for compliance are not specified but the European Commission mentioned in each step (letter of formal notice or reasoned opinion) the mandatory deadlines for national authorities.

[28] https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en.

[29] Margot Horspool (Author), Matthew Humphreys (Author), Michael Wells-Greco (Author), Siri Harris (Contributor), Noreen O'Meara (Contributor), *European Union Law*, 9th ed., Oxford University Press, Oxford, 2016, p. 227.

Commission are fundamental obligations incumbent on the Member States in order to ensure optimal effectiveness of EU law and that failure to fulfil those obligations must, therefore, be regarded **as definitely serious** (judgments of 8 July 2019, Commission v Belgium (art. 260(3) TFEU-High-speed networks), C-543/17, EU:C:2019:573, para. 85; of 16 July 2020, Commission v. Romania (Anti-money laundering), C-549/18, EU:C:2020:563, para. 73; and of 16 July 2020, Commission v. Ireland (Anti-money laundering), C-550/18, EU:C:2020:564, para. 82)"[30].

"Further to an enquiry or a complaint (by citizens, businesses and organisations), or on their own initiative, the Commission's services might need to gather additional factual or legal information for a full understanding of an issue concerning the correct application of EU law or the conformity of the national law with EU law"[31]. For this purpose, the European Commission has implemented in 2008 the EU Pilot project with the participation of 15 Member States; by July 2013 the entire EU-28 had signed up. The EU Pilot's procedure is the following:

- The Commission's services submit a query to the Member State concerned via EU Pilot.

- Member States normally have 10 weeks to reply and the Commission's services, in turn, also have 10 weeks to assess the response

- If the response is not satisfactory, the Commission will normally launch infringement proceedings by sending a letter of formal notice to the Member State concerned[32].

In Romania, the Ministry of Foreign Affairs is the National Contact Point for EU Pilot and coordinates the formulation and substantiation, by the relevant line institutions, of the responses transmitted to the European Commission via the electronic platform[33].

The European Commission has also created a useful tool for citizens facing obstacles in relation with the national public authorities which is named SOLVIT - Internal Market Problem-Solving –"SOLVIT is a service provided by the national administration in each EU country and in Iceland, Liechtenstein and Norway. SOLVIT is free of charge. It is mainly an online service. SOLVIT aims to find solutions within 10 weeks – starting on the day your case is taken on by the SOLVIT center in the country where the problem occurred"[34].

In Romania, the SOLVIT National Contact Point is Ministry of Foreign Affairs[35] which solves the problems raised by the Romanian citizens in relation with the Romanian public authorities or other national public administrations and in this case the National Contact Point from that Member State will be contacted.

„A real partnership of the different actors at European and Member State level responsible for implementation and enforcement will be essential to overcome existing single market barriers. It will help the directing of targeted enforcement action and improving single market law compliance"[36].

5. The impact of the pandemic crisis on the Internal Market[37]

The European Parliament has published in 2021 a study regarding the impact of COVID-19 on the Internal Market which presents the types of the restrictions and their consequences for citizens, business and administrations. On the „restrictions at EU Member State level that impacted cross-border" it is mentioned that the „restrictions to travel have been a feature of the COVID-19 response from the earliest days of the crisis and notifications."

They are also mentioned the restrictions self-imposed by individuals and their effects because „Once people realize that they are at serious risk of a life-threatening infection, many will voluntarily begin to practice various forms of social distancing". „The

[30] CJEU, European Commission v Kingdom of Spain, 25 February 2021, ECLI:EU:C:2021:138, para. 64. It is the first decision under the art. 260. 3 where the Court of Justice obliged a Member State to pay a lump sum and penalty payment: "3. Should the infringement established in point 1 persist at the date of delivery of this judgment, orders the Kingdom of Spain to pay the Commission, as from that date and until that Member State has put an end to that infringement, a daily penalty payment of EUR 89 000. 4. Orders the Kingdom of Spain to pay the Commission a lump sum in the amount of EUR 15 000 000".

[31] https://ec.europa.eu/internal_market/scoreboard/_archives/2014/07/performance_by_governance_tool/eu_pilot/index_en.htm.

[32] CJEU, *Darius Nicolai Spirlea and Mihaela Spirlea v European Commission*, 25 September 2014, case T-306/12, ECLI:EU:T:2014:816, para. 62: "Thirdly, even though the EU Pilot procedure is not in all respects equivalent to the infringement procedure, it may nevertheless lead to it, since the Commission may, at the conclusion of an EU Pilot procedure, formally commence an infringement investigation by sending a letter of formal notice and may, possibly, apply to the Court for a declaration that the breach of obligations alleged against the Member State concerned has occurred. That being so, the disclosure of documents in the context of an EU Pilot procedure would be prejudicial to the subsequent phase, that is to say, the infringement procedure".

[33] https://www.mae.ro/node/27934.

[34] https://ec.europa.eu/solvit/what-is-solvit/index_en.htm.

[35] https://www.mae.ro/node/19314.

The website of all Romanian Ministries must published the link for SOLVIT on their web pages.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Long term action plan for better implementation and enforcement of single market rules, COM(2020) 94 final.

[37] J. Scott Marcus et al., *The impact of COVID-19 on the Internal Market*, Study Requested by the IMCO committee, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, February 2021 (https://www.europarl.europa.eu/RegData/etudes/STUD/2021/658219/IPOL_STU(2021)658219_EN.pdf).

prolonged restrictions have taken a heavy toll on the EU citizens, confronted with a dramatic change in their lifestyles and expectations. It could be argued that the culture of rights in Europe – some critics might label it as a culture of entitlement – has significantly crippled the pragmatic efforts made by the governments to fight the pandemic"[38].

Accordingly with this Study, "Measures imposed or recommended at European level can be assigned to one of three major categories: (1) measures which imposed restrictions, which was largely limited to unified restrictions to travel from third countries into the Union; (2) measures which sought to reduce the cross-border impact of restrictions imposed by Member States individually; and (3) measures that had little do with restrictions or cross-border flows, but were nonetheless important from an EU Internal Market perspective".

In the meantime, the European Commission[39] has underlined that „We are addressing export bans and have issued border management guidance to keep essential goods available". SMET has had the role „to ensure the free flow of products such as face masks, medical supplies and food across the single market". The Commission have also approved measures on the export of protective equipment outside the EU and issued a communication with guidance to EU countries to help them address the shortages of health workers and minimise the effects of the coronavirus emergency's impact on harmonised training requirements[40], including a guidance on the implementation of Directive 2005/36/EC on the recognition of the professional qualifications in respect to healthcare professionals; for certain sectoral professions such as general care nurses, dentists (including specialists), doctors (including specialists), midwives and pharmacists, the Directive also lays down minimum training requirements at EU level.

"The Commission has made liquidity measures available to support European small and medium-sized enterprises (SMEs). €1 billion was redirected from the European Fund for Strategic Investments to reinforce the COSME Loan Guarantee Facility and the InnovFin SME Guarantee Facility to mobilise liquidity support for at least 100,000 SMEs"[41].

6. Final remarks

The main elements of the relationship between European Commission and European citizens were also established by the six Commission's priorities for 2019-2024 among which can be mentioned "An economy that works for people" in parallel with the sensitive "Promoting our European way of life"[42] which has the rule of law at its center, a interesting topic in the last years for some European Central Member States.

The current French Presidency of the EU Council has on its "agenda for a sovereign Europe" some priorities for EU citizens as the following:

- With regard to social issues, the first decision was to revise the posting of workers directive on the basis of the principle of "equal pay for equal work at the same workplace";
- With regard to economic issues, a historic recovery plan funded by joint European borrowing has helped Europe overcome the crisis. And Europe is progressively acquiring commercial protection instruments to no longer be naive when it comes to globalization"[43].

The impact of the Ukraine's situation[44] is serious on the Internal Market and for sure it will deeply analyzed in the future. For the next period, the European Commission must adopt specific rules for Internal Market which could help not only the functioning of this area but also EU citizens and their economic wellbeing.

In conclusion, „the development of European legal provisions and the jurisprudence of the Court of Justice of the European Union on the internal market increase the complexity of the European construction, which is distinguished by a series of stable Union rules, but also by a variable freedom of decision recognized to Member States"[45].

We appreciate that the relationship among European Commission, Member States and EU citizens could be developed on the new aspects and interactions in the benefit of the Internal Market as the cornerstone of the European Union and the power relations must be abandoned.

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[38] Monica Florentina Popa, *Negotiating our health: the EU public policies on covid-19 vaccination and the Astra Zeneca Advance Purchase Agreement*, Challenges of the Knowledge Society, 14th ed., Bucharest, 21st May 2021, p. 454 (http://cks.univnt.ro/articles/15.html).

[39] https://ec.europa.eu/growth/coronavirus-response_en.

[40] Communication from the Commission Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC, C(2020) 3072 final.

[41] https://ec.europa.eu/growth/coronavirus-response_en.

[42] https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people_en; https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life_en.

[43] https://presidence-francaise.consilium.europa.eu/en/programme/priorities/.

[44] https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine_en.

[45] Sergiu Deleanu, *United in diversity - Some aspects to consider regarding elementary rules applicable within the Internal Market of the Union*, in *In honorem Flavius Antoniu Baias. Aparența în drept. The appearance in law. L'apparence en droit*, vol. I, Authors: Adriana Almășan, Ioana Vârsta, Cristina Elisabeta Zamșa, Hamangiu Publishing House, Bucharest, 2021, p. 43.

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BENEFITS OF BEING AN EU CITIZEN – AN OVERVIEW IN THE CONTEXT OF THE UK'S DEPARTURE FROM THE EU

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Abstract

Whilst joining the EU entails numerous rights and obligations for the acceding state, in areas ranging from custom duties to agriculture to judicial cooperation in both criminal and civil matters, the EU Member States' citizens and residents themselves also gain a considerable number of advantages, some immediate and deriving directly from the newly-obtained EU citizenship, like the right to travel to and reside in any other Member State, and some less immediately or frequently exercised, but just as – if not more – important, such as having their fundamental rights protected through the dispositions of the EU Charter of Fundamental Rights, or living in a healthy environment that is protected, at a European level, through numerous regulations and directives. When a state leaves the EU, as the United Kingdom has recently done, the citizens – and, depending on the case, other residents – of that state lose all these added legal, economic, and social safeguards. This paper sets out to analyse the benefits enjoyed by the people living in the EU, compared to those residing outside its borders, using the UK's withdrawal from the EU – the first state to ever do so – as an opportunity to look at the same group's rights before and after such an event.

Keywords: *EU citizenship, free movement of people, social security, Brexit, electoral rights.*

1. Introduction

When European citizenship was formally introduced into EU law by the Treaty of Maastricht, in 1993, one of its main functions was to extend the freedom of movement to situations that did not involve economic activities, with the understanding that there would have to be a cross-border element in order to make the relevant dispositions applicable. EU citizenship was part of a shift the European Union[1] made from an economically-oriented international organisation to one concerned with matters ranging from fundamental rights to environmental law.

In the 1999 case *Grzelczyk*[2] the Court of Justice stated that 'European citizenship is destined to be the fundamental status of the nationals of the member states'; in *Rottman*[3] the Court moved beyond a market-based approach; and in *Ruiz Zambrano*[4] it cemented the disjunction between European citizenship and economic activities, by recognising the application of its benefits in a case that lacked any intra-EU cross-border elements, saying that 'to be at all able to make use of cross-border rights and even if they have not yet crossed any internal borders, European citizens must possess a deeper, more fundamental right to reside on European territory.'

What this has meant for nationals of EU Member States has been an ever-growing array of rights and benefits to be enjoyed within the EU, as well as additional diplomatic and consular assistance when leaving the EU's territory and traveling to third-countries. From the ability to move freely throughout the EU, to having a direct say in the elaboration of EU legislation, to being protected in the work place against conditions that could negatively impact their health, nationals of EU Member States have gradually reached an enviable legal status, in comparison to that of most third-country nationals.

The main vulnerability of this privileged legal status is that it is dependent on holding the nationality of an EU Member State – third-country nationals enjoy some of the protections that EU citizens do, but not all, and frequently have to submit to individual states' legislation and standards. Once an EU Member State withdraws from the Union – or if it decides to revoke an individual's nationality – EU citizenship is lost, and all its associated rights and benefits are lost as well, both for the EU citizens residing on its territory, as well as for its own nationals who reside within the EU. The practical consequences of this loss of EU citizenship will naturally vary from case to case, depending on several demographic and socio-economic factors, but what is essential is to identify the main issues that can arise from such a change in legal status, in order to ensure, first and foremost, that individuals are negatively affected as little as possible by states'

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[1] For the purposes of this paper, the name 'European Union' shall also be used when referencing the European Community.

[2] Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458.

[3] Case C-135/08 *Rottmann*, ECLI:EU:C:2010:104.

[4] Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124.

decisions on the matter of EU participation or of nationality.

2. EU citizenship – corresponding rights and duties

EU citizenship is enshrined in the Treaty on the Functioning of the European Union (TFEU), in Part Two, 'Non-discrimination and citizenship of the European Union', art. 20 to 25, with corresponding rights also regulated in the Treaty on the European Union (TEU), art. 10 and 11.

Art. 21 TFEU extends the free movement of persons to non-economic contexts, allowing EU citizens to move and reside anywhere within the EU without having to exercise an economic activity. This was a major innovation brought about by the Treaty of Maastricht, and a sign of changing views regarding the EU's main values and objectives.

Art. 22(1) TFEU confers EU citizens who reside in a Member State whose nationality they do not hold the right to vote in local elections. Art. 22(2) TFEU provides the right to vote and to stand as a candidate in elections to the European Parliament in whichever Member State the citizen resides, under the same conditions as nationals of that State.

Art. 23 TFEU states that EU citizens, when travelling or residing outside of the EU, can request diplomatic and consular protection from any other EU Member State, if their own is not represented in that third country. The introduction of such a right was a manner of bringing countries closer together, making them unite in their protection of EU citizens, regardless of their nationality. Overtime this could create a feeling of community, of shared identity, solidifying the notion that individuals belong to the EU first, and only secondly to the States, meaning that States take on responsibility for what happens to these individuals, regardless of their nationality. Ideally, each Member State of the EU would protect other States' nationals, who are on its territory, as vigorously as it would protect its own nationals.

Art. 24 TFEU provides the right to hold EU institutions to account, by addressing questions to them. Said questions can be addressed in any official language of the EU, and the institution must reply using the same language. EU citizens can also petition the European Parliament (art. 227 TFEU) and can apply to the European Ombudsman to launch an investigation into the behaviour of EU institutions (art. 228 TFEU), if the citizens feel their rights are not being respected. These dispositions were introduced as part of a prolonged process of increasing the democratic legitimacy of the EU. On the one hand, national parliaments and the European Parliament – whose members are directly elected by EU citizens – have gradually seen their roles increase, and on the other, EU citizens have gained more and more rights and opportunities to influence EU policies.

Art. 10(2) TEU provides that 'EU citizens are directly represented at Union level in the European Parliament', whilst art. 10(3) TEU provides that 'every citizen shall have the right to participate in the democratic life of the Union'. Art. 11(4) TEU provides the possibility of a citizens' initiative, a possibility introduced through the Treaty of Lisbon.

Member States and EU institutions must comply, when applying EU law, with the dispositions of the Charter of Fundamental Rights of the European Union, which include, in Title V, dispositions related to EU citizenship. Additionally, EU institutions have an obligation to respect the principle of transparency, so that EU citizens can participate in the decision-making process and be adequately informed regarding all of the institutions' decisions. This gives EU citizens a clear advantage in comparison to third-country nationals who reside and work within the EU, but who don't have the possibility to influence EU decision-making in any consistent way – they must respect the legislation that comes from the EU as-is.

EU governance is primarily based on representative democracy [art. 10(1) TEU states that 'the functioning of the Union shall be founded on representative Democracy'], but the Treaty of Lisbon made a shift towards participative democracy, with EU citizenship reflecting the idea that the people of Europe should have a direct say in the process of integration, alongside the Member States' authorities.[5]

In the *Delvigne* case,[6] the CJEU stated that there is a clear link between the democratic governance of the EU and EU citizenship, and it showed that 'that the political dimension of EU citizenship is not limited to art. 20 to 25 TFEU, but also involves other provisions of EU law, notably art. 14(3) TEU and art. 1(3) of the 1976 Act. Those provisions impose on the Member States obligations whose objective is to ensure that the basic principles inherent in a democratic electoral system are applied at EU level.'[7]

Duties are mentioned once in conjunction with EU citizenship, but don't have any other corresponding dispositions or legal basis within the EU Treaties. One duty that is presumed to exist, in relation to EU citizenship, is that of moving from one Member State to another, in order to fall within the scope of EU law and enjoy all the associated rights. Whilst it is true that,

[5] Koen Lenaerts, 'Linking EU Citizenship to Democracy', *Croatian Yearbook of European Law and Policy*, vol. 11, 2016, p. VIII.
[6] Case C-650/13 *Delvigne*, ECLI:EU:C:2015:648.
[7] Koen Lenaerts, *op. cit.*, p. XIII.

in most cases and due to the way EU law is structured, movement between two States is necessary, CJEU has repeatedly applied EU law in cases where there was no such cross-border element, as was the case in *Ruiz Zambrano*.[8]

As duties cannot be implied, nor can they be extracted from rights, but rather have to be explicitly stated, it means that EU citizenship, effectively, bestows *only* rights on EU Member States' nationals. This should be considered an asset, rather than an indication that EU citizenship is 'inferior' to States' nationalities. On a worldwide level, for the past decades and even centuries, citizenship-related duties (such as 'paying allegiance to one's lord or ruler') have been dwindling in number, whilst rights have been increasing, a reflection and component of the growing respect and aspiration for democracy, fundamental human rights, and the rule of law. As such, the fact that the EU's fundamental Treaties contain no duties for its citizens is a progressive and laudable approach, and it's even been argued that citizenship duties are 'antithetical to the goals of freedom, liberty, rights protection and individual empowerment that the Treaties set out to achieve.'[9]

In the UK, the right to vote is restricted to British nationals, and qualifying Commonwealth or Irish nationals, provided that they are residents. British nationals who have not lived within the UK for more than 15 years lose their right to vote, regardless of holding continued British nationality. Whilst the UK was in the EU, other Member States' citizens were also allowed to vote in local elections, provided that they resided within the UK. Following Brexit, they will no longer have this right – whilst Scotland and Wales allow all residents to vote in local elections, regardless of their nationality, England and Northern Ireland restrict this right to nationals. As such, more than one million citizens from EU countries lose their right to vote in local elections in England, as a consequence of the UK withdrawing from the EU.[10]

Regarding the right to diplomatic protection and consular assistance from other Member States, Brexit is unlikely to have a strong impact. On the one hand, the situation of EU citizens living in the UK is not legally or practically altered. They can continue using the consulates of their own Member States, as well as those of other EU Member States. On the other hand, as far as British nationals are concerned, they do lose the possibility of asking for help from the EU Member States' consulates. But from a pragmatic point of view, this does not change their legal situation significantly, considering that the UK has diplomatic and consular representatives in most of the world.[11]

Outside of the UK, as far as EU citizens who continue to reside within the EU are concerned, Brexit should not present many issues. These individuals will continue to be able to address the Ombudsman, to vote in local elections even without holding that Member State's nationality, or to participate in elaborating an ECI. On the other hand, British nationals residing within the EU will no longer be able to take part in these procedures.[12] According to UN data, 1.3 million people born in the UK lived in EU countries, in 2019. 302,000 of them resided in Spain, 293,000 in Ireland, 177,000 in France, 99,000 in Germany, and 66,000 in Italy.[13] Through Brexit, these individuals have lost all the rights and benefits tied to EU citizenship.

Arguably the greatest loss incurred by both British nationals and EU citizens post-Brexit is the loss of free movement, one of the fundamental freedoms of the European Union. In addition to British nationals and EU citizens, people affected by this loss of rights include the nationals of EFTA Member States.[14] Iceland, Norway, and Liechtenstein have concluded an international agreement with the EU, creating the European Economic Area (EEA)[15], extending the freedoms of movement to these non-EU states, and creating a space where nationals all parties can travel without any restrictions. Now, British nationals can no longer move freely between EEA Member States, and the UK has to negotiate separate agreements with the three EFTA states, in order to ensure access to their territories for British nationals.

It's been speculated that, without the UK as a member state, the EU may be more likely to agree to common standards for acquiring national citizenship, given that national citizenship automatically allows the exercise of EU citizenship rights throughout all EU member states. It's interesting to note that, despite there being no EU legislation to that effect, Member States' policies on the obtaining of nationality via naturalisation have gradually converged, with the required length of residence being similar in all

[8] Dimitry Kochenov, *EU Citizenship without Duties*, University of Groningen Faculty of Law Research Paper Series, no. 15/2013, p. 8.
[9] *Idem*, p. 7.
[10] Willem Maas, *European Citizenship in the Ongoing Brexit Process*, International Studies, vol. 58, Issue 2, 2021, p. 170.
[11] *Idem*, p. 171.
[12] *Ibidem.*
[13] https://www.un.org/en/development/desa/population/migration/data/estimates2/estimates19.asp (accessed on 1 May 2022).
[14] Switzerland is an EFTA member as well, but its relationship to the EU is based on a series of bilateral agreements that create a legal framework very similar to that of the EEA. Switzerland does not directly take part in the EU decision-making process, but it can decide which pieces of legislation it wants to apply for itself.
[15] Iceland and Norway agreed to join the EEA and the Schengen Area in large part due to the fact that the other Nordic states (Denmark, Finland, and Sweden) had joined the EU. This way, Iceland and Norway can retain free travel with their fellow Nordic states.

Member States.[16] It's very likely that this is one effect of the introduction of EU citizenship.[17]

3. Workers' rights in the EU – the Working Time Directive

In the matter of workers' rights, as protected on a Union level, a crucial piece of legislation has been the Working Time Directive (WTD, currently Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time), which provides many protections for people working within the EU. It has not been without its detractors, including the UK, who tried to block its adoption, and, upon the failure of that attempt, brought an action for annulment against it, which fared no better. Specifically, the Commission chose as a legal basis for the adoption of this Directive an article concerning the health and safety of workers, a matter subject to qualified majority voting. The UK argued that the suitable legal basis would be art. 235 EEC (currently art. 352 TFEU)[18], which requires unanimity (it is rather clear that the UK's goal was to use its power of veto to block the Commission's proposal).

In terms of content, the WTD provides, among other things, minimum daily rest periods of 11 hours; breaks when working days are longer than six hours; weekly working hours of not more than 48 hours, including overtime (a disposition which has caused much discussion at a national level, with many employers seeking to avoid its enforcement); a weekly rest period of 24 uninterrupted hours; a minimum of annual leave of four weeks; and night work to be no longer than an average of eight hours in a 24-hour period. The WTD defines working time as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national law and/or practice', and rest period as 'any period which is not working time'.[19] The WTD also provides exceptions from all of these rules, including the possibility for the working week to exceed 48 hours with the worker's consent.

'Analysis of data from Eurofound's fourth European Working Conditions Survey (EWCS) showed that long working hours are linked to poor working conditions. Those who work more than 48 hours a week are almost twice as likely to consider that their health and safety is at risk because of their work, and that their job affects their health. The impact on work–life balance is even more substantial: 'three times as many long-hours workers report that their working hours do not fit their social and family commitments'.[20]

The WTD includes an opt-out from the 48-hour weekly working limit, that has been employed by some of the EU's Member States, under varying conditions (for example, some States have limited its use to certain occupations or sectors of activity).

The UK was one of the states that did use the opt-out, but its legislation provided that the same maximum number of hours worked applied to people who worked multiple jobs; consequently, it wasn't possible for one worker to conclude multiple full- or part-time employment contracts, with several employers, that would lead to surpassing the 48-hour limit. UK workers over the age of 18 could opt out of the 48-hour week, indefinitely or for a limited period, via a voluntary, individual, and in-writing opt-out. It was forbidden for employers to pressure workers into signing such an opt-out agreement, and the worker could revoke it at any time, with a minimum of seven days' notice. The opt-out did not apply to certain categories of employees, such as workers on ships or boats; airline staff; workers in the road transport industry, such as delivery drivers (and it is interesting to note that this is one category of workers where EU citizens from other Member States were more numerous); other staff who travel in and operate vehicles covered by EU rules on drivers' hours, such as bus conductors; security guards on vehicles carrying high-value goods.[21] The UK was also one of the few Member States that collected data on the use of the opt-out. According to that data, 'In 32.4% of the surveyed workplaces there were at least some workers who had signed an opt-out agreement. In 15.6% of workplaces all employees had signed an opt-out agreement. The highest rates are found in construction, other business services, and transport and communication. In addition to data on the use of the opt-out, WERS also reports that some 11.5% of all employees surveyed usually worked more than 48

[16] Willem Maas, *op. cit.*, p. 177.

[17] See also Oana-Mihaela Salomia, *The legal effects of the European Union citizenship*, Challenges of the Knowledge Society, 12th ed., 11-12 May 2018.

[18] Art. 352(1) TFEU provides: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'

[19] Tobias Nowak, *The turbulent life of the Working Time Directive*, Maastricht Journal of European and Comparative Law, vol. XX(X), 2018, available at https://journals.sagepub.com/doi/10.1177/1023263X18760547 (accessed on 1 May), p. 3.

[20] Jorge Cabrita, Yolanda Torres Revenga, *Opting out of the European Working Time Directive*, Eurofund (2015), Publications Office of the European Union, Luxembourg, 2015, p. 20.

[21] *Idem*, p. 7.

hours per week, with the highest rates in transport and communication, construction and education.'[22]

The lack of data available regarding the use of the opt-out makes it hard to gauge how efficiently workers' rights are protected, on the basis of this directive, within the EU, and how it should be modified to ensure better protection. As far as the UK is concerned, a 2004 report suggested that workers had been pressured into agreeing to work over the 48-hour limit, signing the opt-out. This included, according to European Commission research, the banking sector, where 'in some instances it was 'compulsory' for workers to sign the opt-out as it took the form of a clause of the employment contract offered to them.' Additionally, a 2011 survey of workers found that '23 per cent of long hours workers who had not signed an opt-out said they had experienced employer pressure to work longer, around half of whom thought it was understood as a condition of working at their workplace'.[23]

The Trades Union Congress found, in 2013, that the UK's use of the opt-out led to insufficient protection of workers' rights, with the applicable legislation being poorly understood and enforced, unpaid overtime being increasingly common for white-collar jobs, and the existence of expectations on the part of employers that employees should work long hours. Employers and Industry representatives argued against the TUC's findings, and generally supported the use of the opt-out as much as possible, arguing that it was necessary to keep business afloat, and that a signed opt-out 'provided certainty'. However, the argument that longer working hours results in greater productivity does not stand up to scrutiny, especially when looking at data from countries that rank among the most productive: in Denmark, which does not allow for the use of the opt-out, the maximum number of weekly working hours has been 37 ever since 1990.[24]

If this was the situation of employees before Brexit, it stands to reason that withdrawal from the EU, and thus inapplicability of the directive, will only lead to a further erosion of workers' rights, and the elimination of the maximum number of weekly working hours.

4. EU citizenship and the matter of expulsion

Ever since the Economic European Community's creation, the Treaties have limited expulsions and re-entry bans targeting nationals of other Member States, allowing them to be carried out only on grounds of public policy, public security, and public health.[25] The applicable secondary EU legislation on the matter[26] limits expulsions based on the duration of an EU citizen's residence within the territory of another Member State: in the case of stays no longer than 5 years, an EU citizen can be expelled on grounds of public policy or security; in the case of stays up to 10 years, expulsion can be carried out for 'serious' grounds of public policy and security; and if the EU citizen has resided for longer than 10 years within another Member State, expulsion can be carried out only for 'imperative' grounds of public security.[27]

As far as treatment of EU citizens by UK authorities is concerned, the matter has not always been free from criticism. For example, in 2015 detention of EU citizens had seen a sharp increase compared to 2010: 3,699 EU citizens were detained, compared to 768 in 2010, and out of the total number of detainees, EU citizens represented 11.4% in 2015, compared to 2.7% in 2010. Additionally, in the third quarter of 2016 (immediately after the Brexit referendum), EU citizens represented 17% of all new detentions, and 31% of all enforced removals.[28] Another trend recently observed has been that of increased administrative removal of EU citizens and their family members,[29] on the basis of them 'misusing' their rights, or lacking a residence right.[30] Administrative removal differs, legally, from expulsion and is easier to order when EU citizens do not exercise a right of residence.

Generally speaking, before Brexit EU citizens acquired rights and did not need permission from the UK Home Office in order to exercise those rights, although they could apply for residence documentation, in order to consolidate their position. On the other hand, third-country nationals have always needed permission from the UK Home Office in order to enter and reside in the UK, and acquiring immigration documentation

[22] *Idem*, p. 11.
[23] *Idem*, p. 13.
[24] *Idem*, p. 22.
[25] Elspeth Guild, *What has EU Citizenship done to the Notion of Expulsion?*, in Sandra Mantu (ed.), *Expulsion and EU citizenship*, Nijmegen Migration Law Working Papers Series, Radboud University, Nijmegen, no. 02/2017, p. 5.
[26] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
[27] Elspeth Guild, *op. cit.*, p. 7.
[28] Matthew Evans, *Expulsion of EU Citizens in the UK*, in Mantu, Sandra (ed.), *Expulsion and EU citizenship*, Nijmegen Migration Law Working Papers Series, Radboud University, Nijmegen, no. 02/2017, p. 20.
[29] For more on whom the concept of 'family members' includes, see Roxana-Mariana Popescu, 'Opinion of Advocate General Wathelet and Judgment of the Court of Justice of the European Union in Case C-673/16, concerning the concept of 'spouse' in European Union Law', *Challenges of Knowledge Society*, 13th ed., Bucharest, 17-18 May 2019.
[30] Matthew Evans, *op. cit.*, p. 21.

(such as visas or residence permits) is mandatory; this is the regime now applicable to EU citizens as well.[31]

Yet another practice that has raised eyebrows has been the Home Office's policy of detaining and removing EU citizens whilst treating them like third-country nationals, and overriding their EU law rights. This was the case of a Polish citizen, who had been working in the UK; during a period of unemployment, he was found by the police and detained for rough sleeping, for over five months, during which time no attempt was made to remove him from the country (as per UK policy, EU citizens were only supposed to be detained immediately prior to removal). The case reached the High Court, which found that the maximum reasonable period for detaining prior to removal would have been a week; consequently, the Polish citizen was awarded damages. This is just an instance of the Home Office's treatment of low-income EU citizens, even prior to Brexit.[32]

Brexit has cast a light over the importance and value of EU citizenship, as it has demonstrated how easy it is, in comparison, for states to determine the legal fate of people residing with their territories. A large role in the Brexit debates and outcome was played by the distinction between high-level income migrants and low-level income migrants, and the desire to expel migrants seen as not contributing sufficiently to the national economy. Following the UK's withdrawal from the EU, national authorities, no longer being restricted by EU legislation on the matter, have been able to 'engage in an administrative policy that makes it difficult for EU citizens to document their EU rights thus opening the way for terminating those rights.'[33]

5. Could EU citizenship be retained by a withdrawing state's nationals?

Following Brexit, British nationals have become third-country citizens, or 'foreign nationals', as far as EU Member States are concerned, which means they must now submit themselves to the immigration legislation of whichever EU state they wish to visit, work in, or reside on its territory.

Some authors have argued that people who held British nationality, and thus EU citizenship, before the UK's exit from the EU should retain their EU citizenship even following Brexit. According to this view, the loss of EU citizenship in such a context would amount to 'an arbitrary withdrawal of citizenship, prohibited by international law',[34] and it would be a mistake to assume that the loss of citizenship operates automatically when a Member State withdraws from the EU, considering there is no indication to that effect within the EU Treaties. Suggesting that this assumption relies on general principles of international law and on the Vienna Convention on the Law of Treaties, its detractors consider that this interpretation of said dispositions ignores the importance of fundamental human rights, and how these would be affected and diminished in the case of losing EU citizenship. This line of argumentation has raised the matter of the EU citizenship's legal nature.

Gaining EU citizenship is governed by national legislation on the matter, as it is tied to obtaining the nationality of an EU Member State. Thus, the States in question can prevent individuals from obtaining EU citizenship by barring them from obtaining their nationality, as is the case of certain nationals from overseas territories. However, the claim is that does not necessarily mean its loss should also be governed by national law exclusively, or that it should be entirely dependent on the continued existence of Member State nationality.

Instead, the argument is that EU citizenship, being a legal bond between the EU and the individual, brings the two into a direct relationship. Nevertheless, this relationship exists only by virtue of the Member States' choice to participate in the EU, and grant their citizens access to EU benefits that way; to say otherwise – that the EU could have a legal rapport with an individual outside of the wishes of a state – would imply that an individual has a personal, independent legal relationship with an international organisation, something that would require for the individual to be a subject of public international law.

Nationality was defined by the International Court of Justice, who plays a crucial role in shaping international law, as a 'legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[35] It is important to note that nationality represents, according to this definition, a 'legal' bond, even if one born from the non-legal personal connection between an

[31] *Ibidem.*

[32] *Idem*, p. 23.

[33] Annette Schrauwen, Egle Dagilyte, Sandra Mantu, *Concluding remarks – from Brexit to understanding vulnerability to expulsion*, in Sandra Mantu (ed.), *Expulsion and EU citizenship*, Nijmegen Migration Law Working Papers Series, Radboud University, Nijmegen, no. 02/2017, p. 32.

[34] William Thomas Worster, *Brexit as an Arbitrary Withdrawal of European Union Citizenship*, Florida Journal of International Law, vol. 33, February 2022, p. 96.

[35] *Nottebohm (Liechtenstein v. Guatemala)*, 1995 I.C.J. Reports 4 (Apr. 6). 'According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'

individual and a certain state. Being a legal bond, it has traditionally come with associated rights and duties, although the lack of EU citizens' duties has already been discussed above.

EU citizenship is not called nationality, and the distinction has been explained as being down to the fact that nationality 'can also carry ethnic, cultural, linguistic and/or historic significance and the EU member states likely intended for EU citizenship to constitute a status distinct from member state nationality'[36], which could very well tie into the fact that it works as an added layer of protection. It is worth noting here that not all states and languages make the distinction between citizenship and nationality (for example, Denmark made a unilateral declaration on the matter, in order to reassert that EU citizenship would not override the Danish one, and used the same term – 'borgerskab' – for both), or if they do, that distinction does not always represent the same thing. Based off the fact that the EU has 24 official languages, some covering this distinction and some not, it cannot be concluded that the EU treaties used the word 'citizenship' in order to distinguish it from 'nationality', or how.

Whilst the acquisition of nationality remains the (mostly) unchecked prerogative of each state[37], the withdrawal of nationality is the object of certain limitations, as part of an international effort to protect fundamental human rights, with nationality being considered 'a means for ensuring greater juridical security for States and for individuals'.[38] The restriction of states' possibility to revoke nationality comes down to two factors – the international goal of preventing statelessness, and the recognition of the right of all people to a nationality.

The Court of Justice of the EU has reinforced this commitment to protecting individuals' rights by ensuring they are not arbitrarily deprived of their nationality, stating in *Rottman* that it is a 'general principle of international law that no one is arbitrarily to be deprived of his nationality, that principle being reproduced in art. 15(2) of the Universal Declaration of Human Rights and in art. 4(c) of the European Convention on nationality. When a State deprives a person of his nationality because of his acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act'. The CJEU specified that, when deciding to revoke the nationality of an individual, Member States must take into consideration the consequences of the associated loss of EU citizenship, and thus must make sure the measure is proportionate, serves a legitimate purpose, and is not arbitrary. The CJEU could impose these additional criteria for the Member States to follow because, in its view, any loss of EU citizenship 'falls, by reason of its nature and its consequences, within the ambit of EU law.' However, if nationality was obtained through fraud, and is subsequently annulled, the person never gained EU citizenship in the first place, and the Member State is not compelled to follow the criteria stated in *Rottmann*.

The restriction on arbitrary revocation of nationality includes both procedural protection and substantive protection. On a procedural level, a state must have a legal basis for the revocation of nationality and must provide for legal process to challenge a revocation decision, whilst on a substantive level, the state must have a 'legitimate aim that is proportionate to an important state interest,' in its absence the procedural aspects being insufficient to justify the revocation.

Art. 7 of the European Convention on Nationality[39] allows for the parties to revoke nationality in the following cases: 'voluntary acquisition of another nationality; acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant; voluntary service in a foreign military force; conduct seriously prejudicial to the vital interests of the State Party; lack of a genuine link between the State Party and a national habitually residing abroad; where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled; adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.'

At present, the EU has yet to ratify the European Convention on Human Rights,[40] as per its art. 6 TEU, and has not ratified any other human rights treaties either, but the CJEU has repeatedly clarified that the EU is committed to the protection of human rights as general principles of law, and that it must interpret those rights in light of the Universal Declaration on Human Rights, as well as the ECHR. In addition, the Treaty of Lisbon has included the Charter of Fundamental Rights of the European Union among the

[36] William Thomas Worster, *op. cit.*, p. 108.
[37] Barring cases of a state ratifying an international convention on the matter, like the Convention on the Reduction of Statelessness; however, participation to such a convention is still the state's choice and expression of its sovereignty.
[38] William Thomas Worster, *op. cit.*, p. 99.
[39] Available at https://rm.coe.int/168007f2c8 (accessed on 1 May 2022).
[40] Available at https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed on 1 May 2022).

EU's primary law sources, granting it equal legal force to that of the EU treaties.[41]

Related to the Member States' wide margin of appreciation in so far as acquiring their nationality is concerned, it must be noted that they have the possibility of prohibiting some of their own nationals from acquiring EU citizenship – it is the case of nationals with a connection to overseas territories.

Upon its accession to the European Communities in 1973, the UK submitted a special declaration, revised in 1981, that limited the acquisition of EU citizenship to 'British Citizens', thus excluding other categories of UK nationals - 'British Dependent Territories Citizens,' 'British Overseas Territories Citizens,' 'British Subjects without Citizenship,' and 'British Protected Persons' from becoming EU citizens, despite international law (and UK law for certain purposes) treating them all as British nationals. In 2002, some of the 'British Overseas Territories Citizens' gained the status of 'British Citizens'. Consequently, it became possible for a British national, if also a British Overseas Territories Citizen, to renounce British citizenship and retain British Overseas Territories Citizenship, thus renouncing EU citizenship. This means that, until Brexit, the only comprehensive definition of 'British nationals' existed strictly in terms of EU law. Similarly, Danish nationals with a connection to the Faeroe Islands never gained EU citizenship, despite holding Danish nationality; this is because the Faeroe Islands were excluded from being part of the EU, according to Denmark's accession treaty.[42] Another special case is that of Greenland: it joined the EU as part of Danish territory, and its nationals gained EU citizenship, but it later obtained autonomy from Denmark and withdrew from the EU. However, its citizens retained EU citizenship.

The conclusion, following these arguments, would be that UK nationals qualifying as British citizens according to UK law, who have acquired EU citizenship validly, before Brexit, who do not actively renounce it, and who continue exercising their rights as EU citizens, should retain EU citizenship. Considering the nature of such a category of individuals, it would naturally dwindle until it disappeared, as it could not be supplemented with new EU citizenship holders.[43]

An example put forward by those supporting the idea of British nationals retaining EU citizenship even after Brexit has been that of India and Bangladesh's latest exchange of outstanding micro-enclaves which, unlike previous exchanges, gave the enclaves' residents the possibility to choose which nationality they wanted to hold after the exchange.[44] This would be just one example of the shift towards allowing residents in transferred territories to choose their nationality.

A different solution to this dilemma, proposed by those who do not believe it a viable argument that British nationals should retain EU citizenship even after Brexit, has been that of constituting an associate citizenship of the EU. Officials involved in the Brexit negotiation process declared themselves in favour of allowing British citizens to hold on to certain rights, such as electoral rights and the freedom of movement 'for those citizens who on an individual basis are requesting it', whilst EU law scholars argued in favour of introducing a special status (inspired, partially, from the 'British Protected Persons' status enjoyed by individuals from the former British protectorates) for citizens of states that have withdrawn from the EU, as long as they continue to reside within the EU, as well as for citizens of EU Member States who live in the state that has withdrawn. Other scholars believe that the concept of EU citizenship needs to be adapted so that it becomes much harder for it to be withdrawn, ensuring a (nearly) permanent status; thus, whilst granting nationality would still fall under the scope of internal law and would be governed by Member States, its withdrawal would be a matter of EU law, and near impossible.[45] To that effect, in 2018 EU citizens launched a citizens' initiative, as per art. 10(4) TEU and art. 24 TFEU, asking the Commission to put forward a proposal regarding a way to ensure that, once obtained, the rights derived from EU citizenship are permanent.

The concept of 'associate EU citizenship' has been criticised as 'misrepresenting the core foundations of EU citizenship as it currently stands', as well as being unadvisable from a pragmatic point of view.[46] Allowing the nationals of withdrawing Member States to retain EU citizenship would mean a weaker position for the EU during the subsequent negotiations, since it couldn't leverage their status in order to obtain as many benefits as possible for its own citizens. In practice, it would mean that the withdrawing state's nationals would retain all *their* rights, despite their state of nationality (in our case, the UK) no longer being an EU member, whilst the citizens of EU member states would be guaranteed no rights on the withdrawing state's territory.

[41] For more on EU primary law, see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2015.
[42] William Thomas Worster, *op. cit.*, p. 113.
[43] *Idem*, p. 133.
[44] *Idem*, p. 101.
[45] Dimitry Kochenov, Martijn Van den Brink, *Against Associate EU Citizenship*, Journal of Common Market Studies, vol. 57, no. 6, July 2019, p. 1371.
[46] *Idem*, p. 1367.

Another point of criticism that can be brought forward is the fact that, by recognising an associate EU citizenship, the EU would claim as its own citizens of a third country that has not consented to such a recognition. Additionally, these so-called 'associate citizens', who might not desire the status, would enjoy all the rights that come with EU citizenship without even having to reside on its territory, whilst third-country citizens can reside in the EU for years, contribute to its social security systems, be part of its local communities, yet not benefit from EU citizenship rights as long as they don't have the citizenship of a Member State.[47]

As the CJEU has repeatedly affirmed in its case law, EU citizenship 'is destined to be the fundamental status of nationals of the Member States', and the formulation of art. 20 TFEU makes it clear that EU citizenship complements – and, thus, is dependent on the existence of – Member State nationality; additionally, it's been established, also via they case law of the CJEU[48], that those holding a 'partial' nationality of a Member State cannot enjoy the full rights and benefits associated with EU citizenship. 'Court's case law that put direct pressure on the member states and triggered the gradual evolution of national citizenship laws confirm that EU citizenship depends on, and has no life independent from, the nationalities of the member states'.[49]

It is an acceptable approach, on the other hand, to extend certain rights and benefits currently enjoyed by EU citizenships to third-country nationals – as long as this is done on the basis of an international agreement concluded between the EU and the third party in question.[50] In such a scenario, all criticism regarding the lack of democracy (if disregarding the desire to leave the EU, and extending EU citizenship to people who might not want to retain it) or the disadvantageous position it puts the EU in would be nullified, as the EU would have the possibility to negotiate certain benefits for its own citizens, in exchange for allowing third-country nationals to retain EU citizenship. A similar arrangement can be seen in the case of EEA and Swiss nationals, who may move freely within the EU, and enjoy relevant rights, without being associate EU citizens.

6. Conclusions

In addition to the well-known and researched economic benefits brought about by participation in the EU, it is important to observe that EU citizens directly enjoy numerous rights, that impact much more than just their economic well-being. EU citizenship, when measured against the citizenship of individual states, both within and outside of the EU, ranks as one of the most attractive ones, alongside the US nationality and above Canada's, Australia's, and Japan's, as it gives citizens access to residence and work across the EU Member State, the EEA (and thus Iceland, Norway, and Liechtenstein), Switzerland, and overseas territories of the EU Member States, such as the Canary Islands and the French Guyana.[51]

All these rights are particularly relevant within the EU's territory, but EU citizenship plays an important role at an international level as well,[52] as it grants EU citizens located in third countries the possibility of requesting diplomatic protection and help from the consulates of *any* EU Member State, if their own does not have a consulate in said third country. This is particularly relevant for smaller states, that don't have a wide network of consulates. Also in terms of external relevance of EU citizenship, the majority of EU Member States have transferred to the EU competence in the matter of visas. As one of the core values of the EU is to prevent discrimination between and against its own citizens, the consequence of this transfer of competence being that the EU must ensure that all its Member States' citizens must have the same level of access to third-countries, regardless of the EU Member State that issues their documents. Thus, if a third-country that has been granted visa-free access to the EU decides to block or hinder travel from a specific EU Member State to its own territory, said third-country should see its visa-free status revoked by the EU. So far, the one example of such behaviour has been that of the US, who continues to request visas for citizens from certain EU Member States, despite having received visa-free access to all of the EU. On the other hand, countries such as Australia and Canada were willing to change their visa requirements, in order to preserve visa-free access to the entirety of the EU for their citizens, demonstrating the influence that the EU

[47] *Idem*, p. 1369.
[48] Case C-192/99 *Kaur*, ECLI:EU:C:2001:106.
[49] Dimitry Kochenov, Martijn Van den Brink, *op. cit.*, p. 1373.
[50] Regarding the prospects and subsequent outcome of such a negotiation, see Augustin Fuerea, *Brexit - limitele negocierilor dintre România și Marea Britanie*, Revista de Drept Public, no. 4/2016, Universul Juridic Publishing House, Bucharest, and Augustin Fuerea, *EU-UK Brexit Agreement and its main legal effects*, Challenges of the Knowledge Society, 14th ed., Bucharest, 21 May 2021.
[51] Dimitry Kochenov, Justin Lindeboom, (ed.), *Kälin and Kochenov's Quality of Nationality Index*, Hart Publishing House, Oxford, 2020, p. 216.
[52] For more on this topic, see Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, *The European Union as international actor: the specificity of its external competences*, Analele Universității din București, seria Drept, C.H. Beck Publishing House, Bucharest, 2017.

has in this area, and the benefits it brings to its citizens.[53]

All this has led to Brexit being called by scholars 'the most substantial loss of individual rights in Europe since the fall of Yugoslavia in the 1990s',[54] partly because this can be considered a generational loss – even static citizens, who might not immediately feel the loss of EU citizenship, could have children and grandchildren who would likely want, at some point, to travel, study, or work in another EU Member State.

As we reject the notion that, based on current legislation, it would be legally possible for nationals of withdrawing Member States to retain EU citizenship, unless that state and the EU conclude an international agreement to that effect, we consider that, going forward, it is important for the EU, who is committed to protecting its citizens and human rights and welfare in general, to establish better safeguards, in order to prevent individuals from losing rights they've gained as nationals of a Member State, whether that loss is caused by said State withdrawing from the European Union, or simply by its decision to revoke an individual's nationality.

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[53] Dimitry Kochenov, Justin Lindeboom, (ed.), *op. cit.*, p. 219.

[54] Jo Shaw, *Citizenship and Free movement in a Changing EU: Navigating an Archipelago of Contradictions*, in Benjamin Martill, Uta Staiger (eds.), *Brexit and Beyond: Rethinking the Futures of Europe*, University College London Press, 2018, p. 158.

THE REMOVAL FROM OFFICE OF THE PRESIDENT OF ONE OF THE CHAMBERS OF THE ROMANIAN PARLIAMENT BETWEEN OPPORTUNITY AND NECESSITY. REFLECTIONS ON THE CCR DECISION NO. 17 OF JANUARY 26, 2022

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Abstract

In March 2022, a decision of the Romanian Constitutional Court was published in the Official Gazette of Romania, Part I, which brings to the attention of practitioners, but also of the general public, the issue of the removal from office of one of the Presidents of the two Chambers of Parliament. Such a removal is of particular interest in parliamentary life and beyond, and it has also been addressed in the case-law of the Constitutional Court since 2005. The present paper aims mainly to present the novelties of this decision, and, in the alternative, to show that only the Constitutional Court can draw the limits between which such a removal from office can take place, as it is the guarantor of the supremacy of the Constitution, a value provided by the Fundamental Law.

Keywords: *removal from office, Chamber of Deputies, Senate, President, Constitutional Court.*

1. Introduction

It is already well known that, by virtue of the principle of regulatory autonomy, enshrined in art. 64 (1), first sentence of the Constitution, both Chambers of Parliament have the exclusive competence to interpret the normative content of their own Standing Orders and to decide how to apply them, while the non-observance of some regulatory provisions can be ascertained and fixed by exclusively parliamentary ways and procedures[1]. Moreover, in its case-law[2], the CCR held that, pursuant to the constitutional provisions of art. 61 on the role and structure of the Parliament and of art. 64 on the internal organization of each Chamber of Parliament, each Chamber is entitled to establish, in the limits and with the observance of the constitutional provisions, the rules of organization and functioning, which, in their substance, constitute the Standing Orders of each Chamber. As a result, the organization and functioning of each Chamber of the Parliament are established by its own Standing Orders, passed by its decision of each Chamber, with the vote of the majority of the members of the respective Chamber. Thus, by virtue of the principle of autonomy, any regulation regarding the organization and functioning of the two Chambers, which is not provided by the Constitution, can and must be established by its own Standing Orders. Therefore, the Chamber of Deputies and the Senate, respectively, are sovereign in adopting the measures they deem necessary and appropriate for their proper organization and functioning, including those concerning the establishment and election of leading and working structures.

However, it was the Constitutional Court that also held[3] that regulatory autonomy could not be exercised in a discretionary, abusive manner, in violation of the constitutional powers of Parliament. Thus, there is a mid-way/tool-to-purpose/interest ratio between the constitutional principle regarding the autonomy of the Parliament to establish internal rules of organization and functioning [art. 64 para. (1)] and the constitutional principle regarding the role of the Parliament within all public authorities of the state, where it exercises, according to the Basic law, powers specific to constitutional democracy (legislating, granting the vote of confidence on the basis of which the Government is appointed, withdrawing the trust given to the Government by adopting a motion of censure, declaring a state of war, approving the national defence strategy etc.). As such, the parliamentary Standing Orders constitute a set of legal norms, meant to organize and discipline the parliamentary activity, as well as the rules of organization and functioning of each Chamber.

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[1] In this regard, see CCR Decision no. 44/1993, published in the Official Gazette of Romania, Part I, no. 190 of 10 August 1993, CCR Decision no. 98/1995, published in the Official Gazette of Romania, Part I, no. 248 of 31 October 1995, CCR Decision no. 17/2000, published in the Official Gazette of Romania, Part I, no. 40 of 31 January 2000, CCR Decision no. 47/2000, published in the Official Gazette of Romania, Part I, no. 153 of 13 April 2000.

[2] CCR Decision no. 667/2011, published in the Official Gazette of Romania, Part I, no. 397 of 7 June 2011.

[3] See CCR Decision no. 209/2012, published in the Official Gazette of Romania, Part I, no. 188 of 22 March 2012.

The regulatory norms represent the legal instruments that allow the development of parliamentary activities in order to fulfil the constitutional powers of the Parliament, a representative authority through which the Romanian people exercise their national sovereignty, in accordance with the provisions of art. 2 para. (1) of the Constitution.

These regulations also include those provisions relating to the appointment and removal of members of the Standing Bureau of each Chamber of Parliament, of which the President of that Chamber is a full member. A first point of reference regarding the removal from office of the latter was drawn by the Constitutional Court in 1994 when, referring to the Senate's Standing Orders[4], it found that the possibility of any parliamentary group to apply for the revocation of a member of the Standing Bureau and not only of the one whose representative is the respective member is contrary to art. 64 para. (5) of the Constitution, according to which the Standing Bureau is composed according to the political configuration of the respective Chamber, as the removal from office shall be a symmetric procedure with the appointment of the Member to be elected to the Standing Bureau. Therefore, both the designation and the removal from office are subject to the imperatives of art. 64 para. (5) of the Constitution.

2. The background[5]

With regard to the manner in which the conditions for removal from the office of President of the Senate and the procedure for imposing that legal sanction are regulated, the Court held by Decision no. 601/2005[6] that "the status of the President of the Senate, distinct from the status of the other members of the Standing Bureau, implies an additional requirement in the regulation of his removal from office before expiry". The Court noted that regulating, through the provisions of the fourth sentence of art. 64 (2), the possibility of removing from office members of standing bureaus before expiry, "The Constitution leaves the Parliament free to regulate the conditions and procedures in which removal from office may take place, in accordance with the other constitutional and legal principles". However, the Court set a limit to that freedom, noting that "any regulation which would make possible the removal from office of the President of the Senate whenever a sufficient majority of votes are reached in order to adopt such a measure would be liable to create perpetual institutional instability, contrary to the will of the electorate which defined the political configuration of the Chambers of Parliament for the entire electoral cycle and the interests of the citizens whom the Parliament represents".

By Decision no. 601/2005 and Decision no. 602/2005[7], the Court, having regard to the normative content of art. 64 of the Constitution, ruled that "the removal from office of a member of the Standing Bureau before the expiry of his/her term of office may be decided either as a legal penalty for serious breaches of the legal order or for reasons independent of his/her guilt in the performance of his/her duties, such as the loss of political support from the parliamentary group which proposed him/her. The removal from office of members of the Standing Bureau, including the president of the Senate, for violation of the Constitution and of Parliament's regulations, is based, in a substantial sense, on the provisions of the last sentence of art. 64 (2) of the Constitution, in conjunction with the other rules and principles which, by making compliance with the legislative order mandatory, also establish legal liability for breaches of the Constitution and of the parliamentary regulations". The Court also held that "the rules governing the removal from office of the president of the Senate cannot run counter to the principle of political configuration, which, according to art. 64 (5) of the Constitution, underpins the composition of the Standing Bureau. It is unequivocally clear from that constitutional text that the political configuration of each Chamber is to be understood as its composition resulting from elections, on the basis of the proportion of parliamentary groups in terms of total number of members of that Chamber. The president of the Senate and the president of the Chamber of Deputies are designated based on the same political configuration stemming from the will of the electoral body. The vote given to the president of a Chamber is a political vote which may be cancelled only if the group which proposed him/her requests his/her political removal from office or, in the event of a dismissal as a penalty, when that group or other component of the Chamber requests the replacement of the president for acts which give rise to his or her legal liability. He/she can only be replaced by a person belonging to the same parliamentary group, which may not lose the right to the office of president acquired by virtue of the results obtained in the elections, in accordance with the principle of political configuration". That is why the Court held that "removal from office before the expiry

[4] See CCR Decision no. 46/1994, published in the Official Gazette of Romania, Part I, no. 131 of 27 May 1994.
[5] For a presentation of the decisions of the CCR on the removal from office of the President of one of the Houses of Parliament, which we also reproduce below, see the separate opinion on CCR Decision no. 17 of 26 January 2022, published in the Official Gazette of Romania, Part I, no. 248 of 14 March 2022.
[6] Published in the Official Gazette of Romania, Part I, no. 1022 of 17 November 2005.
[7] Published in the Official Gazette of Romania, Part I, no. 1027 of 18 November 2005.

of the term of office always affects only the term of office of the person removed from office and not the right of the parliamentary group which proposed his/her appointment to be represented in the Standing Bureau and, consequently, to propose the election of another Senator to the vacant seat. Failure to observe that principle and the establishment of the possibility of choosing a new president belonging to another parliamentary group would result in a situation where that the penalty imposed on the president of the Senate, which was removed from office, would extend to the parliamentary group which proposed him/her for election to that office. However, the Romanian Constitution does not allow for such a collective penalty to be applied".

Moreover, the Court held that "any legislation which would allow the removal from office of the president of the Senate whenever a sufficient majority of votes were reached for the adoption of such a measure would be such as to create perpetual institutional instability, contrary to the will of the electorate who defined the political configuration of the Chambers of Parliament for the entire electoral cycle, as well as the interests of the citizens whom the Parliament represents". In the light of these arguments, the Court found that the provisions of art. 30 (2) of the Senate's Regulations, which provided that removal from the office of the president of the Senate may be proposed also by half plus one of the total number of Senators, were unconstitutional because, notwithstanding the provisions of art. 64 (5) of the Constitution, establishing the criterion of political configuration for the composition of the Standing Bureau, with the consequence that the same criterion was to be applied to the removal of the members of that body, the removal from office was made subject to the majority criterion, in the quantitative sense, *i.e.* the majority of Senators entitled to make the proposal for removal from office. The introduction of such a criterion, which excludes the political configuration of Parliament, determined by the will of the citizens at the time of the elections for the supreme representative body and replaces it by a circumstantial majority, resulting from the dynamics in the composition and re-composition of political forces in Parliament on the basis of factors which have not been taken into account by the electorate, infringes the letter and spirit of the Constitution and opens the way for instability in the parliamentary activity".

Subsequently, by Decision no. 1630/2011[8], on the assumption that the hypothesis examined by the Court in Decision no. 601/2005 concerned the "removal from office of a member of the Standing Bureau of the Senate (the President of the Senate) as a legal sanction, for breach of the Constitution or of the parliamentary regulations, at the request of a parliamentary group other than the one which has proposed him/her, and not the hypothesis of removal from office following the withdrawal of political support", the Court held that the exclusion from the party "could not remain without legal consequences as regards the position acquired, an eminently political position. These legal consequences are laid down in art. 33 of Law no. 96/2006[9] and consist of the automatic termination of the status of member of the Standing Bureau or of any position obtained through political support." Moreover, by Decision no. 1631/2011[10], the Court made a new statement, namely that "if in the event of removal from office the reasons for the removal - the existence of acts of breach of the provisions of the Constitution or of the Regulation - are objective and must be stated in the proposal for removal, in case of withdrawal of the political support as a result of exclusion from the political party, the reasons for the party's decision relate only to the relations with the concerned party and there is no obligation to be stated".

Next, in the case settled by Decision no. 467/2016[11], the Court was called upon to clarify whether the fourth sentence of art. 64 (2) of the Constitution, which regulates the institution of the removal from office, constitutes the only way of terminating the term of office as a member of the Standing Bureau before expiry.

Having carried out a case-law examination, the Court held that, "if Decisions of the Constitutional Court no. 62 of 1 February 2005, no. 601 and no. 602 of 14 November 2005 indicate the idea that the termination of the term of office of the President of the Chamber of Deputies may be effected before expiry only by removal from office, with the adoption of Decision no. 1630 of 20 December 2011, the Court upheld as ground for termination, distinct from the removal from office, the automatic termination, motivated, in the present case, by the withdrawal of his/her political support". Moreover, "by Decision no. 1631 of 20 December 2011, the Court considered that removal from office only expresses a legal sanction, whereas the withdrawal of the political support is an implicit political sanction. Therefore, if removal from office was ordered in Decisions no. 601 and no. 602 of 14 November 2005 for both legal and political reasons,

[8] Published in the Official Gazette of Romania, Part I, no. 84 of 2 February 2012.
[9] Law no. 96/2006 on the statute of deputies and senators, republished in the Official Gazette of Romania, Part I, no. 49 of 22 January 2016, as subsequently amended and supplemented.
[10] Published in the Official Gazette of Romania, Part I, no. 84 of 2 February 2012.
[11] Published in the Official Gazette of Romania, Part I, no. 754 of 28 September 2016.

in Decisions no. 1630 and no. 1631 of 20 December 2011 it was ordered only for legal reasons, whereas for political reasons there is an automatic termination of the term of office, without any decisive vote of the plenary in this regard."

Therefore, the Court concluded that "the institution of removal from office contained in the fourth sentence of art. 64 (2) of the Constitution is applicable only if the request thus formulated is based on a legal ground, it being, by excellence, a legal sanction for violations of the Constitution, parliamentary laws or regulations, whereas the automatic termination - even not expressly covered by the text of the Constitution - has a political component and is a self-evident matter, resulting from the very principle of political configuration". As a justification for this mechanism of control by the political party/parliamentary group over its member(s) in the Standing Bureau, the Court noted that, in its absence, "it could very easily lead to disregarding the political configuration of the Standing Bureau as it resulted from the elections and that, in a more or less transparent way, the President of the Chamber could migrate to a new political party/parliamentary group that would more or less openly support him/her, and the meaning of the political vote taken at his/her election is distorted, the political configuration resulting from the elections being compromised". This is why the Court found that "not expressing a legal sanction", "the loss of membership in the parliamentary group and the withdrawal of the political support are grounds for the automatic termination of the term of office, resulting from the need to respect the principle of political configuration", these reasons falling within the scope of art. 64 (5) of the Constitution and not of the fourth sentence of art. 64 (2) of the Constitution.

This conclusion was also emphasized by Decision no. 25/2020[12], when the Court held that, according to art. 32 (3) of Law no. 96/2006 on the Status of Deputies and Senators, "the loss of the political support by a Senator automatically entails the termination of the status of holder of any office obtained through political support", including that of President of the Senate. Corroborating this legal provision with the regulatory provision which provides that the right of each parliamentary group to submit a proposal for a candidate for the office of President of the Senate, the Court found that "it follows that a parliamentary group, if it decides to make a proposal, it can only concern a Senator who is a member of that political group, because only a member can be withdrawn from political support at the time of the proposal and vote. An interpretation to the contrary would lead to a situation in which the withdrawal of the political support by the parliamentary group to which he/she belongs could no longer lead to the loss of the office obtained through political support, which would be tantamount to depriving of legal effects the rule contained in art. 32 (3) of Law no. 96/2006, which is inadmissible".

3. Decision no. 17/2022

3.1. The admissibility issue

The examination of the compliance with the requirements for the admissibility of a referral regarding a Parliament's resolution must be carried out in the light of art. 146 (l) of the Constitution and art. 27 (1) of Law no. 47/1992, according to which "the Constitutional Court shall rule on the constitutionality of parliamentary regulations, resolutions of the plenary session of the Chamber of Deputies, resolutions of the plenary of the Senate and resolutions of the plenary of the two joint Chambers of Parliament, upon referral to one of the presidents of the two Chambers, a parliamentary group or at least 50 Deputies or at least 25 Senators".

The Court noted that the legal act under scrutiny is a resolution adopted by the plenary of the Senate and that the matter was referred to the Court by a parliamentary group in the Senate, so that the requirements relating to the subject matter and the holder of the right to refer the matter to the CCR have been met.

The Court then considered whether the conditions for admissibility of a referral, which are not expressly laid down by law, but which are the result of the interpretation of the legislation by the Court in its previous case-law, were satisfied in the case. In that regard, a condition for the admissibility of challenges concerning the unconstitutionality of parliamentary resolutions is the constitutional relevance of the subject-matter of those resolutions. The Court found that only (i) resolutions affecting constitutional values, rules and principles, or (ii) resolutions concerning the organization and functioning of authorities and institutions of constitutional rank can be subject to constitutional review[13]. The Court also found that art. 27 of Law no. 47/1992 does not differentiate between parliamentary resolutions which may be subject to review by the CCR in terms of the area in which they were adopted or their normative/individual nature, which means that all those resolutions are amenable to

[12] Published in the Official Gazette of Romania, Part I, no. 122 of 17 February 2020.

[13] See CCR Decisions no. 53 and no. 54 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011, CCR Decision no. 307/2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012, CCR Decision no. 783/2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012.

constitutional review, in accordance with the principle of *ubi lex non distinguit, nec nos distinguere debemus*. Consequently, the referrals of unconstitutionality concerning individual resolutions are *de plano* admissible[14].

Also, the CCR has expressly held that, in order for a referral of unconstitutionality to be admissible, the reference rule must have constitutional status so that it can examine whether there is any contradiction between the resolutions mentioned in art. 27 of Law no. 47/1992, on the one hand, and the procedural and substantive requirements imposed by the provisions of the Constitution, on the other. The challenges must therefore be of a relevant constitutional nature and not of a statutory or regulatory nature. Therefore, all decisions of the plenary of the Chamber of Deputies, the plenary of the Senate and the plenary of the two joint Chambers of Parliament may be subject to constitutional review if provisions contained in the Constitution are invoked in support of the challenge of unconstitutionality. Reliance on those provisions must not be formal but effective[15]. In the present case, the Court found that the authors of the referral rely on constitutional provisions, giving express reasons for the infringement of the reference rules.

Referring to the benchmarks established in its case-law, since, in the present case, the Senate's resolution was a measure of individual scope aimed at the removal from office of the president of the Senate, a constitutional authority, and since the challenge of unconstitutionality concerned, immediately, rules laid down by the Basic Law, the Court found that the referral act fulfilled the admissibility requirements.

3.2. The substantive argument

As regards the challenge that any application of the constitutional rules aimed at the removal of members of Standing Bureaux and, by analogy, at the removal of the presidents of the Chambers is contrary to the letter and spirit of art. 64 (2) of the Constitution, the Court analysed the content of the rule relied on in order to determine its meaning and scope.

The constitutional rule requires each Chamber of Parliament to choose a Standing Bureau (first sentence) and a president (second sentence). At infra-constitutional level, art. 22 (1) of the Senate's Regulations provides that "*following the statutory setting up of the Senate, the President of the Senate and the other members of the Standing Bureau shall be elected*'". From a literal-grammatical reading of the legal rule, the Court noted that the explicit and exhaustive list of "the president of the Senate and the other members of the Standing Bureau" demonstrates, on the one hand, that the president of the Senate is a member of the Standing Bureau and, on the other, that the president of the Senate has a distinct legal status within the Standing Bureau. The same conclusion follows from the interpretation of art. 22 (2) of the Regulations, which, after establishing the composition of Standing Bureau of the Senate (the president of the Senate, 4 vice-presidents, 4 secretaries and 4 quaestors) states that "*the president of the Senate shall also act as president of the Standing Bureau*". With regard to the duration of the term of office in the management positions of the legislative forum, the constitutional rule states that "*the president of the Chamber of Deputies and the president of the Senate shall be elected for the duration of the term of office of the Chambers*" (second sentence) and "*the other members of the Standing Bureaux shall be elected at the beginning of each session*" (third sentence of the rule). Finally, the fourth sentence of art. 64 (2) of the Constitution states that "*members of the Standing Bureaux may be removed from office before their term of office expires*".

Moreover, as regards the interpretation of the constitutional rule, by Decision no. 601/2005 and Decision no. 602/2005, the Court held that it follows from the constitutional provisions of art. 64 "that the president of the Senate is a member of the Standing Bureau of the Senate and that, upon the setting up of the Standing Bureau, that is to say, upon the election of its members, including the president of the Senate, and their removal from office before the expiry of the term of office, account is taken of the criterion of political configuration of that Chamber. It follows from the constitutional texts that the president of the Senate has a legal status distinct from that of the other members of the Standing Bureau. The president of the Senate is a member as of right of the Standing Bureau of the Senate, which is clearly apparent from the text of the Constitution, and one of the consequences is his/her election before the setting up of the Standing Bureau by electing the other members. Unlike the other members of the Standing Bureau, who are elected at the beginning of each session, the president of the Senate is elected at the beginning of the parliamentary term for the duration of the term of office of that Chamber".

In view of the status of the president of the Senate as a rightful member of the Standing Bureau, the Court implicitly found that he/she may be removed from office, since the rule laid down in the fourth sentence of art. 64 (2) applies indistinctly to all members of the Standing Bureaux, regardless of how they have

[14] Also see CCR Decision no. 307/2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012.

[15] CCR Decision no. 307/2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012, CCR Decision no. 783/2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012 and CCR Decision no. 628/2014, published in the Official Gazette of Romania, Part I, no. 52 of 22 January 2015.

acquired that status: by direct elections, or indirectly, after having obtained the status of president of the Chamber. It is clear that, in interpreting the constitutional rule, in the case of the president of the Chamber, the removal from office operates in terms of the status of member of the Standing Bureau, a situation expressly provided for in the legislative text, and, implicitly, from the position of president of the Chamber, a situation arising from the president of the Chamber's status of member as of right. In other words, although the constitutional rule does not expressly provide for the possibility of the presidents of the two Chambers of Parliament being removed from office, it follows from a logical and systematic interpretation of the four sentences of art. 64 (2) that, as members as of right of the Standing Bureaux, they may be removed from their offices of presidents of the Chambers. In their case, since the status of member of the standing bureau is derived from that of president of the Chamber, both of which statues are interdependent, the removal from office can only operate simultaneously from both management positions.

Thus, the Court found that the provisions of the fourth sentence of art. 64 (2), which govern the removal from office of members of the Standing Bureaux, also cover the removal from office of the presidents of the two Chambers, since the rule constitutes the constitutional basis for the application of such a penalty to the elected members of the Standing Bureaux and to the members as of right of those governing bodies alike.

The Court therefore found that the allegations made by the authors of the challenge of unconstitutionality that the possibility of removing from office members of The Standing Bureaux applies only to members who are elected to that office and cannot concern the two presidents of the Chambers of Parliament found no substantiation in the provisions of art. 64 (2) of the Constitution, with the result that such a challenge will be dismissed as unfounded.

Next, having examined the referral of unconstitutionality, the Court found that, in accordance with art. 64 (5) of the Constitution, the Standing Bureaux are elected and made up so as to reflect the political spectrum of each Chamber. As a rule, the president of the Chamber of Deputies/Senate is elected first, for the duration of the Chambers' term of office, and subsequently, on the basis of proposals from the parliamentary groups, the other members of the Standing Bureau (vice-presidents, secretaries, quaestors) are elected for the duration of a session. Appointment is of an exclusively political nature and reflects the proportion of parliamentary groups in that Chamber. Termination of the status of member of the Standing Bureau, regardless of the position held, take places on expiry of the term of office entrusted or before such expiry. In the latter case, the term of office may be terminated before expiry by removal from office or automatically.

According to the case-law of the CCR, termination of the term of office of the President of the Chamber occurs as a result of the removal from office, which is ordered solely for legal reasons and is regarded as an expression of a penalty of the same kind, or automatically in respect of acts/deeds which, by their nature, are not capable of constituting grounds for removal from office and cannot be the subject of a decision-making vote, being either matters of fact (death) or an express unilateral manifestation of the intention of the person concerned (resignation), or are related to the delivery of a court ruling (*e.g.* loss of electoral rights) or loss of membership of the parliamentary group or of the political support enjoyed by the person concerned[16].

In the given context, the Court noted that Senate's Resolution no. 131/2021 is a decision of individual scope whereby it was ordered the early termination of the term of office of the president of the Senate. Thus, it was for the Court to verify whether that resolution falls within the situations identified in the case-law of the Court and, depending on the outcome of that review, to decide whether it complies with the constitutional requirements relating to the ways and means of terminating the term of office before the expiry of the term.

The Court noted that the resolution under examination concerns the removal from the office of president of the Senate, which might lead to the conclusion that the measure ordered constitutes a legal penalty imposed on her for infringing the Constitution, the law or the parliamentary regulations. However, having examined the verbatim report[17] of the Senate's sitting of 23 November 2021, the Court found that the removal from office was based on the premise that the president of the Senate no longer enjoys neither the support of the alliance which proposed the president in December 2020 nor the one of the current parliamentary majority, a reason why "the principle of the majority decision, resulting from the pluralistic and democratic nature of the Romanian State, enshrined in art. 1 (3) of the Constitution, and from the elective and representative nature of the parliamentary mandate, becomes applicable (...). On the basis of that principle, both in the organisation and in the work of Parliament, the rule that «the majority decides, and the minority speaks» is the one that operates". Thus, having regard to the reason underlying the issuance of the resolution,

[16] CCR Decision no. 467/2016, published in the Official Gazette of Romania, Part I, no. 1029 of 4 December 2018, para. 50 and 58.
[17] Published in the Official Gazette of Romania, Part II, no. 182 of 13 December 2021.

the Court found that the removal from office was not the result of a penalty giving rise to the legal liability of the holder of the office. Since, by its content, the resolution does not penalise deviations from the requirements of legality necessary for the performance of the office, it means that the removal ordered is not subsumed to the concept of removal from office as a legal penalty.

The Court also noted that the reason underlying the adopted resolution does not fall within the scope of reasons which may lead to the automatic termination of the term of office. The Court found that the reason for the automatic termination of the term of office consisting of the loss of membership of the parliamentary group or of the political support enjoyed by the person concerned does not apply in the present case, because the parliamentary group did not order such political measures. On the contrary, the president enjoys, even after her removal from office, the political support of that parliamentary group.

The Court noted, however, that the constitutional dispute concerns whether the withdrawal of political support to the person holding the office of president of the Senate can be carried out by a parliamentary majority composed of several parliamentary groups formalized in a government coalition the formation of which has also led to the investiture of a new government. The Court noted that there is no precedent in its case-law on the review of constitutionality of a resolution for removal from office issued on account of such a particular situation, which makes use of political elements of legal significance in the relationship between Parliament and the Government. Naturally and inevitably, the specific circumstances justifying such a decision differ from case to case, so that the resolution contains a specific and particular substrate, which is why the Court can only carry out a case-by-case analysis.

The particularity of the case under consideration lied in the fact that the office of president of the Senate was obtained through the political support of a parliamentary majority composed of political parties/formations which at some point constituted a government coalition. The parliamentary group to which the president of the Senate belonged withdrew on its own initiative from the governing coalition, so a new coalition was formed on the basis of a new parliamentary majority with the votes of which a new government was invested.

Therefore, as a matter of principle, the withdrawal of a party from a governing coalition results in either a government reshuffle or the termination of the mandate of that government. Moreover, such a withdrawal, followed by the initiation, voting and adoption of a motion of censure, as was the case here, automatically results in the termination of the mandate of the Government. Consequently, under the given circumstances, by establishing a new parliamentary majority, the political offices held are entering into a process of natural reassessment. However, having regard to the importance of the offices of president of the two Chambers, the constitutional requirement is to avoid the instability of those offices solely in the light of a purely political/circumstantial assessment and to make removal from office subject to the existence of a substantial change at governmental level. Thus, the penalty cannot be purely political or purely legal, but it has a dual (mixt) nature, namely a politico-legal one, since the strictly political act of the formation of a new coalition, by a new parliamentary majority, has led to substantial changes of public law, of constitutional law, by the formation of a new government based on the political support of the new majority.

Therefore, the new parliamentary majority is not one established based on circumstantial grounds simply to remove the president of the Chamber from office, but, on the contrary, its aim was to bring about a new configuration of the constitutional relations between Parliament and the Government. The new majority expressed by vote the political will of investiture of a new government and, as a consequence of the formation of the new government coalition, the political support to the president of the Senate belonging to a parliamentary group that is no longer part of that coalition was withdrawn.

The Court noted that the investiture of the Government by the new parliamentary majority is a politico-legal act determined by changes in the parliamentary majority. The legal nature is expressed precisely by the constitutional legal relationship between Parliament and the Government, the latter being under parliamentary scrutiny. The office of president of a Chamber not only ensures the institutional liaison with the Government, but also has a symbolic value in terms of Parliament's power, so that the change of parliamentary majority and the investiture of a new government are, logically, sufficient grounds to justify the change of the office holder.

Next, the Court found that the use of the term "removal from office" in such a situation is more appropriate than the use of the term "automatic termination", since the removal from office takes place by a decision expressed, that is to say, a decision-making act, involving a vote of the same nature, whereas the automatic termination is the result of a finding of fact and is expressed by a vote establishing the facts. In addition, the removal from office expresses the idea of a penalty which, as has been stated, may be legal or politico-legal, depending on the circumstances of the case. In the present case, it expresses a politico-

legal penalty which may be imposed by the plenary of the Senate only in the mentioned circumstances.

In the light of the foregoing, the Court found that the change of political majority can give rise to a politico-legal penalty at the level of the office of president of the Chambers of Parliament only in so far as, beforehand, it has had legal consequences, such as the investiture of a new Government. That penalty constitutes a natural effect of the new existing factual and legal situation and its meaning must be confined within a broader context which takes account of the political and legal changes brought about by the change of parliamentary majority.

The Court also stressed that the provisions contained in the regulations of the Chambers of Parliament must be consistent with the constitutional provisions and with the decisions of the Constitutional Court. In this context, the Court noted that art. 29 of the Senate's Regulations, *i.e.* the legal ground at the statutory level for the removal from office of the president of the Senate, was not brought into line with Decision no. 601/2005, whereby the Court found that the legislative solution contained in the Regulations was unconstitutional, so that the dismissal of the president of the Senate is now carried out through the direct application of art. 64 (2) of the Constitution. Thus, more than 16 years after the date on which the Regulations' provisions were declared unconstitutional, the Senate failed to fulfil its constitutional duty to bring those provisions into line with the provisions of the Constitution. However, it falls within its constitutional duty to create the appropriate procedural conditions for the removal of the president of the Senate from office. In addition to those obligations, in matters relating to the organization and functioning of the Chambers, for which there are no express or implicit constitutional requirements, the Chambers are free to decide autonomously, in accordance with the principle of regulatory autonomy, which is exercised by the majority of the members of the Chambers and is manifested by vote.

4. Conclusions

So, given all of the above, is the removal from office of the President of the Senate or the Chamber of Deputies just an element of political opportunity? Obviously, the answer is in the negative, considering that a factual situation is examined in terms of compliance with the Basic Law, in applying the role of the CCR as the authority of constitutional jurisdiction in Romania.

Of course, both the Standing Orders of the Chamber of Deputies and the ones of the Senate provided for the possibility of removing from office the members of the Standing Bureau, including the Presidents of the Chambers, but, as the Constitutional Court found in its case-law[18], those provisions did not accurately transpose the constitutional provisions of art. 64 para. (2) final sentence, according to which "members of the permanent bureaus may be revoked before the expiration of the term". As such, in the absence of an intervention of the primary legislator or of the delegated one, it was the Constitutional Court that outlined the constitutional dimensions in which the particular case of the removal from office of the Presidents of the Chambers should have been regulated.

As we can see, with regard to the removal from office of the Presidents of the two Houses of Parliament, the Court is called upon to "arbitrate", by way of constitutional review, situations arising in parliamentary practice which have a pronounced political nature, such as the political configuration of the Chamber of Deputies and of the Senate, the loss of political support, the investment of the Government etc. This does not mean, however, that the court discards from its jurisdictional feature, even if the doctrine[19] has shown that it is "a public politico-jurisdictional authority".

On the other hand, we emphasize that the Romanian legislation does not provide specific sanctions for non-execution of the decisions of the CCR, and the latter cannot replace the Parliament or the Government in the sense of amending or supplementing the piece of legislation subject to constitutional review, respectively to become a positive legislator. This is a direct consequence of the fact that a review exercised by the Court is exclusively one of constitutionality, in all cases in which it rules on the normative acts subject of the notifications addressed to it.

As practice has shown, the prompt reaction of the primary or delegated legislator to amend the law [respectively the act deemed as unconstitutional] and to agree it with the Basic Law, according to the decision of the CCR, depends on the loyal constitutional behaviour of these authorities. The importance of this principle has been emphasized by the CCR, which has ruled that it is primarily the responsibility of public authorities to apply this principle in relation to the values and principles of the Constitution, including in relation to art. 147 (4) of the Constitution on the general

[18] See, for example, CCR Decision no. 62/2005, published in the Official Gazette of Romania, Part I, no. 153 of 21 February 2005.

[19] See I. Muraru, E.S. Tănăsescu (coord.), *Constituţia României. Comentariu pe articole [The Romanian Constitution. Comment on articles]*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, p. 1283.

binding nature of the decisions of the CCR[20]. The Court thus emphasized the importance of cooperation between the powers of the state, for the proper functioning of the rule of law, which should be showed in the spirit of constitutional loyalty. The loyal behaviour is an extension of the principle of separation and balance of power provided for and guaranteed by art. 1 para. (4) and (5) of the Constitution, all the more so when fundamental principles of democracy are at stake.

As such, it is undeniable that the analysis of the rules on the removal from office of the President of one of the Houses of Parliament relates exclusively to constitutional rules and principles.

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- CCR Decision no. 25/2020, published in the Official Gazette of Romania, Part I, no. 122 of 17 February 2020;
- Law no. 96/2006 on the statute of deputies and senators, republished in the Official Gazette of Romania, Part I, no. 49 of 22 January 2016, as subsequently amended and supplemented.

[20] CCR Decision no. 795/2016, published in the Official Gazette of Romania, Part I, no. 122 of 14 February 2017.

A LEGAL PERSPECTIVE ON HOW UNMANNED VEHICLES WILL INFLUENCE FUTURE CONFLICTS

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Abstract

Unmanned vehicles or drones (how they are cultured in general) have become a staple in the modern era conflicts seeing as how they offer mostly the same results as other vehicles with less drawbacks.

The paper will focus on identifying current issues regarding unmanned vehicles used in conflicts, identify the international law documents that are applicable to said vehicles and focus on how states should reconsider a reform in how states handles future conflicts based on unmanned devices.

Conflicts such as the Azerbaijani-Armenian war or the Ukrainian crisis have shown to revolve around the usage of drones as low threshold devices that bypass the rules regarding usage of force and could trigger dangerous responses from states.

Furthermore, the analysis will also take into aspects on how international courts have been tackling modern conflicts and methods, while also delving in the aspects of human rights breaches.

Identifying how the legal regimes applicable for unmanned vehicles and how future legal instruments can be developed and enforced will also be another focus of the paper, as such, conclusions will be based on how legal aspects will evolve and ensure a checks and balances approach in this field, seeing as how influential artificial intelligence will be in the unmanned segment.

Keywords: *international law, drones, unmanned vehicles, armed conflicts, international human rights law.*

1. Introduction

Unmanned aerial vehicles have been used in armed conflicts with different results ranging from flying targets for pilot training to intelligence gathering missions[1], their latest role being that of a mobile weapons platform capable of participating in armed conflicts or anti-terror operations, abroad or at a national level[2].

Unmanned vehicles have been in use even before World War 1, as either guided bombs or target practice devices was seen as a very useful tactic in order to reduce own casualties. Drones have become a staple in military usage starting from the 1990s, when unmanned vehicles had been sent into operations such as Desert Storm[3] and the recon missions done in the Persian Gulf.

None of the drones in the 1990s had weapons attached, but they were appraised for the capability of gathering intelligence and could be launched from almost any type of surface, even from hand. Later on, these vehicles had been used in Bosnia, Kosovo and Yugoslavia, being adopted by NATO.

The global war against terrorism brought into attention a new type of unmanned vehicle, the Reaper with its 2 variants[4], an all-purpose intelligence gathering vehicle and an armed model capable of launching precise strikes.

The most drone strikes have been conducted by the United States of America, the earliest authorization for a strike was given by the Clinton Administration who used the drones from bases in Europe and Pakistan against Taliban forces, all under the Central Intelligence Agency's guidance[5]. Later, the drone fleet was split between Pentagon and CIA.

Other states have adopted unmanned systems and integrated them into their own, but most notable is Turkey as a rising developer of unmanned lethal systems, both radio controlled and autonomous, but without abiding by the competitions rules regarding the respect of human rights law or arms trade[6], as Turkish drones have been seen in Ethiopia targeting civilian objectives and sparking a growing concern for Russia in its Ukrainian crisis, as the Ukrainian army has been buying Baykar Bayraktar TB2 drones.

This is most notable as Turkey is part of the Wassenaar Arrangement[7] meaning the state must

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[1] David Daly, *A Not-So-Short History Of Unmanned Aerial Vehicles (Uav)*, Consortiq, 2021.

[2] Procon, *History Of Us Drone Strikes Abroad*, Britannica Procon, 29.10.2020.

[3] John David Blom, *Unmanned Aerial Systems: A Historical Perspective*, Occasional Paper 37, Combat Studies Institute Press Us Army Combined Arms Center Fort Leavenworth, Kansas, 2010, pp. 88-89.

[4] *Idem*, pp. 107-108.

[5] Ryan Swan, *Drone Strikes: An Overview, Articulation And Assessment Of The United States' Position Under International Law*, Center For Global Security Research Lawrence Livermore National Laboratory, 2019.

[6] Alper Coşkun, *Strengthening Turkish Policy On Drone Exports*, Carnegie Endowment For International Peace, 18.01.2022.

[7] Wassenaar Arrangement On Export Controls For Conventional Arms And Dual-Use Goods And Technologies, 1996.

contribute to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations. As such, through its national policies, Turkey must ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities.

The aforementioned aspect is also available for the other 41 states party to the Arrangement.

2. The growing market and usage of combat ready unmanned devices

In a study by the Center for a New American Security, entitled *„A world of proliferated drones: a technology primer"*[8] it was outlined that over 90 nations and non-state groups are known to operate drones, including at least 30 countries that either operate or are developing armed drones and as such even small sized drones could overwhelm defenses and launch explosive or biological attacks on military and civilian objectives.

Off-the-shelf devices could be retrofitted with weapons or be used as surveillance gear even by terrorist or other non-state actors and are easily accessible on the internet.

In an interview, Marine Gen. Kenneth McKenzie Jr., head of U.S. Central Command stated that off-the-shelf devices are a bigger threat in the Middle East since improvised explosive devices, ISIS being one of the first terror groups to use explosive drones to target coalition forces, while states such as Iran, have been seen to use drones to target other important U.S. assets[9].

Other incidents that include off-the-shelf drones have happened in Venezuela, when Nicolas Maduro was targeted by an improvised explosive drone[10], while the U.S. started developing localized anti-drone systems to protect large gatherings against such devices, because weaponized small drones could become the norm in future terrorist operations or conflicts.

In a paper published by the Center for Strategic & International Studies[11], it was highlighted that during the Karabakh war in 2020 both parties in the conflict used unmanned aerial vehicles, but Azerbaijan used more advanced Turkish and Israeli drones, capable of autonomous flight and loitering attacks, with drones being the focus point of how the Azerbaijani forces won the conflict. The study concludes that drones by themselves did not win the conflict, however, using them in a synchronized operation with artillery and missiles it proved a winning combination that allowed for a fast and relatively cheap conflict.

The most important aspects regarding this conflict have been identified by professor Julian Cooper in his research for the International Institute for Strategic Studies[12], where he outlines that small factor drones and loitering autonomous platforms allowed to overcome the aging Armenian forces.

It's important to note that the same unmanned vehicles are now being used by the Ukrainian army against insurgents in eastern Ukraine with the same effect as seen in the aforementioned conflict[13]. A similar situation has been brought up in the case of Romania who is housing a MQ-9 Reaper squadron and could participate in future conflicts[14], despite said drones have never been confirmed to be armed.

As more and more states develop and acquire armed capable unmanned vehicles, so must security be adapted to face such threats and as such as the U.S.A., Saudi Arabia, Iraq and other European states have started to advance in localized army and police units capable of deterring small explosive drones from reaching their urban or strategic targets[15] as more non-state actors acquire advanced unmanned systems.

The ongoing threat has moved from large intelligence and armed combat drones to the smaller and economically accessible unmanned vehicles, turning civilian technology into a powerful and dangerous weapon.

In a research paper, titled *"Off the Shelf: The Violent Nonstate Actor Drone Threat"*[16], it was showcased how Libyan non-state actors went to Canada to purchase small hobbyist drones and brought them back in Libya without any issue, later using them in Misrata and Tripoli as spying devices on governmental officials and army units, while Columbia is confronted, both on a national and international level,

[8] Kelley Sayler, *A World Of Proliferated Drones: a Technology Primer*, Center For a New American Security, June 2015, p. 5.
[9] Gina Harkins, *Tiny Drones Are The Biggest Threat In The Middle East Since Ieds*, Top General Says, Military.Com, 8.02.2021.
[10] Ben Watson, *Against The Drones*, Defense One, 18.03.2018.
[11] Shaan Shaikh, Wes Rumbaugh,*The Air And Missile War In Nagorno-Karabakh: Lessons For The Future Of Strike And Defense*, Csis, 8.12.2020.
[12] Julian Cooper, *The Nagorno-Karabakh War: a Spur To Moscow's Uav Efforts?*, Iiss, March 2021.
[13] Afp, *Ukraine Destroys Pro-Russian Artillery In Its First Use Of Turkish Drones*, Moscowtimes, 27.10.2021.
[14] Eduard Pascu, *Numărul Dronelor Mq-9 Reaper Dislocate De Sua În România. Posibile Misiuni, Inclusiv În Ucraina*, Defense Romania, 01.05.2021.
[15] James Marson, Stephen Kalin, *The Military's New Challenge: Defeating Cheap Hobbyist Drones*, Wallstreetjournal, 05.01.2022.
[16] Kerry Chavez, Ori Swed, *Off The Shelf: The Violent Nonstate Actor Drone Threat*, Air & Space Power Journal - Feature, Fall 2020.

by narco-drones. The PKK has been another group to use improvised off-the-shelf drones against the Turkish forces, both in precise targeting and swarm attacks, causing casualties in any type of operation.

3. How legal regimes handle the growing threat of unmanned vehicles

From an international law standpoint, unmanned systems have been mostly discussed under their active role in targeted killings, but this discussion has shifted towards the growing usage of said devices and proliferation.

In the context of armed conflict, prohibitions of military conduct comprise the rules of international humanitarian law and especially of specific interdiction or restrictions on the use of certain weapons by multilateral treaties[17]. As long as no treaty exists that bars States from using combat drones, the framework for the recourse to drones is the specifically applicable *ius in bello.*

This means that states are not free to use any type of weapon, even if said weapon is not the target or focus of a specific treaty, meaning that the Advisory opinion regarding nuclear weapons handed down by the International Court of Justice[18] is applicable to any type of weapon and forces states to only employ those types of means and methods of warfare that cannot cause superfluous injury or unnecessary suffering and abides of the principle of distinction between combatants.

According to the Manual on International Law Applicable to Air and Missile Warfare[19] a combat unmanned vehicles is an means an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target.

The threat of these small off-the-shelf drones is based mostly on their ability of bypassing the U.N. Charter and its limits established by art. 2 para. 4, while also limiting states from a reply using art. 51 of the Charter as a basis.

In a 2020 report, the Special U.N. Rapporteur Agnes Callamard[20] acknowledged at least 102 countries had acquired an active military drone inventory, and around 40 possess, or are in the process of procuring, armed drones. 35 States are believed to possess the largest and deadliest class. The Rapporteur described this as being *a second drone age* as conflicts tend to use cheap and low-risk drones because of several factors such as: efficiency where drones are relatively cheap to produce, easy to deploy and offer economy of effort, meaning the option of targeted killing is a less financially onerous choice compared to the alternatives, such as "locate, detain/arrest"; adaptability since these vehicles are truly "all terrain", employable in a variety of settings for a range of purposes by various actors, and they are amenable to ongoing technological innovations.

One of the most interesting points submitted by the Rapporteur is that they afford the user deniability, because the drones are operable at long range and clandestinely, the drone is both easy to deny and its operation more difficult to attribute. Drones further are not "indigenous" to their operators, bearing often similar look and design, range and lethal capability. The very same make and model may be deployed by different State and non-State actors operating in the same geographical area.

Other aspects described in the 2020 report highlight effectiveness, acceptability and political gain regarding drones.

The issues described by the Special Rapporteur are those regarding the lack of transparency and accountability as states who employ such vehicles rarely conduct post-attack investigations or release public information regarding strike locations and post-strike data.

The right to protection from arbitrary deprivation of life is a rule of customary international law as well as a general principle of international law and a rule of *jus cogens*, yet strikes such as that conducted against the Iranian General Qasem Soleimani in 2020 was established by the U.N. as a disregard of this right and also a violation of art. 2 para. 4 of the Charter. Future drone strikes handled with small or off-the-shelf unmanned vehicles could lead to a weakening of the threshold applicable to the limits established by the U.N. Charter, as these types of vehicles are low-cost and low-risk.

These core concepts lose their meaning as the U.N. Charter and the Security Council fail in regards to the ever expanding roster of drones and operation related implications, while also failing to be notified or to react to self-defense situations that do not fall under the general definition of art. 51 of the Charter but under the imminence theory[21].

[17] Sebastian Wuschka, *The Use Of Combat Drones In Current Conflicts – A Legal Issue Or a Political Problem?*, Goettingen Journal Of International Law 3 (2011) 3.

[18] Legality Of The Threat Or Use Of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, Para 78.

[19] The President And Fellows Of Harvard College, Manual On International Law Applicable To Air And Missile Warfare, Humanitarian Policy And Conflict Research At Harvard University, 2009.

[20] A/Hrc/44/38 - Extrajudicial, Summary Or Arbitrary Executions Report Of The Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions, Human Rights Council, 2020.

[21] Rosa Brooks, *Drones And The International Rule Of Law*, Georgetown University Law Center, 28 J. Ethics & Int'l Aff. 83-104 (2014).

Unless a Security Council Resolution is passed to allow the usage of armed force, the usage of armed drones should be halted, yet low-cost drones proliferate the battlefields and disregard the Advisory Opinion of the International Court of Justice regarding The Wall[22], where the right to self-defense can only be exercised in the event of an attack by another state.

It's important to note that these small unmanned devices have become a growing problem and have been developed into swarms, similar to how insects, flocks or birds or shoals of fish act[23].

As drones form swarms and become the norm, the idea behind explosive remnants of war could also be raised as an issue with unmanned vehicles that fall out of the swarm. These types of organized attacks are the pinnacle of the small and off-the-shelf type of devices that anybody can access.

Some swarm incidents have been identified in which unmanned devices had a quantitative and qualitative dimension when they were used against Russian forces in Syria and United Arab Emirates forces close to Yemen[24].

These types of attacks could create a new breed of remnant ammunition, in the form of intelligent self-guided improvised explosives and could be mistaken as toys due to their off-the-shelf nature. A possible way to mitigate such a growing threat would be that of adding unmanned vehicles to the definitions found in Protocol V of the Convention on Certain Weapons and Convention on Clusters Munitions.

Art. 36 showcases that swarms would be highly autonomous, flying themselves and coordinating their actions to avoid collisions and maintain swarm cohesion and one human operator could control an entire swarm as a single entity[25].

The means and methods of warfare found in the Karabakh conflict and the growing number of drone swarms that the Israeli Defense Force has deployed over Gaza glimpses the future of warfare and police actions, which means that international law has to be updated with these potential disruptive technologies[26].

The heart of the debate surrounding lethal autonomous weapon systems is largely about the legal and ethical considerations associated with the use of systems that may be outside of human control. Legal discussions focus primarily on the ability of automated systems to implement the key principles of international humanitarian law: distinction, necessity, and proportionality[27], meaning that these systems must be able to distinguish between combatants and civilians, but also, that the algorithm should be designed in such a way that it can identify only combatants.

However, unmanned devices like those mentioned before, have yet to prove that they are capable of successfully identifying combatants, as it was found by the Panel of experts on Libya pursuant to Resolution 1973 (2011)[28].

The Panel of experts identified that forces in the conflict (both governmental and rebel) in Libya had used Turkish, Israeli and Chinese unmanned vehicles and special ammunition that had lethal payload and autonomous or semi-autonomous targeting systems, but the results of these devices had caused unnecessary damage to civilian infrastructure and buildings or acted as loitering or remnant ammunition and killed persons without discrimination.

The lack of a kill-switch for these types of devices contributed to deadly results and yet the forces at play did not limit their usage, because it offered the best results with the least resource cost.

As Major Andrew Williams Sanders of the U.S. Army[29], highlights in his monograph, the costs of putting too much faith in technology is a double-edge sword where technology eventually spreads and becomes available to adversaries with more primitive capabilities but are less vulnerable to dependence, and argues that robotics and unmanned vehicles are eventually mitigated because of increased availability to all actors. And yet, the U.S. Army does not foresee a future in which the human is replaced by unmanned intelligent devices.

An important observation was brought up by Amnesty International[30] when they launched they *#EscapeTheScan* campaign, a program of international awareness regarding the need of a new international legal instrument regarding the control of international transfers and production of lethal autonomous devices and weapons.

The campaign highlights that people will be targeted by devices without a proper human control, an opinion we do not fully agree with, because in the

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[22] Andreas Schüller, *Unlimited Use Of Armed Drones In The Fight Against Terrorism In Syria? Germany Must Oppose The Erosion Of International Law*, European Center For Constitutional And Human Rights, 2017.

[23] Art. 36, Swarms, Discussion Paper For The Convention On Certain Conventional Weapons (Ccw) Geneva, March 2019.

[24] Maziar Homayounnejad, *Drone Swarming And The Explosive Remnants Of War*, Opiniojuris, 19.03.2018.

[25] See Note 23.

[26] Jason Crabtree, *Gaza And Nagorno-Karabakh Were Glimpses Of The Future Of Conflict*, Foreign Policy, 21.06.2021.

[27] Irving Lachow, *The Upside And Downside Of Swarming Drones*, *Bulletin Of Atomic Scientists*, vol. 73, Issue 2, 2017.

[28] U.N. Security Council, Letter Dated 8 March 2021 From The Panel Of Experts On Libya Established Pursuant To Resolution 1973 (2011) Addressed To The President Of The Security Council, S/2021/229.

[29] Andrew William Sanders, *Drone Swarms*, School Of Advanced Military Studies United States Army Command And General Staff College Fort Leavenworth, Kansas, 2017, pp. 31-32.

[30] Verity Coyle, Ousman Noor, *Global: A Critical Opportunity To Ban Killer Robots – While We Still Can*, Amnesty International, 2.11.2021.

negations that have been held in the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, part of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, have shown that most of the states participating at these meetings have already stated that human control is necessary for this technology to be legal[31].

As most of the states that have developed or are developing unmanned lethal devices have stated, human control will be retained no matter how advanced the technology will become. This was already seen in the 2019 declaration regarding artificial intelligence that was promoted by the states that form the G7[32].

Similar, the G7 states had another important declaration, in the form of Joint Statement from Founding Members of the Global Partnership on Artificial Intelligence[33], in which artificial intelligence equipped devices will be centered on human control and responsibility.

An important remark in interstate international responsibility regarding the usage of drones in conflicts was brought up in the request of the legal counselor representing victims of cross border aerial bombardment in the situation in the Islamic Republic of Afghanistan, that is analyzed by the International Criminal Court[34], where it was solicited that the investigation should be extended to drone operations, but later on, the Prosecutor of the International Criminal Court stated that investigations will only focus on Taliban and ISIS-K forces, not the U.S.[35]

In a study conducted by the United Nations Institute for Disarmament Research[36] it was revealed that drones can be used in swarm tactics for intelligence, surveillance and reconnaissance operations, perimeter surveillance and protection, distributed attacks, saturating enemy air defence,force protection, deception, dull, dirty and dangerous tasks or even swarms as counter-swarms.

The study considers that the 11 Principles on Lethal Autonomous Weapons Systems, that were adopted during the 2019 **Alliance for Multilateralism event** held at the Convention on Certain Conventional Weapons[37], represent a stepping stone as the principles confirm that international humanitarian law continues to apply fully to all weapons systems and, therefore, also applies to the development and use of swarms and lethal autonomous weapons. However, the fact that states have reached formal consensus on these principles does not mean that they are well developed and commonly understood.

As such, unmanned devices, that can operate in any way (controlled, autonomous, semi-autonomous, swarm or others) must be handled in such a way that they remain in human control, while also respect international law (be it humanitarian law or human rights law).

As the researcher Maaike Verbruggen explains: *"Even when human operators might make the executive decision to strike, there are risks: they may not be meaningfully engaged in the operation, they may lose situational awareness, or they may not critically assess whether they should take a machine-recommended action"*[38]. The researcher outlines that human control can be achieved with research and development in which international humanitarian law is integrated in the planed design.

This could be a solution, albeit a temporary one, as we have shown that off-the-shelf drones can be amassed as swarms and be used against targets, as the Jammu incident showed[39], where terrorists used improvised explosive drones to attack the Indian Air Force. The attack brought up how international law regarding terrorism has not evolved to tackle dual-use technology and acts as a loop-hole for accessibility for these types of devices.

4. Conclusions

The paper has shown that both states and non-state entities have used unmanned vehicles to conduct armed operations, most notably being the usage of said

[31] Group Of Governmental Experts On Emerging Technologies In The Area Of Lethal Autonomous Weapons System, Chairperson's Summary, Ccw/Gge.1/2020/Wp.7, 19.04.2021.

[32] Summit Of The G7 Science Academies, Artificial Intelligence And Society, March 25-26 2019.

[33] Summit Of The G7 Science And Technology Ministerial Meeting, Joint Statement From Founding Members Of The Global Partnership On Artificial Intelligence, 15.06.2020.

[34] Submissions On Behalf Of Victims Of Cross Border Aerial Bombardment, Situation In The Islamic Republic Of Afghanistan, The Appeals Chamber, Case Icc-02/17-116 15-11-2019 1/15 Sl Pt Oa Oa2 Oa3 Oa4.

[35] Anthony Deutsch, Stephanie van der Berg, *War crimes prosecutor would not focus on U.S. forces in new Afghanistan probe*, Reuters, 27.09.2021.

[36] Merel Ekelhof, Giacomo Persi Paoli, *Swarm Robotics Technical And Operational Overview Of The Next Generation Of Autonomous Systems*, UNIDIR, 2020, pp. 50-51.

[37] 11 Principles on Lethal Autonomous Weapons Systems (LAWS) can be found on the French Ministry of Foreign Affairs website (https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/multilateralism-a-principle-of-action-for-france/alliance-for-multilateralism/article/11-principles-on-lethal-autonomous-weapons-systems-laws).

[38] Maaike Verbruggen, *The Question Of Swarms Control: Challenges To Ensuring Human Control Over Military Swarms*, EU Non-Proliferation and Disarmament Consortium, Non-Proliferation and Disarmament Papers, no. 65/2019.

[39] Ashutosh Anand, *Jammu Drone Attack: Analyzing Current Legal Frameworks that Regulate Drone Warfare by Non-State Actors*, Jurist, 13.07.2021.

devices as swarms that can act as loitering ammunition, explosive remnants or even improvised explosive devices that can be flown to the target in secrecy.

To prevent proliferation of said devices without affecting the civilian benefits of these vehicles, we consider that the European Union and High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons are on their way of adopting multilateral agreements to contain the phenomenon, but it will require time.

The United States of American is one of the first states to legiferate this situation with its national directive DODD 3000.09[40], that requires that all systems, including lethal autonomous weapons, be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.

The European Union lacks a proper response to these situations, even thou the European Parliament has adopted a number of resolutions, most notable being European Parliament resolution of 12 September 2018 on autonomous weapon systems (2018/2752(RSP))[41] in which it outlines the need for a common position on lethal autonomous weapon systems that ensures meaningful human control over the critical functions of weapon systems, including during deployment, and to speak in relevant forums with one voice and act accordingly. Also, the resolution stresses, in this light, the fundamental importance of preventing the development and production of any lethal autonomous weapon system lacking human control in critical functions such as target selection and engagement.

One of the legal instruments required to contain said devices came in the form a proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence[42], but this had yet to be adopted (at the moment of the writhing of this paper), and as such we can only speculate on how the final edition will be adopted.

What we can only hope that it will uphold is the requirement of human rights impact assessments throughout the entire life cycle of high-risk systems, meaning that future artificial intelligence based devices and vehicles should be designed with human rights and humanitarian law into them, while also ensuring a checks and balances approach for systems that may not perform so well in respecting these rights.

Transparency and human responsibility must remain the focus point, yet closing these loopholes would be legally straightforward, but despite the support of a significant number of states, it has proved politically difficult, this being the key issue on why the expert group at the Convention on Conventional Weapons has yet to adopt a new legal instrument that could help regulate how easy it is for interested parties to obtain devices that can be turned into lethal weapons, swarms or improvised explosives.

However, as the Women's International League for Peace and Freedom organization outlines the issues[43], only part of the states supported the development of a legally binding instrument with prohibitions and restrictions on, while some support an instrument that prevents machines from killing autonomously, yet the European Union, Israel and Russia would like to focus on consensus recommendations for a normative and operational framework.

We consider that a full ban on lethal unmanned vehicles could also be imposed on civilian devices, as they are dual-use technologies, and as such we don't consider it a viable solution as limiting other potential commercial and civilian benefits could undo a proper mobility and transport revolution.

As with other types of weapons and platforms, adopting internationally acknowledged recommendations can ensure that even the most stubborn states can comply and allow the formation of standardized legal regimes, similar to how International Civil Aviation Organization has handled civilian unmanned aerial vehicles.

ICAO has adopted regulations and advisory circulars[44] that ensure a standardized approach to air traffic management and airworthiness certifications, while also respecting state sovereignty in the development of proprietary devices. Yet, a legal document regarding armed devices has yet to surface.

The only legal documents, that can be applicable to the development and commerce of unmanned armed devices are represented by the Wassenaar Agreement, that is unfortunately not legally binding, and the Arms Trade Treaty, that does not explicitly reference drones within its scope, it only implicates that is applicable to

[40] Department of Defense Directive no. 3000.09 on the subject of Autonomy in Weapon Systems, adopted 21.11.2012, with its addendum.

[41] European Parliament resolution of 12 September 2018 on autonomous weapon systems (2018/2752(RSP)), 2019/C 433/10, published in the Official Journal of the European Union, C 433/86/23.12.2019.

[42] Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, {SEC(2021) 167 final} - {SWD(2021) 84 final} - {SWD(2021) 85 final}, 2021/0106(COD).

[43] Ray Acheson, Civil society perspectives on the Convention on Certain Conventional Weapons (CCW) Preparatory Committee for the Sixth Review Conference, Report,vol. 9, no. 5, Reaching Critical Will, 10.09.2021.

[44] ICAO Model UAS Regulations can be accessed on their website https://www.icao.int/safety/UA/Pages/ICAO-Model-UAS-Regulations.aspx.

drones, because most unmanned vehicles are paired with combat aircraft[45] and state practice regarding the weapons trade reports filed to the U.N. Register of Conventional Arms have included drones under this category.

However, we consider this is only a placeholder procedure, as improvised explosive devices and swarm able unmanned vehicles can also be land or water based, seeing as how off-the-shelf drones are capable of traversing any type of terrain or handle any type of biome[46].

It's important to note that these devices are not unlawful weapons or ordnance in the technical sense, yet the lack of transparency in armed drone policies and the use of armed drones for military targeting and killing, resulting in civilian deaths because of drones strikes are key issues that have to be addressed.

We consider that the work of the European Union regarding artificial intelligence and the reform of civil liability, corroborated with the findings of the Expert Group in the C.C.W. could lead to future documents, that may or may not be legally binding, but, that they will introduce an international standard regarding transparency, human centered operations and international state responsibility.

Conflicts such as the ones in Libya, Nagorno-Karabakh and the Donbas region in Ukraine highlight how fragile international law is when its dealing with dual-use unmanned vehicles handled by state or non-state actors.

As news regarding the proliferation of armed drones, such as the Bayraktar TB2 being sold by Turkey, and (in the future) manufactured in Ukraine[47], or that of the Tactical Heron being sold (and built) to Romania[48], so must the international community rush to facilitate legal regimes and standards in regards to fair and safe usage in different situations, and also to ensure that these devices will respect art. 36 of the Additional Protocol I to the 1949 Geneva Conventions[49] regarding new weapons.

Further expanding on the 11 guiding principles that were adopted in 2019 to include off-the-shelf drones or swarm capable drones will allow the industry to create a standardized approach to what the end consumer can find in hobby or generalist stores. The European Union with its 2019/947 and 2019/945[50] regulations have adopted legal means and methods to counter inferior products that could threaten civilian infrastructure and military objectives, while the U.S.A. had went ahead and introduced anti-drone legislation to ensure that law enforcement agencies to confiscate or destroy drone threats[51].

The legal instruments mentioned before can be used to thwart swarms or improvised explosive drones by law enforcement agencies or even consumer protection agencies.

To conclude, we consider that a proper legal mechanism that generate a standardized response to drone control, even if it's not legally binding, can usher in a new age of safe, reliable and easy to track unmanned devices as to ensure that both states and non-state actors use only lawful devices and do not have access to vehicles that can be easily modified or smuggled and later used for other purposes.

States should find the political will to further the discussions in the Group of Experts panel at the C.C.W. as to adopt a proper legal document that adds compliance to international law and ensures human control and oversight of unmanned vehicles and autonomous weapons during operations.

Conflicts similar to the ones between Azerbaijan and Armenia, or Ukraine and the separatists highlight just how easy states and non-state actors have acquired lethal drones and how cheap to wage a conflict has become, diminishing the value of human life with each strike.

The lack of proper checks and balances will mark a constant struggle for smaller states to compete in the ever growing community of states that own armed drones (autonomous or not), while also steadily ensuring that the U.N. Charter remains nonenforceable as states do not have a practice of notifying the Security Council under art. 51 of the Charter or to promote and proceed with proper legal procedures against the aggressor state or party for failing to comply with art. 2 para. 4 of the Charter.

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[45] Rachel Stohl, Shannon Dick, *The Arms Trade Treaty and Drones*, STIMSON, 2018.

[46] Candela Fernández Gil-Delgado, *The Use Of Military Drones: The Impact On Land Forces And Legal Implications*, Finabel – European Army Interoperability Centre, 14.01.2021.

[47] Burak Ege Bekdil, *Turkey and Ukraine to coproduce TB2 drones*, DefenseNews, 04.02.2022.

[48] Robert Lupitu, *Drone militare produse în România: Compania Israel Aerospace Industries a semnat un acord de cooperare cu IAR Brașov*, Calea Europeana, 30.10.2021.

[49] The clause stipulates that: *"In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."*.

[50] Both accesable on the European Union Safety Agency website, https://www.easa.europa.eu/document-library/easy-access-rules/easy-access-rules-unmanned-aircraft-systems-regulation-eu.

[51] Attorney General of the U.S.A., Guidance Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems, Office of the Attorney General, 13.04.2020.

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THE IMPACT, IMPLICATIONS AND LEGAL EFFECTS OF THE DECISION OF THE COURT OF JUSTICE OF 18 MAY 2021

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Abstract

The last few decades have created a global aspiration, a common goal, namely the rule of law. Organizations, governments, individuals have made and are taking numerous steps to support this ideal. Perhaps it was often the common theme that united and divided international relations. While in the constitutions of the communist era the rule of law was seen, although fictional, as an essential principle of socialist society, the Romanian Constitution of 1991 did not consider this concern essential.

The reconstruction and the continuous reform of the state and of the Romanian system, but also of the European integration imposed on Romania the consecration as a primordial principle, of the assurance of the rule of law. Under continuous monitoring since 2007, the Romanian judicial system has shown ups and downs noted annually by the CVM Reports.

The various political changes, the various approaches to the rule of law reforms have only supported some of the European authorities' concerns. Although other European countries have small shortcomings in this regard, Romania has remained with Bulgaria in the top of European concerns. Concerns raised both by some controversial rulings of the Constitutional Court and by some amendments to the legislation made without analyzing the impact on the Romanian justice system, considered by some to be quite shaky.

Keywords: *Rule of law, CVM, Constitution, judicial system, financial liability of the State.*

1. Introduction

At a global level, by the 2005 World Summit Paper, the representatives of the States present, voted on the resolution that universal adherence to the rule of law and its implementation, both nationally and internationally, are required[1] . Subsequently, in 2006, the UN General Assembly adopted a resolution on the rule of law at the national and international levels and continued to do so in subsequent annual sessions. At the level of the European Union.

In taking up his term as President of the European Commission, President von der Leyen, in the Political Guidelines, emphasized the need to establish a European rule of law mechanism covering all Member States, having an objective annual reporting by the European Commission[2].

Therefore, in July 2019, at the level of the European Commission in July 2019, an action plan[3] was adopted outlining the main guidelines of such a mechanism[4] . The first annual report will be prepared in 2020[5]. The aim of the new European mechanism is nothing more than to be translated into a preventive instrument, enabling dialogue and common awareness on the problems facing the rule of law [6] .

Regarding Romania, it shall be noted that the constitutional principle provided for in art. 1 paragraph (3): "*Romania is a state of law, democratic and social, in which human dignity, citizens' rights and freedoms, free development of human personality, justice and political pluralism are supreme values, in the spirit of democratic traditions of the Romanian people and ideals of The revolution of December 1989, and they are guaranteed."* [7] , establishes the principle of respect for the rule of law.

In the following, taking into account the provisions of the 2020 *Report on the rule of law - communication and the chapters directed to each country*[8] , we will try to identify the legal effects that the warnings of the European Court of Justice (CJEU),

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[1] Raoul Wallenberg Institute for Human Rights and Humanitarian Law and The Hague Institute for the Internationalization of Law 2012 ″ Rule of Law - A Guide for Politicians ″, Pro bono translation by Roxana Stoleru, with the support of the Romanian Embassy in Stockholm.

[2] https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf, last access on 15.02.2022.

[3] Communication on strengthening the rule of law in the European Union, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-euro.

[4] COM (2019) 343 final, last access on 15.02.2022.

[5] As part of the major initiatives of the Commission's Work Program for 2020.

[6] European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_ro. last access on 15.02.2022.

[7] The Constitution of Romania, http://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=1#t1c0s0sba3, last access on 15.02.2022.

[8] Published on https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en, last access on 15.02.2022.

the Court (Grand Chamber) of 18 May 2021[9] have on the. Romanian judiciary system.

2. Content

It is already well known the moment when the Cooperation and Verification Mechanism (CVM) was set up, namely in 2007, the year of accession to the European Union. This measure, being a transitional measure, was used in order to simplify and facilitate the efforts that our country has had to make in the field of judicial reform and the fight against corruption[10] . The deadline by which this mechanism will end is conditioned by the satisfactory fulfillment of the reference objectives applicable to Romania[11]. Each year, the CVM Reports provided the European institutions with a clear picture of progress and allowed the European Commission to make recommendations. We must not forget the key moment of 2017, when the Commission carried out a comprehensive assessment of the progress made over the decades of monitoring and cooperation[12] .

Although the Commission highlighted in the CVM Reports year after year the progress that Romania has made, amid legislative changes and the effects of these changes, six requests for a preliminary ruling have been registered with the Court of Justice of the European Union (CJEU). It should be noted that these requests were made by the Romanian courts in litigation between legal or natural persons, on the one hand, and authorities or bodies, on the other.

Following these referrals, the Court of Justice connects the cases and issues the Decision of May 18, 2021, in related cases C-83/19, Association of the Romanian Judges Forum / Judicial Inspection, C-127/19, Association of the Romanian Judges Forum ”And the Association„ Movement for the Defense of the Statute of Prosecutors ”/ Superior Council of Magistracy and C-195/19, PJ / QK and in cases C-291/19, SO / TP and others, C355 / 19, the Association„ Forum of Romanian Judges ”And the Association„ Movement for the Defense of the Statute of Prosecutors ”and OL / Prosecutor's Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX / Romanian State - Ministry of Public Finance.

2.1. Context

After accession, the obligation of each member state of the EU, as in the case of Romania, was to apply the legal norms issued by the European Union. Based on European rules, we emphasize that the official interpretation of legal acts, adopted by EU bodies, is ensured by the Court of Justice of the European Union.

National courts have the possibility of directly applying European law, but in situations where there are doubts, according to art. 267 TFEU, they can send preliminary questions to request the interpretation of European rules[13].

In the analysis of the CJEU Decision of May 18, 2021, it is essential to specify that the main disputes before the Court of Justice are closely related to the reforms that Romania has undertaken, especially in the field of justice and the fight against corruption, processes that are subject to monitoring. European Union since 2007, under the cooperation and verification mechanism established by Decision 2006/9281[14] on the occasion of Romania's accession to the Union ("CVM").

From the moment of the pre-accession process, during the negotiations, Romania undertook the reform

[9] Decisiom of the CJEU in related cases C-83/19, Association of the "Romanian Judges Forum" / Judicial Inspection, C-127/19, Association of the "Romanian Judges Forum" and the Association "Movement for the Defense of the Statute of Prosecutors" / Superior Council of Magistracy and C-195/19, PJ / QK and in cases C-291/19, SO / TP and others, C355 / 19, the Association “Romanian Judges Forum” and the Association “Movement for the Defense of the Statute of Prosecutors” and OL / Prosecutor's Office on to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX / Romanian State - Ministry of Public Finance.

[10] Following the conclusions of the Council of Ministers of 17 October 2006 (13339/06), the mechanism was established by Commission Decision of 13 December 2006 (C (2006) 6569).

[11] *Idem*, 10.

[12] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress under the Cooperation and Verification Mechanism, Brussels, 25.1.2017 COM (2017) 44 final-https://ec.europa.eu/info/sites/default/files/ com/2017-44_en_1.pdf, last access on 15.02.2022.

[13] Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union - Treaty on European Union (consolidated version) - Treaty on the Functioning of the European Union (consolidated version) - Official Journal C 326, 26/10/2012 P. 0001 - 0390 art. 267 (ex: art. 234 TEC):

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) interpretation of treaties;

(b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union;

If such a matter is raised before a court of a Member State, that court may, if it considers that a decision in that regard is necessary for it to give judgment, to apply to the Court for a ruling. on this issue.

If such a matter is raised in a case pending before a national court whose decisions are not subject to appeal under national law, that court shall be required to refer the matter to the Court of Justice.

If such a matter is raised in a case pending before a national court concerning a person who is being held in custody, the Court shall give its decision as soon as possible”.

[14] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of the progress made by Romania in achieving certain specific benchmarks in the field of judicial reform and the fight against corruption, OJ 2006 354, p. 56, Special Edition, 11, vol. 51, p. 55.

and during 2004 adopted three laws, the so-called "laws of justice". The object of their regulation concerned: the status of judges and prosecutors, the judicial organization and the Superior Council of Magistracy, in order to determine the independence and efficiency of the judiciary.

In the Romanian spirit and as a result of the frequent political changes, in the period 2017-2019, the leading laws of the reform were amended by laws and emergency ordinances of the government adopted under the Romanian Constitution. The changes made and their effects are the subject of the main disputes before the CJEU. The plaintiffs in these disputes dispute the compatibility with EU law of the legislative changes made.

In their court actions, the applicants refer to certain opinions and reports prepared by the European Commission on Romania's progress under the CVM. The provisions that support their actions do nothing but invalidate the provisions adopted by Romania during the years 2017-2019, especially regarding the perspective of the objectives regarding the effectiveness of the fight against corruption and guaranteeing the independence of the judiciary.

The referring courts therefore emphasize the question of the nature and legal effects of the CVM. Moreover, these courts also refer issues relating to the scope of the Commission's reports under the CVM. In this matter, the national courts rule that the requirements formulated by these reports must be binding on Romania. Thus: "the content, legal nature and temporal scope of that mechanism should be considered to be limited to the Accession Treaty" [15]

The conflict arises, when there is a national jurisprudence, according to which the law of the Union would not prevail in conflict with the Romanian constitutional order, and "*Decision 2006/928 could not constitute a reference norm within a constitutionality control since this decision was adopted prior to Romania's accession to the Union, and the question whether its content, character and temporal scope fall within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.*[16] "

Moreover, the national jurisprudence seems to be contradicted by the fundamental law itself, art. 148, para. (2): "*As a result of accession, the provisions of the constitutive treaties of the European Union, as well as other binding Community regulations, have priority over the contrary provisions of domestic law, in compliance with the provisions of the Act of Accession."*

2.2. The provisions of the decision and its implications

In its decision of 18 May 2021, the CJEU ruled on a number of issues, including those relating to the legal effects of Decision 2006/928 / EC, those relating to the legal force of Commission reports drawn up on the basis of that Decision. In fact, the Court of Justice also gave its point of view on the establishment of sections are special criminal prosecution that has exclusive competence for crimes committed by magistrates, on the patrimonial liability of the state and the personal liability of judges for judicial errors and on the principle of the supremacy of Union law.

The Grand Chamber of the CJEU has ruled on Decision 2006/928 / EC that this is an act of an EU body, which may be interpreted in accordance with Art. 267 of the TFEU. Moreover, with regard to the legal effects of this act, the CJEU establishes that it falls within the scope of the Accession Treaty, as this measure has binding force, in all its elements, for Romania, being a measure adopted under the Act of Accession. . With regard to the application in time, the Court rules that this legal act is binding from the date of accession to the EU. Regarding the content, this decision contains a series of reference objectives, mandatory for Romania. Objectives which, in the Court's view, are: "*to ensure that this Member State respects the value of the rule of law*"[17].

Following the analysis of these acts, the Court establishes that: "*Romania has thus the obligation to take the appropriate measures in order to achieve the mentioned objectives and to refrain from implementing any measure that risks compromising the achievement of the same objectives*"[18]

While the Court clearly sets out the legal effects of the 2006/928 decision on the reports prepared by the Commission under this decision, the Court notes that they set out requirements in relation to Romania and make "recommendations" to that Member State in order to achieve the reference objectives. . In view of the principle of sincere cooperation, the Court's assessment is that the Member State should refrain from adopting or maintaining in force in the areas covered by the reference objectives measures which would remove progress in the reporting requirements and recommendations.

The second important point that we must emphasize is the existence of a review of the judiciary to ensure compliance with European Union law, which is an essential condition for the rule of law. The Court further emphasizes that Member States must ensure

[15] CJEU, Press Release no. 82/21 Luxembourg, 18 May 2021.
[16] Commission's Decision 2006/928/EC of 13 December 2016, *cit. supra*, note 14.
[17] CJEU, Press Release no. 82/21 Luxembourg, 18 May, 2021.
[18] *Ibidem.*

judicial protection of the fact that the courts are part of its system of remedies.

In fact, the Court notes the importance of preserving the independence of judges, who must be protected from external pressures. At the same time, the Court rules on the rules governing the disciplinary regime of judges, that independence presupposes the existence of a system of guarantees necessary to avoid political control.

Therefore, any regulation provided for in national law regarding the existence of a judicial body specializing in disciplinary actions and investigations of magistrates should not be an instrument of political control. Moreover, such a regulation is contrary to European principles. At the same time, the Court rules that the mere appointment, on a temporary basis, in breach of the ordinary appointment procedure provided for by national law, in the management functions of bodies for the purpose of the principle of independence and why not the rule of law.

In order to ensure such compatibility, in the Court's view, such a provision must be supported by imperative and at the same time verifiable objectives which are necessary for the proper administration of justice. The Member State must also ensure that such an institution is not used as a form of political control. The Court refers here to the observance in the work of such an institution of the requirements of the Charter of Fundamental Rights of the European Union ('the Charter').

In its analysis, the Court held that such a body did not have the effect of failing to comply with Romania's specific obligations under Decision 2006/928 in the field of the fight against corruption[19]. What is noteworthy is that the CJEU leaves it to the national courts to verify whether or not the regulations on the establishment and organization of such a section lead to outside influences. Moreover, it is also up to the national courts to verify whether the national regulations do not prevent the examination of the cases concerning the judges and prosecutors concerned within a reasonable time, according to the provisions of the charter.

A key point, brought to the Court's attention, is also the regulations regarding the patrimonial liability of the state and the personal liability of judges for judicial errors[20]. In such cases, the Court finds that such a provision is compatible with European Union law only in the case of restrictive provisions and based on objective, verifiable criteria. Thus, the rationale for determining the recourse of a judge's personal liability for miscarriage of justice must be based on imperative, clear, verifiable objectives necessary for the proper administration of justice. In order to ensure that such provisions do not interfere with the content of decision, the Court rules that well-defined rules are needed to define the conduct likely to engage the personal liability of judges in order to ensure the independence of their mission and to avoid they are exposed to the risk that their personal liability may be incurred solely as a result of their decision.

A simple error of justice contained in a decision is not the only condition for incurring the liability of that judge. The Court's recommendations provide for an express determination of the arrangements for the personal liability of judges. Thus, national law must contain the necessary guarantees that all the necessary operations in such a case will not be instruments of pressure on the judicial activity. The Court rules that the authorities, which will conduct the investigation and any other procedural arrangements necessary in such a case, should act impartially and objectively, so as not to give rise to legitimate doubts. Clearly, the fundamental rights enshrined in the Charter [21] must be respected, from the right to defense, to being heard, and so on.

Although it was provided in the Romanian Constitution, as I mentioned in art. 148, para. (2), the principle of the supremacy of Union law in relation to national law, were also identified situations not covered by these provisions. Thus, we have in mind national regulations of a constitutional nature, which deprive a lower court of the right to leave unenforced, of its own motion, a national provision which falls within the scope of Decision 2006/928 and which is in conflict with European Union law. That is why the Court sheds light on this case, stressing that the effects of the principle of the supremacy of European Union law over national law are binding on all bodies and judicial institutions of a Member State, including those of the nature of the Constitutional Court. Moreover, the Court emphasizes that no rule of national law concerning the jurisdiction of the courts can preclude the application of that principle. In that decision, the Court emphasizes the need for national courts to give an interpretation of national law in accordance with the principles of European Union law.

What we must emphasize is the Court's approach to the alleged breach of the EU Treaty or Decision 2006/928, *"the principle of the rule of law of the*

[19] CJEU, Decision of 18 May 2021, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex =0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1239022 , last access on 15.02.2022.

[20] The doctrine has often analyzed the administrative-patrimonial responsibility of the state for judicial errors. For example, E.E. Stefan, *Legal Liability. Special look at liability in administrative law*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 196-201.

[21] Art. 46 et seq., TITLE VI, JUSTICE, CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2012 / C 326/02), https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri= CELEX: 12012P / TXT & from = RO.

European Union requires the referring court to leave the provisions in question unenforceable, whether of legislative or constitutional origin"[22].

2.3. Internal interpretation of the decision

In response to the CJEU ruling, the Romanian Constitutional Court (hereinafter referred to as the CCR), the Constitutional Court, ruled that this ruling did not reveal any novelties regarding the legal effects of Decision 2006/928 / EC and the reports prepared by the Commission. Based on it. Moreover, in its communication, the court underlines the conclusion of the Ministry of Justice: "*In fulfilling these clear obligations, Romania must take due account of the requirements and recommendations formulated in the CVM reports, having the task of cooperating in good faith with overcome the difficulties encountered in achieving the "benchmarks", in full compliance with those objectives and the provisions of the Treaties"*[23]. It should be noted that the court of constitutional contentious, "*maintained its previous jurisprudence and found that the only act which, by virtue of its binding nature, could have constituted a norm interposed to the constitutionality control performed by reference to art.148 of the Constitution - Decision 2006 / 928 -, through the provisions and objectives it imposes, has no constitutional relevance, as it does not fill a gap in the Basic Law, nor does it establish a higher standard of protection than the constitutional norms in force* ".[24]

Regarding the organization and establishment of the SIIJ, the CCR made a summary of the requirements highlighted by the CJEU: justification by objective and verifiable imperatives related to the proper administration of justice, the existence of specific guarantees to remove any risk of prejudice to the independence of judges and prosecutors; During the investigation procedure, judges and prosecutors should enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the right to a fair trial. Starting from the 3 aspects, CCR analyzed to what extent the rule of law would be affected by the rules governing the organization and SIIJ operation. The CCR assessment refers to the fact that "*these regulations represent an option of the national legislator and fulfill the guarantees stipulated in the CJEU decision, in accordance with the constitutional provisions contained in art. 1 para. (3) and in art. 21 para. (1) and (3) regarding the free access to justice, the right to a fair trial and the settlement of cases within a reasonable time and, Implicitly, in accordance with the provisions of art. 2*[25] *and art. 19 para. (1) TUE*[26]".

What we think is essential is the CCR's dissenting opinion on the jurisdiction of the courts with regard to the application and interpretation of European Union law. Thus, the CCR's interpretation of art. 148 of the Constitution proposes only infra-constitutional legislation. According to the CCR opinion: "art. *148 not giving EU law priority to apply to the Romanian Constitution, so that a court does not have the power to analyze the conformity of a provision of "domestic law", found to be constitutional by a decision of the Constitutional Court, with the provisions of EU law by prism art. 148 of the Constitution".*[27]

In the view of the Constitutional Court, the CJEU's assessment of the binding nature of Decision 2006/928 / EC has limited the effects of this decision, which is the responsibility of such collaboration. CCR considers that this collaboration according to art. 4, TEU, is more of a politico-administrative nature.

CCR emphasizes that the provision in the operative part of the CJEU ruling on the possibility for a court to "*CJEU, as being contrary to this decision or art. 19 para. (1) second paragraph TEU*[28] "*has no basis in the Romanian Constitution. Thus art. 148 of the Basic Law, states the principle of application of EU law to the contrary provisions of domestic law.* Therefore*, the reports drawn up on the basis of Decision 2006/928 / EU, by their content and effects, as established by the CJEU decision of 18.05.2021, do not constitute rules of*

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[22] CJEU, Decision of 18 May 2021, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=1239022, last access on 15.02.2022.

[23] Analysis of the CJEU Judgment, carried out by the Ministry of Justice, available: https://www.just.ro/analiza-hotararii-cjue-din-18-mai-2021/., last access on 15.02.2022.

[24] CCR, Press Release, June 8, 2021, available at https://www.ccr.ro/wp-content/uploads/2021/06/Comunicat-de-presa-8-iunie-2021.pdf., last access on 15.02.2022.

[25] Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union - Treaty on European Union (consolidated version) - Treaty on the Functioning of the European Union (consolidated version) - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference adopting the Treaty of Lisbon signed on 13 December 2007 - Correlation tables, Official Journal C 326, 26/10/2012 P. 0001 - 0390, Article 2: The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law , as well as respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

[26] CCR, Press Release, June 8, 2021, available at https://www.ccr.ro/wp-content/uploads/2021/06/Comunicat-de-presa-8-iunie-2021.pdf, last access on 15.02.2022.

[27] *Ibidem.*

[28] Treaty on European Union, art. 19, para. 1. Member States shall lay down the necessary remedies to ensure effective judicial protection in the areas covered by Union law. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF, last access on 15.02.2022.

European law which the court should apply as a matter of priority. Removing the national norm[29]. Starting from the idea that the reports in question contain only recommendations, they do not have a normative character, they have neither the value nor the potential risk of provoking a conflict with the internal norms. The CCR thus invalidates the possibility for the national judge to decide on the application of recommendations to the detriment of national rules.

In the opinion of the CCR, the Decision of 18.05.2021 of the CJEU cannot have the validity of *an element that would determine a jurisprudential reversal in terms of ascertaining the incidence of Decision 2006/928 / EC in the constitutionality control and, implicitly, the violation of art. 148 of the Constitution*[30].

2.4. Effects, implications

If we look at the arguments presented by the CCR, we see their judicious nature. In its opinion, the Constitutional Court does not invalidate the supremacy of EU law, it seems that it is formulated in line with the decisions by which it ensured the effectiveness of EU law. The result of a contrary opinion can only be a conflict between internal and European bodies, on the occasion of the application or non-application of the principle of the supremacy of European law.

Analyzing the two opinions, I can only argue that the establishment of the CVM and the content of the decision by which it was established, oblige Romania to pursue and meet the targets within the 4 reference themes of Decision no. 2006/928/EC. Both opinions, both of the CJEU and of the CCR, note that in the reports we find recommendations, the legal effect of which is obvious, as they are not binding, they do not require mandatory conduct. In our opinion, putting an equal mark between the reports drawn up under the CVM under Decision 2006/928/EU and an EU legislative act is an excessive statement. In support of this statement, we must take into account the legislative technique, in the content of the report are not indicated as in a normative act the legal means to be followed.

We do not deny the mandatory nature, indirectly assigned as a result of the Act of Accession of the reports drawn up under Decision 2006/928 / EU, but we must point out that this recognition would create a new source of law, both in the national legal order and in the order national legal framework. To date, such acts have not been recognized as a source of law. Establishment of obligations Decision 2006/928 / EU by means of generating only the means through the Member State will address the shortcomings necessary for integration. It should be noted that the decision contains only one concrete obligation, namely the establishment of the National Integrity Agency[31]. The other obligations have an open content, being set the objectives of it is achieved, without mentioning the means. The European authorities leave to the discretion of the Member State the means used to achieve the benchmarks.

Regarding the limits of the applicability of EU law, we must refer to the principles enshrined in Article 5, TEU:[32]

- The principle of attribution of competences - EU competences are conferred by the EU Treaties, treaties ratified by all Member States;
- The principle of proportionality - EU actions are aimed only at achieving the objectives of EU treaties;
- The principle of subsidiarity - in areas where both the governments of the Member States and the EU can act, the EU only intervenes when its actions are more effective than those of the Member State.

According to the provisions of art. 4 para. (3) TFEU, in the area of freedom, security and justice, the competence of the EU is not an exclusive one, but a shared one. In light of the provisions of art. 4 para. (2) TEU regarding the observance of the essential functions of the states, regarding the internal judicial organization, the EU has not legislated. Therefore, in

[29] CCR, PRESS RELEASE, June 8, 2021, available at https://www.ccr.ro/wp-content/uploads/2021/06/Comunicat-de-presa-8-iunie-2021.pdf. last access on 15.02.2022.

[30] *Ibidem.*

[31] EC Decision of 13 December 2006 establishing a mechanism for cooperation and verification of the progress made by Romania in achieving certain specific benchmarks in the field of judicial reform and the fight against corruption (notified under document number C (2006) 6569] (2006/928 / EC-https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32006D0928&from=RO, last access on 15.02.2022.

[32] Treaty on European Union, art. 5 (ex: art. 5 TEC)

1. The delimitation of Union competences shall be governed by the principle of conferral. The exercise of these powers is governed by the principles of subsidiarity and proportionality.

2. The Union shall, in accordance with the principle of conferral, act only within the limits of the powers conferred upon it by the Member States in the Treaties to achieve the objectives set out in those Treaties. Any competence not conferred on the Union by the Treaties shall lie with the Member States.

3. In accordance with the principle of subsidiarity, the Union shall intervene in areas which are not within its exclusive competence only if and to the extent that the objectives of the envisaged action cannot be satisfactorily achieved by the Member States, either at central or regional level. but due to the size and effects of the planned action, they can be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol.

4. In accordance with the principle of proportionality, Union action shall not go beyond what is necessary in order to achieve the objectives of the Treaties. The Union institutions shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality.

the light of art. 2 para. (2) TFEU, Romania has the capacity and competence to organize its judiciary, obviously without violating democratic principles.

With the claim of a democratic state, Romania must consolidate its rule of law even if there were no recommendations in the reports.

Regarding the three elements regarding the establishment and functioning of the SIIJ, on which the CJEU considered that the internal bodies are the ones empowered to verify compliance with Union law, the Constitutional Court statement does not provide enough relevant information. Instead, the Ministry of Justice considers that the CJEU's assessment definitively puts *an end to the public debate that the abolition of the SIIJ should be accompanied by certain guarantees and sharply removes the argument that the mere existence of the SIIJ the independence of the judge, respectively that: " in this way, an adequate protection of the magistrates is ensured against the pressures exerted on them, against the abuses committed through arbitrary notifications / denunciations "*[33].

Therefore, the main legal effect of the CJEU Decision of 18 May 2021 is the abolition of the Section for the Investigation of Crimes in Justice (SIIJ), its existence being according to the EU Report on the Rule of Law, the chapter on Romania, a crucial element in undermining the independence of justice[34]. Because the implementation of these measures regarding the functioning and organization of the SIIJ confirmed the concerns expressed since the 2018-2019 CVM Reports, concerns *that were at the forefront related to the pressures to which judges and prosecutors are exposed, as well as the independence, efficiency and the quality of justice*[35]. In these successive reports, the Commission recommended to Romania the revision of the legislative framework governing the jurisdictional system taking into account the recommendations of the MCV, but also those formulated by the Venice Commission and GRECO.

Although the 2021 Report on the Rule of Law, the situation of the rule of law in the European Union, the low activity of this body and the proposals to amend the laws of justice are mentioned, until the date of this study, SIIJ is operational. We must continue to argue that, as regards the rule of law, the mere existence of that body is a matter for the European Commission: "*there are still serious concerns about its functioning."*[36].

Moreover, in its opinion of 5 July 2021, the Venice Commission appreciates Romania's intention to amend the legislative framework governing the field of justice. The Venice Commission especially appreciates the proposed changes in the sense of abolishing the SIIJ and the proposed changes in order to restore the competence of the specialized prosecutor's offices (DNA, DIICOT).

We must also note what the Venice Commission is amending, *namely that these amendments introduce a new type of inviolability for judges and prosecutors in an extremely sensitive area (criminal prosecution), which goes far beyond functional immunity and that criminal proceedings which do not fall within the scope of functional immunity should not fall within the jurisdiction of the CVM, but should be referred directly to the courts without first being examined by the CVM*"[37].

Therefore, it remains to be seen what progress will be made in 2022 and how the Romanian authorities will take into account the CJEU Decisions of 18 May 2021, the CVM recommendations and the warnings of the Venice Commission and GRECO.

In view of the provisions of the CJEU decision of 18 May 2021 and the latest proposed amendments concerning the civil liability of judges and prosecutors, I consider it essential that these amendments adequately reflect the recommendations of international bodies and take into account relevant European standards.

In fact, the Romanian state assumed in 2021 that the legislative changes, related to the justice sector, will be operated as a result of analyzing the requirements of the CVM Report of the European Commission, the GRECO reports and the opinions "*Commission of Venice. In this regard, the 2021 Report on the Rule of Law notes that the stated aim of the draft laws is to remedy the negative effects of the changes in the period 2017-2019 and to propose solutions to many of the*

[33] Analysis of the CJEU Decision, carried out by the Ministry of Justice, available: https://www.just.ro/analiza-hotararii-cjue-din-18-mai-2021.

[34] For an analysis of the principle of independence of the judiciary, see E.E. Ştefan, *Reflections on the principle of independence of justice*, in Proceedings of the Challenges of the Knowledge Society Conference (CKS) 2013, pp. 671-676, available online at http://cks.univnt.ro/cks_2013/CKS_2013_Articole. html, accessed on 15.02.2021.

[35] 2020 Report on the rule of law , Chapter on the situation of the rule of law in Romania accompanying the document, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Report on the rule of law 2020 in the European Union, Brussels, 30.9.2020 SWD (2020) 322 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0322&from=EN. last access on 15.02.2022.

[36] 2021, Report on the rule of law i Chapter on the situation of the rule of law in Romania accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2021 report on the rule of law page 5, available at: https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_romania_ro.pdf.

[37] Opinion CDL-AD (2021) 019 of the Venice Commission, p. 14.

problems identified in the MCV reports, in particular as regards on the abolition of the SIIJ, increasing the degree of professional independence of prosecutors by repealing legislative proposals as amended in 2018, civil liability of magistrates, restrictions on the freedom of expression of magistrates and procedures for dismissal and appointment of prosecutors to management positions"[38]

Assuming that, in the event of a proven breach of the EU Treaty or the CVM Decision, the principle of the supremacy of European Union law presupposes that the referring court leaves the provisions in question inapplicable, regardless of the nature of the rule of a functional nature of the Romanian judicial system. The issue arises in the context in which we are dealing with the conflict between Union law and constitutional norms, because at European level we do not have uniformly regulated the hierarchy and competences of the constitutional courts. Here we are faced with different legal traditions, which are closely linked to domestic law and the rules of organization of the judicial system, the rules for the division of jurisdiction between state powers. The interference of the CJEU decision with the internal jurisdictional organization appears to be an interference with the sovereignty of the State.

Since there is no single European regulation, a European constitutional regulation, can we support the principle of the supremacy of European law and in conflict with the constitutional norm? Or would it be better to harmonize the constitutional norms with the provisions of European law? These are questions that the European Union and our country will probably answer in the next period.

From the perspective of domestic legislation, according to art. 147 para. (4) of the Constitution and art. 11 para. (3) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, we must not forget that in the Romanian legal system, the decisions of the Constitutional Court are final and generally binding, a court does not have the possibility to censor decisions. Thus we must remember the revisions of art. 3 of Law no. 47/1992: "*(1) The attributions of the Constitutional Court are those established by the Constitution and by the present law. (2) In the exercise of its attributions, the Constitutional Court is the only one entitled to decide on its competence. (3) The competence of the Constitutional Court, established according to para. (2), cannot be challenged by any public authority*"[39].

According to the practice and provisions in the Romanian judicial system, the legislator does not offer the judge the opportunity to remove or create legal norms, according to his own understanding or according to his personal way of interpreting a recommendation of the European institutions, because such activity would involve interference with other bodies that according to the fundamental law have such prerogatives. We thus consider that there is a possibility of violating the principle of separation of powers in the state.

We emphasize that the possible resolution of this issue raised by the CJEU Decision of 18 May 2021, is given by the mobilization of the Romanian authorities, to urgently transpose the recommendations, the obligations deriving from EU law, regardless of the source, in national legislation Accession Treaty. Moreover, the vigilance of the authorities could lead to the avoidance of situations in which a national judge would have to rule in accordance with the decision of the CJEU decision in question.

3. Conclusions

As the 2021 CVM Report notes, the setback in meeting Romania's benchmarks in 2021 has been surpassed by the measures taken in 2021. The Commission's expectations are constant and include the Romanian authorities in operating the measures. and the changes to which they have committed themselves, in order to fully meet the outstanding objectives. The Commission's view, with which we agree, is that: *The decision of the Court of Justice of 18 May 2021 provides a clear framework and direction for the ongoing reforms to meet the benchmarks of the CVM in a satisfactory manner, with full respect for the rule of law and EU law in general."*[40]. The new legislation to be adopted must take into account the framework provided by the CJEU Decision and remove any doubt.

Moreover, judging by our opinion, we consider it essential that the Romanian legislator makes changes to remove the conflict between the constitutional norm and European norms and to apply those amendments, which remove any doubt about the supremacy of Union law over domestic law. The JRC also does not deny the supremacy of European law, but its position on the

[38] 2021 Report on the rule of law , Chapter on the situation of the rule of law in Romania accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2021 report on the rule of law page 5, available at: https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_romania_ro.pdf.

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[40] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Romania's progress in the cooperation and verification mechanism, Brussels, 8.6.2021, COM (2021) 370 final, available at https://ec.europa.eu/info/sites/ default / files / com2021370_en.pdf.

conflict with the constitutional norm raises concerns at European level and especially at the level of monitoring the rule of law by European bodies and authorities.

In fact, the problem is more of a functional nature, a problem that can only be solved by the legislator in ensuring the necessary mechanisms. It is therefore within the competence of the Romanian authorities and political bodies to resolve the case. Therefore, going through the analyzes carried out by the various European bodies, the reform of the Romanian jurisdictional system is far from being completed, and the responsibility lies with the Romanian authorities.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE CONSTITUTIONAL AND LEGAL REGIME OF GOVERNMENT EMERGENCY ORDINANCES AND THEIR RELATIONSHIP WITH GOOD GOVERNANCE AND DISCRETIONARY POWER

Oana ŞARAMET*

Abstract

In a state governed by the rule of law in which democratic principles recognized, enshrined by the Constitution, are the basis for the organization and functioning of the public authorities and institutions in that state, the principle of separation and balance of power in the state cannot be ignored. According to this constitutional principle, governments are part of the executive branch and their main role is to implement the most important normative acts, the laws, adopted by parliaments. In order to achieve this role, generically identified, governments have constitutionally recognized the possibility of adopting legal acts, of a normative or individual nature, through which it is possible to them to organize the enforcement of laws or even to ensure their enforcement. Although, according to this above mentioned principle, we could not identify a "legislative power" recognized to governments, the reality has led even the constitutional legislator to recognize them the possibility of adopting legal acts with a legal force similar to that of laws to solve different special, exceptional, extraordinary, situations, even crisis.

The legislative delegation thus enshrined in the constitution, allowed governments to "legislate", to adopt primary normative acts by which, even only temporarily, to adopt measures that otherwise could not have been adopted except by law, by parliaments. Although, in principle, for the adoption of such normative acts with a legal force similar to the law, governments need the "permission" of parliaments expressed by adopting a law under the conditions established by the Constitution itself, however in some constitutional systems it is also recognized the possibility the issuance of such acts by governments, without the need to issue such a law in advance.

Taking into consideration that some governments, as well as ours, develop a "true passion" for the adoption of such acts, as emergency ordinances are in our constitutional system, by this article, we intend to analyze the possibility that by exercising a such attributions, usually and not of an extraordinary character, should be affected even by the Government the good governance that it has to ensure, thus exercising even a true discretionary power.

Keywords: *ordinances, urgency, government, discretionary power, good governance.*

1. Introduction

Legislation is one of the dimensions through which state power is realized and which, according to the principle of separation and balance of powers in the state and, implicitly, of the constitutional functions and attributions consecrated, belongs, in any democratic state, to the national parliament.

According to the constitutional provisions, as those from art. 74 para. (1) of the Romanian Constitution, the legislative initiatives - "starting material" in the legislative process - also come from the executives, more precisely from the Government. In fact, over time, the state practice[1] has shown that the vast majority of these legislative initiatives are formulated and submitted to the competent Chamber of Parliament by the Romanian Government.

Starting from the premise of good faith given that it is the public authority that, by virtue of its constitutional role, knows best the economic, social, political reality, etc., as well as the concrete and specific needs of the field to be regulated, necessary premises for the configuration of a draft law, the Government will hope that that draft law will be adopted by the Romanian Parliament as conceived. However, even if the Government is supported by a substantial parliamentary majority, the democratic exercise includes the debate of such bills within the legislative authority, all the more so as the attribute of the legislation belongs, in law and in fact, to the Parliament. However, any parliamentary debate - both at the level of committees and in the plenary of the Chambers of Parliament - can have as a consequence the modification and / or completion of the draft law conceived by the Government. As there may be even differences between the Government's intention to legislate expressed in the draft law and the Parliament's will to legislate, embodied in the law adopted by it, the Government may be determined to seek to identify those constitutional ways to even deals with "legislation". However, such a mechanism, enshrined

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[1] See, in this regard, the public information on the website of Chamber of Deputies of Romanian Parliament, http://www.cdep.ro/pls/proiecte/upl_pck2015.home#, accessed on: 21.03.2022.

in the Constitution, can be considered the legislative delegation, and the instrument, also enshrined in the Constitution, by which this can be expressed is the ordinance.

But, the legislator is obliged, in our opinion, to ensure that such a power to issue normative acts with the legal force of a law will not consist in a transfer of legislative power from the Romanian Parliament to the Government, or will not involve even a "real takeover" of this legislative power by the Government, and Parliament just will only formally hold it. Therefore, it is mandatory that, by constitutional provisions, to be established instruments, mechanisms and procedures to limit the exercise of this power of Government or even to verify its exercise.

Constitutional configuration of such limitations, as well as control mechanisms and procedures for the exercise of legislative delegation, must be carried out in such a way that it cannot be exercised in a discretionary manner or jeopardized by good governance.

2. Emergency Ordinance of Government - expression of legislative delegation

The Romanian constitutional legislator, also in the initial version of the 1991 Constitution, by the provisions of art. 114, but also in the revised and republished version of it from 2003, especially by art. 115, has identified as normative acts by which to concretize the legislative delegation - the ordinance with its two forms: the ordinance issued on the basis of the enabling law (identified by doctrine[2] as a simple ordinance) and the emergency ordinance.

The principle *delegata potesta non delegatur* and, implicitly, its application oppose the idea of a second delegation of powers by the legislature to the executive, the first delegation - the original being the one that the people gave to their representatives, to draft laws on its behalf[3].

Unfortunately, especially the reality of recent years has shown us that the institution of legislative delegation is a necessity in special situations given the complexity of the parliamentary legislative procedure and the heavy way of working of the Romanian Parliament and its internal structures. Moreover, the CCR stated that the legislative delegation "is a limitation of the parliamentary monopoly on legislation, but finds a unanimously accepted justification that springs from the principle of separation and cooperation of powers in the state"[4].

On the other hand, we must also keep in mind that it is almost impossible to predict all possible future situations that require legal regulation. This reality was also highlighted by John Locke who thus justified for the seventeenth century the need to recognize the possibility of the executive to adopt legal acts with the same legal force as the law adopted by Parliament[5] because "[t]he executor of laws, having power in his hands by common law of nature, obtains the right to use it for the good of society in many cases where local laws do not give any guidance, until the legislature can meet to make [such laws]"[6], therefore to exercise its own legislative powers. But, if for those times such predictability in identifying the need for regulation by law may sometimes not be possible, today the risk of lack of predictability is even higher.

However, such an impediment in the exercise of legislative power exclusively by Parliament cannot be invoked and used absolutely, unconditionally, to justify the constitutional configuration of the legislative delegation.

Therefore, all the more so, if we are to allow governments to participate in the exercise of their "legislative power"[7] today, it is imperative that the constitutional provisions set out as clearly and conclusively as possible the legal framework, including the limits within which ordinances may be issued, on the one hand, and, on the other hand, the Romanian Parliament is obliged to use the constitutional mechanisms specific to its control to ensure that legislative delegation has not been exercised at its discretion by the Government.

Moreover, our doctrine underlined that once the role[8] of the Parliament as “the sole legislative authority

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[2] See, for example, I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional (Constitutional litigation)*, Hamangiu Publishing House, Bucharest, 2009, p. 134.

[3] See V. Duculescu, C. Călinoiu, G. Duculescu, *Constituția României comentată și adnotată (The Romanian Constitution commented and annotated)*, Lumina Lex Publishing House, Bucharest, 1997, p. 316, apud. I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2022, p. 911.

[4] See point 27 of the Decision of the CCR no. 258/2015 regarding the exception of unconstitutionality of the provisions of art. 33 of Law no. 146/2002 regarding the legal regime of the county foundations for youth and of the municipality of Bucharest, published in the Official Gazette of Romania, Part I, no. 417 of 12.06.2015.

[5] See, I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles)*, *op. cit.*, 2022, p. 973.

[6] J. Locke, *Al doilea tratat despre cârmuire. Scrisoare despre toleranță (Second Treatise of Government. A Letter Conecrning Toleration)*, Nemira Publishing House, Bucharest, 1999, p. 154.

[7] See I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, p. 911.

[8] See I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, 2022, p. 911.

of the country" was enshrined constitutionally, according to art. 62 para. (1) of the Constitution, however, the constitutional recognition of legislative delegation "[m]ust be authorized by Parliament and can only be limited"[9]. Moreover, the Constitutional Court itself ruled, by its decisions, that "legislative delegation is an institution specific to constitutional law which involves the transfer of powers from Parliament to the Government under certain conditions provided by the enabling law or the Constitution"[10].

In this article, we intend to analyze the issues mentioned in its title and abstract from the perspective of Government emergency ordinances given their constitutional regime and, implicitly, the Government's appetite for issuing them.

As pointed out in our doctrine, by the notion of ordinance, the Romanian Constitution "[d]etermines the legal act by which the Government exercises its legislative delegation which, being a power that the Parliament delegates to the Executive, implies the adoption of an investment law for this purpose"[11]. But, in the case of emergency ordinances, such an enabling law is no longer necessary because their adoption is made directly on the basis of the constitutional provisions because "The Government receives the power to issue ordinances… through the direct application of art. 115 para. (4) of the Constitution"[12].

According to the constitutional provisions, "in terms of the material criterion for determining the concept, Government ordinances are limited both in content and in terms of applicability over time."[13]. In the case of emergency ordinances, these limitations[14] are identified even by the constitutional provisions of art. 115:

- identification of "extraordinary situations whose regulation does not suffer postponement" [art. 115 para. (4) of the Constitution],

- the fulfillment of two cumulative conditions in order to be able to enter into force, namely: "submission for debate in the emergency procedure to the competent Chamber [of the Parliament, *s.n.*] to be notified" and "publication in the Official Gazette of Romania" [art. 115 para. (5) Thesis I of the Constitution],

- no adaptation of them in fields expressly mentioned in the constitutional text, namely: "constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly" [art. 115 para. (6) of the Constitution].

Although these constitutional limitations exist, the constitutional legislature has regulated mechanisms by which can be verified the fulfilment of these limits by the Government. I mentioned such a first mechanism before, being, at the same time, one of the constitutional limitations in issuing emergency ordinances, and being represented by the parliamentary control that is exercised by the Parliament according to the provisions of art. 115 para. (5), (7) and (8) of the Constitution. Also, according to art. 146 letter d) of the Constitution, including emergency ordinances, the constitutional legislator not making any distinction from this point of view between these ordinances and the simple ones, may be subject to the constitutionality control exercised by the CCR. This type of control can be both substantially, in terms of regulation (intrinsic control) and formally, in compliance with the constitutional procedures for the adoption of the ordinance (extrinsic control)[15], as was noted by the Constitutional Court. through its jurisprudence[16]. By the provisions of art. 126 para. (6) the second thesis of the Constitution corroborated with those of art. 9 of Law no. 554/2004 of the administrative contentious, with the subsequent amendments and completions, is also enshrined "a special legal mechanism for contesting their unconstitutionality [ordinances] within

[9] A. Iorgovan, *Tratat de drept administrativ (Administrative Law Treaty)*, vol. I, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 406.

[10] See point 1) of the CCR Decision no. 1438/2010 regarding the exception of unconstitutionality of the provisions of art. 17 letter c) of Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption, as well as the provisions of the GEO no. 124/2005 regarding the amendment and completion of Law no. 78/2000 for the prevention, discovery and sanctioning of corruption, published in the Official Gazette of Romania, Part I, no. 16 from 07.01.2011.

[11] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituția României revizuită. Comentarii și explicații (Revised Romanian Constitution. Comments and explanations)*, All Beck Publishing House, Bucharest, 2004, p. 223.

[12] I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *op. cit.*, p. 133.

[13] *Idem*, p. 134.

[14] In this sense, see, for example, I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *op. cit.*, pp. 134-135, or S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional (Elements of constitutional litigation)*, C.H. Beck Publishing House, Bucharest, 2021, pp. 87-88, or, I. Muraru, E. S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, 2022, pp. 985-990.

[15] See V. Bărbățeanu, C.M. Krupenschi, *Aspecte din jurisprudența Curții Constituționale referitoare la controlul constituționalității extrinseci a legilor și ordonanțelor (Aspects of the jurisprudence of the Constitutional Court regarding the control of the extrinsic constitutionality of laws and ordinances)*, in Current landmarks in the jurisprudence of the Romanian Constitutional Court and perspectives of European justice, Sitech Publishing House, Craiova, 2012, p. 255.

[16] Such a more recent example is represented by the Decision of the CCR no. 152/2020 regarding the exception of unconstitutionality of the provisions of art. 9, art. 14 letters c^1)-f) and of art. 28 of the GEO no. 1/1999 on the state of siege and the state of emergency and the emergency ordinance, as a whole, as well as the GEO no. 34/2020 for the amendment and completion of the GEO no. 1/1999 on the state of siege and the state of emergency, as a whole, published in the Official Gazette of Romania, Part I, no. 387 din 13.05.2020.

the common law judicial procedures"[17], being provided a special mechanism by which the CCR may be notified with exceptions of unconstitutionality (objections of unconstitutionality, *s.n.*) of an ordinance or provisions within one, by the administrative contentious courts which are competent to resolve the claims of injured persons by ordinances or, as the case may be, by provisions of ordinances declared unconstitutional.

But, as we mentioned before, state practice has shown that even the 2003 revision of the Constitution when substantial changes were made to the ordinance regime, especially the emergency regime, failed to curb the Government's "passion" for the latter type of ordinances. Although, as we have shown above, mechanisms have been created by which specific constitutional review, neither the Parliament, nor the CCR has succeeded in getting the Government to understand and accept that "the power of the Government to issue ordinances it is a delegated power and not its own power"[18].

3. Good governance and the issuance of normative acts - expression of the legislative delegation

Does good governance imply an "extension" of the limits of the principle of separation and balance of power in the state by building a permissive constitutional framework for legislative delegation? Or, on the contrary, does it entail the constitutional regulation of this legal institution so that legislation delegated by the executive is adopted in special situations, clearly identified, but without jeopardizing the legislative function of the legislative authority of the Parliament?

In our opinion, obviously the second question is the one that should be answered in the affirmative way. Such an answer is all the more valid when we consider that good governance has as its premise a constitutional and legal framework built on the principles specific to a democracy, such as the separation and balance of power in the state, loyal interinstitutional cooperation, the state legal certainty or the supremacy of the Constitution. However, these principles must also guide the constitutional legislator in configuring the legal framework for legislative delegation, as well as the "actors" who operate with it. But, when the constitutional regulation of a legal institution, as is the case of legislative delegation, is overtaken by the reality determined by the application of these provisions, by the state practice in the field, allowing even its discretionary and even abusive application, it is called into question the capability of state to ensure good governance.

Although, in the doctrine, there are also appreciations according to which today we can talk about a fashionable concept, even an "inflation of an idea"[19], yet "clearly implicit in the general concept is the notion that good governance is a positive feature of political systems and that bad governance is a problem that countries need to overcome"[20]. Indeed, good governance is a concept that we often hear in different contexts, viewed from different perspectives[21] to meet the different needs of today's society[22], but the governance of a state presupposes "[t]the use of political authority and exercise of control in a society to the management of its resources for social and economic development"[23]. Among the different meanings of the concept of good governance, one of them identifies it with "[a] situation or event in which government follows a set of principles considered to be ideal. For example, the following in a policy statement of good governance: governments should make decisions based on principles of transparency, accountability, and responsiveness; a concern for efficiency and effectiveness; respect for the rule of law; and a commitment to creating a corruption free administration. This notion of "good governance" is normative and a matter of public policy"[24]. In this regard, the former UN Secretary-General Kofi Annan said that "good governance is ensuring respect for human rights and the rule of law, strengthening

[17] S.G. Barbu, A. Muraru, V. Bărbățeanu, *op. cit.*, p. 88.

[18] See point 2) of the Decision of the CCR no. 1/1995 regarding the obligation of the decisions of the CCR pronounced within the constitutionality control, published in the Official Gazette of Romania, Part I, no. 16 of 26.01.1995.

[19] See even the title of this article: M. Grindle, *Good Governance: The Inflation of an Idea*, in ID Working Paper Series 2010.202, Harvard University, Cambridge, MA, October 2010, available at: https://dash.harvard.edu/bitstream/handle/1/37366227/202.pdf?sequence=1&isAllowed=y, accesed on: 21.03.2022.

[20] M. Grindle, *op. cit.*, p. 2.

[21] See, for example, T.G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, in Third World Quarterly, vol. 21, no. 5 (Oct., 2000), p. 796 and next, available at: https://www.jstor.org/stable/3993619, accesed on: 21.03.2022.

[22] See, in this sens, the website of OECD regarding the different perspectives of govevrnance and, implicitly, the ways to improve it in various fields, namely: https://www.oecd.org/general/searchresults/?q=good%20governance&cx=012432601748511391518:xzeadub0b0a &cof=FORID:11&ie=UTF-8, accessed on: 21.03.2022.

[23] OECD, Participatory Development and Good Governance, 1995, p. 14, available at: https://www.oecd.org/dac/accountable-effective-institutions/31857685.pdf, accesed on: 21.03.2022.

[24] P. Joyce, F. Maron, P.S. Reddy, *A Dangerous Virus: Introduction to IIAS Special Report*, in Good Public Governance in a Global Pandemic – IIAS Public Governance Series, vol. I, ed. I, p. 9, The International Institute of Administrative Sciences, Brussels, 2020, available at: https://www.iias-iisa.org/page/ebook, accesed on: 21.03.2022.

democracy; promoting transparency and capacity in public administration"[25].

Analyzing the principles around which the concept of good governance is built and developed by any state or supranational organizational structure operating within democratic limits, we can see that some of them are constantly found, and the rule of law is both one of these principles, but also one that governs the identification of all the characteristics of this concept.

In our opinion, when a fundamental concept is centered or even developed by the fundamental principle of the rule of law which presupposes, inclusive, the observance of the principle of separation and balance of powers in the state, the constitutional legislator must be very careful, vigilant even with constitutional drawing of delicate legal institutions as it is legislative delegation.

We consider that such an approach is imperative in order not to infringe the principle of separation and balance of powers in the state, neither in terms of its content as it will be transposed by the rules of the fundamental law, nor of the way it will act in practice.

But, ensuring good governance is also conditioned by the way in which legal institutions, such as the legislative delegation, is constitutionally configured and operates, including through emergency ordinances. This allegation would be translated, in the case of legislative delegation by emergency ordinances, by the inclusion in the relevant constitutional text of its essential elements, such as: domain or domains, and / or situations, according to the constitutional legislator, in which it can be used; the period, if it is the case, during which a government may thus participate indirectly in the legislative process; the possibility or obligation, as the case may be, of subjecting emergency ordinances adopted to parliamentary, or constitutional, or judicial control; other limits that may condition the adoption of such acts of delegated legislation; procedural issues regarding the adoption of emergency orders, at the time of entry into force, as well as the types of controls to which these orders may be subject.

The enshrinement, even by the constitutional norms, of the above-mentioned elements will allow, implicitly, the identification of limits in which a real good governance can be ensured from this perspective so that the operating principles of a rule of law, such as that of separation and balance of power in the state, namely that of loyal cooperation between public authorities, not to be adversely affected or even infringed.

On the other hand, we consider that the use of legislative delegation in a discretionary and even more in an abusive way, especially through emergency ordinances, is not a practice that can justify, in any way, ensuring good governance. We support such a statement by the fact that, in our opinion, good governance cannot be ensured by "replacing" Parliament in the exercise of the legislative function by the Government, by legislative delegation and, above all, by adopting emergency ordinances, precisely because the first-mentioned authority would have difficulty in carrying out such tasks with delay, including due to poor management and even a complex and rather heavy legislative procedure.

However, as we have already shown, there may be special situations that require the Government to adopt normative acts with the legal force of a law in an emergency, thus justifying the need for constitutional regulation of legislative delegation, including that by ordinances emergency.

4. Discretionary power and issuance of normative acts - emergency ordinances - expression of legislative delegation

By "discretionary power", according to the Explanatory Dictionary of the Romanian language[26], is meant that "prerogative recognized by law in some states to some state bodies to take action, without being restricted in their initiative", and sometimes this seems to be the acceptance on which the Government embraces when it adopts emergency ordinances.

We think that is more appropriate a very simple explanation according to which discretionary power "[r]efers to the possibility to "exercise free choice constrained only by legal limits"[27]. Practically, we would consider the possibility of recognizing the Government of a right of appreciation in which to exercise its specific attributions of "delegated legislator" constrained by the observance of the absolute constitutional limits imposed[28], as well as by

[25] K. Annan, Secretary-General stresses need for political will to tackle Africa's problems, Press Release, 16 April 1998, available at: https://www.un.org/press/en/1998/19980416.SC6502.html, accesed on: 21.03.2022. For more detailed information on the principles that shape the concept of good governance, see, for example, the Council of Europe website: https://www.coe.int/en/web/good-governance/12-principles, accesed on: 21.03.2022.

[26] See, DEX online, the meaning of the word "discretionary", available at: https://dexonline.ro/definitie/discre%C8%9Bionar, accesed on: 21.03.2022.

[27] K. Davis, (1969). *Discretionary justice: A preliminary inquiry.* Baton Rouge, Lusianan State Universty Press, p. 4, quoted by A. Spire, *Discretionary Power as a Political Weapon Against Foreigners*, in Etikk i praksis. Nord J Appl Ethics (2020), 14(2), p. 90, available at: https://www.ntnu.no/ojs/index.php/etikk_i_praksis/article/view/3479/3576, accesed on: 21.03.2022.

[28] See regarding those type of limits, I. Muraru, E. S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, 2022, p. 988.

the obligation to appreciate and act[29] within the similarly established relative limits.

Thus, according to the provisions of art. 115 para. (4) of the Constitution, for the issuance of an emergency ordinance, the Government must identify the extraordinary situation whose regulation cannot be postponed, as well as the arguments justifying the qualification of that situation as such, but also the urgency that requires such regulation.

Given the content of the mentioned constitutional text, namely "The Government can only adopt emergency ordinances in exceptional cases (extraordinary situations, *s.n.*), the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents" means that it has the possibility to identify not only one, but two or more such extraordinary situations which lead him to adopt the same emergency ordinance. In such a situation it is necessary that those extraordinary situations: to be in correlation; to be identified and explained individually, but also to be explained the connection between them; and the urgency to be so motivated as to justify the adoption of the emergency ordinance for all extraordinary situations considered. Although such an interpretation might transpire from the above-mentioned constitutional provisions, we appreciate that we could, in fact, distinguish between simple, focused and justified on one dimension extraordinary situations, and complex extraordinary situations in which that situation could affect several dimensions at the level of society, such as politics, social, economic and medical, for example.

The constitutional text does not offer other benchmarks for identifying a situation as an extraordinary one, only mentioning, through para. (6) in art. 115, the areas in which such emergency ordinances cannot be adopted even if an extraordinary situation could be identified and motivated by the Government, namely: "the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly".

Therefore, regarding the identification of the extraordinary situation that would justify the use of such a legislative delegation by emergency ordinances, we consider that the Government has a real discretionary power which does not justify any possible ignoring of other constitutional provisions that configure the legal regime of these ordinances, such as nor of the clarifications with which the CCR has come over time.

Thus, in one of its decisions[30], the Constitutional Court ruled that the Government must comply with three cumulative conditions for the adoption of an emergency ordinance: there must be an extraordinary situation, its regulation cannot be postponed and the urgency of the ordinance must be justified. And, among other aspects on which the Constitutional Court detailed explanations, through its decisions, we can mention some that we consider pertinent for outlining some limits in assessing a situation as extraordinary, including in trying at least to limit the discretionary tendencies of the Government in the interpretation and cataloging of certain situations.

Thus, we will be able to emphasize the relevance in the current constitutional context of some assessments that referred to the phrase used before the 2003 constitutional revision, namely the "exceptional case" to justify the issuance of an emergency ordinance, an assessment according to which "its essence is the objective character", "in the sense that its existence (of the extraordinary situation, *s.n.*) does not depend on the will of the Government which, in such circumstances, is forced to react promptly to defend a public interest by way of the emergency ordinance"[31] which "requires adoption of immediate solution "[32]. The extraordinary situation identified by the Government must have "an objective character, in the sense that its existence does not depend on the will of the Government, which, in such circumstances, is forced to react promptly to defend a public interest through the emergency ordinance"[33].

The Constitutional Court also underline that "the extraordinary reasons that justified (and justifies even nowadays, *s.n.*) the issuance of the emergency ordinance …… must be assessed according to the time

[29] *Ibidem.*

[30] See CCR Decision no. 255/2005 regarding the notification of unconstitutionality of the Law for the approval of the GEO no. 100/2004 regarding the transfer of some forest lands from the public property of the state and from the administration of the National Forests Authority - Romsilva in the property of the Archdiocese of Suceava and Rădăuţi, published in the Official Gazette of Romania, Part I, no. 511 of 16.06.2005.

[31] See CCR Decision no. 65/1995 regarding the constitutionality of the Law for the approval of the GEO no. 1/1995 regarding the conditions for increasing the salaries in 1995 for autonomous companies and commercial companies with majority state capital, published in the Official Gazette of Romania, Part I, no. 129 of 28.06.1995.

[32] *Ibidem.*

[33] See CCR Decision no. 83/1998 regarding the exception of unconstitutionality of the provisions of the GEO no. 22/1997 for the amendment and completion of the local public administration Law no. 69/1991, republished, published in the Official Gazette of Romania, Part I, no. 211 of 08.06.1998.

of issuance of the ordinance, and not according to the factors that occurred later"[34].

Also, recently the Constitutional Court emphasized that "the extraordinary situation expresses a high degree of deviation from the ordinary or common place and that it must be of an objective nature, without depending on the will of the Government, but not that it must represent, in itself, an element of novelty"[35].

Practically, through such assessments, through its jurisprudence the Constitutional Court also establishes limits of the right of appreciation of the Government in identifying situations as extraordinary to justify the need, even imperative, to adopt an emergency ordinance, thus trying to limit its discretionary power.

We consider that the approaches of the Constitutional Court when it ruled on the urgency of the extraordinary situation that determined the adoption of an emergency ordinance, are in the same sense as we mentioned above. Thus, the Court emphasized that this urgency "cannot be equated with the existence of the extraordinary situation"[36], but "is consequential to it"[37], and that "it cannot be accredited or motivated"[38] by its usefulness[39], "the opportunity or the reason for the regulation"[40].

On the other hand, we appreciate that this discretionary power of the Government was also felt in the assessment of the absolute or relative limits, as the case may be, mentioned by art. 115 of the Constitution at par. (6) and on which there is also consistent case law of the Constitutional Court. For example, and by its more recent decisions[41], the Constitutional Court recalled that “it has consistently ruled [that] from the corroboration of the constitutional norms contained in art. 53 para. (1) and in art. 115 para. (6) it follows that the impairment / restriction of fundamental rights or freedoms can only be achieved by law, as a formal act of the Parliament[42]. Aspects regarding the discretionary power of the Government in respecting these limits, as well as on the decisions of the Constitutional Court in this regard, we will detail in subsequent articles.

On the other hand, considering the constitutional provisions of art. 115 para. (4) et seq., such a discretionary attitude of the Government in the adoption of emergency ordinances, we appreciate that it was also encouraged by the consecration of the possibility of their adoption in the field of organic laws, respecting the limits mentioned above. The field of organic laws, as it is identified primarily through the provisions of art. 73 para. (3) of the Constitution, but also by those referred to in letter t) of the same constitutional text, it is much more desirable to be regulated by the Government than that of ordinary laws due to the importance of the areas concerned. That is why we find it pertinent to say that the 2003 revision of the constitutional text on the majority required for the adoption of emergency ordinances issued under the Organic Law may equal to "an indirect invitation to the Government to adopt such ordinances"[43].

We appreciate that the Government benefited from such an "encouragement" even when, according to art. 12 para. (2) of Law no. 24/2000[44], republished, with subsequent amendments and completions, it was provided that "Government Emergency Ordinances shall enter into force on the date of publication in the Official Gazette of Romania, Part I, provided they are submitted to the competent Chamber before being notified, unless a later date is provided in them". But, such a provision that makes possible the entry into force of an emergency ordinance even a few months after its publication in the Official Gazette of Romania, even in our opinion, prejudices the purpose, the reason for which the legal regime of the these emergency ordinances. Such a provision cancels or at least calls into question the urgency of the regulation, but also the impossibility of postponing the regulation and, implicitly, the use of parliamentary legislative procedures.

[34] See point 2 para. 8) of the CCR Decision no. 42/2014 regarding the exception of unconstitutionality of the provisions of art. 9 of the GEO no. 84/2012 regarding the establishment of the salaries of the personnel from the budgetary sector in 2013, the extension of some terms from normative acts, as well as some fiscal-budgetary measures and of the ordinance as a whole, republished, published in the Official Gazette of Romania, Part I, no. 210 of 25.03.2014.

[35] See point 53 of the CCR Decision no. 60/2020 regarding the exception of unconstitutionality of the provisions of the GEO no. 57/2019 on the Administrative Code, published in the Official Gazette of Romania, Part I, no. 369 of 08.05.2020.

[36] See point 53 of the CCR Decision no. 60/2020, *op. cit*.

[37] See point 57 of the CCR Decision no. 60/2020, *op. cit*.

[38] *Ibidem.*

[39] See CCR Decision no. 255/2005, *op. cit.*

[40] See point 57 of the CCR Decision no. 60/2020, *op. cit.*, as well as the CCR Decision no. 109/2010 regarding the exception of unconstitutionality of the provisions of the GEO no. 159/2008 regarding the amendment and completion of Law no. 51/1995 for the organization and exercise of the legal profession, published in the Official Gazette of Romania, Part I, no. 175 of 18.03.2010.

[41] See, for example, CCR Decision no. 157/2020 regarding the exception of unconstitutionality of the provisions of art. 2 letter f) and of art. 4 of the GEO no. 21/2004 on the National Emergency Management System, published in the Official Gazette of Romania, Part I, no. 397 of 15.05.2020.

[42] Point 89 of the CCR Decision no. 109/2010, *op. cit.*

[43] I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, 2022, p. 987.

[44] Law no. 24/2000 regarding the norms of legislative technique for the elaboration of normative acts, republished, with the subsequent modifications and completions. The republishing was published in the Official Gazette of Romania, Part I, no. 260 from 21.04.2010.

5. Conclusions

Although in order to eliminate an area in which the Government's discretionary power is felt, it would seem simpler to repeal the constitutional provisions on legislative delegation, especially those on emergency ordinances, we should be aware that "the non-delegation doctrine is almost a complete failure"[45], and "it has not prevented the delegation of legislative power"[46]. Moreover, such an attitude did nothing but to fail "[t]o provide needed protection against unnecessary and uncontrolled discretionary power"[47], which is why the concern of the constitutional legislator must involve the development of some " [s]tandards, principles, and rules to confine discretionary power"[48].

In this regard, in a future revision of the Constitution, such amendments could be considered, as mentioned in the doctrine[49]:

- "setting precise deadlines for both Chambers (of the Parliament, *s.n.*)… in which the ordinance is actually approved or rejected, under the sanction of caducity"[50]. Regarding to this proposal, we would just add that the deadlines should be expressly mentioned in the constitutional provisions and should not be longer than 10 days in order for the Parliament to respect the purpose and reason for which emergency ordinances can be adopted, being able to quickly appreciate the opportunity of the identified extraordinary situation, not only the legality.

- the prohibition of the adoption of emergency ordinances in the field of organic law, taking into consideration the three types of laws that can be adopted by the Romanian Parliament, according to art. 73 of the Constitution. Indeed, such a constitutional amendment could lead to a low interest on the part of the Government in "legislation by emergency ordinances". But, there is a risk of the occurrence of an extraordinary situation and the regulation of which can not delayed, and its urgency may be justified, but the regulation cannot be adopted because it falls within the scope of organic laws. In this context, we consider that it could be provided that emergency ordinances do not modify, supplement, repeal codes or provisions thereof.

- In view of the above, we also consider that it would be necessary to include an express provision of the date of entry into force of the emergency ordinances, which must respond to the reason for which this type of ordinance was constitutionally regulated. Thus, the ordinary legislator would no longer be offer the possibility to regulate the entry into force of the emergency ordinance at a date subsequent to its publication in the Official Gazette of Romania, a date provided even in its content, a date as far as possible from the date of publication in the Official Gazette of Romania cannot support the need to adopt the emergency ordinance, the urgency and extraordinary nature of the situation which led to its adoption. In this context, we consider justified, opportune and pertinent the proposal of the CCR that the date of entry into force of the emergency ordinances will be provided by the Constitution itself and be the very day following its publication in the Official Gazette of Romania[51].

- maintaining the obligation to submit all emergency ordinances, without exception, to the approval of the Parliament[52] which, in its capacity as legislative authority, will maintain "the power to censor the GEO, both in terms of legality and opportunity"[53]. Moreover, the CCR emphasized that the Parliament has not only the power to reject the emergency ordinance by law if it considers it unconstitutional, but even the obligation[54], the legislation by the Parliament not being an unconditional and unlimited power that could allow the unconstitutionality of an emergency ordinance to be ignored.

The CCR has ruled that the first " [m]eaning of the concept of the rule of law is the observance of the rules of positive law, in force for a certain period of time, which expressly or implicitly regulate powers, prerogatives, attributions, obligations or duties of state institutions / authorities "[55]. Therefore, "[t]he loyalty of state institutions / authorities must always be

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[45] K.C. Davis, *A new approach to delegation*, in The University Chicago Law Review, vol. 36:713, 1969, p. 713, available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3620&context=uclrev, accesed on: 21.03.2022.

[46] *Ibidem.*

[47] *Ibidem.*

[48] K.C. Davis, *op. cit.*, p. 733.

[49] I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, 2022, pp. 976 and next.

[50] *Idem*, p. 976.

[51] See point 340 of the CCR Decision no. 80/2014 on the legislative proposal on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 246 of 07.04.2014.

[52] See, I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole (The Romanian Constitution. Comment on articles), op. cit.*, 2022, p. 981.

[53] *Ibidem.*

[54] See point 89 of the CCR Decision no. 240/2020 regarding the objection of unconstitutionality of the Law for the approval of the GEO no. 44/2020 regarding the extension of the mandates of the local public administration authorities included in the period 2016-2020, some measures for the organization of the local elections from 2020, as well as the modification of the GEO no. 57/2019 on the Administrative Code, as well as the GEO no. 44/2020, published in the Official Gazette of Romania, Part I, no. 504 of 12.06.2020.

[55] See point 106 of the CCR Decision no. 611/2017 on the requests for settlement of legal disputes of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Ministry - the Prosecutor's Office attached to the HCCJ, on the other hand, requests made by Senate and Chamber presidents Deputies, published in the Official Gazette of Romania, Part I, no. 877 from 07.11.2017.

manifested towards constitutional principles and values, while inter-institutional relations must be governed by dialogue, balance and mutual respect."[56]. Consequently, when dialogue, balance and mutual respect between state authorities, such as the Government and Parliament, including in the exercise of the powers specific to the legislative delegation, is vitiated by the discretionary exercise of those powers by one of them, usually by the Government, and not be able to ensure good governance, it is the duty of the constitutional legislator to intervene to make the necessary changes to correct such conduct. Until the moment of the constitutional review, however, it is the duty of the Parliament and the Constitutional Court, within the limits of their powers, to sanction any discretionary action of the Government in adopting emergency ordinances by misinterpreting and misapplying the relevant constitutional provisions, or even their infringement.

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[56] See point 112, second sentence of the CCR Decision no. 611/2017, *op. cit.*

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LEGISLATIVE UPDATES ON PUBLIC SERVICES

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Abstract

Meeting general interest needs has always been a concern of public authorities. The performance of the activity, both in the public and in the private sector was challenged to continuous adjustment in order to meet social needs and to provide certain services. On this occasion, on first sight, public medical services stood out as important from the rest of the public services, due to the fact that the concern of the authorities for the protection of public health was globally highlighted in the foreground. From this point of view, it is all the more necessary to have a coherent legal framework to regulate in an unitary way the general legal regime of public services, as there is a tendency to digitize public administration. Therefore, we are urged by the regulation of public services in the Administrative Code to analyze the legislator's perspective on this matter.

At the same time, the states are concerned to transpose European normative acts, acts with binding legal force, into the national legislation. In this respect, this paperwork will be focused on certain public services, by way of a case study, namely it will analyze the way of transposing the European legislation on road transport into our national legislation. Finally, we will draw the conclusion that emerges from the documentation of the proposed topic.

Keywords: *Administrative Code, public service, public authority, directive, road transport.*

1. Introduction

We resume the topic dedicated to public services[1] from another perspective, topic on which we have reflected on another occasion. This time, the adoption of the Administrative Code in the summer of 2019, by our legislator, gives us the opportunity to present the regulation of public services in the content of this normative act. We refer to GEO no. 57/2019 on the Administrative Code[2], a normative act that managed to bring a new spirit in this field.

The fact that this work of codifying the administrative law has been successful is undoubtedly a factor in the progress of the normative regulation. In terms of the content, we note that the Administrative Code, in its substance, regulates basic concepts necessary to understand the legal framework applicable to public administration[3], such as: public authority, public domain, public service, administrative liability etc. According to the doctrine: "in order to extend the jurisdiction of the administrative tribunals, the concept of public service has been used in France, with the scope of designating any activity of a public body the purpose of which is to satisfy a general interest need: post office, rail transport, public education, national defense"[4].

The structure of the paperwork is to highlight the regulation of public services[5] in the Administrative Code, on the one hand and to present the stage of the transposition into the national legislation of the *Posting Directive* in the field of road transport, and at the same time to analyze the requirement of *good repute,* by using methods[6] specific to the research in the field of the law.

2. Paperwork content

2.1. Regulation of public services in the Administrative Code

The structure of the Administrative Code comprises 10 parts and public services are regulated in two such parts, as follows: the 4th Part – *The Prefect, the Prefect's Institution and Deconcentrated Public Services,* (art. 277-283) *and* the 8th Part– *Public Services*, Title I – *Principles and Classification of Public Services*; Title II – *Regulation and Establishment of Public Services*; Title III – *Public Service Management*, (art. 580-596).

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[1] E.E. Ștefan, *Brief considerations on deconcentrated public services as a consequence of coming into force of the Emergency Ordinance number 37 from 22.04.2009 concerning certain measures of improving the activity of public administration*, in Lex et Scientia International Journal no. 2/2009, pp. 239-252.

[2] GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 555 of 5 July 2019, with latest amendments by GEO no. 1/2022 for the amendment and supplementation of GEO no. 121/2021 on the establishment of measures at the level of the central public administration (...), published in Official Gazette of Romania no. 41 of 13 January 2022.

[3] See R.M. Popescu, *ECJ case-law on the concept of „public administration" used in article 45 paragraph (4) TFUE,* in the proceedings of CKS e-book 2017, pp. 528-532.

[4] T. Drăganu, *Introducere în teoria și practica statului de drept,* Dacia Publishing House, Cluj Napoca, 1992, p. 150.

[5] See M.C. Cliza, *Drept administrativ Partea a II-a*, Universul Juridic Publishing House, Bucharest, 2012, pp. 218-227.

[6] On the construction of the legal regulation, N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202 or M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp. 167-187.

The Administrative Code defines public service in art. 5 letter kk) as being: "*the activity or the set of activities organized by a public administration authority or by a public institution or authorized or delegated by it, in order to satisfy a general need or a public interest, on a regular and continuous basis*". Previously, Law no. 554/2004 on the contentious administrative defined in its content public service in art. 2 para. (1) letter m.): "*an activity organized or authorized by a public authority for the purpose of satisfying a legitimate public interest*".

The specific principles applicable to public services are provided by the legislator in art. 580 of the Administrative Code as follows: "the establishment, organization and provision of public services are carried out according to the specific principles applicable to public services, namely: transparency, equal treatment, continuity, adaptability, accessibility, responsibility and provision of public services to quality standards[7].

The specific principles[8] applicable to public services are defined by the Administrative Code:

a) transparency principle represents the observance by the public administration authorities of the obligation to inform on the way of establishing the component activities and scopes, on the regulation, organization, functioning, financing, provision and evaluation of public services, as well as on the measures to protect users and the mechanisms used to settle claims and litigations.

b) principle of equal treatment in the provision of public services means the elimination of any discrimination against the beneficiaries of public services based, as the case may be, on ethnic or racial criteria, on religion, age, gender, sexual orientation, disability, as well as the application of identic rules, requirements and criteria for all authorities and bodies providing public services, including in the process of delegating public service.

c) in the provision of public services, public authorities, as well as public service providers shall be bound to ensure *continuity* (...).

d) adaptability principle. The authorities and public administration institutions shall be bound to meet the needs of the society in order to fulfill the scopes.

e) accessibility principle involves ensuring access to public services for all beneficiaries, especially to those services that meet their basic needs; accessibility requires taking into account, even from the substantiation phase of public service establishment, the aspects related to cost, availability, adaptation, proximity.

f) principle of responsibility for the provision of public service represents the existence of a public administration authority, the competence of which is to provide the public service, independent of its management and provision to the beneficiary[9].

g) principle of providing public services at a high-quality standard represents the establishing and monitoring of the quality indicators for each public service, throughout the term of the provision thereof. Public administration authorities shall be bound to meet quality and/or cost standards established for public services".

In what concerns *public service classification*, the following are referred to in the Administrative Code:

a) "services of general economic interest and services of general non-economic interest, depending on the content of the activity;

b) public services of national interest and public services of local interest, in terms of the territorial competence to meet public interest needs;

c) public services provided in an unitary manner, either by a public administration authority, or by a public service provider and public services provided by one or more public administration authorities or by one or more bodies providing public services, depending on the ways in which the service is provided".

The doctrine states that: "in the European legislation, public services are known as public services of general interest (SGI). These are services which the public authorities of the Member States consider to be of general interest and which are subject to specific public service obligations. This term refers to both economic activities, and to non-economic services[10]". "Non- economic services are not contemplated by the specific legislation of the European Union and do not fall under the scope of the rules on the domestic market and competition[11] provided by the Treaty of Lisbon[12]". In recent years, there has been a growing trend towards digitization targeted by the activity of public

[7] For a more detailed analysis of the principles of law, see E. Anghel, *General principles of law*, in LESIJ.JS XXIII no. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp. 364-370.

[8] For a more detailed analysis of the topic, see E.L. Cătană, *Drept administrativ*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2021, pp. 487-492.

[9] For other details on the topic, from another perspective: E. Anghel, *The responsibility principle*, article published in the proceedings of CKS-eBook 2015, pp. 120-130.

[10] V. Negruț, *Serviciul public. Proprietatea publică,* C.H. Beck Publishing House, Bucharest, 2020, pp. 9-10.

[11] For other details on this topic, see Cornelia Ene-Dinu, *The term of „Relevant Market", as element of dominant position, provided by art. 102 of Treaty on the functioning of the European Union*, în LESIJ Lex ET Scientia International Journal, no. XXVI, ISSN 1583-039X, eISSN 2066-1886. vol. 1/2019, pp. 77-83 or L. Lazăr, *Abuzul de poziție dominantă. Evoluții și persepective în dreptul european și național al concurenței,* C.H. Beck Publishing House, Bucharest, 2013, pp. 2 and the following.

[12] V. Negruț, *op. cit.*, 2020, p. 10.

authorities, such as the collection of taxes[13] and fees by electronic means.

2.2. Case study

Within the European Union[14], Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) no. 1024/2012[15] was adopted. This directive is also called the *Posting Directive* which provides the transposing rules in art. 9 para. (1)[16]: "Member States shall apply the respective provisions as of 2 February 2022".

Posting Directive was transposed into our national legislation by means of GO no. 12/2022 for the amendment and supplementation of certain normative acts in the field of road transport[17]. Furthermore, from public information, it appears that: "until 7 February 2022, the countries that have implemented *Posting Directive* are Belgium, Denmark, Finland, France, Slovakia, Norway (although it is not an EU Member State and Directive (EU) 2020/1057 is not applicable, the payment of minimum wage for certain transport operation applies), Romania[18]".

In this regard, we also mention Regulation (EU) no. 2020/1.055 of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC) no. 1071/2009, (EC) no. 1072/2009 and (EU) no. 1024/2012 with a view to adapting them to developments in the road transport sector[19]. We do not intend to detail the content of the European normative acts or the case-law of the CJEU[20] in the field of transport, but we consider to analyze the conditions on the *requirement of good repute*[21], respectively the administrative procedure on the loss of good repute, by noting how important is for the European legislator the good repute in the field of public services[22] in the sector of transport, but not only. Specifically, we refer to art. 6 of Regulation (EC) no.1.071/2009, as amended by Regulation (EU) 2020/1.055.

According to the national legal framework, in compliance with the European legislation, in order to fulfill the requirement of good repute, the transport undertaking and the transport manager shall comply with the following conditions (art. 14 of GO no. 12/2022):

"a. the transport undertaking and/or transport manager have not been convicted or sanctioned according to the provisions of art. 6 para. (1) of Regulation (EC) no. 1071/2009;

b. the transport undertaking and/or transport manager have lost good repute for serious infringements referred to in the 4th Appendix to Regulation (EC) no. 1071/2009 being declared unfit to manage transport activities according to art. 14 of Regulation (EC) no. 1071/2009 and rehabilitation has occurred".

Furthermore, "in the case referred to in para. (1) letter b), the transport undertaking and/or transport manager shall be considered rehabilitated after a period of at least one year as of the loss of good repute and only after the transport manager proves that it has passed an examination (…) to regain the certificate of professional competence". Unless and until a rehabilitation measure is taken "in accordance with the provisions of para. (2) the certificate of professional competence of the transport manager declared to be unfit, shall no longer be valid in any Member State".

GO no. 12/2022 provides that: "The body designated to issue the administrative procedure on the loss of good repute of the transport undertaking/manager referred to in art. 6 para. (2) of

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[13] For other details, see R. Ciobanu, Z. Varga, *Romanian and hungarian fiscal systems. Regulations and fiscal apparatus*, Transilvania University of Brașov. Bulletin. Series VII: Social Sciences, Law, 2020, pp. 307-317.

[14] For other details on this topic, see A. Fuerea, *Manualul Uniunii Europene*, 4th ed., revised and supplemented after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2010, pp. 13 and the following; L.-C. Spătaru – Negură, *Dreptul Uniunii Europene - o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, pp. 104 and the following.

[15] Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) no. 1.024/2012, published in OJEU of 31.07.2020, L249/17, available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32020L1057, visited on 19.02.2022.

[16] From another perspective, see M.-C. Cliza, L.-C. Spătaru-Negură, *Towards a Cleaner Planet – The Implementation of the Deposit Guarantee System in Romania*, in Perspectives of Law and Public Administration, vol. 10, no. 1/2021, pp. 54-64, online at http://www.adjuris.ro/revista/articole/an10nr1/5.%20Cliza,%20Spataru.pdf., visited on 19.02.2022.

[17] GO no. 12/2022 for the amendment and supplementation of certain normative acts in the field of road transport, published in Official Gazette of Romania no. 98 of 31 January 2022.

[18] Public information, available online at https://detasaretransport.ro/, visited on 19.02.2022.

[19] Regulation (EU) no. 2020/1055 of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC) no. 1071/2009, (EC) no. 1072/2009 and (EU) no. 1024/2012 with a view to adapting them to developments in the road transport sector, published in OJEU of 31.07.2020, L 249/17, available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32020R1055, visited on 19.02.2022.

[20] For further details on the topic: A.M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2020, pp. 71-82.

[21] From another perspective of good repute analysis, see I. Muraru (coord.), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, pp. 159-160.

[22] Regarding public services prior to current regulations, see Roxana-Mariana Popescu, *Serviciile de interes general. Scurte considerații*, Annals of the University, Law series, Pro Universitaria Publishing House, 2006, pp. 135-142.

Regulation (EC) no. 1071/2009 shall be I.S.C.T.R. (State Inspectorate for Road Transport Control)". This administrative procedure shall be approved by order of the Minister of Transport and Infrastructure, by taking into account at least the following: "a check performed at the premises of the undertaking and the assessment of the sanctions applied to the transport undertaking/manager".

Therefore, this procedure on the loss of good repute of the transport undertaking/transport manager is approved by means of an administrative act[23] of the line ministry, respectively Order of Minister. Furthermore, the French doctrine showed that "*the unilateral administrative act* is an act, taken either by an administrative authority, in the exercise of public power prerogatives, or by a private person who has been entrusted with the execution of a public service within the mission the person in question is invested with"[24]. The normative act referred to in by the legislator is Order of the Minister of Transport and Infrastructure no. 980/2011 approving the Methodological Norms on the application of the provisions regarding the organization and performance of road transports and their related activities established by Government Ordinance no 27/2011 on road transport[25].

The Methodological Norms (…) provide the following in art.12: "following the application of the administrative procedure, I.S.C.T.R. shall draw up a report motivating the decision to withdraw the good repute or the failure to do so". Finally, "the administrative procedure shall be deemed completed after the report has been signed by the Chief State Inspector, after the report has been registered and after all the entries on good repute have been completed in the national electronic register of road transport operators" (art. 13 of the Norms).

3. Conclusions

We consider the proposed objective of the paperwork achieved, more precisely that of presenting the current legal framework applicable to public services and we hereby refer to the Administrative Code which dedicates several articles to this topic in the 4th Part – *The Prefect, the Prefect's Institution and Deconcentrated Public Services* and in the 8th Part – *Public Services*. Therefore, this topic was presented in a personal manner, by detailing specific aspects in the field of road transport, such as the administrative procedure on the loss of good repute, in accordance with the European legislation. On this occasion, we noted that our country transposed Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020, also known as the *Posting Directive*, by adopting Government Ordinance no. 12/2022.

In conclusion, as evidenced by the documentation of the topic, the body designated to issue the administrative procedure on the loss of good repute of the transport undertaking/ manager referred to in art. 6 para. (2) of Regulation (EC) no. 1071/2009 is I.S.C.T.R. and the line ministry approves it by means of order. The topic remains open for analysis in future research on public services, from the jurisprudential perspective and maybe, in the not-too-distant future, the legislator will also adopt the Code of administrative procedure[26] which will complete the legal framework applicable to public administration.

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[24] C. Debbasch, J.C. Ricci, *Contentieux administratif*, Precis Publishing House, Paris, 2000, p. 107 *apud* I. Lazăr, *Jurisdicții administrative în materie financiară*, Universul Juridic Publishing House, Bucharest, 2011, p. 83.

[25] Order of the Minister of Transport and Infrastructure no. 980/2011 approving the Methodological Norms on the application of the provisions regarding the organization and performance of road transports and their related activities established by GO no 27/2011 on road transport, published in Official Gazette of Romania no. 854 of 2.12.2011, with the latest amendment by Order no. 1049/2021 of the Minister of Transport and Infrastructure (…), published in Official Gazette of Romania no. 776 of 11 August 2021.

[26] For further information, see I. Nedelcu, *Considerații privind necesitatea adoptării unui Cod de procedură administrativă cu trimiteri la instituții juridice civile*, in Revista de Științe Juridice no. 2/2006, Craiova, p. 116.

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THE AGREEMENT FOR THE CONCESSION OF PUBLIC ASSETS IN THE LIGHT OF THE ADMINISTRATIVE CODE

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Abstract

As of 5 July 2019, the content of the essential normative act in the field of public administration in our country, namely the Administrative Code has been regulated the legal regime of the public and private property of the state and of the administrative and territorial divisions. From this point of view, this paperwork aims to provide an overview on this topic as a result of the amendment of the legislation in this regard, without going into detail on the doctrinal disputes which emerged after the adoption of the Administrative Code. In this respect, the article will analyze one of the ways to exercise public property right on which we will focus, namely the concession of public assets, given that the Administrative Code repealed a normative act that regulated precisely this matter. From this perspective, the proposed topic is of interest and it is important for both legal theorists and legal practitioners who want to be informed on this topic.

Therefore, the main scope of this paperwork is to provide additional information on the normative regulation in the Administrative Code of the legal regime of the public property of the state and of the administrative and territorial divisions.

At the end of the paperwork, we will draw the conclusions emerged following the analysis of the current legislative framework on the proposed topic.

Keywords: *Constitution, public property, Administrative Code, public assets concession, directive.*

1. Introduction

According to the case law of the Constitutional Court: "in order for the constitutional provisions to be effective, the legislator regulated a distinct legal regime of the assets contemplated by the public property of the state and of the administrative and territorial divisions"[1]. From this perspective, the object of regulation of the Administrative Code[2] is worded in the content of art. 1 as follows:

Para. (1): "*regulates the general framework for the organization and functioning of the authorities and institutions of public administration*[3]*, the statute of their personnel, administrative liability, public services, as well as certain specific rules on the public and private property of the state and of the administrative and territorial divisions*" and

Para. (2): "*This Code shall be supplemented by Law no. 287/2009 on the Civil Code*[4]*, republished, as further amended and by other common law regulations applicable in this field*".

The doctrine condemns[5] the fact that same matter is regulated by both the Civil and Administrative Code, but we will debate neither this subject, nor the issues[6] on the unconstitutionality[7] of this normative act. The two sections of the paperwork will detail how the Administrative Code regulates public and private property of the state, by operating a selection of the most important articles in the content of this normative act and by using research methods for law[8]. By way of

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[1] CCR Decision no. 384/2019, published in Official Gazette of Romania no. 499 of 20 June 2019.

[2] GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 555 of 5 July 2019, with latest amendments by GEO no. 1/2022 for the amendment and supplementation of GEO no. 121/2021 on the establishment of measures at the level of the central public administration and for the amendment and supplementation of some normative acts, as well as for the amendment of GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 41 of 13 January 2022.

[3] R. M. Popescu, *Jurisprudența CJUE on the term of "public administration" used in art. 45 par. (4) TFUE,* in the proceedings of CKS e-book 2017, pp. 528-532.

[4] Law no. 287/2009 on the Civil Code, published in Official Gazette of Romania no. 511 of 24 July 2009, republished in Official Gazette of Romania no. 505 of 15 July 2011, with latest amendments by Law no. 17/2017 (…), published in Official Gazette of Romania no. 196 of 21 March 2017.

[5] D. Apostol Tofan, *Tezele prealabile ale proiectului Codului administrativ. Proiectul Codului administrativ, Câteva reflecții,* in CJ no. 11/2016, p. 601 *apud* V. Vedinaș, *Codul administrativ adnotat. Noutăți. Examinare comparativă. Note explicative,* 2nd ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 224.

[6] On the first control of the constitutionality of laws in Romania, see C. Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, pp. 265-266.

[7] More details on the exception of unconstitutionality in Barbu S.-G., A. Muraru A., V. Bărbățeanu V., *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021, pp. 74-106.

[8] On the research methods for law, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014, pp. 14-18.

legal construction[9], the end of the paperwork will consist of the conclusions drawn up following the performance of this analysis.

2. Paperwork content

2.1. Regulation of Public and Private Property of the State and of the Administrative and Territorial Divisions in the Administrative Code

The Administrative Code regulates public and private property of the state in Part V – with marginal name "*Specific rules on the public and private property of the state and of the administrative and territorial divisions"*. This consists of two titles, as follows: Title I – *Exercising the right of public property of the state or of the administrative and territorial divisions* and Title II - *Exercising the right of private property of the state or of the administrative and territorial divisions*.

As we have shown on other occasion, "the adoption of the Administrative Code meant the repeal of Law no. 213/1998 on the legal regime of public property (with the exception of art. 6[10]), however, this normative act failed to clarify the issue of the regulation of this matter, given that this has already been provided by the new Civil Code[11]".

The Administrative Code provides, on the one hand, the assets that make up the *public domain* of the state or of the administrative and territorial divisions and, on the other hand, the assets that make up the *private domain* of the state or of the administrative and territorial divisions. Therefore, in respect of the public domain, art. 286 para. (1) shall read as follows: "the public domain of the state or of the administrative and territorial divisions is made up of the assets referred to in art. 136 para. (3) of the Constitution, of those referred to in appendices 2-4 and of any other assets which, according to the law or by their nature are of public use or interest and are acquired by the state or by the administrative and territorial divisions by one of the means provided by the law".

In what concerns private domain, art. 354 shall read as follows: "it is made up of assets that are owned by them and that are not part of the public domain. The state and the administrative and territorial divisions shall have private property rights over these assets", and art. 355 provides the following: "the assets that are part of the private domain of state and of the administrative and territorial divisions are in the civil circuit and shall be subject to the rules provided by Law no. 287/2009 republished, as further amended and supplemented, unless the law provides otherwise".

Another aspect regulated by the Administrative Code refers to the *specific principles[12] of the public property right*. These are regulated by art. 285: "Public property right of the state or of the administrative and territorial units shall be exercised under the observance of the following principles:

a) the principle of public interest priority;

b) the principle of protection and conservation

c) the principle of efficient management;

d) the principle of transparency and publicity".

One of the most important provisions of the Administrative Code on the public property of the state and of the administrative and territorial divisions refers to the regulations of the *means to exercise public property right*. Specifically, they are nominated as such in the content of art. 297 para. (1):

„a) contracting out;

b) concession;

c) lease;

d) gratuitous use".

The previous legislation, now repealed, namely Law no. 213/1998, established "the following means to acquire public property right in art. 7:

a) by natural means, meaning movable and immovable accession;

b) by public procurement performed under the law;

c) by expropriation for reasons of public utility;

d) by donations or legacies accepted by the Government, the county council or the local council, as the case may be, if the respective asset falls under the public domain; by transferring an asset from the private domain of the state into the public domain thereof or from the private domain of an administrative and territorial division, into the public domain thereof, under the terms of the law;

e) by other means provided by the law"[13].

Furthermore, the Administrative Code is also concerned to determine which *entities exercise the right*

[9] Other details on the construction of the legal norm in M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp. 167-187 or N. Popa (coord.), E. Anghel, C. Ene - Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202.

[10] D. Apostol Tofan, *Drept administrativ*, vol. II, 5th ed., C.H. Beck Publishing House, Bucharest, 2020, p. 230: "Almost 8 years late, the Administrative Code had its revenge, by taking over and developing under the dynamics of the activity of the public administration authorities, the provisions remaining in force of Law no. 213/1998, expressly repealed by art. 597 par. (2), except art. 6 (...)", *apud* E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, p. 253.

[11] E.E. Ștefan, *Drept administrativ, op. cit.*, 2022, pp. 252-253.

[12] On the principles of law, see E. Anghel, *General principles of law*, in LESIJ.JS XXIII no. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp. 364-370.

[13] V. Negruț, *Drept administrativ, Serviciul public Proprietatea publică*, C.H. Beck Publishing House, Bucharest, 2020, pp. 59-60, *apud* E.E. Ștefan, *Drept administrativ, op. cit.*, 2022, p. 259.

of public property of the state or of the administrative and territorial divisions. In this respect, we indicate art. 287: "The exercise of the right of public property of the state or of the administrative and territorial divisions, except for the representation before the court of the Romanian state by the Ministry of Public Finance[14] in connection with the legal relations regarding property shall be carried out by the following bodies:

a) Government, by means of the line ministers or by the specialized bodies of the central public administration subordinated to the Government or to the line ministers, as the case may be, for the assets belonging to the public domain of the state;

b) Deliberative authorities of the local public administration, for the assets belonging to the public domain of the administrative and territorial divisions".

We do not intend to detail within this paperwork all the means of exercising public property right, but only concession. The legislator has dedicated a distinct number of articles to each of these means, as follows: contracting out (art. 298-301), concession (art. 302-331), lease (art. 332-348), gratuitous use (art. 349-353).

2.2. The Agreement for the Concession of Public Assets in the Light of the Administrative Code

The adoption by the legislator of the Administrative Code also meant the modification of the legal framework applicable to the legal regime of the agreements for the concession of assets. In this respect, we note that the national legislation is aware of the *concessions of public assets* which the Administrative Code is applicable on, as detailed in this section. Furthermore, the legal framework in this matter is also established by the Constitution[15] but also by the Civil Code. Prior to 5 July 2019, the date of the publication of the Administrative Code in the Official Gazette, the agreement for the concession of public assets was subject to the provisions of GEO no. 54/2006 on the agreement for the concession[16] of public assets[17], normative act repealed by the Administrative Code. It was pointed out on other occasion that the amendment of the national legislation was required by the fact that "the unification of the legislation in this field was started at the European level, three Directives which were to be transposed being adopted[18]: Directive 2014/23/EU on the award of concession contracts[19]; Directive 2014/24/EU on public procurement[20]; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[21] and therefore national legislation has been harmonized with European legislation[22]". At this point in time, we prefer not to further develop European Union legislation[23] in this field.

The legislation also provides on the concession of services[24] or works, but they are subject to Law no. 100/2016 on the concessions of works and services[25] and not to the Administrative Code.

The concession[26] of public assets is developed in the 3rd Section – The concession of public assets of the 3rd Chapter – The means to exercise the right of public property of the state or of the administrative and territorial divisions, of Title I – The exercise of the right of public property of the state or of the administrative and territorial divisions, of Part V – Specific rules on the public and private property of the state or of the administrative and territorial divisions.

The Administrative Code defines the agreement for the concession of public assets in art. 303 par. (2): "the agreement for the concession of public assets is the agreement concluded in writing whereby a public authority, called concession provider, transfers the right and obligation to exploit a public property, on a fixed-term, to another person called concession holder, who

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[14] An analysis from another perspective in R. Ciobanu, Z. Varga, *Romanian and hungarian fiscal systems. Regulations and fiscal apparatus*, Transilvania University of Braşov. Bulletin. Series VII: Social Sciences, Law, 2020, pp. 307-317.

[15] Art. 136 para. (4) of the Constitution.

[16] On the agreement for the concession of public assets under prior legislation, see M.C. Cliza, *Drept administrativ Partea a II*-a, Universul Juridic Publishing House, Bucharest, 2012, pp. 210-214.

[17] GEO no. 54/2006 on the regime of the agreements for the concession of public assets, published in Official Gazette of Romania no. 569 of 30 June 2006(...), currently *repealed*.

[18] On transposition, from another perspective, see M-C. Cliza, L-C. Spătaru-Negură, *Towards a Cleaner Planet – The Implementation of the Deposit Guarantee System in Romania*, in Perspectives of Law and Public Administration, vol. 10, no. 1/2021, pp. 54-64, online at http://www.adjuris.ro/revista/articole/an10nr1/5.%20Cliza,%20Spataru.pdf., visited on 19.02.2022.

[19] Available online at: http://eur-lex. europa. eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0023, visited on 1 February 2016.

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[22] E.E. Ștefan, *Drept administrativ, op. cit*., 2022, pp. 92-93.

[23] For other details, see A. Fuerea, *Manualul Uniunii Europene*, 4th ed., revised and supplemented after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2010, pp. 13 and the following; A-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, p. 290 or L-C. Spătaru-Negură, *Dreptul Uniunii Europene ... o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, pp. 104-100.

[24] In what concerns public services prior to current regulations, see Roxana-Mariana Popescu, *Serviciile de interes general. Scurte consideraţii*, Annals of the University, Law Series, Pro Universitaria Publishing House, 2006, pp. 135-142.

[25] Law no. 100/2016 on the concessions of works and services, published in Official Gazette of Romania no. 393 of 23 May 2016, with latest amendment by GO no. 3/2021 for the amendment and supplementation of some normative acts in the field of public procurement, published in Official Gazette of Romania no. 821 of 27 August 2021.

[26] Other details on the topic in E.L. Cătană, *Drept administrativ*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2021, pp. 455-460.

acts at his own risk and responsibility, in exchange for a royalty".

In what concerns the price of the concession, this is called royalty, while the contracting parties are: the concession provider[27] and the concession holder. The Administrative Code provides in art. 311 the principles underlying the awarding of the agreements for the concession of public assets: "transparency, equal treatment, proportionality, non-discrimination and free competition".

The Administrative Code regulates two procedures for the awarding of the agreements for the concession of public assets: concession by public tender and concession by direct awarding. The documents on which the normative act provides are the preliminary study and the tender book. In this respect, the Administrative Code provides for example, that: "the concession initiative must be based on the performance of a preliminary study (...)" or "the tender book must include at least the following elements: general information on the scope of concession; general terms of concession; validity conditions that the tenders must fulfill; clauses on the termination of the agreement for the concession of public assets".

In what concerns the criteria for the awarding of the agreement for the concession of public assets, these are expressly regulated: "the highest level of royalty; economic and financial capacity of the tenderers; environmental protection; specific conditions imposed by the nature of the leased asset".

The Administrative Code provides as follows: "the term of the agreement for the concession of public assets shall not exceed 49 years, as of the date of its execution" however: "concessions which exceed 49 years can be established by special laws". Furthermore, the normative act established: "The agreement for the concession of public assets must include the regulatory part, which consists of the clauses referred to in the tender book and the clauses agreed by the contracting parties, in the supplementation of those in the tender book, without contravening the scopes of the concession provided in the tender book". At the same time: "the contractual relations between the succession provider and the succession holder shall be based on the principle of the financial balance of the concession between the rights granted to the concession holder and the obligations incumbent on it".

The last aspect to mention herein refers to litigations, regulated in art. 330: "the settlement of the litigations occurred in connection with the awarding, conclusion, execution, amendment and termination of the concession agreement, as well as those on damages shall be performed under the legislation on the contentious administrative[28]". Given this perspective, from the philosophy of Law no. 554/2004 on the contentious administrative, art. 2 lit. c^1) we note the following: **"**the agreements concluded by public authorities having as scope the improvement of public assets, the execution of public interest works, the provision of public services, public procurement shall be assimilated to administrative acts, for the purpose of this law; other categories of administrative agreements can be provided by special laws". In what concerns litigations, according to art. 8 para. (2) of Law no. 554/2005, we note that: "The court of contentious administrative shall have the jurisdiction to settle:

a) litigations that occur in the phases preceding the conclusion of an administrative agreement;

b) any litigation related to the conclusion of an administrative agreement;

c) litigations having as scope the annulment of an administrative agreement" while: "Civil courts of common law shall have jurisdiction to settle litigations arising from the execution of administrative agreements".

Therefore, the agreement for the concession of public assets is an administrative agreement[29], as follows from the above.

3. Conclusions

The Administrative Code currently regulates the legal regime of the public and private property of the state and of the administrative and territorial divisions. In this respect, we consider that the scope of this paperwork to present an overview of this matter has been fulfilled. In this way, on the one hand, we noted that the normative act dedicated to the topic in question Part V – with marginal name "*Specific rules on the public and private property of the state and of the administrative and territorial divisions"*, on the one hand. On the other hand, the concession of public assets is detailed in the Administrative Code in art. 302-331.

Following the analysis performed herein, the agreement for the concession of public assets is an administrative agreement with all the consequences arising from this legal qualification. Therefore, the competence to settle the litigations in this matter is the one granted by the legislation of the contentious

[27] For further details on public authorities of Romania, see M.C. Cliza, C.C. Ulariu, *Drept administrativ. Ediție revizuită conform modificărilor Codului administrativ*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 7-22.

[28] Other details in E. Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in CKS - eBook 2013, pp. 477-483, available online at: http://cks.univnt.ro/cks2013/CKS2013Articles.html, visited on 10.03.2022.

[29] Further details on administrative agreements in C.S. Săraru, *Contractele administrative. Reglementare, doctrină, jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009, pp. 7-314.

administrative. The research on this matter remains open for a future analysis in terms of the case law[30].

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[30] For details on the role of the case law in international law, in general, see: R.-M. Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 41.

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LEGAL DISCUSSIONS REGARDING DIGITAL ENTRY FORM IN ROMANIA

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Abstract

In the current pandemic context, in which modern society is being challenged not only from a socio-medical point of view, but also from a moral and legal perspective, legislators across the world have been confronted with the fact of identifying a series legislative, concrete and coherent solutions, in order to limit the transmission of SARS-CoV virus 2.

From this perspective, it is clear that legislative solutions have been both dissipated as an overview and insufficiently analyzed and publicly debated, arousing a wave of controversy and impugnment around the world, an issue that could cause serious concern in the legal world and to really question the citizens' trust in the judicial and constitutional litigation system, which are those designed to resolve legislative inconsistencies, with a direct transposition in the way of resolving various administrative cases before the courts.

The situation is not at all special in Romania, which has adopted during the pandemic a series of normative acts that raised a multitude of legal interpretation issues.

In this regard, we recall the fact that, on several occasions, the Romanian Constitutional Court has declared unconstitutional the legislative approach of the national authorities, just as the courts have invalidated a series of unilateral administrative acts, with normative character.

The GEO no. 129/2021 on the implementation of the digital entry form in Romania also provided heated discussions in the legal field as well as an endless wave of criticism from the recipients of this normative act, which requires a detailed analysis of the issues related to the adoption of this normative act.

Keywords: *pandemic, digital form, procedure, unconstitutionality, predictability, accessibility.*

1. Introduction

The requirement to respect and safeguard public security, the health of citizens and the economic stability of the Member States of the European Union has required legislative and organizational measures, including medical measures, traffic control measures, measures to immunize citizens, to enforce restrictive and coercive measures, unprecedented until now, at least after the Second World War.

The virulence with which this pandemic has hit Europe, as well as the rest of the world, has alerted lawmakers in EU member states in a desperate attempt to find legal, socio-political and coercive instruments to control, within the limits of reasonableness and of endurance, the effects of the SARS-CoV2 pandemic.

Given the non-unitary national practice manifested by the legislative systems of the EU Member States, as well as the urgent need for a unified approach on their part to address the necessary and useful measures to control the pandemic evolution, with the natural consequence of ensuring the necessary means of verifying and easily identifying the flow of passengers, nationals of Member States, within the European space, the European Commission has agreed to adopt a secondary regulatory act regulating this extremely sensitive and volatile area, such as the process of controlling the spread of the COVID pandemic.

2. The european regulatory framework

In this regard, the European Commission adopted Implementing Decision (EU) 2021/858 of 27 May 2021 amending Implementing Decision (EU) 2017/253 as regards alerts triggered by serious cross-border threats to health and in order to detect the contacts of passengers identified by passenger location forms, document which comes in support of the national authorities, in order to issue legal proceedings and to state the concrete forms of control of the movement of citizens within the European Union.

But this inevitably implies a restriction on the fundamental right of EU citizens to free movement, as enshrined in art. 3 (2) of the Treaty on European Union (TEU) and, in application of this primary regulatory act, by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

This is also acknowledged by the European institutions, which have pointed out that, "*although the Schengen area is generally regarded as one of the main achievements of the European Union, its existence has recently been jeopardized by the COVID-19 pandemic,*

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as Member States closed borders to control the spread of the virus before the EU digital certificate on COVID was introduced in July 2021. Prior to the pandemic, the main challenges were the considerable influx of refugees and migrants into the EU, as well as terrorist attacks"[1].

However, although the exercise of the right to free movement is an essential dimension and a determining factor in the birth of the European Union, it cannot be exercised by the recipients in a discretionary and unlimited manner.

Thus, by the provisions of art. 45 para. 3 and para. 4, related to those of art. 51 and art. 62 of the Treaty on the Functioning of the European Union (TFEU) imposed a series of limitations or obligations related to the right to free movement of citizens, perfectly compatible with the raison d'être of this fundamental right[2].

In objectifying this idea of reasonable and, at the same time, regulated limits of exercise of the right to free movement, which allows for the adoption of vigorous measures in pandemic situations, paragraph 1 of the Preamble to Commission Implementing Decision (EU) 2021/858 of 27 May 2021, shows that *„The identification of a positive case of COVID-19 following a particular cross-border route fulfills the criteria set out in Article 9 (1) of Decision no. 1082/2013/EU, as it may continue to cause a significant mortality rate in humans, may increase rapidly in magnitude, affect several Member States and may require a coordinated response at Union level. In accordance with point 23 of Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to restricting free movement in response to the COVID-19 pandemic, information on COVID-19 cases detected upon arrival of a person in the territory of a Member State Member State should be notified without delay to the public health authorities of the countries in which the person concerned has been located during the previous 14 days, in order to trace contact, using the Early Warning and Rapid Response System (SAPR) established by Article 8 of Decision no. 1082/2013 / EU and operated by the European Center for Disease Prevention and Control ("ECDC") ".*

According to art. 1 (a) of the Commission Decision, the passenger location form means "*a completed form at the request of the public health authorities which collects at least the passenger data specified in Annex I and which supports those authorities in managing an event. public health, enabling them to detect cross-border passengers who may have been exposed to a person infected with SARS-CoV-2 ".*

Annex I to this Decision mentions the concrete content of the form.

3. Internal rule for implementing the Commission Decision

Commission Implementing Decision (EU) 2021/858 of 27 May 2021 has been translated into national law by the GEO no. 129/2021 on the implementation of the digital entry form in Romania, a normative provision that does not lack imperfections and that gave rise to a series of discussions in the field literature.

However, the inconsistency of the Romanian law giver in the matter of measures to limit and control the SARS-CoV 2 Pandemic has a long history, there are often solutions to criticize the normative provisions issued by the Romanian authorities.

An example in this sense is provided by the Decision of the National Committee for Emergency Situations no. 28/14.05.2021, approving the list and classification of countries / territories of epidemiological risk in order to establish the persons on whom the measure of quarantine of 14 days is established regarding those who arrive in Romania from them, as well as the Decision of the National Committee for Situations Emergency no. 40/17.06.2021, which approved the classification of countries / territories according to the cumulative incidence rate, in order to establish the persons arriving in Romania from them and regarding which the quarantine measure is established, provided in the annex to the decision.

Invested with an action in administrative disputes regarding the validity of these administrative acts, the court was put in the situation of analyzing the sanction that intervenes in case of non-publication in the Official Gazette of Romania of normative administrative acts, that of "non-existence" of the normative act, and not that of its "nullity / illegality".

Taking advantage of the doctrinal opinions particularly grounded and relevant issued in this matter[3], the court found the non-existence of art. 1 of HCNSU no. 40/2021 and the related annexes, as well

[1] https://www.europarl.europa.eu/factsheets/ro/sheet/147/libera-circulatie-a-persoanelor, in the form of 25.01.2022.

[2] See the CJEU decision in Lawrie-Blum v. Land Baden-Württemberg case, 66/85 of 03.07.1986, and Reyners, 2/74 (rec. 1974, p. 631).

[3] Marta Claudia Cliza, Constantin Claudiu Ulariu, *Drept administrativ,* Pro Universitaria Publishing House, Bucharest, 2021, pp. 274 et. seq.; Tudor Drăganu, *Actele de drept administrativ*, Ştiinţifică Publishing House, Bucharest, 1959, p. 151; Ch. Eisenmann, *Cours de droit administratif,* tome II, L.G.D.J., Paris, 1983, pp. 73 et seq.; Rodica Narcisa Petrescu, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2004, p. 346; Antonie Iorgovan, *Tratat de drept administrativ,* vol. II, All Beck Publishing House, Bucharest, 2002, p. 327; V. Vedinaş, *Drept administrativ şi instituţii politico-administrative, manual practic,* Lumina Lex Publishing House, Bucharest, 2002, p. 121.

as the non-existence of HCNSU no. 28/2021 and its annexes[4].

Also, the CCR found that the provisions of art. 72 para. (2) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, with reference to art. 42 para. (3) of the Government Emergency Ordinance no. 21/2004 regarding the National Emergency Management System, as well as the legislative solution from art. 72 para. (1) of Law no. 55/2020, according to which the provisions of this law are supplemented with the common law regulations applicable in the matter regarding the settlement of actions filed against Government decisions establishing, prolonging or terminating the state of alert, as well as orders and instructions which establishes the application of measures during the state of alert, are unconstitutional.

According to art. 2 para. 4 of the GEO no. 129/2021, "*the form is completed individually, in digital format, by each person who enters the territory of Romania under the conditions provided in art. 1 para. (1), and for persons who present themselves at border crossing points without holding a form, they have the obligation to complete the form within 24 hours of entering the country "*, and according to art. 4 of the same normative act, "*Failure by the person entering the territory of Romania of the obligation to complete the Digital Form of entry into Romania within 24 hours of entering the country constitutes a contravention and is sanctioned with a fine from 2,000 lei to 3,000 lei. The finding of the contraventions and the application of the sanctions provided in par. (1) is carried out, based on the data and information provided by SII-FDIR, by the personnel from the county public health directorates or from the Bucharest municipality, empowered to carry out state sanitary inspection activities. The provisions of Government Ordinance no. 2/2001 regarding the legal regime of contraventions, approved with modifications and completions by Law no. 180/2002, with subsequent amendments and completions re applicable to the contravention from para. (1).*"

Finally, according to art. 5 of the mentioned normative act, "*this emergency ordinance enters into force on the date of publication in the Official Gazette of Romania, Part I, except for the provisions of art. 4 para. (1), which shall enter into force within 10 days from its publication in the Official Gazette of Romania"*.

Regarding the limitation of the right to free movement of Romanian citizens through this emergency ordinance, the constitutionality of this approach is questioned in relation to the provisions of art. 53 para. 1 of the Constitution, according to which "*the exercise of certain rights or freedoms may be restricted only by law ... "*.

In this regard, as rightly noted in the doctrine, the Constitutional Court has shown an undesirable inconsistency, especially with regard to the package of laws on restrictive measures caused by the COVID 19 pandemic.

Thus, it was shown that if by "*Decision no. 150 / 12.03.2020, published in the Official Gazette of Romania no. 215 / 17.03.2020, we would have been tempted to conclude that, finally, CCR has ended its jurisprudential inconsistencies in the matter and ruled for the future in a definitive way, giving a coherent interpretation disp. art. 115 para. (6) of the Constitution, namely this rule does not allow emergency ordinances to be adopted in the field of constitutional law (...) however, by Decision no. 152/6 May 2020, published in the Official Gazette of Romania no. 387/13 May 2020, as well as by the decision pronounced on May 13 [3] regarding the exception of unconstitutionality of GEO no. 21/2004 on the National Emergency Management System [4], CCR returns to its previous jurisprudence, which is also non-unitary, according to which the restriction of the exercise of fundamental rights / freedoms can only be achieved by law, within the meaning of art. 61 para. (4) of the Constitution, and not by emergency ordinances "*[5].

Regarding the way of regulating the obligation of Romanian citizens entering the country from abroad, to fill in the form individually, in digital format, and for the persons who present themselves at the border crossing points without holding a form, they have the obligation to complete the form within a maximum of 24 hours from the entry into the country, as well as the sanction for non-fulfillment of this obligation, these seem reasonable, at first sight.

But provided that the mentioned normative act entered into force, a series of problems of accessibility and its predictability arise, as a fundamental pillar of the right to a fair trial regulated by art. 6 para. 1 of the ECHR.

It is true that, pursuant to art. 4 para. 2 of GO no. 2/2001, by derogation from paragraph 1 of the same article, in urgent cases it may be stipulated the entry into force of the contravention law within a period of

[4] Bucharest Court of Appeal, Section IX Cont. adm. and fisc., sent. no. 1076 / 1 July 2021, published in the Official Gazette of Romania no. 805 of August 23, 2021, available on the website http://legislatie.just.ro/Public/DetaliiDocument/245450, in the form of 25.01.2022.

[5] Lidia Barac, *Inconsecvențe jurisprudențiale relative la posibilitatea restrângerii exercițiului unor drepturi sau libertăți fundamentale. Problematica limitării exercițiului unor drepturi și libertăți fundamentale în contextul instituirii stării de urgență sau a stării de alertă*, https://www.juridice.ro/683898/inconsecvente-jurisprudentiale-relative-la-posibilitatea-restrangerii-exercitiului-unor-drepturi-sau-libertati-fundamentale-problematica-limitarii-exercitiului-unor-drepturi-si-libertati-fundamentale.html, in the form of 25.01.2022.

less than 30 days, but not less than 10 days and that by art. 5 of GEO no. 129/2021 it was stipulated that *„This emergency ordinance enters into force on the date of publication in the Official Gazette of Romania, Part I, except for the provisions of art. 4 para. (1), which shall enter into force within 10 days from its publication in the Official Gazette of Romania "*, however, by the specific way in which this last normative act came into force, the Romanian citizens who spent their winter holidays abroad could be deprived of the real and effective possibility to get acquainted with the legal obligation to complete the Digital Entry Form in Romania within 24 hours of entering the country.

Thus, in the conditions in which a citizen was abroad at the date of entry into force of this normative act, not having access to an internet source, corroborated with the fact that the entry into force coincided with the legal winter holidays, as well as taking into account the fact that the Romanian authorities have not taken any concrete steps to publicize this obligation to complete the form, it is obvious that the art. 4 para. 2 of GO no. 2/2001 does not benefit, in this case, from the requirements of accessibility and predictability, which attracts the nullity of the ascertaining act, lacking the requirement of the legal element from the constitutive structure of the contravention.

Regarding the contravention consisting in the fact that the person did not fill in the form within the legal term, we point out that, in the hypothesis iterated above, the Romanian citizen may be in real and effective impossibility to proceed in the sense specified by law, provided that on the date of entry into the country, he did not find on the Ministry of Foreign Affairs website any information regarding such an obligation incumbent on him, namely to complete the Digital Entry Form in Romania within 24 hours of entering the country.

4. Conclusions

From the summary normative ensemble, but full of significant legal elements, including those regarding a rather severe sanctioning regime, of the GEO no. 129/2021, we note that, in the circumstance in which the legal norms of this ordinance were not in any way publicized, corroborated with the fact that the entry into force of this legal norm, regarding the contravention sanction provided by art. 4 para. 1, was made on 25.12.2022, on Christmas day, taking into account the fact that this ordinance was not published on the website of the Ministry of Foreign Affairs, serious questions can be raised about the effective accessibility of a citizen who was abroad during this period of legal holidays and predictability, from the perspective of the mandatory conduct prescribed by law, of the GEO no. 129/2021.

This inconsistency or negligence on the part of the legislator is likely to lead to burdening the courts with a series of misdemeanor complaints against the sanctioning acts drawn up by the authorities and concerning those who did not complete the form in the first days of the new year.

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- See the CJEU decision in Lawrie-Blum v. Land Baden-Württemberg case, 66/85 of 03.07.1986, and Reyners, 2/74 (rec. 1974).

THE DEFENSE OF CONSUMER INTERESTS, DUE TO THE F.S.A. DECISION NO. 1148/17.09.2021

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Abstract

The Romanian insurance market is an extremely complex area of legal regulation, which involves not only compliance with the principle of fair competition between professional competitors, competitors on the market, but especially compliance with high standards of consumer protection, which are clearly inferior , from a financial, informational and organizational point of view, compared to the compulsory civil insurance policyholders.

From this perspective, the withdrawal of the operating license and the initiation of bankruptcy proceedings against the Insurance-Reinsurance Company City Insurance - S.A. raises a number of major problems for the customers of this insurer, not only in terms of the contractual relations established by the insurance contract, but especially by the procedural way of action by these consumers, so that the protection of their rights is full, and that the effects of the opening of bankruptcy proceedings against City Insurance be mitigated, as far as possible, in relation to the already precarious situation of these clients.

Through this study, we intend to highlight a series of stringent legal issues and to propose a series of answers to legal, substantial or procedural issues arising from the withdrawal of the authorization of this important player on the Romanian insurance market.

Thus, those entitled to recover the expenses occasioned by the repair of the cars involved in road accidents caused by the clients of City Insurance - S.A. have the way open to a special and expedited procedure for recovering such damages, without waiting for the opening of bankruptcy proceedings against this insurer and registration in the credal mass, extremely laborious legal proceedings and time-consuming, which raises problems for consumers who are victims of traffic accidents, but also for the clients of the insurance company, which could be involved in legal actions meant to lead to the compensation of those injured in road accidents and which could endanger their personal patrimony, although they appear as contracting parties and beneficiaries of MTPL insurance policies perfectly valid on the date of causing the damage.

Keywords: *insurance, liability, consumers, Insured Guarantee Fund.*

1. Introduction

Insurance reports are not an innovation of the modern era, but have their origins in ancient times, when the need to guarantee certain activities or actions required, in incipient forms, the establishment of a series of preventive and predictive measures, which were materialized in real insurance agreements.

Therefore, the shaping of the idea of insurance is practically concomitant with the emergence of the monetary system, when in order to guarantee the liquidity and fluency of financial transactions, mankind has resorted to the system of insurance conventions.

As the saying goes, rightly so, "*The emergence of the first forms of insurance took place in close connection with the development of maritime powers. The Babylonians were the first to legislate and regulate the insurance status in the famous Hammurabi Code. Thus, merchants traveling on water had the opportunity to receive a loan to finance their transportation. In order to ensure their transport, they could pay an additional amount to the creditors, which assured them that, in case the freight transport had been stolen, the merchants would no longer have to repay the creditor's loan. It can therefore be stated that the first statutory insurance was the one against theft* "[1].

Therefore, right in the early days of mankind, the first forms of concretization of the legal relations of insurance were developed, a legal and financial instrument essential for the future becoming of mankind.

"Individual insurance policies, in their current form, first appeared in the 14th century in Genoa, in the form of insurance contracts, which included various risks in the case of maritime transport. The renaissance was a time of development of insurance, both in terms of their complexity and in terms of diversification of insurance systems and types of policies. The most important were the maritime ones, encouraged by the intensification of maritime trade and life insurance, which were popular among high-ranking people. "[2].

Regarding the insurance contract, taking into account the elements provided by art. 2199 of the Civil Code, this represents the convention *"by which a natural or legal person called insured, in exchange for*

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[1] https://www.baar.ro/utile/istoria-asigurarilor, in the form of 01.02.2022.

[2] *Ibidem.*

the obligation assumed by the insurer to bear the risks arising from the occurrence of future adverse events for the insured, that is of paying him or a third party a sum of money as insurance indemnity "[3].

Therefore, the insurance contract achieves the desire to share the risks between the insured and the insured, as well as the objective of guaranteeing third parties harmed by the risk of activity, introduced in civil legal relations through the activity of the insured, to be properly compensated, avoiding the insolvency of the debtor, author of prejudicial legal acts / facts.

2. The European regulatory framework

The abusive clauses Directive[4] stipulates that abusive clauses contained in a contract with a seller or supplier are not binding on the consumer. However, the assessment of the unfairness of the terms within the meaning of that directive does not concern either the definition of the main object of the contract or the appropriateness of the price or remuneration, on the one hand, in relation to the services or goods provided in exchange for them, and on the other hand, in so far as those clauses are clearly and intelligibly stated.

Regarding the terms of the insurance contract, in the light of its clarity and predictability, the Court of Justice of the European Union has ruled that *„Those clauses which concern the main object of an insurance contract may be considered to be drafted in a clear and comprehensible manner if, on the one hand, they are grammatically intelligible to the consumer and, on the other hand, they set out in a transparent manner the actual operation of the insurance mechanism, taking into account the contractual framework, so that the consumer is able to assess, on the basis of precise and intelligible criteria, the economic consequences which result from it for him."*[5].

Therefore, provided that the clauses of the insurance contract are accessible and predictable to the consumer, the agreement of the parties being legally concluded, its legal effects are imposed on both contracting parties, mainly until the realization of all contractual rights and obligations.

This general rule results from the general provisions of art. 1321 of the Civil Code, according to which *"the contract terminates, in accordance with the law, by execution, the agreement of will of the parties, unilateral denunciation, expiration of the term, fulfillment, fortuitous impossibility of execution, as well as for any other causes provided by law "*.

Starting from the provisions of art. 1417 para. 1 of the Civil Code, according to which *"the debtor forfeits the benefit of the term if he is in a state of insolvency or, as the case may be, of insolvency declared under the law"*, we could conclude that the insurer's insolvency is a general cause of immediate exigibility of the insurer's obligations arising from the insurance contract.

However, art. 123 para. 1 of Law no. 85/2014 on insolvency prevention and insolvency procedures[6], derogating from the general norm of civil law, provides that *"ongoing contracts are considered maintained at the date of opening the procedure, art. 1417 of the Civil Code is not applicable. Any contractual clauses for the termination of contracts in progress, forfeiture of the benefit of the term or for the declaration of early payment for the reason of opening the procedure are null and void. "*.

Although the insurance contract is maintained, this does not mean, however, that the payment of the insurance indemnity by the insurers, in case of the insured risk, will be made according to the common law, but only according to the special insolvency law, being, in fact, suspended , according to art. 262 para. 4 of Law no. 85/2014, all *"judicial, extrajudicial actions or measures of forced execution for the realization of claims on the debtor's property"*.

However, according to art. 262 para. 3^2 of Law no. 85/2014, within 90 days from the date of pronouncing the decision to open the bankruptcy procedure, the insurance policies concluded by the insurance / reinsurance company cease by right; under the same conditions, reinsurance contracts will be terminated.

Moreover, art. 123 para. 1 of Law no. 85/2014 allows the judicial administrator / judicial liquidator to, within a limitation period of 3 months from the date of opening the procedure, to terminate any contract, unexpired rents, other long-term contracts, as long as these contracts have not been fully executed or substantially executed by all parties involved.

3. The situation of "City Insurance" clients

By FSA Decision no. 1148 of September 17, 2021 on the withdrawal of the operating license of the Insurance-Reinsurance Company City Insurance - S.A., ascertaining the state of insolvency and promoting the application regarding the opening of bankruptcy proceedings against it[7], The Financial

[3] https://legeaz.net/dictionar-juridic/contract-de-asigurare, in the form of 01.02.2022.
[4] Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, Special Edition, p. 273).
[5] Decision in Case C-96/14, Jean-Claude Van Hove v. CNP Assurances SA.
[6] Published in the Official Gazette of Romania, Part I no. 466 of June 25, 2014.
[7] Published in the Official Gazette of Romania no. 921 of September 27, 2021.

Supervisory Authority imposed the measure of withdrawal of the operating license of the Insurance-Reinsurance Company City Insurance - S.A., found the state of insolvency of the Insurance-Reinsurance Company City Insurance - S.A., Societatea Asigurare-Reasigurare City Insurance - S.A. having the obligation to take all necessary steps to notify the insured both regarding their possibility to terminate the insurance contracts concluded with the insurer, as well as their right to recover insurance premiums paid under contracts in proportion to the period between the time of termination and the expiry of the term of validity of the contracts.

From the perspective of the effects of the insured state of the mentioned insurer, we note that all insurance contracts concluded by City Insurance remain valid, and, consequently, they remain mandatory and effective, until their expiration, including insurance policies taken out by City Insurance, *"except in cases: where the holders denounce them, the 90-day period from the date of the decision to open the bankruptcy proceedings expires or the judicial liquidator in the bankruptcy proceedings denounces them "*[8].

In such a difficult situation, City Insurance policyholders (but especially those harmed as a result of road accidents caused by policyholders, who benefit from the insurance policies handed over to them) have two real possibilities to exercise their rights under the insurance contract:

- the first one results from the provisions of art. 102 para. 1 by reference to art. 162 para. 5 of Law no. 85/2014, according to which, with one exception (of the insurer's employees) all creditors, whose claims are prior to the opening date of the procedure, will submit the request for admission of the claims within the term set in the decision to open the procedure; applications for admission of claims will be recorded in a register, which will be kept at the court registry. Insurance claims, established by enforceable titles obtained after the moment of pronouncing the bankruptcy decision, are registered in court, under the sanction of forfeiture, within maximum 10 days from the date of obtaining the title. The judicial liquidator is obliged to verify and, if necessary, to register these claims in the table of claims, in compliance with the order of preference and / or their legal causes of preference. In all cases, the application for registration of these claims may not be submitted later than the date of preparation of the final consolidated table of claims, according to this law.

The possibility of following this legal insolvency procedure is also confirmed by art. 17 of Law no. 213/2015, which establishes an alternative action available to interested parties for the recovery of their claims from the assets of the bankrupt insurer, including for the amount due that exceeds the guarantee ceiling of 500,000 lei, up to which the Insured Guarantee Fund may make payments.

- the second one results from the FSA Decision no. 1.148 of 17 September 2021, namely any person who invokes a claim against the Insurance-Reinsurance Company City Insurance - SA, as a result of the occurrence of risks covered by a valid insurance policy, will be able to request the opening of the claim file to the Insured Guarantee Fund between the date of withdrawal of the operating license and the date of termination of insurance contracts.

According to art. 32 para. 1 of the Law no. 32/2000 on the activity and supervision of insurance and reinsurance intermediaries, in the situation where according to a court decision, an insurer enters the liquidation procedure, its insured have priority over the insurer's assets and have priority over by all other creditors of the insurer, immediately after the payment of the liquidation expenses.

Also, according to art. 12 para. 1 of Law no. 213/2015, any person who invokes a claim against the City Insurance insurer as a result of the occurrence of risks covered by a valid insurance policy, between the publication date in The Official Gazette of Romania of the decision of the Financial Supervisory Authority to withdraw the operating license and establish the existence of indications of insurer insolvency and date of termination of insurance contracts, but not later than 90 days from the date of the decision to open bankruptcy proceedings , may request the opening of the damage file through a request addressed to the Fund.

According to art. 14 para. 2 of Law no. 213/2015, the payment request shall be made in writing by the potential creditor and communicated to the Fund, directly or through its agents, at headquarters or by post, e-mail or other means ensuring the transmission of the text of the deed, with the attachment of supporting documents, in certified copy. from which to result exactly the amount requested.

If the payment request concerns several claim files and / or insurance contracts, the potential insurance creditor shall attach a record containing the identification data and the amounts related to each claim file / insurance contract, as well as any relevant documents, if any.

According to art. 12^2 para. 4 of Law no. 213/2015, The Fund draws up the list of potential insurance creditors based on the records and documents taken from the insurer and ensures its publication on its website.

[8] https://blog.ilegis.ro/9-actualitate/472-ai-asigurare-la-city-insurance-afla-cum-trebuie-sa-procedezi, in the form of 02.02.2022.

According to art. 13 para. 3, art. 3^1 and art. 4 from the same normative act, in order to pay the amounts due to the insurance creditors, the Guarantee Fund shall verify the damage files and insurance claims recorded in its records, taking into account the applicable rules and general and specific insurance conditions provided in the insurance contracts with the insurer against whom the state of insolvency has been established. In case of injury to bodily integrity or health or in case of death resulting from a vehicle accident, the determination of compensation representing moral damages is made in compliance with the principle of fairness, by reference to the negative consequences suffered physically and mentally, taking into account objective and reasonable criteria.

The approval or rejection of the amounts claimed by the petitioners is the responsibility of the special commission, consisting of seven members of the Fund.

Following the registration and analysis of the applicants' payment claims, together with the attached documents, the list of insurance creditors whose certain, liquid and due receivables are to be paid from the Fund's funds is drawn up, as well as the list of payment claims, which are to be partially or totally rejected.

The lists are submitted to the special commission, with the proposal of approval or rejection of the payment, and after the approval of these lists by the Special Commission, the payments of the insurance claims are made to the insurance creditors.

According to art. 16 of Law no. 213/2015, depending on the circumstances, the Special Commission may request the petitioners to complete the documentation and / or specify or provide additional information regarding their request for payment. The requested information shall be transmitted to the Commission, subject to the sanction of rejection of the request, within a maximum of 30 days from the receipt of its request.

The payment of the insurance claims established as certain, liquid and due is made by the Fund within the limit of a guarantee ceiling of 500,000 lei, as provided in art. 15 para. 2 of this normative act.

From the above considerations, it follows that the right to choose between the two legal proceedings belongs exclusively to the interested party, who will start the procedure that best represents his interest, but the choice of the payment method of compensation is much easier and faster, assuming a level of knowledge and following a formal approach much less laborious than that required by enrolling in the creditors of the City Insurance insurer.

4. Conclusions

From all the incidental regulations in this case, it results that the request to open the insolvency procedure initiated by ASF against City Insurance created not only an undesirable turmoil on the Romanian insurance market, with undesirable effects, materializing in endangering the reliability of the insurance system and distortion of the compulsory motor insurance market, including by the general increase of the price of the compulsory civil insurance policies, but also the premises of a situation of vulnerability of the beneficiaries of MTPL insurance policies issued by City Insurance.

They are forced to go through a series of legal procedural paths, characterized by a certain specificity and laborious action, difficult to access by legally uneducated people and requiring the loss of time and money from these consumers.

On the other hand, we note that the Romanian legislator has made available to policyholders a series of extremely useful and reliable guarantee measures, likely to lead, effectively and directly, to the desire to protect the interests of consumers, beneficiaries of MTPL insurance policies , but also of those harmed as a result of road accidents caused by the insured.

References

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- Published in the Official Gazette of Romania, Part I no. 466 of June 25, 2014.

CANCELLATION OF CLASSIFIED ADMINISTRATIVE ACTS

Adelin-Mihai ZĂGĂRIN[*]

Abstract

By reference to the legislation in the field of classified information protection, public authorities and institutions may issue typical, unclassified administrative acts, but also atypical administrative acts, classified as state or service secret, according to their content.

Of course, the protection of this act must not be other than that established by law, and no superior interest can be invoked contrary to the interest of the law to protect the content, so as to prejudice in rights even persons who may have rights and obligations they spring from that act (the jurisprudence on the payment of the military's daily allowance in the theaters of operations and the fact that a dry administrative act was not brought to their attention).

The classified administrative act carries rights and obligations for persons who cannot always be easily identified, and their mere concealment for the stated purpose of protecting their content cannot be imputed to them, as they do not have access to the content of the administrative act in Cause.

The classified contract is another kind of administrative act, but in this case a change of law is required ferenda, in the sense that the mere existence of the title "classified contract" allows misinterpretation contrary to the status granted by law: "any contract under which classified information is circulated". For this situation, which does not comply with European standards on the right to good administration and the right of access to one's own file, the remedy is provided by European and national legislation requiring prudent allocation of classified level, so as not to harm the legitimate interest of individuals or legal person.

Keywords: *administrative act, classified acts, classified contract, motivation of administrative acts.*

1. Introduction

The choice of the title of classified administrative acts does not refer to a didactic categorization or to a literary classification or to the taxonomy of administrative acts found in the specialized doctrine, but the notion of classification evoked in Law no. 182 of 12 April 2002, on the protection of classified information, the classification having a corresponding English language of the word classified, where the literary and legal meaning is of classified information. It follows *in extenso* that we can find in practice classified normative administrative acts, classified administrative acts of individual character as well as legal contracts or classified administrative contracts.

So a classified administrative act (*service secret or state secret*) can be classified by assignment in one of the two classes, in compliance with the legal provisions invoked both by Law no. 182 of April 12, 2002 on the protection of classified information as well as by the application norms represented by the Government Decision no. 585 of June 13, 2002 for the approval of the National Standards for the protection of classified information in Romania.

However, when assigning the class of secrecy and the level, the civil servant must pay attention to the legal issues regarding the consultation of the lists of information decrees of service established by the heads of the units holding such information, as well as the lists of state secret information, approved by a classified decision of state secret level.

In Law no. 554 of December 2, 2004 of the administrative contentious art. 1 para. (2) is regulated the right of any natural or legal person to appeal to the court[1] to submit to the fullness of its control of legality an individual administrative act, which is not addressed to him or is addressed to another subject of law than the one who appeals to the court. However, that article, on the one hand, creates a right of principle, and no person is allowed to proceed in such a way that individual administrative acts are hidden, by classification, or are not communicated to him, with the obvious consequence of not to be able to verify, investigate, examine or control it in order to identify any legal situation that could affect its legitimate rights and interests.

And then we can legitimately ask ourselves, how anyone could know if an administrative act of an individual character classified as a service secret or a state secret is harmful to him, if he does not have the legal possibility to find out about its existence, even more so from the content who can look at it directly.

Therefore, the essential condition for a person to be able to examine an individual administrative act and to determine whether it is harmful to him, is limited to

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[1] The injured party may also be addressed to the administrative court in his own right or in a legitimate interest by an individual administrative act addressed to another subject of law.

his knowledge, by any means provided by law, of its content. Only in such a situation could we claim that art. 1 of the Administrative Litigation Act is operationalized, effective and produces its legal effects as intended by the legislator, otherwise it remains a mere illusory prerogative, and not an effective right or remedy for violation of the law. The conclusion at the disposal of those who assign classification levels is that they could always hide a classified administrative act, in order to evade the control of legality and opportunity of any person.

2. Classified legal acts, theoretical landmarks

By the effect of Law no. 182 of 12 April 2002 on updated information, classified, the sovereign national legislature[2] has assessed that within the public entities, be they authorities or institutions, as well as in the case of economic agents holding classified information, functional structures are organized, compartment level, which have as main objective of activity "*evidence, processing, processing, storage, handling and multiplication of them, in safe conditions*", as it appears *expressis verbis* even from the content of art. 41. We can appreciate *a priori* that for the responsibility given first and foremost to the leader and directly to the immediate lower hierarchical compartment, by the sole legislative authority of the country[3], the classification of information is of particular importance but worth scientifically exploring, but this concern is not studied. this article.

The same legislator delegated to the Government, through art. 42 of the aforementioned law, the ability to establish by an infralegal legal norm - by a normative administrative act, such as the government decision[4], which belongs eminently to the executive power, a series of attributions, among which: classification and concrete establishment of information which have the status of state secret, but also the regulation of concrete protection measures specific to each class of information; regulating the physical flow from their creation to their destruction; obligations and responsibility for the protection of state secret information; establishing the rules regarding the access to the information classified as service secret and state secret, corroborated with the security verification procedure; the rules regarding the access of foreigners[5] to state secret information; other rules necessary for the application of this law[6].

In this context, of the organization and concrete execution of the law, H.G. 585 of June 13, 2002 for the approval of the national standards for the protection of classified information in Romania, normative act that gives rise to a kind of legal contract, called classified contract, by which the executive power understands any type of legal contract concluded between the parties. classified information (special contracts, standard contracts, concession contracts, administrative contracts etc.) is included and circulated. The rule is not very clear, suggesting that the only

[2] According to the decision of the Constitutional Court no. 308 of March 28, 2012 regarding the notification of unconstitutionality of the provisions of art. 1 letter g of the law on the temporary restriction of access to certain public positions and dignities for persons who were part of the structures of power and the repressive apparatus of the communist regime between March 6, 1945 and December 22, 1989, point III is established and resumed the content of the Constitution , from art. 61 para. (1) regarding *"The Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country"*.

[3] Art. 61 para. (1) of the Romanian Constitution, establishes that "the Parliament is the only legislative authority of the country". In other words, its power to legislate in accordance with constitutional provisions cannot be limited if the law thus adopted complies with the needs, requirements and requirements of the Basic Law. The legislative monopoly is attenuated and balanced both by art. 115 of the Constitution, which enshrines the legislative delegation, regarding the aptitude of the Government to issue simple ordinances, at para. (1)-(3) or emergency ordinances, at para. (4)-(6). It is consequently observed that the transfer of legislative tasks to the executive authority is carried out following an act of legal and political will of the Parliament. According to the CCR decision no. 152/2020, previously mentioned, point 23, the very plastic constitutional control court evoked that by delegation of competence the Government is not allowed to negatively affect the constitutional rights and freedoms, but the mandate of the executive power must be strictly limited to granting powers. It is necessary in the same way to clarify the ordinances of the Government, elaborated as normative acts, in relation to which the constitutional court, by decision no. 479/2015, point 15, the ordinance does not represent a law in the formal sense, but an administrative act assimilated to the law by the effects it produces, through this point of view ensuring its material criterion. Here we can say, beyond any complete scientific rigor but without error, that the ordinance is an assimilated law, which arose from the concatenation of the formal criterion with the material criterion of the law, defined both in form and content.

[4] By reference to art. 126 para. (6) of the Constitution, the Government decision is not issued as a result of exercising a constitutional power of the Government, as is the case of certain decrees of the President of Romania, but is a real normative administrative act, located at the top of the hierarchy of legal norms. control of the administrative contentious court. In conclusion, the government decision is a normative administrative act on which the control of legality exercised by the administrative contentious courts is allowed, by way of art. 21 (free access to justice) and art. 52 (the right of the person injured by a public authority) of the Fundamental Law. In order to eliminate the errors of assessment of the legal status, we will invoke the same CCR decision no. 152/2020 point 88, where it is stated unequivocally that from the perspective of the content, the decree issued by the President of Romania is an administrative act issued in the exercise of a constitutional attribution. In other words, the President's decree is an administrative act of secondary regulation, which implements an act of primary regulation, such as the Constitution.

[5] The foreigner is legally defined by art. 2 letter a) of the GEO no. 194 of December 12, 2002, republished, regarding the regime of foreigners, as follows: "any person who does not have Romanian citizenship, the citizenship of another member state of the European Union or of the European Economic Area or citizens of the Swiss Confederation".

[6] An unfortunate and long-criticized expression for not complying with the quality requirements of the law imposed by the norms of legislative technique, and it can be interpreted that the Government can extend its mandate alone, as it considers by its own power.

condition for a legal contract, from any branch of law, to become a classified contract, is the circulation of classified information, unrelated to the object, nature, duration, purpose etc. The rule is questionable and may give rise to the existence of legal relationships or rights and obligations that are opposable to third parties, the latter being effectively revoked their prerogative to verify whether they are covered by classified contracts, including classified administrative contracts, and the right the person injured by a public authority, found in art. 52 of the Romanian Constitution republished, is no longer guaranteed and becomes illusory.

For an additional confusion, in art. 3 we find defined the classified document as "*any material that contains classified information, in original or copy, such as paper, storage media, etc.*" Certainly the issuing legislature wanted to refer in the judgment, by the formula of a classified document, to the legal act - *negotium*, not to the ascertaining document - *instrumentum probationis*, which can be a document.

Confusion can also be found in the courts, where classified documents are approached as surreal documents, with limited access that can be imposed even by an administrative authority against the interests of litigants, as understood by the Bucharest Court of Appeal in the communication to a natural person, party to a lawsuit, by the address no. 5/3852/C of May 12, 2021, signed even by the security officer - judge, other than the member of the court panel: "considering the answer communicated by the Romanian Intelligence Service we cannot allow you access to study the documents in the custody of the Department of Classified Documents, except on the basis of an approval from the management of the workplace ". The error of assessment of the court is incomprehensible, and especially it contradicts art. 22 of the Code of Civil Procedure, marginally called The role of the judge in finding out the truth.

As can be clearly seen, in the article relied on, the legislator clearly establishes concrete guidelines for the judge, including the role of preventing any error in finding out the truth. Requesting explanations from the parties, orally or in writing, as a right of the judge, in the event that it is not clarified by the factual circumstances or the reasoning invoked by the parties, cannot be a substitute for a post-dictation solution, as the judge "settles the dispute according to which are applicable to him ", and the address of the invoked public authority does not have the competence to create legal norms or rules for carrying out the process.

The court's approach further violates the fundamental right to defense but also the status of judges found in Law no. 303 of June 28, 2004[7], where the judge is called to apply the law, not to follow the written instructions of an administrative authority which invokes by the address of 06.05.2021, the principle of the need to know, provided by art. 3 to H.G. 585/2002 according to which "only persons who, in order to perform their duties, must work with or have access to such information in order to fulfill their duties" may have access to classified information, if they hold an access authorization / security certificate". The right of access to one's own file is a fundamental right, found in art. 40 para. (2) letter b) of the Charter of Fundamental Rights of the European Union, and the impartiality of those called upon to apply the law may be called into question if, contrary to the law, a simple administrative indication (whether from a central, local or autonomous administrative authority) leads to breaking the law.

3. Preliminary procedure (graceful appeal) in annulment of classified administrative acts

Gracious appeal or prior appeal, an obligation which falls on the person who has to prove it, as a condition of admissibility of the summons, is mandatory[8]. However, in case of non-communication of the classified administrative act, this right is practically paralyzed and cannot be subject to the control of the legality of the court if the legislator himself provided that the classified legal acts are found in security zones class I or class II, being it is forbidden to remove them, even in the case of administrative litigation, outside these areas of physical and legal protection. Apparently the classified legal act, in our case the classified administrative act, is the prisoner of the law and of the space in which it was created, and for the fact that it is not communicated to the person concerned, as is the case of the administrative act issued by ORNISS with the opinion of the Designated Security Authority, creates a situation of blocking access to justice.

A possible fear of filing classified administrative acts in court is unjustified, as

Magistrates have access through classified law to classified information, based on internal procedures, as provided in art. 7 para. 4 letters f) -h) without fulfilling the procedures provided in para. (1) of the same article, regarding the prior verification, regarding their honesty and professionalism, regarding the use of this information.

Similarly, access to classified information should be granted to litigants as soon as classified documents

[7] Law no. 303 of June 28, 2004 (** republished **) on the status of judges and prosecutors.

[8] Rodica Narcisa Petrescu, Olivia Petrescu, Transylvanian Journal of Administrative Sciences , article *Update of the resource administrative in romanian law. Some considerations regarding a recent regulation from french law*, 2012, p. 82.

are filed in the court file, with their introduction in a specific training program, but it is clear that restricting access to classified documents subject to a lawsuit affects the right to defense, the principle of adversarial proceedings and equality of arms, an idea that we support in the form of a bill.

If the classified administrative acts have as object the civil service and aim at granting or establishing salary rights, it is mandatory that prior to notifying the court, the civil servant must go through the preliminary procedure and the object of his request must comply with the limits established by art. 8 of the Law no. 554/2004. Moreover, some courts[9] have expressed the view that failure to comply with the prior procedure, against administrative acts by which they were previously established in respect of payroll, has the effect of inadmissibility of the employer's legal obligation to grant salary rights outside of employment decisions. payroll attacked.

In the administrative litigation, the recognition of a right or a legitimate interest and the reparation of the damage are subsequent to the request which has as object the correction of a typical or assimilated administrative act, under the conditions enacted by the provisions of art. 2, para. (1) letter c) and art. 2 para. (2) of Law no. 554/2004 of the administrative contentious.

Therefore, in accordance with those established by Decision no. 9 in the interest of the law of May 29, 2017, there are situations when the completion of the preliminary procedure is no longer necessary, the person can attack directly in administrative litigation, under the sanction of extinctive prescription for filing an action for damages[10].

The administrative appeal distinguishes several procedures[11]: the administrative appeal filed with the public authority issuing the act (graceful appeal), the administrative appeal filed with the public authority hierarchically superior to the issuing one (hierarchical appeal) and the appeal filed before the court (contentious appeal). Law no. 554/2004 provides, in art. 7 para. (1), the obligation of the injured person to exercise either the graceful appeal or the hierarchical appeal before addressing the administrative contentious court. Therefore, the injured party has the right to choose the type of administrative appeal he will exercise, but it is mandatory to exercise one of them before filing the action in court. The preliminary procedure is regulated as a condition for exercising the right of action, the non-fulfillment of which is sanctioned by the rejection of the action as inadmissible. If the person who considers himself injured introduces the action in administrative litigation without waiting, either for the public authority to respond to the preliminary procedure, or for the legal term of 30 days provided by art. 8 of Law no. 554/2004 to be fulfilled, the action will be rejected as premature.

In the case of classified administrative acts, the graceful / hierarchical appeal may take either the classified form, which will subsequently create the impossibility of attaching it to the summons or an appeal, or to be made in unclassified form, through the means of communication provided by law. .

The prior complaint (graceful appeal) is mandatory, according to the law, in the matter of administrative litigation, being at the same time a condition for exercising the right to sue, the approach being supported by both legal doctrine and consistent jurisprudence on this matter. But there are also exceptions[12] to the graceful appeal, established by way of judicial practice - *per iurisprudentiam*, supported in this respect by the HCCJ Decision no. 9 of May 29, 2017 regarding the unitary interpretation of the provisions of art. 34 of Law no. 330/2009, art. 30 of Law no. 284/2010, art. 7 of Law no. 285/2010 and art. 11 of the GEO no. 83/2014, but also by the HCCJ Decision no. 54 of June 25, 2018 regarding the application of the common law in the matter of administrative litigation[13], respectively Law no. 554/2004, finds its applicability in the civil service litigations that have as object the granting of salary rights, as well as if it is necessary to follow the obligatory procedure prior to the notification of the court by the civil servant. According to the decision no. 9 invoked employees must follow the preliminary procedure in a situation that specifically concerns the notification of the administrative contentious court with actions whose object is the annulment / revocation / modification of the administrative acts that were communicated, by which the employers (those who fall under the laws that form the object of Decision no. 9/2017) established the basic salaries. On the other hand, other categories of rights (aids, bonuses, compensations) regulated by law, which are an integral part of the gross income of the employee, not recognized by the employer, as well as any requests for retroactive granting of these salary rights, do not require prior to the procedure, being applicable the common law that allows the formulation of a direct

[9] Mureș, Craiova and Alba Iulia Courts of Appeal, Bucharest and Iași Courts (sentence no. 603 of April 12, 2018).

[10] HCCJ Decision no. 61 of September 24, 2018 in resolving a legal issue regarding the moment from which the limitation period for filing an action for compensation begins to run, questioning two temporal landmarks: either the time of communication of the illegal administrative act or the date of finality of the the decision to annul this act.

[11] CCR Decision no. 12 of January 14, 2020 regarding the exception of unconstitutionality of the provisions of art. 7 para. (6) and of art. 11 para. (1) letter e) is from the Law on administrative litigation no. 554/2004.

[12] https://legislatie.just.ro/Public/DetaliiDocumentAfis/195636.

[13] https://www.iccj.ro/2018/06/25/decizia-nr-54-din-25-iunie-2018/.

action to the competent court to rule on the disputes regarding the salary rights claimed by the parties[14].

4. Cancellation, legal operation specific to the court

Theoretical-doctrinal landmarks in the field of annulment of normative or individual administrative acts are enshrined by reputable specialists in public or private law, but the annulment of classified administrative acts, normative, individual or contracts, tends to bring an additional practical difficulty by being a species of the administrative act, quite rare in practice, but also very little scientifically researched.

The doctrine defines the annulment operation as *"the legal operation which consists in a manifestation of will in order to determine, directly, the annulment of the act and therefore, the definitive cessation of the legal effects produced by it"*[15].

From the point of view of its nature, the nullity of a legal act, therefore also of the administrative act, is a sanction that intervenes in the situation in which the act is hit by defects of legality, and the Civil Code, at art. 1246 defines it as the sanction that intervenes if at the conclusion of the contract the conditions required by law for its valid conclusion[16] were violated.

In the file no. 1811/2019[17], having as object litigation regarding the statutory civil servants the Bucharest Court of Appeal, analyzing the appeal, found that the plaintiff-respondent, statutory civil servant within the Institution of the Prefect of Teleorman County did not contest the two administrative acts he mentioned in the request for summons (Order of the Prefect no. S / 116 / 19.11.2008 for appointment with 15.11.2008 on a public function of chief specialist officer I, respectively Order no. S / 152 of 31.12.2009 for promotion of 15.12. 2009 on a position with special activities), the object of his request being the obligation of the defendant-appellant to be reassigned to a position, 10 years after his initial assignment. The decision to quash the appealed sentence issued by the Court of Appeal is correct by reference to the provisions of art. 8 para. 1 of Law no. 554/2004[18] of the administrative contentious, where it is expressly provided that the court appeals to the object with which it can be invested, namely "annulment in whole or in part of the act, reparation of the damage caused and possibly reparations for moral damages". In that case, in addition to the fact that the object of the notification is not the annulment of an administrative act which leads *sine die* (at any time) to a negative solution, the term of extinctive prescription of the material right to the action in annulment of an administrative act is also questioned, which affects the stability of substantial legal relations of administrative law, protected by the legislator by prescription. *Addito conclusione* (supplementary) it is noted that from the initial S preceding no. registration, the two administrative acts invoked were classified as trade secrets, and their inclusion in this class does not pose problems for their submission to the control of the legality and validity specific to the administrative acts.

The classified normative acts are still present, *ope legis* (with the help of the law), in the Romanian administration, which wants to be modern and as transparent[19] as possible and which must have the citizen in its center of attention, regardless of its socio-professional status where the general interest must to be the satisfaction of the public interest. The existence of such acts should be reassessed in the light of the rules of European law, the right to good administration and reconsideration by virtue of the fundamental rights to a fair trial, the right to defense, etc., as the classification of service or state secret normative creates for the subject of law to which it is addressed, a report of law about which it has no way to take note, cannot ascertain it and cannot submit it to the control of legality of the courts.

According to Law no. 24 of March 27, 2000, republished, regarding the norms of legislative technique for the elaboration of normative acts, are excluded from the regime of publication in the Official Gazette of Romania: the classified decisions of the Prime Minister; classified normative acts and classified normative acts of an individual character, for which, according to the legislator, it can be either an autonomous administrative authority or a specialized central public administration body.

In the decision no. 2960/2021 of the HCCJ, the supreme court decided to reject the appeal filed by the civil servant against the sentence no. 239/2019 of the Bucharest Court of Appeal, as unfounded, the reason invoked being the failure to go through the

[14] It does not matter whether the rights have been recognized or not by the authorizing officers, nor is it relevant whether the authorizing officer is a public authority or a private legal person having the powers of authorizing officer. We have in this sense the HCCJ Decision no. 28 of April 24, 2017, according to which the notion of public authority is not similar to that of public institution. By assimilation, public authority is also the legal person of private law which, according to the law, in the regime of public power, is authorized to provide a public service.

[15] Antonie Iorgovan, *Treatise on Administrative Law*, vol. II, 4th ed., C.H. Beck Publishing House, Bucharest, p. 72.

[16] Verginia Vedinaș, *Administrative Law*, 12th ed., revised and updated, Universul Juridic Publishing House, Bucharest, 2020, p. 383.

[17] http://www.rolii.ro/hotarari/5cbe6beae49009801e00004a.

[18] Law no. 554 of December 2, 2004 administrative litigation.

[19] Law no. 53 of January 21, 2003, republished regarding the decisional transparency in the public administration, art. 1 para. (2) letters a)-c) stipulate the purpose of the law as increasing the degree of transparency and the level of the entire public administration, from which it is very clear that this obligation of transparency belongs to the central and local authorities but also to the autonomous administrative authorities.

administrative procedure provided by Law no. 360/2002 on the status of the police officer, which had the value of a special norm in question. The court also reiterates doctrinal arguments, taken over by the judicial practice, invoking by right the provisions of art. 7 para. (5) of Law no. 554/2004[20], amended by Law no. 212/2008, where it is expressly provided that in the case of actions in court against administrative acts that can no longer be revoked due to the fact that they entered the civil circuit, the prior complaint is no longer mandatory[21].

A particular situation that is distinguished in the course of an administrative procedure, in the case of classified administrative contracts, as law no. 101/2016 calls it prior notification[22], addressed to the contracting authority, before the notification of the National Council for the Settlement of Appeals or of the Courts, for which it is necessary to declassify all legal acts.

5. Conclusions

The annulment of classified administrative acts follows the same path as the annulment of typical administrative acts, which cannot be considered surreal or have a role other than to protect the purpose for which they were enacted. Classification of an administrative act, whether normative or individual, cannot be an impediment to its control by the courts, as the right to defense under the European Convention on Human Rights would be seriously violated and circumvented from its perspective. of fundamental law would become illusory, no longer having the effectiveness provided by law.

Substantial changes are required to the laws of administrative litigation but also to the laws on classified information, so as to ensure the right to good administration, the right to good administration and quality administration, etc. A necessary amendment contained in the law of contentious *expressis verbis*, where for the objectification of the content and for the applicability and unequivocal applicability of classified administrative acts must be introduced separately, as a kind of legal acts that are subject to contentious control of the courts. By their omission to present themselves as acts that are subject to the control of the judicial authority, one can create the impression of exempt norms, or the Romanian Constitution provided as non-receipt only military acts of command and those related to relations with Parliament.

The second proposal of *lege ferenda*, absolutely necessary, as it violates the law of the European Union regarding the right to good administration, refers to the obligation to motivate all decisions of the administration and the removal from H.G. 585/2002[23] of the mentions found in Annexes 15-17, according to which the person on whom security checks are carried out agrees that the non-granting of the security clearance should not be motivated. The need to remove it is to comply with the rules of fundamental value, both constitutional and European, expressly providing the right of the administration to motivate its decisions in fact and in law. It is also unanimously accepted that it is not possible to derogate from the rules of public policy by a convention contrary to them, which leads to the obvious conclusion that the person's consent not to have motivated the decision not to grant is inadmissible and null and void.

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[20] Law no. 554 of December 2, 2004 administrative litigation.

[21] Decision no. 2960/2021, found at the web address https://www.scj.ro/1093/Detalii-jurisprudenta?CustomQuery% 5B0% 5D.Key = id & customQuery% 5B0% 5D.Value = 183692 # highlight = ##% 20anceal% 20act%.

[22] Negruț Vasilica, *The administrative-Jurisdictional Procedure for Solving Complaints Filed under the Provision of the Law on remedies and Appeals concerning the Award of Public Procurement and concession Contracts*, Acta Universitatis Danubius. Juridica, vol. 12, no. 2, 2016.

[23] Decision no. 585 of June 13, 2002 for the approval of the National Standards for the protection of classified information in Romania.

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- CCR decision no. 308 of March 28, 2012.

MEASURES OF THE COURT OF AUDITORS - RELATION OF THE COURT OF AUDITORS - AUDITEES. PREREQUISITES FOR COMMITTING THE OFFENCE PROVIDED FOR IN ART. 64 OF LAW NO. 94/1992 IN "CO-AUTHORSHIP"

Ionela-Alina ZORZOANĂ[*]

Abstract

The scope of the study is to analyse the Regulation on the organisation and conduct of specific activities of the Court of Accounts, as well as the use of documents resulting from these activities (RODAS)[I] *from the perspective of the relationship between the audit authority and the auditee, in relation to the offence provided for in Art. 64 of Law no. 94/1992*[II] *.*

We want to analyse the relationship between the Court of Auditors and the auditee, considering the fact that although the audit institution orders measures to recover alleged damages, the exclusive power to choose such measures pertains to the management of the entity.

However, the Court of Auditors may decide to refer the matter to the criminal investigation bodies if the damage is not recovered.

Keywords: *Court of Auditors, measures ordered, enforceability, regulation, auditee, offence.*

1. Introduction

The idea for this study arose from the extensive material on the implementation of the measures ordered by the Court of Auditors[1] .

What particularly caught our attention was the following sentence: the economic operator can concurrently challenge the existence of the damage and/or the misconduct identified by the Court of Accounts and at the same time take, by amicable or judicial means, remedial action for a damage and/or a misconduct the existence of which is challenged and, therefore uncertain. We believe that such an approach is intended to exempt the economic operator from the serious consequences enshrined in art. 64 para. (1) and (2) of Law no. 94/1992.

Thus, the author of the material suggests that once the deeds issued by the Court of Auditors, by which misconduct was found and measures were ordered, are challenged in the administrative-contentious court, the auditee should take steps to implement the latter. However, if we were to accept this suggestion, we would be depriving the auditee of the finality of its action to challenge the deeds issued by the Court of Auditors in administrative-contentious proceedings. The author of the material justifies this approach in order to avoid the notification by the audit institution of the criminal bodies for committing the offence provided in art. 64 para. (1) from Law no. 64/1992. On the other hand, assuming that we accept such an approach, the author does not tell us what happens if, in the context of the administrative-contentious proceedings, the entity obtains the suspension of the execution of the administrative deeds issued by the Court of Auditors, and even a final decision to annul such. What happens to the steps taken to implement the measures ordered by the Court of Auditors?

Starting from this, at least surprising, approach, we try to understand what is, from the perspective of the regulations governing the powers and activity of the Court of Accounts, the relationship between the audit institution and the auditee and what are the constituent elements of the offence provided for in art. 64 of Law no. 94/1992.

At this point, we would like to specify that we do not share the author's opinion and we shall develop our arguments to this effect in the last chapter dedicated to the Conclusions.

2. Relationship Court of Auditors – auditee

Following any audit by the Court of Auditors, the auditors issue an audit report in which the found deviations are recorded and a decision is subsequently issued, ordering the management of the auditee to take measures to ensure legality and recovery of the alleged damages. Concurrently, the issued decision establishes terms by which the auditee has to carry out the ordered measures and, at the same time, recover the damages.

On the other hand, art. 33 par. (3) of Law no. 94/1992 provides that " In cases where deviations from

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[I] Published in the Official Gazette of Romania, Part I, no. 547 from 24 July 2014.

[II] Republished in the Official Gazette of Romania, Part I, no. 238 from 03 April 2014.

[1] https://www.legistm.ro/blog/m-i--aplicarea-masurilor-curtii-de-conturi.

legality and regularity are found to have caused damage, the management of the audited public entity shall be notified thereabout. The management of the auditee is bound to determine the extent of the damage and to take measures to recover such". Thus, it can be noticed that the lawmaker has established the exclusive competence to determine the extent of the damage and the choice of measures for its recovery in the exclusive responsibility of the auditee. Therefore, from the legal text mentioned, we consider that two important issues emerge:

- The auditee alone decides whether there is any damage and what the extent thereof is;
- The auditee is the only one who assesses the suitability of measures to recover any damage.

It can be seen that this is the only legal norm comprising references to the obligation to recover the damage, without there being any provision in primary legislation stipulating what follows and what the Court of Auditors' powers are after the audit action has been finalized and the decision ordering measures has been issued.

Also worth mentioning are the provisions of par. 181 from RODAS, according to which the decision mentions the following issues:

a. errors/misconduct in legality and regularity and, where applicable, situations of non-compliance with the principles of cost-effectiveness, efficiency and effectiveness in the use of public funds and in the management of public and private assets of the state/administrative-territorial units, found as a result of audit actions of the Court of Accounts both at the auditee and at subordinate/coordinating/sub-authority entities or other entities that received public funds through the budget of the auditee, even if the latter categories of entities were not included in the Court of Accounts' work schedule. For each error/misconduct, a brief indication of the infringed legislation should be given;

b. the measures to be taken by the auditee or other involved entities to eliminate the deficiencies found by the audit team, in order to determine the extent of the damage and to take measures to recover such or, where appropriate, to increase cost-effectiveness, efficiency and effectiveness in the use of public funds or in the administration of the public and private assets of the State and of administrative-territorial units;

c. the terms by which the head of the auditee has to inform the head of the specialised structure within the Court of Auditors, which issued the decision of how each measure ordered should be carried out.

At this point, the powers of the auditors within the Court of Auditors cease once the measures have been ordered.

Further, we note that point 234 from RODAS provides that *"The verification of implementing the measures ordered by decisions shall be completed by drafting a report on the implementation of the measures ordered by decision (follow-up report)"* and that *"If the audit report/follow-up report (. ...) of the deed of non-recovery of the damage as a result of the failure of the management of the entity to comply with the ordered measures"*[2] it is proposed to refer the matter to the criminal investigation authorities for committing the offence provided for in art. 64 para. (1) of Law no. 94/1992.

Further to the analysis of the aforementioned legal texts result the following:

- The responsibility to establish the extent of the damage and arranging recovery measures rests exclusively with the auditee;
- The Court of Auditors is authorized to verify the measures ordered by the auditee and to decide whether the terms of committing the offence provided for in art. 64 para. (1) of Law no. 94/1992 are met. (1).

However, given that the auditee is the only one authorized to assess the suitability of the measures it has to take in order to comply with the decisions of the Court of Auditors, on what legal basis can the audit institution analyse this assessment?

Has the lawmaker not had a "loophole" which absolves the auditors of the audit institution of any liability? Because however hard we try to find an explanation, it is difficult to understand how criminal liability can be incurred for the suitability of certain measures, when the law renders to the auditing entity exclusive competence to determine the extent of the damage and to take measures to recover such.

3. The offence provided for in art. 64 para. (1) from Law no. 94/1992

In accordance with the above-mentioned legal provisions, the non-recovery of damage as a result of the failure of the management of the entity to take and implement the measures remitted by the Court of Auditors is an offence.

From the content of the legal provision, we attempt to deduce the constituent elements of the offence. Thus, it is an offence not to recover damages following measures ordered by the Court of Auditors, but ONLY if such are the result of the failure of the auditee to order and follow up the measures ordered by the Court of Auditors.

It is clear from the foregoing that, in order to be a prerequisite for committing that offence, it is not sufficient to have a non-recovery of the damage, but that such must be the result of both a failure to order

[2] Item 243 et seq. from RODAS.

measures and to follow-up the measures ordered by the Court of Auditors.

Per a contrario, if the entity has ordered measures and has followed up the measures ordered by the audit institution, but the damage has not been recovered, then there is no offence and criminal liability cannot be incurred.

In this view, it was mentioned in an article *that the offence can only be held to have been committed if the perpetrator does not order any of the measures remitted by the Court of Auditors. If the management of the entity takes minimal measures to recover the damage, criminal liability cannot be incurred*[3] .

On the other hand, it is almost notorious practice for audit institutions to refer matters to the criminal investigation authorities without really investigating the reasons why the auditee has not been able to recover the damage, even if it has ordered measures and has followed up the fulfilment thereof.

The following situation is encountered in practice: the auditee applies both for annulment and for a stay of the execution of administrative deeds issued by the Court of Auditors, pending the final settlement of the action for annulment. The entity obtains the stay of the execution of the administrative deeds, so that their execution is legally suspended. Thus, as of that moment on, no measure can be legally carried out. Subsequently, the application for annulment is definitively dismissed, so that the effects of the suspension cease and the implementation of the measures ordered by the Court of Auditors becomes mandatory. The problem that frequently arises in practice is that the dispute extends beyond the limitation period. And in such a case, any action taken by the entity is destined to be dismissed, as the limitation period for the substantive right of action has expired. Nevertheless, in the presence of a real impossibility to carry out the measures, the Court of Auditors, without considering the fact that measures to recover the damage have been ordered and have been pursued, chooses the easier path of referring the matter to the criminal investigation authorities, even if the constituent elements of the offence provided for in art. 64 of Law no. 94/1992 are not met.

4. Conclusions

Based on the opinion of the author of the material on which this analysis relies, we reiterate that we cannot agree with the simultaneous formulation of an administrative-contentious action and the formalities to implement the measures ordered by the Court of Auditors. We consider that such an approach has no legal basis, apart from the fear of falling under the offence provided for in art. 64 of Law no. 94/1992.

Nevertheless, we cannot fail to note the lack of involvement of the audit institution in guiding the auditee between the time of ordering measures for the recovery of a damage and verifying how the measures are carried out.

Thus, it seems that everything turns into a witch-hunt, the sole purpose of which seems to be to refer the matter to the criminal investigation authorities, when we are not aware of any cases in which the Court of Auditors' auditors have considered the measures ordered by the auditee, even if for objective reasons (such as the example we referred to earlier), it was not possible to recover the damage.

On the other hand, it seems that the Court of Auditors extensively applies the provisions of art. 64 of Law no. 94/1992, given that the non-recovery of damage does not constitute per se an offence, but only if it is the result of the failure to take measures and to follow such up.

Having regard to all these issues, we consider that two essential conclusions result:

- We can talk about a co-authorship of the Court of Auditors in moral view, in committing the said offence, in the absence of any guidance to the auditee;
- *De lege ferenda*, we consider that it is necessary to rethink the applicable legal framework, establishing a link between the exclusive obligation of the auditee to assess the damage and the actual recovery measures and the task of Court of Auditors to verify how the measures ordered are carried out.

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THE ROLE OF IDEAS IN COPYRIGHTED WORKS AND DOCTORAL THESES. CONTRADICTION IN THE REGULATION OF THEIR REGIME (LAW NO. 8/1996 AND LAW NO. 206/2004)

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Motto

"But surpassing all the rest of the amazing inventions, what a sublime mind he had, who dreamed of finding the means to communicate his deepest thoughts to any other man, no matter how far away, beyond vast expanses of time and space. Speak to those in India; to speak to those who have not yet been born and will not be born sooner than a thousand or ten thousand years from now; and that's how easy it is, arranging twenty different signs on a page in any way! "

Galileo Galilei, 1632

"It's enough to get out of the house and plant a tree and you've created a world"

Rainer Maria Rilke

Abstract

Some ideas, which become generators of other ideas and are initially expressed in art, but which have utility and applicability in the field of industrial property, we could call demiurgic ideas. These have an overwhelming impact and should be protected, precisely to give the author the rights to be enjoyed by all authors for the creation of other ideas.

Law no. 8/1996 is incomplete. It does not confer or formulate a fundamental right on the author of the work - the right to protect his own idea of the work. An idea that can generate other ideas and that can change the destiny of a fundamentally evolving society. Such ideas, perhaps even from the core of their creativity, are not recognized as having the fundamental right to be protected. At least not by Law no. 8/1996, perhaps not coincidentally called „copyright law". It remains a real challenge that future regulations no longer commit injustices within the body and spirit of the text of the law.

Keywords: *ideas generating other ideas, Law no. 8/1996, protection of ideas, demiurgic ideas.*

1. Introduction. Why the ideas?

The vocation to authenticity of the personality will be reproduced in the following in the form of the meaning of ideas. Expressed from a doctrinal, dogmatic, scientific, legal and artistic perspective, we will be able to be more pretentious about shaping a new, more conducive framework, in order to better develop the environment of "being" the content generator, the fruitful seed, what we understand today to be - the intellectual property.

The human ability to be creative has caused controversy since the beginning of evolution, as the extent to which he exercises this absolute power has generated results worthy of debate. People who generate small things tell jokes, show expressions that can excite those around them. Great people come up with ideas. In philosophy, in literary writings, in inventions, in technology or in everyday life that attracts a need that must be solved more usefully, more effectively, better.

This article aims to understand and bring to the fore why ideas are the greatest. Why do ideas deserve the podium and the trophy for the protection of all laws that understand the defined concept? And why ideas must remain the basic foundations of any human evolution.

Where do the ideas come from? Why do thoughts come? How do we know that an idea is unique? How do we prioritize them when the same idea has been thought of by at least one other person on the planet?

Every person who is born and dies, recognized by a state, was from the very beginning in the formation of the contour of a destiny. This route, undetected, unexplained, becomes a trajectory, worthy of being followed as a human life. A human's main concern is survival, finding a purpose, discovering deeply rooted talents from DNA, growing and maturing with the experiences gained, developing on several social levels and elevating him, through the brilliance of intelligence, truth or wisdom, among the masses of people. As our poet also acknowledges: "(...) *In each*

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one there is a woman, in each one there is a man, And above all other people only rises he who can"[1]

Those who have the brightness become the object of observation. The differentiating element of this brilliance most of the time, consists in innovation. Evolving. In the idea. **To recognize a human's ideas means to recognize him as an individual**. How could we really capitalize on such a human resource, if not capitalizing on its own innovation, work or idea?

As I write this article with such a controversial legal and creative theme, it becomes even more challenging, as I have to start directly from God. I cannot abandon the logical red thread of our existence, of creation, of humanity without understanding, to some extent, to the extent of the power of a single mind or, more precisely, to the indulgence of those who will judge and weigh in turn to these meanings.

"*In the beginning was the Word, and the Word was with God, and the Word was God! "*[2] (John 1: 1-14). Of course, this first form of being, where everything was perfect, we almost don't think we would have needed anything else. Only later, after the fall of man, did the first invention (and one of the greatest of mankind) appear - **writing**. At first, people had the word. And the word was enough for them. Following the deterioration of Edenic harmony, people proved to lose their word, and we could say that an "improvement" was needed. **Thus, writing appears an inventive, materialized form, as an evolutionary mechanism.**

Writing, according to some, had a demonic origin (since leaving Eden meant returning to sin, so the worldly form of conquering the human mind), but other researchers believe that it was invented in Egypt, including the writing medium – the papyrus: " *With writing, new spiritual connections were born and developed in time and space. The need to predict the Nile flood data with some accuracy forced the Egyptians to calculate time, thus inventing the Calendar and Astronomy. Mathematics and Geometry developed in connection with the measurements required by the construction of canals, dikes, or monumental buildings (temples, pyramids, funerary monuments.*"[3] So, the first person who had the idea to write the first symbols, generated an idea, which gave rise to a multitude of ideas and sciences that have contributed significantly to the evolution of mankind.

However, researchers of the history of ideas place the first revolution of inventions somewhere in the Paleolithic, where the first stone tools appear - the stone knife, then the bow, the crossbow, and then all the other weapons useful for that time of human survival, settlements or cities. Even today, some anthropologists wonder what was the reason for the evolution of man to an organism with a huge brain in a muscular atrophied body: "*The brain accounts for about 2-3 per cent of total body weight, but it consumes 25 per cent of the body's energy when the body is at rest. By comparison, the brains of other apes require only 8 per cent of rest-time energy. Archaic humans paid for their large brains in two ways. Firstly, they spent more time in search of food. Secondly, their muscles atrophied.*"[4] One of the first manifestations of the human mind to imagine objects that have no real correspondence is" *an ivory figurine of a <lion-man> (or <lioness-woman> from the Stadel Cave in Germany and dating to approx. 32.000 years ago). The body is human, but the head is lionine. This is one of the first indisputable examples of art and probably of religion, and of the ability of the human mind to imagine things that do not really exist."*[5] Perhaps the sculptor of this statue did not imagine what creative powers would be unleashed in his contemporaries and descendants and what aspirations and feelings people began to aspire to seeing this figurine. Over a few tens of thousands of years, remarks Yuval Harari, a Frenchman named Armand Peugeot, set up a limited liability company in 1896, also called Peugeot, a legal fiction designed to protect the owner of creditors: „*How exactly did Armand Peugeot, the man, create Peugeot, the company? In much the same way that priests and sorcerers have created gods and demons throughout history, and in which thousands of French* curés *were still creating Christ's body every Sunday in the parish churches. It all revolved around telling stories and convincing people to believe them [...] According to French legislators, if a certified lawyer followed all the proper liturgy and rituals, wrote all the required spells and oaths on a wonderfully decorated piece of paper, and affixed his ornate signature to the bottom of the document, then hocus-pocus, a new company was incorporated.*"[6]

[1] Mihai Eminescu, the poem *Letter I* Leon Levițchi translation, see here: https://allpoetry.com/-First-Epistle, accessed on 25.04.2022.

[2] Bible – King James version (KJV), https://www.biblegateway.com/passage/?search=John%201&version=KJV, accessed on 25.04.2022. See also: Bible or Holy Scripture, Bucharest, IBMBOR Publishing House, 2018.

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[5] *Idem*, pp. 25-26.

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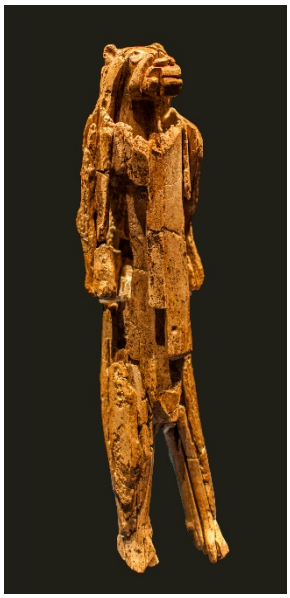
FIG. 1 Ivory cave figurine from Stadel cave in Germany.[7]



Fire leads to the formation of the Bronze Age, then the Iron Age where iron remains certified as an invention and not as a discovery. Iron made possible other inventions such as: the wheel, the writing already mentioned, the appearance of crafts, measuring instruments, electricity and, nowadays, the internet in another order of ideas - thus a completely new world was generated generating prosperity.

2. Ideas - Concepts. Terminological definitions. Meanings

When I think of existence, humanity, the planet, the living, the circle of life and the spiral of existence from the creation of the earth, the world, living things, man through biblical myth, we are somehow inspired and predestined to look up directly at the Creator. Where we seek to know, to understand, believe it or not, that we have a God. This God when He created our world first of all had the IDEA. Later this idea becomes the origin of the world, the new unseen or encountered in the Universe. So almost from this beginning we have to ask ourselves if **the idea has become original or not originality preceded the idea.** Even God longed for the creative act from the perspective of a spark, which I call an idea.

The idea of the idea will be the main topic of this article as the main concern will be to understand and adapt, to a suitable and fair context, any person who will shine. We cannot abandon brilliant minds without re-creating their Paradise where genius b 7uilds its own home in idea.

God Himself created the universe, the starry sky, the earth, living things, nature, and man. When it came to man, it was another idea. Namely that of retreating to Himself. In an earthly, humanoid, complex form, according to His image: "*So God created man in his own image, in the image of God created he him; male and female created he them (Gen. 1, 27).*"[8] First he prepared the right environment and context (we do not know if the first idea of creation was to give a purpose to the next idea so they were voluntarily cyclized or occurred as a result of the beautifully creative act).

So the **first idea** of God was about the contextual complexity (the universe, the starry sky, and our current home) and **the second idea it was the creation of man**. So far, so good. I dare to remind you as you read that we do not know and cannot be sure whether the source of these first two ideas from the Universe, coming directly from God, was based on any decree or "normative" but I like to believe that everything it was developed with the order of a system that will weigh the nature of things well.

So, going back to God the Almighty, we need to focus on anthropological issues. After God created the world, when he had the desire to fall back on Himself, in man, did he self-plagiarize?

The term "idea" in ancient Greek has at least three meanings: on the one hand, we have the meaning of " *appearance* **,** *appearance* **, *form, appearance .*"** *LXX, Genesis 5: 3 (* ***ἰδέαν*** *) and in the form of* "[9], on the other hand, refers to a" *particular form, distinctive character: face, kind, way, species, type: [...] <all forms of flight and escape death could be seen in the Athenian camp >*"[10] that is, in the specific mode of expression which presupposes a precise distinction from what is imprecise, even with reference to "***form, style, essential aspect, classification criterion, species***"[11], and the third has a philosophical connotation, especially in Platonic thinking where we have: "***the ideal form****, idea, notion [* ***idea good*** *]*[12]" that is, the perfect and transcendent world of ideas, after which the demiurge creates the worldly world. Later, in Latin thought, Seneca tried to explain and translate into Latin the concept of ***eidos*** **(idea**) influenced by the

[7] See: https://upload.wikimedia.org/wikipedia/commons/4/4c/Loewenmensch1.jpg accessed on 25.04.2022.
[8] Bible – King James version (KJV), https://quod.lib.umich.edu/cgi/k/kjv/kjv-idx?type=citation&book=Genesis&chapno=1&startverse=26&endverse=31 accessed on 25.04.2022.
[9] Constantin Georgescu, Simona Georgescu, Theodor Georgescu, *Dicţionar Grec-român*, vol. V, Z-H-Θ-I, Nemira Publishing House, Bucharest, 2013, p. 150, *sq*, article ἰδέα.
[10] *Idem*, pp. 151.
[11] *Ibidem.*
[12] *Ibidem.*

Greek understanding of the term: " *The statue has a certain face: it is <eidos-ul>. But the model itself, which the artist contemplates making the statue, also has a certain face: this is the idea (Habet aliquam faciem statua: haec est idos. Habet aliquam faciem exemplar ipsum, quod intuens opifex statuam figuravit: haec idea est).*"[13] Of course, we agree with Clara Auvray-Assayas, who subtly remarks that translating the concept of *eidos (idea)* from ancient Greek into Latin "*changes the meaning or, more precisely, reduces it. Wanting to transmit, he freezes; privileging example impoverishes thinking*"[14].

When Alfred Whitehead argued that "*European philosophical tradition is just a long series of footnotes to Plato,*"[15] he hinted that the originality of ideas is an extremely difficult endeavor, in which few have a chance to say a new idea, which has not been expressed in any way by our forerunners, so that the attempt of some to convince us of the originality of some ideas seems doomed to failure. Therefore, I will try in this article to argue the need to protect those truly original ideas, certain ideas that have the role and ability to inspire to impact large masses of people to create new ideas, methods, procedures or technologies that we they improve and change our lives for the better.

3. Regulations and legislation

Romanian legislation puts the scales of ideas in the balance sheets. In this legislative DNA, the legislator provides the framework where the idea is born. **Law no. 8/1996** introduces us to the idea, however, what matters in this plate of the law is only its expressive manner (although we will be able to make an analysis of the text of the law where we will notice that the legislator himself subtly contradicts the admissibility expression). Only the form of the idea will reach the heart of the legislator and not the substance. Since Law no. 8/1996 recognizes the existence of a work through the prism of originality, however, it does not protect its idea - that is, the germs that can lead to the whole creative process, and without which the work itself would not exist. The imprint of the author of the work is completely detached within the meaning of the law from the instrument without which the author would have been amputated in the creative act. It even stipulates in a manner that is not at all mannered and resolutely states that the idea does not benefit from the supreme protection of the law.

Art. 9 letter a), in the order of the enumerations, stipulates that, the ideas, as the first ones excluded from the protection. Nothing is more unjust and overwhelming in terms of a law that claims to understand, admit, protect, and serve the supreme good of the author.

Ideas are not a priority, in the classical sense, but they are not seen as spiritual either. Or not decisive enough to convince the public, the readers of the works remaining with the idea of the work, touched by the expression of the author but can always have a free way to become the "puppet" of the idea, giving a new destiny to the original idea. Thus, if we are in the presence of a literary work where the writer of the work had the inspiration to outline an entire intrigue around an idea, the idea not being protected, it can be taken over by any reader. The idea will be transposed in a new or different way and, thus, the "destiny" of the idea, initially foreseen by its original creator, will be completely changed. Therefore, the idea itself by granting the infinite possibilities of staging suffers from the perspective of the originality of its appearance, as the originality of the idea will no longer inherit the expression of its author by *extenso*, once the idea goes to another author. So in the spirit of Law no. 8/1996, which protects the expression of works, it was not provided that failure to protect the ideas generating other beneficial ideas that can add value to society, will lose the value of the expression of the author and therefore the entire capital. We cannot claim to give value to the work, validating the manifestation of the author's will and expression without capitalizing on the idea that generated the author's expression. No personality of the author denies the living spirit of the idea that generates for himself the final result to which the work is directed.

Art. 7 of Law no. 8/1996 provides in its text the description of the objective "**whatever** the way of creation" but, by "any" the legislator does not include the manner arising from the idea. By "way" of creation in order to play a work we can understand the "bursting" of the idea that leads to the very birth of the work. **The generalized form of expression of the legislator allows the interpretive approach** , **of all the meanings**. An article of law that allows a lexical universality forgetting the new meanings that can give rise to controversy. Without this "outburst", as a way of expressing the author's self, the work would not have existed. We would have been in complete absence. Also **art. 9 letter a) of the Law no. 8/1996** , by formulating the text, whatever the way of taking over, **of writing** "infringes", through the text of the law,

[13] Barbara Cassin (coord.), *European Vocabulary of Philosophies. Dictionary of untranslatables*, translation and additions to the Romanian edition coordinated by Anca Vasiliu and Alexander Baumgarten, Polirom Publishing House, Iași, 2020, p. 1220.
[14] *Idem*, p. 1221.
[15] Plato, *Integral Opera*, vol. I, Translation, General Introduction, Introductions and Notes by Andrei Cornea, Humanitas Publishing House, Bucharest, 2021.

the freedom of the authors of the works to render the work in their own, authentic manner.

Law no. 8/1996 is incomplete. It does not confer or formulate a fundamental right on the author of the work - **the right to protect his own idea of the work**. An idea that can generate other ideas and that can change the destiny of a fundamentally evolving society. Such ideas, perhaps even from the core of their creativity, are not recognized as having the fundamental right to be protected. At least not by law 8/1996, perhaps not coincidentally called „copyright law". It remains a real challenge that future regulations no longer commit injustices within the body and spirit of the text of the law.

The right to protect one's own idea must belong to its author, its "creator", only to the one who brought it to life, and to recognize in its absolute way the proper way of existence of the self through work, and of the work through idea.

Also **the extension of the term of protection of the works**, provided in art. 27, art. 28, art. 29, art. 30, art. 31, art. 32, art. 33, and art. 34 of Law no. 8/1996 should also provide a certain category of protection regarding the **determining priority** which will classify the works, through the exclusive prism of ideas. This exclusive character will lead to a rethinking of the calculation of the life of the works, namely the fact that if an idea from a work can be easily taken and manipulated later, this fact could be interpreted as altering the quality preserved after taking the idea, of the whole work. Thus, the work will no longer be able to benefit from the same term of protection as the central defining element that led to its creation and determination as a work, in terms of the exclusive and absolute nature of the idea of the work was manipulated, freely taken over and reinterpreted. "The old polish is not new!"

4. Ideas protected in the light of Law no. 206/2004

On the other side of the scale, Law no. 206/2004, also known as the "law of plagiarism," weighs the weight of shamefully appropriated facts in terms of ideas.

If Law no. 8/1996 allowed the takeover of ideas and, this fact not only was not punished, it was not even provided as unnatural, Law no. 206/2004 does not allow the takeover of one's ideas, without recognizing the source. Thus, whether we address the academic environment, the business environment, or research, the ideas cannot be taken over without the consent or consent of the author of the original idea. Every idea taken already has a date of birth, a certificate of life and a path that can generate amazing results, or profitability or an evolution without which humanity would go mad through the darkness of involution.

If in Law no. 8/1996 we had the legislative, enumerative, and exemplary text, starting from the methods of rendering the work and the freedom of the author to manifest himself through this prism, from a general (but not specifying a particular, such as the rendering of the idea, and the idea should be worthy of being called the method of rendering the expression of the author of the work) in Law no. 206/2004, art. 4, letter e).

Ideas from literary works are rare. And stepped by copyright privileges. The ideas in scientific works, research papers become the object of differentiation, as the purpose is to determine what is new. Thus, this aspect is immediately closely related to the citation condition and within the Law no. 8/1996, art. 35, letter b).

The freedom to take over in this law is allowed, however, conditioned by the recognition of the author of the idea or the citation of the source. So the freedom to take over is more obvious, but more restrictive, while in Law no. 8/1996, the taking over of ideas is a pure act of ownership of the idea, without being considered an act of betrayal towards its author.

The main highlight in the case of the two laws, regarding the idea of works is to determine the value of the work. In Law no. 8/1996, the value of the work regarding the idea is considered to have a low threshold of originality, thus pursuing high diversity; while in Law no. 206/2004, regarding the expression of renderings, the high standard of novelty of the idea is pursued. So he obeys the rules of plagiarism. The novelty element generates the scientific research work.

Also art. 9 of Law no. 8/1996 and art. 4 of Law no. 206/2004 do not contradict, but complement each other, in the spirit and interpretation of the law. Law no. 206/2004 is also presented in the form of shocking and severe sanctions provided in art. 14. Thus satisfying the interference required by such an honorable research framework as the academic one.

We also find the aspects mentioned in the case of scientific works, research, or doctoral theses. When we refer to a doctoral thesis, in the sense assigned by art. 42 of the Code of doctoral studies, according to GD 681 of June 28, 2011 published in the Official Gazette of Romania no. 551 of August 3, 2011, we see that there is a clear distinction between scientific doctorate and the professional one: in the case of the first, the finality is *"the production of original scientific knowledge, relevant internationally, based on scientific methods"*, and in the case of the professional doctorate it is addressed to the fields *„of arts and sports, scientific method and systematic reflection, on artistic creations or on sports performances of high national and international level and which can constitute a basis for*

the professional career in higher education and in research in the fields of arts and sports."[16] The condition of originality is mentioned by the lecturer in the case of both types of doctorate, but without specifying the way in which the originality is verified, but at art. 65 para. 5 states that it is mandatory *to "mention the sources for any material taken.*" Art. 4 letter (d) of Law no. 206/2004 describes plagiarism, *i.e.* "the *acquisition of ideas, methods, procedures, technologies, results or texts of a person, regardless of the way in which they were obtained, presenting them as personal creation,*" in other words we have some form of protection of ideas, described by the fact that if a person acquires during the scientific research activity an idea that does not belong to him and does not mention the source, this is a plagiarism, in contradiction with art. 9 letter a) of Law no. 8/1996, which stipulates that the ideas do not benefit from the legal protection of copyright.

5. Debates and controversies

There is not yet a history of the originality of ideas or a history of the origin of ideas, because, at least from a biological and psychological point of view, the manner or algorithm for the formation of ideas or thoughts has not yet been elucidated. Some researchers estimate that the human mind generates about 60,000 thoughts a day[17] according to a consistent methodology, but with an undisclosed mechanism and it is unknown why some thoughts or ideas are more persistent and insistent, and others disappear into oblivion. However, mankind over time has sought to understand the importance of certain ideas in understanding the world, and some have been willing to sacrifice their lives for an idea, or a bunch of ideas, because they felt it was more important to fight for an idea. Idea or for several ideas, considered so important and valuable that they deserved even the ultimate sacrifice. For example, Socrates did not write any ideas, but the system of ideas he presented orally to his students was of such great personal value that he was willing to fight for these ideas and defend them before the Athenian court. If he risked the death penalty for impiety and corruption of the youth.[18] We have many examples of this, from Giordano Bruno, convicted and burned at the stake by the Inquisition, to Jan Palach, a Czech student who set himself on fire in January 1969 in protest of the invasion of his country by Soviet troops and which became a symbol in the Czech Republic.[19] Do not the ideas in the name of which these people were willing to give their lives deserve to be capitalized on and protected? Was their sacrifice in vain? Not to mention the martyrdom of hundreds and thousands of people who throughout history have fought for various religious ideas. The advent of printing in the sixteenth century alone helped nearly 200,000 editions of books, with nearly 200 million copies, awaken humanity from the slumber of reason, revitalizing scientific research and encouraging thousands and millions of people to come up with new ideas for the progress of humanity.[20]

Going back to Plato, it is worth mentioning that in his system of thinking, ideas had the most important role, that of being the source of inspiration for the demiurge for the creation of this world, there being a perfect world of ideas that existed in itself. **This idea of separating the immanent of the transcendent, the world of perfect ideas of the corruptible immanent world was the source of inspiration for all** subsequent philosophical systems on the European continent and for the philosophical conceptualization of Christian religious doctrine. Later, during the Middle Ages, the great debate was also around ideas and generated the *quarrel of universals* , which resulted in three concepts: realism, nominalism and conceptualism.[21] Nominalism was represented by a French thinker, **Roscellin,** who argued that **ideas** are in fact ***flatus vocis***, words in the wind (empty words) and have no existence in themselves. Also in the Middle Ages, Thomas Aquinas analyzed the objections of the existence of ideas in God and argued that " *the divine mind begets a plurality of ideas based on creative intelligence... Each human creature has its own specific form, due to which it participates in the representation of the divine essence. Therefore God, insofar as he recognizes his essence imitated by the human creature, also recognizes his own way of being, as well as the Idea represented by this human creature [...] It is found that God conceives a plurality of ways and own systems for modeling the plurality of ideas.*"[22] In modern times, **Descartes** is the one who brings to the fore the thought process (and methodical doubt) as essential and specific

[16] Code of doctoral studies, according to GD 681 of June 28, 2011 published in the Official Gazette of Romania 551 of August 3, 2011, art. 42.

[17] Gabriel Liiceanu, *The madness of thinking with your mind*, Humanitas Publishing House, Bucharest, 2016, p. 22.

[18] Costică Brădățan, *To die for an idea. About the dangerous life of philosophers*, translated from English by Vlad Russo, Humanitas Publishing House, Bucharest, 2018, p. 15.

[19] *Idem*, pp. 15 et seq.

[20] Raymond Trousson, *History of free thought, from its origins to 1789*, translated by Mihai Ungurean, Iași, Polirom publishing house, 1997, p. 50.

[21] Giorgio del Vecchio, *Lessons in Legal Philosophy*, translated by J. Constantin Dragan, preface by Mircea Djuvara, Europa Nova Publishing House, Bucharest, *sa*, pp. 187 et seq.

[22] Toma de Aquino, *Summa theologiae. Works I. About God*, translated from Latin by Gheorghe Sterpu and Paul Găleșanu, Scientific Publishing House, Bucharest, 1997, p. 265.

to the human being and the only way that makes us aware that we exist: *„**cogito, ergo sum** (think, therefore, exist).”*[23] Debates have been about the **origin of ideas** , such as the idea of causality, of God, of the soul, of immortality, etc., whether they **are innate** or taken from experience and processed by our minds. **John Locke** claimed that our minds are born ***the tabula rasa*** (like a blank slate) to which ideas are added, taken from experience, while other authors, such as Descartes or Leibniz, argued that we are born with certain ideas, such as those mentioned, because otherwise we would not be aware of them and we would not he had a similar representation in the minds of all men. **I. Kant** is the thinker who *„distinguished, therefore, in hierarchical order, the elements of knowledge, arranging them architecturally, according to their own function and value, and showed that some elements of knowledge are necessary and a priori, that is, they do not derive from experience because they are the conditions that make the experience itself possible.*"[24] In other words, we are born with the ideas of temporality and spatiality, and these make us understand that the passage of time should not terrify us, nor should closing in a smaller space, such as a room, trigger us the feeling of claustrophobia.

A French author and jurist, **Edmond Picard**[25], argued **that an author has an absolute right over his work**, although "*especially in terms of duration, because it seems, in principle, from now on that all productions of the mind must fall, after a certain period, in the public domain, "to return to it", as we say in an expression that reveals the feeling, hidden and right, that they are, in reality, emanations of the community much more than of an Individuality.*”[26]

6. Case Study

Some ideas, which become generators of other ideas and are initially expressed in art, but which have utility and applicability in the field of industrial property, we could call **demiurgic ideas** , have an overwhelming impact and should be protected, precisely to give the author the rights to be enjoyed by all authors for the creation of other ideas.

If we analyze the modern controversy of the **history of camouflage,** we will see the relevance of this debate. Even today, the Americans and the British dispute the primacy and paternity **of the use of camouflage in the military field, after works of art** by the British painter Norman Wilkinson (24.11.1879 - 30.05.1971)[27] and the American painter Abbott Handerson Thayer (12.08.1849 - 29.05.1921).[28] It is true that both authors had their first works of art in similar periods: Abbott Handerson Thayer wrote about the first ways of camouflage in nature in 1892[29] and during the American-Spanish War of 1898 he became involved in the **first forms of camouflage of warships** and the first patent for the military camouflage method was obtained in 1902 with a friend, George de Forest Brush, and was entitled "*Process of Treating the Outsides of Ships, etc., for Making Them Less Visible*"[30] After the outbreak of World War I in 1915, he proposed to the British War Office to cooperate in camouflaging ships, but was rejected, but received support from the United States Navy and, along with other enthusiasts, recruited hundreds of artists into the American Camouflage Corps.[31] Around the same time, the British Norman Wilkinson, in 1917, while serving in the army had a **flash of an idea, when he thought what would be the way one ships to avoid the torpedoes of German submarines, inventing the way to paint dazzling or "dazzle painting."**[32] After the war, Norman Wilkinson had a legal dispute with John Graham Kerr, a zoologist who had written to Winston Churchill in 1914 about how to camouflage ships in contrasting tones by hiding the top of light-colored cannon ships and lower in darker colors.[33] At the end of the legal dispute, Norman Wilkinson was declared the winner by the judiciary and received financial compensation, as he was also the one who **widely used**

[23] R. Descartes, *Discourse on Method*, translated by Cr. Totescu, Scientific Publishing House, Bucharest, 1957, p. 21.
[24] Giorgio del Vecchio, *op. cit.*, p. 187.
[25] See also Viorel Roș, *The right of creators to eternity and intellectual rights*, in Romanian Journal of Intellectual Property Law, no. 3 of 2018, pp. 25 et seq.
[26] Edmond Picard, *Le droit pur*, Paris, 1908, page 101: "*Mêmes opérations pour les droits intellectuels. Le Plein c'est le droit absolu de l'Auteur sur son œuvre, sauf les limitations légales, spécialement quant à la durée, puisqu'il semble de principe, désormais, que toutes les productions de l'esprit doivent tomber, après un certain délai, dans le Domaine public, « lui faire retour », comme on dit par une expression révélant le sentiment, caché et juste, qu'elles sont, en réalité, des émanations de la Collectivité bien plus que d'une Individualité*."
[27] See https://valentinefineart.co.uk/portfolio-item/norman-wilkinson/#biography accessed on 25.04.2022.
[28] See http://americanartgallery.org/artist/readmore/id/542 accessed on 25.04.2022.
[29] See https://en.wikipedia.org/wiki/Abbott_Handerson_Thayer / accessed on 25.04.2022.
[30] *Ibidem*.
[31] *Ibidem*.
[32] Norman Wilkinson, *The Dazzle Painting of Ships, Journal of the Royal Society of Arts*, vol. 68, no. 3512 (march 12, 1920), pp. 263-273, see https://www.jstor.org/stable/41355095, published by: RSA The royal society for arts, manufactures and commerce, see https://en.wikipedia.org/wiki/Norman_Wilkinson_(artist) accessed on 25.04.2022.
[33] Hugh Murphy and Martin Bellamy, *The Dazzling Zoologist. John Graham Kerr and the Early Development of Ship Camouflage*, in The Northern Mariner / Le marin du nord Journal, Ottawa, Ontario, vol. XIX, 2009, pp. 174 et seq. See: https://www.cnrs-scrn.org/northern_mariner/vol19/tnm_19_171-192.pdf accessed on 25.04.2022. See also https://en.wikipedia.org/wiki/John_Graham_Kerr accessed on 25.04.2022 accessed on 25.04.2022.

camouflage techniques in the military. Wilkinson was able to convince the court (albeit unjustly) that John Kerr "*sought invisibility, rather than disturbing the image*."[34]

Today, all the armies of the world use the camouflage technique, inspired and adapted according to an idea of a painter who used his own painting technique with great skill, and the new "canvas" for painting became military ships. Here is how an idea, a technique, and then another idea, saved the lives of those involved in that military conflict. I dare to call these kinds of **ideas demiurgic ideas**.

Another example of a "demiurgic" idea is the creation of **w**orld **w**ide **w**eb or the Internet by Tim Berners-Lee, a British man who in March 1989 developed a simple way to transfer files from one computer to another at CERN. But it was not until the following year, in 1990, that his boss at CERN accepted this proposal, which he found "vague but interesting [35]," but which was later adopted by all mankind. For this proposal, Tim Berners-Lee did not want to protect her invention in any way, nor to market or patent it, but decided to leave it free of any kind of constraint, so as not to limit its usefulness and distribution.[36]

7. An Organization / Organization to protect ideas

Although there is no institution to protect the ideas that generate others ideas, or "demiurgic" ideas, I believe that an Organization should be set up to protect ideas (I propose the Organization for the Protection and Appear of Ideas - OPAI) and to inventory them, following the rights of creators of ideas, because some artistic ideas have industrial utility, they come to be so large that in reality they come to benefit others from such ideas, to the detriment of the one who created the idea for the first time. What would Tim Berners-Lee and many other strangers like him look like today if Internet giants like Amazon, Google, Facebook, Microsoft, and others paid for the right to use the Internet? What would have been the progress of mankind if the righteous had been truly stimulated and rewarded and given their due rights? How many people like Tim Berners-Lee would we have had and how advanced materially and spiritually could we have become?

8. Why do ideas deserve to be protected by copyright?

Ideas are valuable. The fact that Law no. 8/1996 does not protect ideas, but Law no. 206/2004 penalizes plagiarism, *i.e.* the appropriation of the ideas of others, shows that the legislator wanted at least in the field of scientific research to have a form of recognition of the value of ideas. Of course, not all ideas deserve to be protected. I can't say that I came up with an idea to look at the Betelgeuse star, and everyone in my opinion would have to either quote me or use this idea in a limited way, but only ideas that generate other ideas, or that are useful and have industrial applicability and which can be validated and certified by OPAI.

A form of recognition of the value of ideas is also regulated by Law no. 489/2006, where at art. 41 letter b) it is stipulated that the written presentation of ideas of a religious nature in the form of a confession of faith is recognized as a manifestation of religious freedom. It is not possible to recognize a second cult with exactly the same confession of faith or with the same name, according to art. 8, para. 4: "The name of a cult cannot be identical to that of another cult recognized in Romania." The value of this confession, together with the other elements required by law, lead to autonomy from all points of view, of course respecting the constitutional provisions, including regarding the organization of the own education system, according to art. 39 of Law no. 489/2006.

9. Back to the argument

Ideas cannot remain "hidden" only under the protection of Law no. 204/2006 without enjoying the protection of copyright, the copyright maker of the work (a work that can be the initiative and the proven result of a single idea - as were the stories of Jules Verne).

Ideas that generate ideas are a category that, framed and classified legally accordingly, in a relevant normative form, would protect the ideas that have already demonstrated that they bring a new utility and value, greater to the whole society. Sometimes the ideas in the works can be more edifying for the author himself, as he is looking for the pure act of creation, apart from identifying the right idea or inventing it, the author's creative life would no longer make sense.

THE IDEA ETERNIZES ORIGINALITY! And not the other way around. I do not believe in an originality that does not recognize that it is based on the idea that is the generator of brilliance in that work.

[34] *Ibidem*.
[35] See https://en.wikipedia.org/wiki/Tim_Berners-Lee accessed on 25.04.2022.
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- https://valentinefineart.co.uk/portfolio-item/norman-wilkinson/#biography accessed on 25.04.2022;
- http://americanartgallery.org/artist/readmore/id/542 accessed on 25.04.2022;
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OVERVIEW OF CRYPTO ASSETS FROM INTELLECTUAL PROPERTY PERSPECTIVE

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Abstract

Technology is now guiding our everyday life. Things that were created years ago and not used or used in a small manner gain popularity now. This is the case of blockchain technology which in the latest years becomes very popular. This technology started from the blockchain created for the cryptocurrency Bitcoin which also determined the creation of other cryptocurrencies. At the end of 2021, the cryptocurrency market worth over $ 2.2 trillion, many people investing in it. Cryptocurrencies are considered as „an example of digital innovation"[I]

Cryptocurrencies are crypto assets that work on blockchain technology. However, they are not the only existing crypto assets, others gaining popularity in the last two years as we will see in this paper. In addition, blockchain technology is now reinvented to be used in many fields, other than the financial one and we will see some examples in this paper.

The purpose of this paper is to present the relation of blockchain technology with crypto assets, how they interact and finally how do they fit in the current legal frame of intellectual property law, more precisely if they can be protected by intellectual property rights and what are the legal challenges they face. The analysis will take into consideration also the Romanian legal frame.

Keywords: *copyright, patents, non-fungible token, code, database.*

1. Introduction

We live in a digital world. Our lives are guided by technology and most of us cannot anymore imagine life without it, returning for example in times when we had to buy goods only from physical stores or to have the wallet full of coins to pay for the goods. We might say that our lives become easier and more comfortable due to the technology which allows us to buy the goods with a simple click from the comfort of our homes and pay them using also just a click or bringing the phone or the card close to a device. More importantly, technology helped us a lot during Covid-19 pandemic and allowed us to remotely carry out our working activity and not going any more to the office.

Nowadays we are surrounded by news, discussions, conferences, seminars about crypto assets, which are new developed technologies. As always have been, the opinions regarding these technologies are divided in pro and against and is normal to be like that because it is in human nature to be conservatory and to be skeptical to new creations that might affect their way of doing things. Some see only the risks, the disadvantages, and the work they have to do to get out of their comfort zone and embrace the new technology and others see only the benefits and the advantages.

There are multiple types of crypto assets such as financial tokens, non-fungible tokens, digital assets (such as utility tokens, cryptocurrencies, and stable coins). Some authors define „crypto asset" as „a digital asset that can be represented by a particular quantity of cryptographic tokens that someone holds of that asset"[1] and the International Organization for Standardization („ISO") is defining it in „Vocabulary" as „digital asset implemented using cryptographic techniques".

But we cannot talk about „crypto assets" without referring firstly to blockchain technology. Many crypto assets, such as cryptocurrencies, financial tokens, non-fungible tokens are functioning based on the blockchain technology.

Also, this technology is already used in many other industries and is suggested also to be used even in intellectual property field to create the so-called „smart intellectual property rights", such as database for trademarks to „track the entire life cycle of a right"[2], but as we will see later, this technology is already implemented by many institutions or is envisaged to be implemented.

We are not proposing in this paper to discuss in detail about the technical aspects of blockchain and

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[I] Expression used in the answer given on behalf of the Commission on 02.08.2018 https://www.europarl.europa.eu/doceo/document/E-8-2017-007564-ASW_EN.html to the question related to blockchains asked by the European Parliament on 07.12.2017 https://www.europarl.europa.eu/doceo/document/E-8-2017-007564_EN.html (accessed on 07.02.2022).

[1] Luis-Daniel Ibanez, Michal R. Hoffman, Taufiq Choudhry, *Blockchains and Digital Assets*, p. 2, https://www.eublockchainforum.eu/sites/default/files/research-paper/blockchains_and_digital_assets_june_version.pdf (accessed on 29.03.2022).

[2] Birgit Clark, *Blockchain and IP Law: A Match made in Crypto Heaven?*, WIPO Magazine, 2018, https://www.wipo.int/wipo_magazine/en/2018/01/article_0005.html (accessed on 28.03.2022).

crypto assets. The purpose of this paper will be to present the relationship between cryptocurrencies and non-fungible tokens, and their liaison with blockchain technology and the way such technology may be applicable in the intellectual property field. Also, we will analyse to establish if they can be protected by intellectual property laws, with a focus on the Romanian laws. Our analysis is divided in two parts, the first part addressing the notions of „blockchain", „cryptographic system", „blockchain", „cryptocurrency", „non-fungible tokens" and the second part addressing the protection by intellectual property of blockchain, cryptocurrencies and non-fungible tokens.

2. Presentation of notions

2.1. Short history of blockchain technology

Blockchain is the foundation of cryptocurrencies, the latter working with this technology. However, even if blockchain „can exist and evolve with or without cryptos", „nearly all cryptos depend on blockchain technology and they would likely disappear without it"[3], existing only few cryptos that do not need blockchain to operate, such as 1980s eCash and 1990s Digicash, which were developed as computer code that included advanced cryptography[4].

There is not unanimity regarding the first use of blockchains. Some authors say that it was first invented by Stuart Haber and Scott Stornetta in 1991, „as a way to timestamp digital documents to verify their authenticity" [5]. Even Stuart Haber thinks of himself to be the creator and inventor of blockchain together with his colleague Scott Stornetta[6].

However, during our research we have found out that the notion of „blockchain" has its source in a rudimentary form back in the 1970s, when the internet as we know it today was created[7], we calling this source as the ancestor of the current blockchain.

The inventor Horst Feistel submitted in 1971 to the USA Patent Office his patent application registered in 1974 for „Block cipher cryptographic system" which was assigned to IBM. The invention envisaged the encryption of „a block of binary data under the control of a key consisting of a set of binary symbols" to „ensure complete privacy of data and information that is stored or processed within a computing system", having in view the growing use at that time of remote-access computer networks which provide a larger number of subscriber access to „Data Banks" for receiving, storing, processing and furnishing information of a confidential nature.[8]

In 1976, the inventors William Friedrich Ehrsam, Carl H. W. Meyer, John Lynn Smith and Walter Leonard Tuchman requested to the USA Patent Office the registration of their patent for „Message verification and transmission error detection by block chaining"[9]. This invention also was assigned to IBM and it was based on cryptographic apparatus having as purpose the secure transmission of multi-block data messages from a sending station to a receiving station.

Only after these two inventions and others based on cryptography, Stuart Haber and Scott Stornetta came, in 1991, with their paper[10] suggesting the timestamping of documents by using the „family of cryptographically secure collision-free hash functions" to be able to establish the priority of intellectual property rights related to text, audio, picture and video works. In their paper, it is not used the notion of „block". However, it is used the notion of „chains" with respect to the „chain of timestamps"[11].

In 2008, when Satoshi Nakamoto[12] released the Bitcoin cryptocurrency together with the white-paper „*Bitcoin: A Peer-to-Peer Electronic Cash System*"[13], neither he used the notion of „blockchain" when describing the electronic cash system. He used the notions of „block" and „chain" separately, saying that an electronic coin is a chain of digital signatures. However, it seems that his creation was inspired by Stuart Haber and Scott Stornetta's „Surety" service, many papers of these authors being cited by Satoshi Nakamoto in his white- paper.

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[3] Rajendra Kulkarni, *Origins of Blockchain*, 2019, Kulkarni, Rajendra, Origins of Blockchain (June 1, 2019). Available at SSRN: https://ssrn.com/abstract=3399644 or http://dx.doi.org/10.2139/ssrn.3399644 (accessed on 12.03.2022).

[4] *Ibidem.*

[5] Daniel Oberhaus, *The World's Oldest Blockchain has been hiding in the New York Times since 1995*, 2018, https://www.vice.com/en/article/j5nzx4/what-was-the-first-blockchain (accessed on 12.03.2022).

[6] Stuart Haber, *Blockchain: Decentralization is Central*, Speech at the TEDxBeaconStreet, 2019, https://www.youtube.com/watch?v=AmQyJoTdnwo&t=91s (accessed on 12.03.2022).

[7] Nathalie Dreyfus, *Marques et internet. Protection, valorisation, défense*, Collection Lamy Axe Droit, Lamy, 2011, p. 18.

[8] Application number 05/158360 filed on 30.06.1971 and registered under no. 3798359 on 19.03.1974.

[9] Application number 05/680404 filed on 26.04.1976 and registered under no. 4074066 on 14.02.1978.

[10] Stuart Haber, W. Scott Stornetta, *How to Time-Stamp a Digital Document*, Journal of Cryptology, 1991, https://link.springer.com/content/pdf/10.1007/BF00196791.pdf (accessed on 12.03.2022).

[11] Following this article, Stuart Haber and Scott Stornetta created the timestamping service named „Surety" which „ensures the integrity of electronic records, files or any digital content by establishing that they were created at a specific point in time and have not been tampered ever since". http://surety.com/ (accessed on 12.03.2022).

[12] Is the pseudonym used by the creator of Bitcoin cryptocurrency. It is not known yet if the pseudonym refers to a single person or to a group of people.

[13] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 2008, https://bitcoin.org/bitcoin.pdf (accessed on 12.03.2022).

2.2. Cryptographic system

We may notice from the above section that blockchain is created based on cryptographic system.

In the Bible there is a verse (Ecclesiastes 1:9) saying that „What has been, will be again, what has been done will be done again; nothing is new under the sun".

In intellectual property field, we may interpret this saying by arguing that everything existed before, and we only reinvent things and give them new use and purpose, or we improve them to better serve us in our times. Anyway, no new creation is entirely new, at least not in our times; everything is based on something that existed before and this is normal because each creation takes into consideration the available past and contemporary knowledge and information.

In our case, blockchain technology also is not totally new, it lays down on the cryptographic system, which was used since ancient times in Egypt, Greece, and Rome, more exactly since men started to organise themselves in little groups and later in societies. The cryptographic system was used for sending encrypted messaged to avoid the situation in which other persons than the recipient, including the enemy, would read the message.

Cryptographic system (*i.e.* the creation of the cryptologic system) together with cryptanalysts (i.e. techniques applied to uncover the secret writing), more exactly the encoding and decoding is part of the „cryptology", which is the study of secret writing. „Crypto" comes from the Greek „crypto" which means „hidden" or „secret"[14].

This system evolved during the time, from the system of Caesar which involved substituting the fourth letter of the alphabet, namely D for A and so forth. After the fall of the Roman empire, cryptology vanished and reappeared in Renaissance era, being used by Roger Bacon[15] to keep scientific truths secret[16], Geoffrey Chaucer[17] who „encrypts (in his work) six short passages of instructions on how to use the equatorium"[18] and even by Queen Mary of Scotland[19]. The cryptographic system was used intensively during World Wars, when were invented Enigma machine[20] and Colossus machine[21].

In all times, the system involved the recipient to have a key to decipher the message.

Nowadays, cryptographic system is used by blockchain technology, cryptocurrencies and even for the protection of personal data, as an obligation of all processors and controllers. Of course, today cryptographic system is adapted to the current technologies, and it is based on mathematics, computer science, electrical engineering, communication science and physics and focused not only to encrypt messages and data, but also to authenticate the sender/receiver, the electronic signatures.

Cryptographic system is defined today by the ISO Standard 22739:2020 as „discipline that embodies the principles, means, and methods for the transformation of data in order to hide their semantic content, prevent their unauthorized use, or prevent their undetected modification".

2.3. The notion of blockchain

Even if first proposals of blockchain use were in the 1970s, this technology is still considered „relatively new" and it „has not (yet) been subject to a legal definition"[22].

Despite the fact that blockchain technology does not have a legal definition, the ISO has developed and published seven ISO standards for blockchain and distributed ledger technologies referring to (i) Vocabulary (2020), (ii) Privacy and personally identifiable information protection considerations (2020), (iii) Reference architecture (2022), (iv) Taxonomy and Ontology (2021), (v) Overview of and interactions between smart contracts in blockchain and distributed ledger technology systems (2019), (vi) Security management of digital asset custodians (2020), (vii) Guidelines for governance (2022) and ten more are under development[23]. Under the ISO Standard referring to Vocabulary, blockchain is defined as „distributed ledger with confirmed blocks organized in

[14] https://www.dictionary.com/browse/crypto-#:~:text=Word%20Origin%20for%20crypto%2D,hidden%2C%20from%20kruptein%20to%20hide (accessed on 16.03.2022).

[15] Roger Bacon (1220 – 1292) was a Franciscan monk, philosopher.

[16] John F. Dooley, *History of cryptography and Cryptanalysis. Codes, Ciphers and Their Algorithms*, Springer, 2018, p. 16, https://books.google.ro/books?hl=ro&lr=&id=q61qDwAAQBAJ&oi=fnd&pg=PR7&dq=The+history+of+cryptography&ots=37szNpsivd&sig=vqHv1ytGcbs8wl97XypvN1phIwY&redir_esc=y#v=onepage&q=The%20history%20of%20cryptography&f=false (accessed on 03.04.2022).

[17] Geoffrey Chaucer (1340 – 1400) was an English poet, author and civil servant best known for *The Canterbury Tales.*

[18] John F. Dooley, *op. cit.*, p. 17.

[19] Queen Mary of Scotland (1542 – 1587), who's encrypted letters were deciphered and bring her the death execution being accused by treason against Queen Elisabeth I of England.

[20] This machine is invented by the German inventor Arthur Scherbius (1878-1929).

[21] This machine is invented by the English engineer Tommy Flowers (1905-1998) to help solve encrypted German messages.

[22] Gönenç Gürkaynak, İlay Yilmaz, Burak Yeşilaltay, Berk Bengi, *Intellectual property law and practice in the blockchain realm*, Computer Law & Security Review, 34, 2018, p. 851, https://www.gurkaynak.av.tr/docs/8c65a-ip-law-and-practice-in-the-blockchain-realm.pdf (accessed on 02.04.2022).

[23] ISO/TC 307 Blockchain and distributed ledger technologies, https://www.iso.org/committee/6266604.html (accessed on 02.04.2022).

an append-only, sequential chain using cryptographic links".

The notion of blockchain received many definitions during the time. As example, we mention two of the definitions: „blockchain is a type of database stored on many computers in a peer-to-peer network and is particularly adapted for recording transactions"[24] or „blockchain is a decentralised database, without intermediary allowing to automate, authenticate and timestamp a transaction by guaranteeing its immutability and tamper-proof. It can also ensure confidentiality of data through encryption"[25], therefore, all such actions will be made without the support of a trusted third person.

Based on the above definition, blockchain is considered to have the following characteristics: distributed public database, more precisely shared by its different users, without central authority, reliable and inviolable (tamper-proof). Therefore, blockchain may be compared to the accounting register: public, unforgeable, and verifiable. Blockchain is considered unforgeable because each modification to a transaction from a chain makes that transaction inconsistent and for altering a part of the chain, one must be able to alter the entirety of the blocks starting with the modified transaction as fast as the entire world network, which cannot happen[26].

Blockchain technology is used for:

a) Assets transfer using cryptocurrencies;

b) Blockchain applications as distributed ledger technology (DLT) ensuring a better traceability of products and assets;

c) Smart contracts, which are autonomous programs automating executing the contractual clauses once started without human intervention. In IP domain for example, they may be used for transactions with patents to verify the assignment, the validity, to negotiate the sale purchase-agreement, to pay and notify the IP offices about the transactions[27] and they are also used by non-fungible tokens („NFT").

Blockchain can be private or public. The public blockchain, for example the one used by Bitcoin, „records all transactions on the network and is totally transparent to all participants"[28], everybody having the possibility to participate to the network, while for private blockchains, one needs to obtain the permission from the system to become part to the network.

As we might think, blockchain technology is not used only in financial services. In 2012, arose the first discussions on how to use blockchain technology in fields other than digital payments[29] and nowadays, it can also be used in many other industries, including in the public sector, these additional applications being known as „Blockchain 2.0."[30]. For example, blockchain may be used to fight against IP counterfeiting. In this regard, the European Union Intellectual Property Office („EUIPO"), one of the most open institutions to use new technologies, launched in 2019 the „Anti-Counterfeiting Blockathon Forum", its Executive Director stating that „In today's fast-moving world, we need to use the latest technology to keep a reliable record of the origin of goods and their progress through international supply chains. Blockchain's ability to create permanent and unchangeable records makes it one of the best candidates to deliver results on the ground"[31].

In April 2021, almost two years after the press release launching the „Anti-Counterfeiting Blockathon Forum", EUIPO announced[32] that trademarks and designs databases were using blockchain „to bring super-fast, reliable, and secure delivery of IP rights information". A few months later, in July 2021, Malta was the first EU country which transferred 60.000 records to trademarks and designs databases through the blockchain network[33].

Also, in IP field, there are people suggesting using the blockchain technology to eliminate the IP offices as intermediaries in registrations of designs, patents, trademarks and also to reduce the costs of registration

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[24] Yuhen Tom Zhang, *Blockchain. What is it and what are its IP issues?*, Robic, 2017, https://www.robic.ca/en/publications/blockchain-ip-issues/ (accessed on 02.04.2022).

[25] B. Barraud, *Les blockchains et le droit*, Revue Lamy Droit de l'Immatériel, 2018, p. 48 *apud.* Jean-Bernard Auby, *Les conditions de la régulation publique des blockchains. Le droit au défi des blockchains*, Revue francophone de la propriété intellectuelle, Special Number, February 2021, p. 7.

[26] Jean-Guillaume Dumas, Pascal Lafourcade, Ariane Tichit, Sébastien Varrette, *Les blockchains en 50 questions. Comprendre le fonctionnement et les enjeux de cette technologie innovante*, Dunod, 2018, 2019, p. 6.

[27] Paul Cosmovici, *La blockchain et la propriété intellectuelle peuvent-elles faire ensemble un pas de deux ou vont-elles trébucher et tomber à terre?*, 2021, https://blogs.pme.ch/paul-cosmovici/2021/12/03/la-blockchain-et-la-propriete-intellectuelle-peuvent-elles-faire-ensemble-un-pas-de-deux-ou-vont-elles-trebucher-et-tomber-a-terre/ (accessed on 02.04.2022).

[28] Kevin Werbach, *Trust, but Verify: Why the Blockchain Needs the Law*, Berkeley Technology Law Journal, vol. 33, no. 2 (2018), p. 503, https://www.jstor.org/stable/26533144 (accessed on 02.04.2022).

[29] Gönenç Gürkaynak, İlay Yilmaz, Burak Yeşilaltay, Berk Bengi, *op. cit.*, p. 848.

[30] Yuhen Tom Zhang, *op. cit., loc. cit.*

[31] EUIPO Press release, *Using blockchain in the fight against counterfeiting – EUIPO launches a Forum to support concrete solutions in that field*, 2019, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/News/Blockchain_Forum_launch_PR_en.pdf (accessed on 29.03.2022).

[32] EUIPO, *EUIPO connects to TMview and Design View through blockchain*, 2021, https://euipo.europa.eu/ohimportal/en/web/guest/news/-/action/view/8662923 (accessed on 29.03.2022).

[33] EUIPO, *Malta is the first EU country to join the IP register in Blockchain*, 2021, https://euipo.europa.eu/ohimportal/en/web/guest/news/-/action/view/8793606 (accessed on 29.03.2022).

and enforceability[34]. Others[35] suggest using such technology to eliminate the collective management bodies as intermediaries which collect the remuneration for artists and interprets from the users of their works, such use making easier the entire procedure, ensuring a better knowledge of the amounts to be collected by a certain artist and being cheaper for the artist.

In France, blockchain technology is used since 2019 by the Trade Registry for increasing the transparency and efficiency of the management of legal transactions related to business life[36].

At EU level, it was created the European Blockchain Services Infrastructure (EBSI) at the initiative of the European Commission and the European Blockchain Partnership whose purpose is to „accelerate the creation of cross-border services for public administrations and their ecosystems to verify information and to make services more trustworthy"[37]. Romania is also a member of EBSI and EBSI may be used by public administrations, businesses and also by citizens.

There are also private users of blockchain technology in intellectual property domain. In this domain, the blockchain is used as a database, as a technology to authenticate products and as a smart contract, such use being considered a „true legal revolution allowing to save proof, track products and execute smart contracts which simplify rights exploitation"[38]. It is also suggested to be used as database in the music industry to establish a link between the musical creation of an author and its interpretation by multiple artists, such link allowing to ensure a better remuneration for the owners which are part of the creation chain[39]. However, with respect to private blockchains in IP domain, there are authors who outline the fact that the advantage of blockchain represented by the impossibility to erase an information, might also constitute a disadvantage when false information is registered in the chain[40].

2.4. The notion of cryptocurrency

Following a survey made by Deloitte during the period March 24 and April 10, 2021, it is thought that digital assets, such as cryptocurrencies, may replace traditional currencies in the following five to ten years[41].

Taking into consideration that cryptocurrencies are used as currencies in the digital environment, prior to analyse the notion of „cryptocurrency" and its use, we propose to make a short presentation about the apparition of traditional currencies.

It is not possible to say exactly when the currency was invented. It is considered that traditional currencies appeared from people need to replace the barter, being easier to obtain the needed products by exchanging money instead of other products. The first use of coins is considered to be in Lydia, a kingdom tied to ancient Greece and located in modern-day Turkey, in years 640 BC and the first use of banknotes in China in years 600 BC. Many years, the coins were made from gold or silver and in Europe the coins were used until AD 1600 since precious metals could be melt from the conquered colonies and used to make coins. In 1944, first global financial institutions were founded, namely the International Monetary Fund and the World Bank.

Currencies as we know them today are the product of an evolution taking into consideration that they evolved from barter to coins, banknotes, cards, electronic wallets, other financial instruments, such as checks, promissory notes. Currencies have three cumulative functions, and it is considered that „any object which does not fulfil the below functions is not a real currency. The functions are the following[42]:

a) Intermediary and exchange mean of products and services between individuals;

b) Store of value;

c) Account unit.

From our point of view, currencies represent a creation and they started to be used frequently when people put their trust in the respective currencies, being based on a convention. Nowadays, the trust is given by the fact that the currencies are issued and controlled by an intermediary, namely by the central banks and other banks. However, this trust may be broken having in view that banknotes and financial instruments may be forged. Especially, international currencies are affected by forgery, mainly the US dollar.

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[34] See Gönenç Gürkaynak, İlay Yilmaz, Burak Yeşilaltay, Berk Bengi, *op. cit., loc. cit.*

[35] Dragoș Bogdan, Mihai Stănescu, *Blockchain și copyright*, 2021, https://www.juridice.ro/748698/blockchain-si-copyright.html#_ftnref2 (accessed on. 02.04.2022).

[36] Press release, *La blockchain dédiée à la gestion du RCS*, 2019 https://www.cngtc.fr/fr/actualite.php?id=143 (accessed on 29.03.2022).

[37] https://ec.europa.eu/digital-building-blocks/wikis/display/EBSI/What+is+ebsi (accessed on. 02.04.2022).

[38] Vincent Fauchoux, *Panorama des applications de la Blockchain en propriété intellectuelle*, https://blockchainyourip.com/blog/blockchain-panorama-applications-propriete-intellectuelle (accessed on. 02.04.2022).

[39] Hervé Jacquemin, Andra Cotiga, Yves Poullet, *Les blockchains et les smart contrats à l'épreuve du droit*, Collection du CRIDS – Faculté de droit de l'UNamur, Larcier, 2020, p. 294.

[40] Hervé Jacquemin, Andra Cotiga, Yves Poullet, *op. cit.*, p. 308.

[41] Deloitte Insights, *Deloitte's 2021 Global Blockchain Survey. A new age of digital assets*, 2021, p. 5. https://ro.register-deloittece.com/forms/registration.html?docid=263&utm_source=CP&utm_medium=RO&utm_campaign=deloittes-global-blockchain-survey (accessed on. 02.04.2022).

[42] Jean-Guillaume Dumas, Pascal Lafourcade, Ariane Tichit, Sébastien Varrette, *op. cit*, pp. 45, 112.

Cryptocurrencies are digital assets that operate as „medium of exchange"[43], which are secret, and we think that their name has to do with the fact that the identity of the person owning a cryptocurrency may not be established.

When referring to „cryptocurrency", we may notice that many notions are used to designate this currency, such as „virtual currency", „decentralised virtual currency", „cybercurrency" or in Romania even „surrogate currency"[44].

The ISO Standards referring to Vocabulary defines „cryptocurrency" as „crypto-asset designed to work as a medium of value exchange".

The European Central Bank uses the notion of „virtual currency" and defines it as „a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community"[45].

In Romania also, it is used the notion of „virtual currency" and it is defined in the same manner by two normative acts as „digital representation of value that is not issued or guaranteed by a central bank or public authority, that is not necessarily linked to a legally established currency and does not have the legal status of money or currency, but is accepted by natural or legal persons as a means of exchange and can be transferred, stored and traded electronically"[46]. The definitions were introduced in the Romanian legislation in 2020 by the anti-money laundering laws and in 2021 by the Criminal Code.

The CJEU mentions that the „virtual currency has no purpose other than to be a means of payment"[47].

From the above definitions, we may notice that cryptocurrencies are used without the state's guarantee and what is more important is that according to a French author, the cryptocurrencies raise constitutional issues considering that the creation and the control of currencies are since a long time the exclusive right of states, national constitutions expressly stating this right of states[48].

Like the traditional currencies, virtual currencies must also fulfil some functions[49], such as:

a) They must be non-forgeable, meaning the impossibility of non-authorised user to create a currency;

b) The impossibility to spend twice the same unit of the currency;

c) The possibility to identify the cheater if a forgery takes place to be sure that an innocent person is not accused.

What is characteristic to cryptocurrencies is that they are the biggest application in blockchain technology, and they allow each participant to be part of the system in the blockchain, meaning that each participant will validate the transactions. The relationship between blockchain and cryptocurrency is given by the fact that blockchain is a way of storing data, while cryptocurrency, as measure of value, represents the very data that is stored on blockchain, it does not exist in any other form[50].

The most known cryptocurrency is Bitcoin created by Satoshi Nakamoto and launched in 2008, when the economic crisis started to affect the entire world.

In present, there are more than 9.000 cryptocurrencies in use[51], although not all of them are popular nor attract investors, most known ones being Bitcoin and Ethereum.

Bitcoin is characterised by the European Central Bank[52] as follows:

a) digital token that can be exchanged electronically;

b) not recognised as a currency because it is not issued by a central public authority;

c) not a generally accepted form of payment;

d) not granting protection to users;

e) not offering stability to owners;

f) speculative asset (having in view that its value is determined by the public interest, being based on supply and demand).

We consider that these characteristics are applied by the European Central Bank for all cryptocurrencies, not only Bitcoin and we may add that these currencies do not have a legal exchange rate because no person is obliged to accept such currency as payment.

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[43] Peggy Keene, *The Rise of Cryptocurrency"*, 2018, https://www.klemchuk.com/ideate/the-rise-of-cryptocurrency (accessed on 03.04.2022).

[44] Vâlcea Court, civ. s. II, decision no. 693/2020, http://www.rolii.ro/hotarari/5f8111b1e490096405000029 (accessed on 03.04.2022).

[45] European Central Bank, *Virtual currency schemes*, 2012, p. 13, https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf (accessed on 12.03.2022).

[46] Art. 2 (t^1) from Romanian Law no. 129/2019 on preventing and combating money laundering and terrorist financing and amending and supplementing certain acts with its subsequent amendments, published in the Official Gazette of Romania no. 589/18.07.2019 and art. 180 (4) of the from Criminal Code with its subsequent amendments, published in the Official Gazette of Romania no. 510/2009.

[47] CJEU, Case no. C-264/14, Skatteverket, p. 24.

[48] Jean-Bernard Auby, *op. cit*., p. 12.

[49] Jean-Guillaume Dumas, Pascal Lafourcade, Ariane Tichit, Sébastien Varrette, *op. cit*., p. 45.

[50] Frank Gerratana, interview, *La brevetabilité de lq blockchain et de la crypto-monnaie (vidéo) – Propriété intellectuelle*, 2021, https://thepressfree.com/la-brevetabilite-de-la-blockchain-et-de-la-crypto-monnaie-video-propriete-intellectuelle/ (accessed on 29.03.2022).

[51] According to the registry of Coin Market Cap https://coinmarketcap.com/ (accessed on 29.03.2022).

[52] European Central Bank, *What is bitcoin*, 2018, updated in 2021, https://www.ecb.europa.eu/ecb/educational/explainers/tell-me/html/what-is-bitcoin.en.html (accessed on 12.03.2022).

Some countries, such as France, England, Canada and more recently USA announced their intention to develop as an alternative to cryptocurrencies, their own digital currency indexed on the national currency to mitigate the risk of people losing their trust into traditional currencies. Such digital currency is named „central bank digital currency" or as some authors call it „state cryptocurrency"[53] and it „would be reliable and retain its value over time"[54].

Therefore, Canada launched the Project Jasper in 2017 having as goal „to better understand how the technology could transform the future of payments in Canada"[55]. England launched in 2020 a discussion paper[56] on central bank digital currency and the USA in 2022[57]. In neither country this type of currency was not yet introduced.

Recently, following Ukraine's invasion by Russia and the international sanctions imposed to Russia for its actions, the Bank of England though to regulate the cryptocurrencies because „they could be used to circumvent financial sanctions imposed to Russia (…)"[58].

More interestingly is that Venezuela is until present the sole state to have adopted its own cryptocurrency, whose value is based on oil. Venezuela has launched in 2018 the *petro* cryptocurrency. It is said that this cryptocurrency was created „to circumvent international sanctions against it [Venezuela] and revive the country's flailing economy"[59].

Following the trends, Facebook announced in 2019 its intention to launch its own cryptocurrency named Libra[60], which should have been a stable coin, meaning a cryptocurrency without the volatile characteristic and only with few people mining the coins and validating the transactions. An important difference from „traditional" cryptocurrencies would have been that Libra would give access of participants to the system only as clients[61]. However, this project was rejected by regulators.

While there are not many litigations in relation to blockchain and cryptocurrencies in Romania there are already settled few disputes. One of the disputes[62] related to a cryptocurrency started in 2018 and was settled by the court in 2020. This dispute refers to an action regarding the observance of contractual dispositions, namely the observance of payment obligations by the company A which asked company B to provide consultancy and marketing services for the event of launching the OPIRIA tokens, more precisely the PDATA cryptocurrency and the services had as object to draft the white-paper, the economic data of tokens, to design the opiria.io website, to create the software smart contracts for the launching event, etc.. Therefore, the issue to settle by the court did not concern the IP, but the payment obligation towards the company B which was not observed by the company A, issue that the court dismissed based on the fact that since company B had the key to the virtual wallet, the payment could have been done by it.

2.5. The notion of non-fungible token

The „token" is defined by the ISO Standard Vocabulary as „a collection of entitlements".

The literature establishes that the token „designates a form of digital value issued and exchanged using blockchain technology", being different than other cryptocurrencies because the token is not born from a blockchain, but it operates „over it"[63].

The Romanian law does not provide a definition for this notion. However, monetary, and financial French code defines it as „any intangible asset representing, in digital form, one or more rights, which may be issued, recorded, stored or transferred by means of a shared electronic recording device that enables to identify, directly or indirectly, the owner of that asset".

From this definition we notice four characteristics, namely:

a) an intangible movable good;

b) representation in digital form of one or multiple rights;

c) the capacity to issue, record, store or transfer the token through a shared electronic recording device;

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[53] Julien Mouchette, *Les usages publics de la blockchain. De quoi les „cryptomonnaie d'Etat" sont-elles le nom?,* Revue francophone de la propriété intellectuelle; Special Number, February 2021, p. 71.

[54] UK central bank digital currency https://www.bankofengland.co.uk/research/digital-currencies (accessed on 12.03.2022).

[55] Project Jasper, 2017, https://www.payments.ca/sites/default/files/project_jasper_primer.pdf (accessed on 12.03.2022).

[56] Bank of England, *Central Bank Digital Currency: opportunities, challenges and design,* 2020 https://www.bankofengland.co.uk/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design-discussion-paper (accessed on 12.03.2022).

[57] Board of Governors of the Federal Reserve System, *Money and Payments: The US Dollar in the Age of Digital Transformation,* 2022, https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf (accessed on 26.03.2022).

[58] Huw Jones, David Milliken, *Bank of England sketches out first regulatory approach to crypto*, 2022, https://www.reuters.com/business/finance/bank-england-sketches-out-regulatory-approach-crypto-2022-03-24/ (accessed on 26.03.2022).

[59] Jake Frankenfield, *Petro (PTR)*, 2022, https://www.investopedia.com/terms/p/petro-cryptocurrency.asp (accessed on 26.03.2022).

[60] It was renamed Diem.

[61] For more information, see Deyan G., *Facebook's Cryptocurrency [Libra Explained]*, 2022, https://techjury.net/blog/facebook-cryptocurrency/#gref (accessed on 29.03.2022).

[62] Timiș Court, civ. s. II, decision no. 107/2020 http://www.rolii.ro/hotarari/5e69a2a4e49009d821000044 (accessed on 03.04.2022).

[63] Alice Barbet-Massin, Faustine Fleuret, Alexandre Lourimi, William O'Rorke, Claire Pion, *Droit des crypto-actifs et de la blockchain*, LexisNexis, Paris, 2020, p. 31.

d) the possibility to identify the owner of the good.

In this definition are not included the cryptocurrencies and NFTs as long as they are acquired as such and not for claiming a right on issuer[64].

There is no legal definition of NFTs. The online version of Cambridge Dictionary offers the following definition of NFT: a unique unit of data (=the only one existing of its type) that links to a particular piece of digital art, music, video, etc., and that can be bought and sold[65], adding that NFTs track the ownership and guarantee the authenticity of digital art.

The literature defines them as „crypto-assets over blockchains, having identification codes and unique metadata which allow them to differentiate one from another, being characterised by uniqueness, indivisibility, non-interchangeability"[66]. This means that by comparison with cryptocurrencies which are identical like any other currency, and which may be exchanged one with another, a NFT cannot be exchanged with another NFT, this being unique, like a painting of Picasso, for example.

Others define NFTs as „digital objects such as a drawing, animation, piece of music, photo, or video with a certificate of authenticity created by blockchain technology"[67]. Therefore, NFTs are used to represent works such as photos, videos, audio, and other digital files and any digital work can be transformed into an NFT, even physical goods that are priorly made to be represented in digital form.

The first NFT ever is the one created by Kevin McCoy in 2014 named „Quantum", which is an animated octagon.

Most NFTs work on Ethereum blockchain and they may be bought with the cryptocurrency Ether, but there are NFTs that work also on other types of blockchains, and they will be bought with the currency of that specific blockchain.

We all know about the famous NFTs all over the world; however, Romania is not behind in this domain and we may mention the NFT project launched on February 13rd, 2022[68] by a team of lawyers consisting of 2,000 unique kittens created by a Romanian designer, which are available on Elrond blockchain[69], and which may be acquired with eGold cryptocurrency.

On this blockchain also will be launched the NFT collection of SanoPass, which in addition to the digital art also offers a full health subscription for persons choosing a way of life based on prevention[70].

The Romanian wine producer GRAMMA Wines purchased, at the end of 2021, 27 NFTs from the collection „Ancestors" launched also on Elrond. After the purchase, the wine producer transformed the NFTs in physical etiquettes in one of its limited editions of wine bottles[71].

We see that NFTs are used in creative domains. But how do they work? Briefly, one has to have an account with an intermediary (i.e. blockchain technology) and a wallet with cryptocurrencies. Once this step is finished, any image may be uploaded to the platform and the platform will transform it into data in the blockchain, the result consisting in a code, a metadata file, the NFT not being the actual image itself. In addition, when the NFT is sold, „it is not sold a signed copy of a work, but a sort of a signed receipt of a work, where the ownership is not of the work itself, but ownership of the receipt"[72].

In conclusion, NFTs are working by using blockchain, cryptocurrencies and smart contracts.

3. Protection by intellectual property right

Taking into consideration that most of crypto assets are functioning based on blockchain technology, we will first analyse the protection by intellectual property rights („IPR") of the blockchain technology.

3.1. Protection of blockchain

We have noticed from the above sections, that crypto assets are based on blockchain technology, and we are wondering if blockchain technology may be protected by intellectual property rights under the Romanian law.

Blockchain technology is in fact a computer software program created in open source and by its functioning it creates a chain of blocks which will store

[64] *Idem*, p. 33

[65] Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/nft (accessed on 03.04.2022).

[66] Oana Dragomir, *Criptoactivele. Perspectivă teoretică, tehnică şi normativă.* Revista Română de Drept al Afacerilor no. 4 / 2021.

[67] The Economic Times, Panache, *The first NFT ever created, „Quantum", goes under the hammer*, 2021, https://economictimes.indiatimes.com/magazines/panache/the-first-nft-ever-created-quantum-goes-under-the-hammer/articleshow/83253657.cms (accessed on 03.04.2022).

[68] Juridice.ro, *Primul proiect NFT al unei echipe de avocați din România*, 2022, https://www.juridice.ro/768325/primul-proiect-nft-al-unei-echipe-de-avocati-din-romania.html (accessed on 03.04.2022).

[69] Elrond blockchain is founded in 2018 in Sibiu, Romania, by three Romanian founders and it is known mostly for its cryptocurrency eGold.

[70] Mihaela Pântea, *Startup-ul SanoPass lansează pe blockchain-ul Elrond prima colecție de NFT-uri cu utilitate în sănătate*, Biz, 2022, https://www.revistabiz.ro/startup-ul-sanopass-lanseaza-primele-nft-uri/ (accessed on 03.04.2022).

[71] Gabriel Barliga, *GRAMMA Wines lansează etichete noi bazate pe NFT-uri din colecția „Strămoși" lansată pe Elrond*, Biz, 2021, https://www.revistabiz.ro/gramma-wines-lanseaza-etichete-noi-bazate-pe-nft-uri-din-colectia-stramosi-lansata-pe-elrond/ (accessed on 03.04.2022).

[72] Andres Guadamuz, *The treachery of images: non-fungible tokens and copyright*, Journal of Intellectual Property Law & Practice, vol. 16, no. 12, 2021, p. 1371.

the past information about transactions in case of cryptocurrencies, about execution of agreements in case of smart contracts, etc. „In other words, it is an assembly of special rules which exchange data or the collective behaviour of processes or network computers, having as purpose of carrying out one or more tasks that contribute to the harmonious functioning of a general entity"[73].

Therefore, from its characteristics, blockchain technology is qualified to be protected under copyright law, namely under Law no. 8/1996 on copyright and related rights[74], herein called as „Romanian copyright law", both as a computer software program and as well as a database.

It is important to underline, that under Romanian copyright law, the right is born as of the creation of the work, either finished or unfinished, without the necessity to register the creation in a public registry nor to make other formalities.

3.1.1. Protection as a computer program

In relation to computer software programs, Romanian copyright law states that „the protection of computer software includes any expression of a software, application software and operating systems, expressed in any language, whether source code or object code, preparatory design material, and manuals".

Also, Romanian copyright law excludes from protection the idea, processes, methods of operation, mathematical concepts and principles underlying any element of a computer program, including those underlying its interfaces.

As such, the protection of computer programs by copyright is limited strictly to its expression, the functionality of the computer program not being important and not obtaining protection by copyright.

In this view is oriented also the case-law of CJEU which states that „neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program"[75].

This means that one can write another program with another expression (form of expression, different code lines, different succession of logical steps, etc.) but with the same functionality to replace the first one, without this procedure to raise an issue from copyright perspective[76] because otherwise it would mean to grant protection to ideas which are expressly excluded from copyright protection. Or, „the reuse of an idea or theme does not constitute an act of copyright infringement, but only the reproduction of the form in which that idea or theme is expressed"[77].

The Bitcoin cryptocurrency was implemented in open source software and is freely available. That means that the developers cannot protect their code, being obliged to make it freely available. Therefore, it is said that „one cannot assert a legal claim or title on blockchain technology itself and may only claim a right on a patentable invention or copyrightable work that is created through, based on or derived from blockchain, and only if the work or invention fulfils the applicable legal prerequisites"[78].

3.1.2. Protection as a database

The provisions related to databases were transposed into Romanian law from the Directive 96/9/EC on the legal protection of database („EU database directive") and they establish two types of protection, namely a protection through copyright if the database represents an intellectual creation and a protection through *sui-generis* rights (*i.e.* special rights granted to persons who made substantial quantitative and qualitative investment to obtain, verify or present the contents of a database).

Protection through *sui-generis* rights. At the section regarding *sui-generis* rights, Romanian copyright law defines a „database" as „a collection of works, data or other independent items, whether or not protected by copyright or related rights, arranged in a systematic or methodical way and individually accessible by electronic or other means".

From this definition, we understand that it is not compulsory that the elements from the database to be protected by copyright and that a database must fulfil four cumulative conditions[79]. Therefore, we might say that „even a blockchain with uncopyrightable facts such as financial transactions can be protected as a database"[80], but before jumping to conclusions, we

[73] Thibaut Labbé, *Les usages publics de la blockchain. Blockchain et administration de la justice*, Revue francophone de la propriété intellectuelle; Special Number, February 2021, p. 61.

[74] Republished in the Official Gazette of Romania no. 489/2018.

[75] CJEU, Case no. C-406/10, SAS Institute Inc., p. 39.

[76] Dragoș Bogdan, Ana-Maria Teodorescu, *Software: creativitate și protecție juridică*, 2021, https://www.juridice.ro/749942/software-creativitate-si-protectie-juridica.html (accessed on 03.04.2022).

[77] Ciprian Raul Romițan, *Condiții cerute pentru protecția operelor în cadrul dreptului de autor,* Revista de Științe Juridice, no. 1/2007, pp. 90,91, *https://drept.ucv.ro/RSJ/images/articole/2007/RSJ1/A10RomitanCiprian.pdf* (accessed on 27.03.2022).

[78] Gönenç Gürkaynak, İlay Yilmaz, Burak Yeşilaltay, Berk Bengi, *op. cit.*, p. 851.

[79] For more details about the analysis of blockchain as constituting a database, see Hervé Jacquemin, Andra Cotiga, Yves Poullet, *Les blockchains et les smart contrats à l'épreuve du droit*, Collection du CRIDS – Faculté de droit de l'UNamur, Larcier, 2020, pp. 253-262.

[80] Sebastian Pech, *Who owns the Blockchain? How copyright law allows rights holders to control blockchains?*, Journal of Business & Technology Law, vol. 16, Issue 1, 2021, p. 69, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1326&context=jbtl (accessed on 27.03.2022).

suggest analysing and see if blockchain technology meets the four conditions.

The first condition refers to database as a collection of works, data, or other items which „involves the fact that the database must be composed of multiple elements grouped in the same place to form a whole unit”[81]. The blockchain technology fulfils this condition considering that each block contains a series of information.

The second condition establishes that the works, data, or other items must be independent. The law does not define the „independence”, but in a preliminary ruling, the CJEU established that the materials are independent if they „are separable from one another without their informative, literary, artistic, musical, or other value being affected”[82]. In case of a blockchain, each block constitutes an independent element in relation to the whole chain, „the individual information, like a financial transaction (having) autonomous information value”[83] and therefore this condition is met.

The third condition establishes that the works, data, or other items must be arranged in a systematic or methodical way. This means that data must be arranged according to specific rules[84]. We consider this condition to be also fulfilled by blockchains having in view that each block is arranged chronologically, and the network can verify the validity of each information.

And the fourth condition refers to the fact that works, data, or other items must be individually accessible by electronic or other means, in other words the elements of a database are individually accessible if they can be retrieved[85]. In case of blockchains, the users of certain applications may access and consult the chain in its entirety but also an individual block from the chain and this condition is also met by blockchains.

Therefore, we may conclude that the operator of a blockchain, but also the participants in the blockchain network can have rights over the information stored on the blockchain.

In addition to the above conditions, to be in the presence of a database protected by *sui-generis* rights, we must demonstrate also the „substantial quantitative and qualitative investment made to obtain, verify or present the contents of a database”. The law does not establish to what this syntagm is referring to. However, the CJEU established in its case-law[86] that this syntagm refers to:

a) „investment in the creation of that database as such”[87];

b) the „resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials”[88];

c) the „resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation[89].

Regarding the condition of the substantial investment, it is considered that since „Bitcoin blockchain, for example, uses (…) special equipment and large amount of computational power” translating into a high amount of electricity consumed, „energy costs alone are more than sufficient to qualify as a substantial investment”[90], being therefore accomplished this condition.

Despite that blockchain technology meets all legal conditions to be qualified as a database under the Romanian copyright law, other persons argue that, in general, there are differences between a blockchain and a database[91]. These differences refer to decentralisation in case of blockchain, each participant having „a secured copy of all records and all changes, so each user can view the provenance of the data” versus centralisation in case of a traditional database. The advantage of the blockchain is that any unreliable information will be immediately identified and corrected „even if a third person maliciously changed” it. In the same manner, any change made by a participant into the blockchain will determine the update of the record and its validation by all participants.

Having in view that blockchain technology meets all four conditions of a database, it results that it is protected by the *sui generis* right of a database.

Protection through copyright. Some authors[92] asked themselves if blockchain could also be protected as database under copyright. Those authors analysed

[81] S. Von Lewinski, *Database directive*, in M. Walter et S. Von Lewinski (dir.), *European Copyright law – A commentary*, Oxford, Oxford University Press, 2010, p. 692 apud. Hervé Jacquemin, Andra Cotiga, Yves Poullet, *op. cit.*, p. 255.

[82] CJEU, Case no. C-444/02, Fixture Marketing, p. 29.

[83] Sebastian Pech, *op. cit.*, p. 70.

[84] *Ibidem*.

[85] *Ibidem*.

[86] EU database directive is in force for almost 30 years, but the case-law of the CJEU is not so vast, being ruled only 10 decisions in the preliminary ruling procedure.

[87] CJEU, Case no. C-203/02, British Horseracing Board, p. 30.

[88] *Idem*, p. 31.

[89] *Idem*, p. 34.

[90] Sebastian Pech, *op. cit.*, p. 73.

[91] IBM Blockchain Pulse, *What's the difference between a blockchain and a database?*, 2019, https://www.ibm.com/blogs/blockchain/2019/01/whats-the-difference-between-a-blockchain-and-a-database/ (accessed on 27.03.2022).

[92] Hervé Jacquemin, Andra Cotiga, Yves Poullet, *op. cit*, pp. 263-266.

the IPR under the EU database directive, but this analysis is valid also for the Romanian law because that EU directive was transposed into the national law through the Romanian copyright law.

We know that copyright is granted to authors for original works as of their creation. The Romanian copyright law as well as the EU copyright normative acts do not define the notion of „originality". Therefore, the doctrine and the case-law had the task to establish the characteristics of the originality. The doctrine has established that „for this condition to be considered fulfilled, the author must not limit himself to a mechanical execution of the work, by ordinary technical means, without making his own contribution in terms of the substance of the ideas which constitute the work in question"[93]. Thus, the work must bear „the stamp of the personality, of the individuality of the author"[94]. In present, the notion of „originality" is harmonised at EU level following the interpretations given by the CJEU[95] which indicates the following:

a) copyright can only apply to an object, (...), which is original, being the author's own intellectual creation;

b) an intellectual creation is owned by an author when it reflects his/her personality. According to Romanian case law, the author's personality may be manifested both in the form of expression and in the elements of fantasy, choice, selection of material or mental processing[96];

c) this situation is found when the author has been able to express his/her creative capacities during the creation of the work by making free and creative choices. According to the doctrine, „at the basis of creative activity lies the author's imagination, the way in which he/she knows how and succeeds in expressing his/her thoughts and feelings"[97]. In addition, the creation of an original creative work „means choosing, analysing, comparing, hesitating, calling on all the resources of taste, intelligence, sensitivity, in a word, creating in a personal way"[98];

d) the author must be able to give a „personal touch" to the work he/she created.

Regarding blockchain technology, having in mind the characteristics of the „originality", the conclusion of the authors[99] was that blockchain cannot be protected as database under copyright and we share this opinion because in blockchain technology the author has few free creative choices, and the content of the database is frequently established by the technical necessities of the structure.

Of course, the information contained in the blockchain may be protected under copyright, but if it meets the criteria of originality. Here also, it is considered that under EU law, the compilation of information stored on a blockchain is not subject to copyright protection in most cases[100].

3.1.3. Protection as patent[101]

Patents are granted to incentivize innovation and they provide the IP right holder with a legal right to prevent others to make, use, sell, and import that invention for a certain period.

According to art. 27 of the TRIPS Agreement but also to art. 6 (1) of the Romanian law no. 64/1991 on patents („**Romanian patents law**"), patents are available for any inventions, in all fields of technology under three conditions: (a) to be new, (b) to involve an inventive activity and (c) to be capable of industrial application.

As we mentioned earlier, blockchain is a computer program. Having in view that computer programs are protected by copyright, can they also be protected by patent laws?

As a rule, Romanian patents law includes computer programs in the inventions category, as long as the patent application or the patent do not relate to such objects or activities considered in themselves, more precisely when the invention do not refer to the computer program as such, „without any reference to a

[93] Yolanda Eminescu, *Dreptul de autor. Legea nr. 8 din 14 martie 1996 Comentată*, Lumina Lex Publishing House, Bucharest, 1997, p. 77.

[94] E. Ulmer, *Urhever und Varlagsrecht*, ed. III, 1980, Springer Verlag, Berlin, Heidelberg, New York, pp. 119-125 apud. Yolanda Eminescu, *op. cit.*, p. 77.

[95] CJEU, Case no. C-145/10, Painer, pp. 87, 88, 89, 92.

[96] HCCJ, civ. s. I, Decision no. 4244/2011.

[97] Viorel Roș, *Dreptul proprietății intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis*, C.H. Beck Publishing House, Bucharest, 2016, p. 209.

[98] Aurelian Ionașcu, Mircea Mureșan, Nicolae Comșa, *Dreptul de autor în Republica în R.S.R.*, Academiei Publishing House, Bucharest, 1969 apud. Viorel Roș, *op. cit.*, p. 209.

[99] Hervé Jacquemin, Andra Cotiga, Yves Poullet, *op. cit.*, pp. 263-266.

[100] Sebastian Pech, *Who owns the Blockchain? How copyright law allows rights holders to control blockchains?*, Journal of Business & Technology Law, vol. 16, Issue 1, 2021, p. 71, https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1326&context=jbtl (accessed on 27.03.2022).

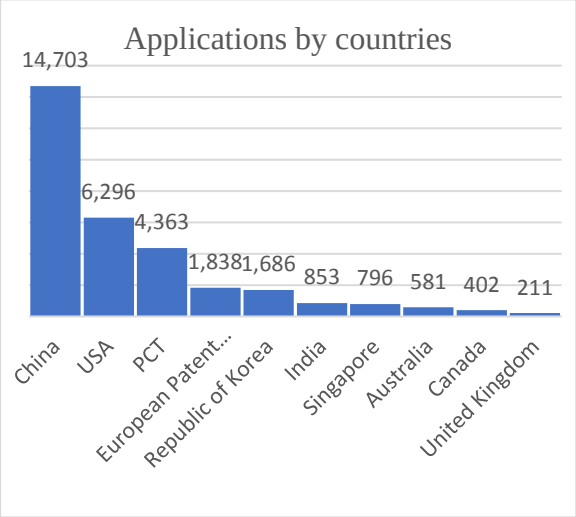
[101] The first recorded patent in the world for an industrial invention was granted in 1421 in Florence to the architect and engineer Filippo Brunelleschi (https://www.britannica.com/biography/Filippo-Brunelleschi - accessed on 03.04.2022). The patent gave him a three-year monopoly on the manufacture of a barge with hoisting gear used to transport marble. It appears that such privileged grants to inventors spread from Italy to other European countries during the next two centuries (William Weston Fisher, *Patent*, Encyclopedia Britannica, May 27, 2019. https://www.britannica.com/topic/patent (accessed on 03.04.2022).

running device"[102], by a computer program as such being understood „a non-technical program"[103].

This rule is not stipulated only by the Romanian patents law, but also by the TRIPS Agreement and Patent Cooperation Treaty („PCT") and if we do not carefully read the legal provisions, we might think that computer programs cannot be protected by patents.

In case blockchain technology would provide a solution to a technical issue, it could also be protected under the patent laws. However, Bitcoin and its blockchain technology are not patented and experts say that „this lack of intellectual property protection […] allows for Bitcoin and similar cryptocurrencies to improve, grow, and innovate in terms of speed, block time, and use" because „coders have been allowed to copy Bitcoin's code, improve on it, and since then, newer cryptocurrencies that have spawned can now boast turnaround times in the seconds"[104].

However, by analysing the WIPO's Patentscope database[105], we may notice that since 2014 until present there are more than 32.800 patents related to blockchain published, the majority having applicants from China and USA.



The most recent interesting patents published from our point of view, refer to „Smart voting system using blockchain"[106], „Method for Alzheimer disease classification using machine learning based EEG Image segmentation with blockchain technology"[107], „Smart device and tracking system"[108].

3.2. Protection of cryptocurrency

We have mentioned in the above sections that cryptocurrencies are types of currencies functioning on the blockchain technology, not being guaranteed by a central bank, and being created by private individuals or private companies, their use being optional, each person having the possibility to use or not to use cryptocurrencies.

3.2.1. Protection by copyright law

Having in view the above aspects, we are wondering if cryptocurrencies may be protected by the Romanian copyright law. If we analyse the dispositions of this law, we notice that it does not offer protection to payment means. The Romanian copyright law does not offer a definition of the payment means, but the literature[109] established that the main payment means are represented by national currencies, foreign currencies, checks, promissory notes, cards, international coins (special drawing rights).

The reason for excluding the payment means from the copyright protection is based on the public use[110] of such payment means. Other authors argue that payment means „involve a creative activity and have originality" and that their exclusion „from copyright protection does not mean that they are not protected and neither that the person who created the work which became [payment mean] does not have a right to reward for his/her creation. This right exists, but it will not be protected by copyright, the transfer of copyright of such creations having the effects of a nationalization"[111].

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[102] Dragoș Bogdan, Ana-Maria Teodorescu, *op. cit., loc. cit.*

[103] EPO Board of Appeal, Case no. T 1173/97 https://www.epo.org/law-practice/case-law-appeals/recent/t971173ex1.html (accessed on 03.04.2022).

[104] Peggy Keene, *The intersection of Cryptocurrency and Intellectual Property Law*, 2018, https://www.klemchuk.com/ideate/cryptocurrency-and-intellectual-property-law (accessed on 27.03.2022).

[105] The search was made after the word „blockchain" https://patentscope.wipo.int/search/en/result.jsf?_vid=P11-L1J6WB-61989 (accessed on 03.04.2022).

[106] Application number 202211013685 / 14.03.2022 in India Office, https://patentscope.wipo.int/search/en/detail.jsf?docId=IN355391636&_cid=P11-L1J8ZY-72511-1 (accessed on 03.04.2022).

[107] Application number 202211010850 / 28.02.2022 in India Office, https://patentscope.wipo.int/search/en/detail.jsf?docId=IN355007109&_cid=P11-L1J8ZY-72511-1 (accessed on 03.04.2022).

[108] Application number 17506449 / 20.10.2021 in USA Office https://patentscope.wipo.int/search/en/detail.jsf?docId=US350352067&_cid=P11-L1J8ZY-72511-2 (accessed on 03.04.2022).

[109] Teodor Bodoaşcă, *Discuții privind conceptul de operă (de creație intelectuală) și condițiile de fond pentru protecția ei juridică*, Revista Dreptul, no. 5/2016.

[110] *Ibidem.*

[111] Viorel Roș, *op. cit.*, pp. 183, 184.

Therefore, the question is if cryptocurrencies may be characterised as being part of the public domain[112].

Prior to answer this question, we propose to establish what public domain means. Although there is no clear definition of the public domain in any state[113], the public domain can be viewed[114]:

a) in a narrow sense - it refers to works whose protection by an intellectual property right has expired;

b) in a broad sense - encompasses:

(i) works whose protection by an intellectual property right has expired;

(ii) the common fond, namely information which by its nature has never been protected by an intellectual property right (*e.g.* ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts, official texts of a political, legislative, administrative or judicial nature and translations thereof, news and press information, etc.);

(iii) the consensual public domain or voluntary public domain, namely works protected by copyright which are voluntarily put to free use by authors or copyright holders. They are considered to represent a „breathing space"[115] for our culture and knowledge because they allow free interaction between them and any person, and according to legal doctrine[116], the public domain is the rule, while protection through intellectual property rights is the exception.

Works in the public domain can be used by anyone at any time without further consent being required.

Coming back to our inquiry if cryptocurrencies may be characterised as being part of the public domain. To find a response to this question, we must analyse two conditions. Are cryptocurrencies addressing to the population and must be known by all citizens?

From our perspective, in order fall in the public domain, these two conditions must be cumulatively met. Cryptocurrencies are addressing to the population since any person may buy and sell units of cryptocurrencies. As for the second condition, cryptocurrencies are not compulsory to be used, nor to be accepted as payment for products and services. Therefore, cryptocurrencies do not have to be known by all citizens. There is also an exception, namely the case when a cryptocurrency is adopted as national currency, as it happened in September 2021 with Bitcoin in El Salvador. However, even if Bitcoin is recognised as a national currency in El Salvador, it seems that most companies in the country do not use it for their business, only 14% of the respondents to a survey saying they have transacted in Bitcoin since it became national currency[117].

Having in view that the two above conditions are not cumulatively met, we might say that cryptocurrencies are not part of a public domain, but of the private domain. This means that may be protected by copyright and no other person may make a business from the same cryptocurrency launched by another person.

3.2.2. Protection by trademark law

In addition to copyright, cryptocurrency may be protected by trademark laws, but not as easy as other products and/or services because „[a] cryptocurrency may not qualify as a product or service if its sole function is merely as a medium of exchange, such as a traditional currency. However, a good or service associated with a function could enable a cryptocurrency name to be trademarked"[118]. The creators of cryptocurrencies are advised to register the name of their cryptocurrency if they do not want to be in the same situation as the creators of Dogecoin which faced challenges to use their name in the USA because other persons had sought registration for the name[119].

3.2.3. Protection by patent law

In case a cryptocurrency fulfils the conditions of a patent mentioned in one of the above sections, it may be protected as such. However, in USA, for example, patent applications for cryptocurrencies were rejected because they were found „abstract" and to be simply „organizing human activity". To successfully register a

[112] The notion of „public domain" should not be confused with the notion of „public domain" as used in administrative law. The fact that a work has fallen into the „public domain" means that the monopoly on the exploitation of the work, recognised in favour of the holders of the right for a limited period, has ceased and that, from that moment, the work (...) is part of the common heritage of mankind, available to all and may be freely used. Viorel Roș, *op. cit.*, p. 362.

[113] Séverine Dusollier, „*Scoping study on copyright and related rights and the public domain*", World Intellectual Property Organization, p. 6, www.wipo.int/meetings/fr/doc_details.jsp?doc_id=161162 (accessed on 27.03.2022).

[114] Melanie Dulong de Rosnay, Hervé Le Crosnier, „*Propriété intellectuelle. Géopolitique et Mondialisation*", CNRS Editions, 2013, Les Essentiels d'Hermès, 978-2-271-07622-9, halshs-01078531, p. 20, https://halshs.archives-ouvertes.fr/halshs-01078531/document (accessed on 27.03.2022).

[115] Public domain manifesto, https://publicdomainmanifesto.org/manifesto/ (accessed on 27.03.2022).

[116] Melanie Dulong de Rosnay, Hervé Le Crosnier, *op. cit*., p. 28.

[117] Michael D McDonald, *El Salvador's Companies Barely Bother With Bitcoin*, 2022, https://www.bloomberg.com/news/articles/2022-03-18/el-salvador-s-businesses-barely-bother-with-bitcoin-study-finds (accessed on 27.03.2022).

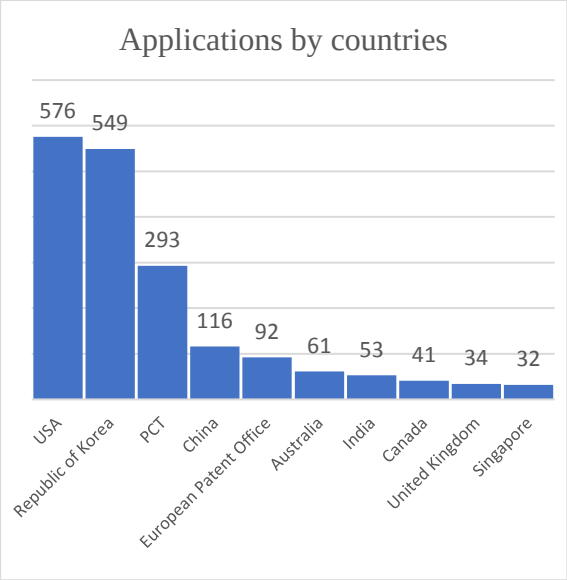
[118] James E. Rosini, Christopher Gresalfi, *Timely Trademarks Are Important to Crypto: Dogecoin Disputes Illustrate Potential Naming Issues"*, The National Law Review, vol. XI, no. 280, 2021, https://www.natlawreview.com/article/timely-trademarks-are-important-to-crypto-dogecoin-disputes-illustrate-potential (accessed on 27.03.2022).

[119] Derek Andersen, *Dogecoin Foundation registers name and logo as trademark within the EU*, 2022, https://cointelegraph.com/news/dogecoin-foundation-registers-name-and-logos-as-trademarked-within-in-the-eu (accessed on 02.04.2022).

patent related to cryptocurrencies, „[a]pplicants must show that they have actually changed the underlying (blockchain) technology to achieve a specific result”[120], in other words that the new envisaged technology for protection brings a solution to a known technical issue.

However, by analysing the WIPO's Patentscope database[121], we may notice that since 2014 until present there are more than 1.900 patents on cryptocurrencies published, the majority having applicants from USA and Republic of Korea.

The most recent patents published involve also the artificial intelligence and machine learning and most interesting patents, from our point of view, refer to „The effect of Bitcoin & Cryptocurrency on digital marketing & Business”[122], „Method and system for real-time exchange of non-fungible tokens (NFT) in a distributed ledger based network”[123], „Machine learning to analyse the impact to crypto currency on economical growth”[124].



3.3. Protection of non-fungible tokens

As previously mentioned, NFT is not a work of art, but a „token of that work (of art)”[125].

Usually, the buyers do not receive copyright over the purchased good, except for few situations, more precisely when the NFT is working on a platform that is developed with copyright transfer; however, there are not many such platforms.

Also, having in view that NFT is not a work, buyers do not purchase the work itself, „but rather a digitally signed ledger entry of a work”[126], in other words they buy the code in which the respective work is written. This may be compared to a copy of a book purchased from a bookstore or at an auction which does not transform the buyer into a copyright holder of the content of the book, but only into the owner of a physical support[127] of the content.

While there might not be issues regarding the legal protection by IPR of an image under NFT made after the own work of an artist if copyright conditions are fulfilled, most important one being the originality, for certainty there are legal issues when an NFT copies the image of a third person's work, including but not limited to designs, trademarks, works protected under copyright such as photos, paintings etc., in other words if an NFT is infringing the IPRs of third persons.

For instance, we have the case of Hermès Birkin bag which was reinterpreted in a NFT by the artist Mason Rothschild and was named „Metabirkin”. In this case, Hermès sued the artist for trademark infringement, trademark dilution and cybersquatting based on its earlier registered trademarks[128] which refer to (i) the name „Birkin” and to (ii) the shape and look of the bag. Even if this lawsuit is judged based on USA law, it will be interesting to see the court's decision considering that there are general rules of trademarks which are applicable in most jurisdictions, namely that trademarks are protected, as a rule, only for the goods and/or services they are registered for. Also, the most interesting aspect to see is if the court will consider that the artist infringed Hermès trademarks, having in view that the later are registered for products, namely for leather or imitation leather goods, while the NFT is only a code that runs an image in the digital world.

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[120] Jonathan Solomon, *Patent Protection for Cryptocurrencies and Blockchain Technology*, 2021, https://www.inhouseops.com/2021/08/patent-protection-for-cryptocurrencies-and-blockchain-technology/ (accessed on 03.04.2022).

[121] The search was made after the word „cryptocurrency” https://patentscope.wipo.int/search/en/result.jsf?_vid=P11-L1J6WB-61989 (accessed on 03.04.2022).

[122] Application number 202211011145 / 02.03.2022 in India Office, https://patentscope.wipo.int/search/en/detail.jsf?docId=IN355007631&_cid=P11-L1J7P1-65989-1 (accessed on 03.04.2022).

[123] Application number 202241010924 / 01.03.2022 in India Office https://patentscope.wipo.int/search/en/detail.jsf?docId=IN355008215&_cid=P11-L1J7P1-65989-1 (accessed on 03.04.2022).

[124] Application number 202241008070 / 16.02.2022 in India Office https://patentscope.wipo.int/search/en/detail.jsf?docId=IN352550272&_cid=P11-L1J7P1-65989-1 (accessed on 03.04.2022).

[125] Andres Guadamuz, *op. cit.*, p. 1372 about the sale of a tweet, explaining that the tweet was never for sale, being in fact sold an NFT of it.

[126] *Idem*, p. 1377.

[127] We mention this as a response to the actions of a book's buyer at a public auction who believed he had acquired the copyright over that book https://www.theartnewspaper.com/2022/01/17/nft-group-shamed-jodorowsky-dune-book-copyright (accessed on 04.04.2022).

[128] For more details, the complaint of Hermès International and Hermès of Paris, inc against Mason Rothschild, https://media-exp1.licdn.com/dms/document/C561FAQFKSHDkqULgsw/feedshare-document-pdf-analyzed/0/1643212129525?e=2147483647&v=beta&t=3_q8Zn7fDJRXBPE-UuIyZhyyJ1iwke6zfE5cpNRZJAQ (accessed on 04.04.2022).

From our perspective, the court should rule in favour of Hermès because irrespective of the fact that NFT is not a leather bag *per se*, the author used without permission, in the online environment, the design of the bag and the trademark.

There are authors arguing that NFTs are not infringing IPRs, even if they are created without authorisation, because it does not exist a direct relationship between NFTs and the work that was used to create them[129]. We do not agree with this point of view because the infringement does not relate to the NFT code, but to the image ran by the NFT code. Is like we would say that the image of a famous painting or that the image of a Ferrari car together with its trademark could be used in a video game without constituting infringing of the IPRs.

NFTs are at the beginning of their journey and even if there are many opinions saying that they will change the art world for better, making more secure the rights of authors, we have our doubts because we think that NFTs will open new ways to produce counterfeits of works in the digital world, NFTs being possible to be created without the permission of the author of the original work.

4. Conclusions

Blockchain, cryptocurrencies and NFTs are still new, not many people are used to them or open to use them in their activities. However, they started to be explored more in recent years.

We noticed from this paper that blockchain, cryptocurrencies and NFTs are linked together, they are interacting with one another and the latter two are functioning on the blockchain technology. While blockchain technology is independent, cryptocurrencies and NFTs are dependent to blockchain.

They also have a strong link with the IP, being able under certain conditions to be protected by different rights, such as copyright, trademarks, patents.

Only time will tell if they survive and would be used by an increasing number of people. Also, from our point of view, in case they will survive, the legislators should think to regulate them in order to establish specific rules for them.

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THE COURT OF JUSTICE OF THE EUROPEAN UNION'S DECISION IN POLAND V. EUROPEAN PARLIAMENT – THE LAST CHALLENGE DISMISSED, WHO WILL TAKE THE NEXT STEP FORWARD?

Paul-George BUTA*

Abstract

This article follows the Court of Justice of the European Union's decision in Poland v. European Parliament and Council of the European Union (C-401/19), the 'last-ditch' effort made by the Republic of Poland to annul (in part, at least) art. 17 of the Digital Single Market Directive, which famously captured both the legislative and public debate by proposing that online content sharing service providers be, where they have not secured a license from the relevant copyright and/or related rights holders, directly liable for the communication to the public of works or protected subject matter not by themselves but by their users. This very important shift in the liability regime for copyright infringement has naturally attracted a lot of criticism, with some of the critics' arguments being used by Poland in their briefing the present case. In response, Attorney General Øe and then the Grand Chamber of the Court, in following his findings, allow the provision to stand but, by highlighting its qualification as a serious interference with the right to freedom of expression and information, subject it to a series of very stringent conditions, which would seem to make it, at least in light of current technology, only exceptionally applicable.

Keywords: *art. 17 of the Digital Single Market Directive, online content sharing service providers, liability regime for copyright infringement, the right to freedom of expression and information, the exclusive right of communication to the public.*

1. Introduction

The very recent Court of Justice of the European Union's ("CJEU") decision of 26 April 2022 in *Poland v. European Parliament and Council of the European Union*[1] has been, although not surprising in its overall approach, one of significant importance for the shaping of the implementation of the highly contentious art. 17 of Directive 2019/790 on the Digital Single Market[2]. The importance of the decision is further highlighted by the fact that the court has decided the issue in a Grand Chamber and, we could ironically say, the overall direction of the decision could have been hinted at by the fact that the decision was issued on World Intellectual Property Day (*i.e.* 26 April).

The decision concerned an application by the Republic of Poland for the annulment of art. 17(4), point (b), and point (c), *in fine*, of Directive 2019/790 and, in the alternative, if the Court were to consider that those provisions cannot be severed from the other provisions of art. 17 of the directive without altering the substance thereof, to annul art. 17 of the directive in its entirety.

Art. 17 of Directive 2019/790 is, arguably, the most contentious provision of the copyright modernization package, initially envisaged by the Juncker Commission's Digital Agenda.[3] The "monster provision" of the Directive, "both by its size and its hazardousness",[4] "a major internet policy experiment of our decade",[5] its provisions have already fueled the creation of a significant body of literature.[6]

2. Contents

2.1. The *status quo ante* and the problem identified

The provision was, in the words of Advocate General Øe, meant to "remedy the 'Value Gap', namely the perceived gap between the value that online sharing service providers derive from protected works and subject matter and the revenue they distribute to

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[1] CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297.

[2] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *OJ.* L 130/17.05.2019, p. 92.

[3] See Communication from the Commission, *A Digital Agenda for Europe*, 26 August 2010, COM (2010) 245 final/2 in Séverine Dusollier, "The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition", *Common Market Law Review*, vol. 57 (2020), p. 980, note 4.

[4] Séverine Dusollier, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, Common Market Law Review, vol. 57 (2020), p. 1008.

[5] João Pedro Quintais, Martin Husovec, *How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, GRUR International, vol. 70, Issue 4, April 2021, pp. 325-348.

[6] See, for some examples, *Idem*, note 11.

rightholders"[7]. Art. 13, as the provision was numbered when the proposal for a directive was made public, was part of a package meant to, first, adapt EU copyright and related rights rules to the evolution of digital technologies, and, secondly, to further harmonize these rights within the territory of the European Union "in a way that, whilst continuing to guarantee a high level of protection of intellectual property, ensures that creative content is widely available throughout the European Union and maintains a 'fair balance' with other public interests in the digital environment."[8]

Basically, the problem that art. 17 was meant to resolve was that of a perceived imbalance in the level of remunerations paid by online content sharing service providers (or „OCSSPs") for use of copyright/related rights protected works/subject matter, in their case, uploaded to their respective platforms by their users (and known as user-generated content) as opposed to the level of remunerations paid to rightholders by the music streaming services for, arguably, equivalent use of the same type of works.

While there has been (and will likely continue to be) a heated debate on whether this 'value gap' ought to have been the object of legislative resolution and whether the mechanism chosen is appropriate, the legal framework targeted by art. 17 was, as Advocate General Øe indicated in his opinion, based on two provisions: art. 3(1) and (2) of Directive 2001/29[9] and art. 14 of Directive 2000/31.[10]

The first provision vested rightholders (in copyrighted works or subject matter of related rights) with an exclusive right of communication to the public, including in what concerns the making available of such in a way that members of the public may access them from a place and at a time individually chosen by them. This right was considered to have been infringed upon "the uploading, by a user, of a work or protected subject matter to a sharing service"[11] where such user did not secure the rightholder's authorization for such. Under the copyright legal framework, the liability of the provider of the "sharing service" for the acts of the user would only be triggered, as the result of a direct infringement, where the provider itself makes an act of communication to the public.[12]

The second provision concerns the so-called 'safe harbor' under the e-commerce framework, which shields from liability hosting providers for information stored at the request of a recipient of the service where the provider of the service has no actual knowledge of illegal activity or information and, with regard to claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

The CJEU has developed an encompassing approach of the two which it consolidated in its decision in *YouTube* and *Cyando*,[13] holding that "the operator of a video-sharing platform or a file-hosting and ‑ sharing platform, on which users can illegally make protected content available to the public, does not make a 'communication to the public' of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright. That is the case, inter alia, where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform."

Therefore, prior to art. 17, the direct liability of the operators of such platforms was only exceptionally triggered, thereby leaving rightholders in the unenviable position of policing these platforms in

[7] CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 13.

[8] *Idem*, para. 12.

[9] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *OJ* L 167/22.06.2001, pp. 10-19.

[10] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ* L 178/17.07.2000, pp. 1-16.

[11] CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 17.

[12] CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 16 July 2020, *Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C‑682/18) and Elsevier Inc. v. Cyando AG (C‑683/18)*, ECLI:EU:C:2020:586, para. 65.

[13] CJEU, Grand Chamber, Decision of 22 June 2021, *Frank Peterson v. Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C‑682/18) and Elsevier Inc. v. Cyando AG (C‑683/18)*, ECLI:EU:C:2021:503.

search of "specific illegal acts committed by [the platform's] users relating to protected content that was uploaded to [the] platform"[14] and then proceeding to a notification and take-down procedure ("NTD procedure"), only a lack of response to such being (absent proof of direct participation, support or encouragement of/from the operator of the platform in the illegal sharing of content) likely to trigger the liability of the operator of the platform. This was also compounded by the fact that art. 15 of Directive 2000/31 prohibited the imposition of a "general obligation on providers […] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

2.2. The outcome of the legislative process

Following the intense legislative process, peppered with lobbying, protests and a negative vote in the European Parliament, the outcome was art. 17 as adopted, which provides that:

1. An OCSSP is itself making an act of communication to the public or an act of making available to the public, for the purposes of Directive 2019/790, whenever it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An authorization granted by the rightholders is therefore needed.

2. The authorization obtained by the OCSSP shall be deemed to also cover the acts carried out by its users and falling within the scope of art. 3 of Directive 2001/29, if the users act on a non-commercial basis or obtain insignificant revenues by this activity.

3. The safe harbor in the e-commerce Directive is inapplicable to the situations envisaged by art. 17 but remains applicable for situations falling outside this scope.

4. Where no authorization from the rightholders exists, the liability of the OCSSP for unauthorized acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter will be triggered unless the provides proof that it (a) has made best efforts to obtain an authorization, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of content for which the rightholders have provided relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. Assessment of the provider's qualification for the exception provided above must be made in light of the principle of proportionality and based on, at least, the following elements: (a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and (b) the availability of suitable and effective means and their cost for the service provider.

6. Para. 6 concerns a partial derogation for new OCSSPs the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, such OCSSPs qualifying for the exception provided under para. (4) even if they only meet the first criterion (best efforts to secure authorization), and they act expeditiously, upon receiving sufficiently substantiated notice, to disable access/remove content. Where such OCSSP surpasses 5 million unique visitors per calendar year, qualification for the exception requires meeting in full criteria under (4)(a) and (4)(c).

7. In meeting the criteria under art. 17, the OCSSPs will not prevent the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation, these being "any of the following existing exceptions or limitations […]: (a) quotation, criticism, review; [and] (b) use for the purpose of caricature, parody or pastiche."

8. The application of the Article must not lead to any general monitoring obligation, OCSSPs needing to provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the actions undertaken in application of para. 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

9. An effective and expeditious complaint and redress mechanism needs to be put in place by OCSSPs for the benefit of users who dispute the disabling of access to, or the removal of, works or other subject matter uploaded by them. Such mechanism is to be complemented with out-of-court redress mechanisms and needs to be without prejudice to the legal protection afforded by national law, including the rights of users to have recourse to efficient judicial

[14] *Ibidem.*

remedies, especially to assert the use of an exception or limitation to copyright and related rights. Rightholders requesting to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, must duly justify the reasons for their requests and legitimate uses, such as uses under exceptions or limitations provided for in Union law shall not be affected. Complaints submitted under this mechanism must be processed without undue delay, and decisions to disable access to or remove uploaded content must be subject to human review. Moreover, regard for the safeguarding of personal data needs to be had and users need to be informed of their benefit of the exceptions or limitations to copyright and related rights provided for in Union law.

10. The European Commission must organize dialogues with stakeholders and issue guidance on the application of art. 17.

2.3. The legal challenge

The Republic of Poland filed a claim asking that the court either annul art. 17 in part, that is art. 17 para. (4) letter (b) – the condition that the OCSSP prove that it made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of content for which the rightholders have provided relevant and necessary information – and the second part of para. (4) letter (c) – the condition that the OCSSP prove that it made best efforts to prevent their future uploads in accordance with point (b) – or, were the court to find that the specific provisions referred to before cannot be severed from the other provisions of art. 17 without altering the substance thereof, annul art. 17 in its entirety.

The specific claim was that the imposition on OCSSPs of the obligation to make best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information and the imposition on OCSSPs of the obligation to make best efforts to prevent the future uploads of protected works or other subject-matter for which the rightholders have lodged a sufficiently substantiated notice would make it necessary for the providers – in order to avoid liability – to carry out prior automatic verification (filtering) of content uploaded online by users therefore making it necessary to introduce preventive control mechanisms. Such mechanisms would undermine the essence of the right to freedom of expression and information and would not comply with the requirement that limitations imposed on that right be proportional and necessary.[15]

Therefore, the argument brought by Poland was essentially that the challenged provisions would cause the OCSSPs, in order for them to avoid direct liability, to carry out preventive monitoring of all the content their users try to upload onto their platforms. In order to do so, the OCSSPs would have to use filtering software which enables the prior automatic filtering of that content. Poland considered that the *de facto* imposition of such a preventive monitoring without providing safeguards to ensure that the right to freedom of expression and information is respected, constitutes a limitation on the exercise of that fundamental right, which respects neither the essence of that right nor the principle of proportionality and which could not, therefore, be regarded as justified.[16]

Oral arguments in the case were held on 10 November 2020, when in a four hour hearing (deemed "very long" by the President of the CJEU[17]), the court heard the parties as well as the representatives of the Kingdom of Spain, the French Republic, and the European Commission (who intervened in support of the respondents).

The court communicated some questions to the parties and intervenors, to be prepared in advance and discussed at the oral hearing. These questions were:[18]

"The Council and the Parliament having noted, in substance, that the wording of Article 17 (4) (b) and (c) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 , on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019, L 130, p. 92) does not require adoption by online content sharing service providers, automatic content filtering mechanism ("upload filters"), these parties as well as the other participants in the hearing are invited to express themselves in their pleadings:

– on the possible necessity, in practice, of putting in place such mechanisms for the application of these provisions – the parties and other participants being invited to specify, in this regard, whether, to their knowledge, they exist, in the current state of technology, effective alternative solutions to meet the requirements provided for in these provisions and, that being the case, which ones;

[15] Action brought on 24 May 2019 — *Republic of Poland v European Parliament and Council of the European Union*, (C-401/19), https://curia.europa.eu/juris/document/document.jsf?text=&docid=216823&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5031146, accessed 4 May 2022.

[16] CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297, para. 24.

[17] Ted Shapiro, *Poland v. EU – The Battle for the Value Gap*, https://www.wiggin.co.uk/insight/poland-v-eu-the-battle-for-the-value-gap/, accessed 4 May 2022.

[18] *Idem*, unofficial translation from French.

– on the risks associated with such an implementation in the particular context of freedom of information and communication on the Internet, this network being characterized by the speed of the exchange of information;

– on the question of whether art. 17 of Directive 2019/790 allows, impose or, on the contrary, opposes, a system in which only manifestly infringing content would be automatically blocked when it is posted online, while that the content likely to make a legal use of a work could only be so once an agent of the operator has raised their illegal nature – see European Commission, "Targeted consultation addressed to the participants to the speaker dialogue on art. 17 of the Directive on copyright in the digital single market ", section IV, subsection (ii), as well as

– on the specific measures put in place to mitigate these risks, in particular with regard to the requirements recalled by the Court in its judgment of 16 July 2020, Facebook Ireland and Schrems (C-311/18, EU: C: 2020: 559, point 175[19])."

One of the main points raised in the hearing was the point made by the European Commission that the obligation in art. 17 para. (7) is an obligation of results while the one in art. 17 para. (4) is an obligation of diligence. The argument would be that priority should be given to free speech, *i.e.* only "likely infringing" (in the Commission's words) or "manifestly infringing" (in the court's questions) would be taken down. Also, a significant number of arguments were centered on the existence of safeguards to ensure that non-infringing content is not blocked (especially by reference to the mechanism envisaged by art. 17 para. (9)). Another point that was emphasized was that the directive does not envisage a preventive general monitoring but only a monitoring based on the information received from the rightholders (but the quality of such information to be provided to the OCSSP and which would cause the OCSSP to have been 'informed' is unclear[20]).

2.4. The Advocate General's Opinion

Advocate General Øe issued his Opinion in the case on 15 July 2021 (even though in the hearings he had indicated he would do so by 22 April). Importantly, in the meantime, the European Commission issued the guidance on the application of article 17[21] that it was mandated to give pursuant to the provisions of art. 17(10). The AG has indicated that the essence of the guidance is in accordance with his findings and reflects the European Commission's prior position made in the oral hearings in the case. The AG points out however that he finds the Commission's suggestion that rightholders should have the possibility to 'earmark' subject matter the unauthorised uploading of which 'could cause significant economic harm to them', with the consequence that OCSSPs should *ex ante* block such content solely because it was so 'earmarked')even if that content were not manifestly infringing), not in line with his Opinion.[22]

First of all, the Advocate General determined that, unlike under the previous regime, in order to avoid liability where no authorization for the OCSSP exists, Article 17 imposes upon them an obligation of diligence – to use best endeavors – to prevent *ex ante* infringing content from being uploaded, and not just to have an *ex post* reaction to remove it.[23]

Secondly, the Opinion argues that, even though the directive does not *directly* mandate the use of filtering software, such as automatic content recognition tools, it *indirectly* imposed the use thereof by the OCSSPs as a condition to avoid liability.[24] Even though there is a possibility that, by factoring in proportionality and suitability, use of such tools could not be mandated in certain cases, as a rule, the AG found, „ in all situations in which various appropriate and effective tools are available on the market and are not unreasonably expensive, sharing service providers are a priori required to put them into place in order to demonstrate that they have made 'best efforts' to prevent the uploading of illegal content and, therefore, to comply with the contested provisions."[25]

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[19] "Following from the previous point, it should be added that the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, para. 139 and the case-law cited). That previous point is as follows: "Furthermore, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Under the second sentence of art. 52(1) of the Charter, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

[20] See, questions addressed by Advocate General Øe to the European Parliament and the European Commission - Ted Shapiro, "Poland v. EU – The Battle for the Value Gap – Rough Notes", https://www.wiggin.co.uk/app/uploads/2021/03/TS-Article-Post-on-CJEU-PL-v.-EU-Art-17-22-MAR-21.pdf, pp. 9-10, accessed 4 May 2022.

[21] European Commission, *Communication from the Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market'*, COM(2021) 288 final/4.06.2021.

[22] CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 263.

[23] *Idem*, para. 52-53.

[24] *Idem*, para. 63.

[25] *Idem*, para. 68.

The AG then found that the mechanism of liability/exemption provided by para. (4) imposes upon the OCSSPs an obligation to preventively filter and block the content in question (*i.e.* the works and other protected subject matter identified by rightholders).[26] This makes the obligations incumbent upon OCSSPs 'prior restraints' or 'preventive measures' which constitute an 'interference' with the exercise of the users' freedom of communication and with the public's freedom to receive information.[27] Moreover, this interference is attributable to the EU legislature.[28]

Having found that the obligations instituted by art. 17 para. (4) are an interference with the fundamental right to freedom of expression, the Opinion then goes on to examine whether this interference is compatible with the Charter by verifying whether the limitation is first, 'provided for by law', secondly, in respect of the 'essence' of that freedom and, thirdly, in respect of the principle of proportionality.

With regards to the first condition, the AG found that the limitation is provided by law since it clearly stems from provisions adopted by EU legislature and it is also sufficiently accessible and precise. In respect of the latter, the Opinion argues that even if the provisions make use of some open concepts which create some uncertainty, such use is meant to allow adaptation to different types of operators and situations, as well as changes in technology and practice.[29]

In respect of the second condition, the Opinion argues that „preventive measures for monitoring information are generally regarded as particularly serious interferences with freedom of expression"[30] because of the fact that, by restricting information before dissemination, they impede any public debate on the contents thereof. This, the AG finds, is even more true in what internet communication is concerned, as platforms "play a role in a form of 'democratisation' of the production of information and […] have in fact become essential infrastructures for online expression."[31] Thus, if authorities were to impose "the obligation preventively to monitor, in general, the content of users of their services in search of any kind of illegal, or even simply undesirable information, that freedom of communication would be called into question as such [and] the 'essence' of the right to freedom of expression, as provided for in art. 11 of the Charter, would be affected"[32]. Importantly, the AG also notes that the prohibition of a general monitoring obligation (enshrined in art. 15 of Directive 2001/31) is a "g*eneral principle* of law governing the Internet" which goes beyond the scope of the provision in Directive 2000/31 and is binding not only on the Member States, but also on the EU legislature.[33]

However, in the given case, the AG found that the monitoring obligation was not 'general' but 'specific' and also provided references to the CJEU's evolving practice on this distinction.[34] Thus, the AG found that the contested provisions concern "a matter of searching, among that content, for 'specific works or other subject matter' for which the rightholders will have already communicated to [OCSSPs] the 'relevant and necessary information' […] or a 'sufficiently substantiated notice' […]. those factors are sufficient, in my view, to demonstrate that those provisions do indeed lay down, indirectly, a 'specific' monitoring obligation and to rule out an infringement of the 'essence' of the right to freedom of expression."[35]

Therefore, the Opinion finds that while the EU legislature can't delegate to online intermediaries the "carrying out [of a] general preventive monitoring of information shared or transmitted through their services", the imposition of "certain active surveillance measures concerning certain specific illegal information, on certain online intermediaries" would be possible without undermining the essence of the freedom of expression. However, such imposition would always have to ensure respect of the principle of proportionality which presupposes the existence of sufficient safeguards for the users of such intermediaries.[36]

With regards to proportionality, the Opinion notes that, according to art. 52(1) of the Charter,[37] this presupposes a meeting two sub-conditions: the limitation must be (1) necessary and (2) genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. As the meeting of the second sub-condition was not disputed (also because intellectual property is protected as a fundamental right), the Opinion has then focused on verifying whether the first sub-condition is met, which presupposes cumulatively meeting three

[26] *Idem*, para. 78.
[27] *Idem*, para. 80.
[28] *Idem*, para. 84.
[29] *Idem*, para. 95.
[30] *Idem*, para. 102.
[31] *Idem*, para. 103.
[32] *Idem*, para. 104.
[33] *Idem*, para. 106.
[34] *Idem*, para. 111-112.
[35] *Idem*, para. 114.
[36] *Idem*, para. 115.
[37] *Charter of Fundamental Rights of the European Union*, *OJ* C326/26.10.2012, p. 391.

requirements: that the limitation be (1) appropriate, (2) necessary, and (3) proportionate *stricto sensu*.[38]

The AG found that the limitation is appropriate, under the test that "the Court must ascertain not whether that measure constitutes the *best means* of attaining the objective pursued, but whether it is *appropriate for contributing* to the achievement of that objective."[39] The contested provisions were found to qualify, as they 'strongly encourage' OCSSPs to conclude licensing agreements in respect of the content uploaded by their users and as they also enable rightholders to "control more easily the use of their works and subject matter on those services."[40]

In respect of necessity, after indicating that the necessity test requires "verifying whether alternative measures exist which would be *as effective* as the measure chosen to attain the objective pursued whilst being *less restrictive*",[41] the AG finds that the elimination of the additional monitoring obligations from the requirements of article 17 would make those provisions not equally effective as those of article 17 as adopted, and therefore would not qualify as an alternative, even if less restrictive.[42]

Finally, proportionality *stricto sensu* would require verifying whether "the disadvantages caused by the measure in question are not disproportionate to the aims pursued."[43]

In this regard, the AG argues that the EU legislature enjoys a broad discretion to choose to change the balance initially created by means of Directive 2000/31 and that the policy choice in favor of the creative industries is not disproportionate. The combination of factors cited by the Opinion as underlining the proportionality of the measures included: (1) the extent of the economic harm to rightholders caused by the upload of their works, especially given the huge amount of content uploaded and the speed at which this content is being exchanged; (2) the difficulties in getting the 'notice and take down' system to work in respect of these platforms; (3) the difficulties in litigating with the users responsible and, (4) the fact that the monitoring obligations concern specific intermediary providers.[44]

The Opinion reminds that the risk entailed by these limitations concerns a possible over-blocking of content, which would mean that "in order to avoid any risk of liability vis-à-vis rightholders, the sharing service providers systematically prevent the making available, on their services, of all content which reproduces works and other protected subject matter for which they have received the 'relevant and necessary information' or a 'sufficiently substantiated notice' from those rightholders, including content which does not infringe their rights",[45] such risk being even higher as the provisions indirectly mandate the use of automatic content recognition tools and, also, allow for 'over-complaining' by the rightholders.

In light of this risk, the EU legislature must (itself, and not the Member States) also provide for the safeguards which need to be sufficient to minimize the risks to freedom of expression.[46] The AG has expressed the opinion that the system of safeguards provided by art. 17 is sufficient for meeting the requirements under art. 52(1) of the Charter.

However, in so finding, the AG makes some very important points. First of all, the Opinion argues that, by adopting art. 17(7), "the EU legislature has expressly recognised that users of sharing services have subjective rights under copyright law"[47] and, consequently, "[t]hose users now have the *right*, which is enforceable against the providers of those services and rightholders, to make legitimate use, on those services, of protected subject matter, including the *right* to rely on exceptions and limitations to copyright and related rights",[48] such being, "in accordance with art. 17(7) [any] *of the exceptions and limitations provided for in Union law*, and in particular those set out in art. 5 of Directive 2001/29."[49] The AG therefore holds that art. 17(7) has purposefully provided for a new right, previously inexistent, in favor of users of such OCSSPs, which right can be claimed under before courts, including courts of the Member States.[50] This would be a significant change in the long debate surrounding the legal nature of limitations and exceptions and a big boost to the users who benefit from these.

Secondly, for the AG, art. 17(7) "imposes an *obligation* on sharing service providers *to achieve a result*: *the result they must achieve* is not to prevent the making available on their services of content that

[38] CJEU, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2021:613, para. 116-118.
[39] *Idem*, para. 120.
[40] *Idem*, para. 121.
[41] *Idem*, para. 124.
[42] *Idem*, para. 125-127.
[43] *Idem*, para. 128.
[44] *Idem*, para. 137.
[45] *Idem*, para. 143.
[46] *Idem*, para. 153.
[47] *Idem*, para. 161.
[48] *Ibidem*.
[49] *Idem*, para. 162.
[50] *Idem*, note 197.

legitimately reproduces works and other protected subject matter, even if such works and subject matter have been identified by the rightholders. The limit of permissible filtering and blocking measures is therefore clearly defined: they *must not have the objective or the effect of preventing such legitimate uses*."[51]

Moreover, the AG argues that, in order for the safeguards to be proportional, the procedural safeguards under art. 17(9), aiming for an *ex post* remedial effect of over-blocking, would not be sufficient if the results obligation under art. 17(7) (*i.e.* making sure that no legitimate content is blocked) would not be considered *ex ante*, thereby objectively requiring OCSSPs that, as a result of their preventive monitoring, they do not block any legitimate content.[52]

In continuation of this, the AG goes on to argue that, under art. 17(8), the OCSSPs can't be "expected to make 'independent assessments' of the lawfulness of the information"[53] and, therefore, should "only be required to filter and block information which has first been established by a court as being illegal or, otherwise, information the unlawfulness of which *is obvious from the outset*, that is to say, it is *manifest*, without, inter alia, the need for contextualisation",[54] meaning "content which is 'identical' or 'equivalent' to works and other protected subject matter identified by rightholders."[55]

2.5. The Court's Decision

By its judgment of 26 April 2022, the Court first followed the AG's Opinion to find that the liability regime enshrined by art. 17(4) entails a limitation to the fundamental right to freedom of expression and information of the users of the platforms in question.[56]

The Court went on to examine whether the limitation thus instituted meets the requirements set out by art. 52(1) of the Charter. Moreover, citing the ECtHR's decision in *Yildirim*,[57] the Court noted that in respect of a limitation to the right of freedom of expression and information which poses such a risk, "a particularly tight legal framework is required."[58]

Nevertheless, the Court also indicated that its interpretation needs to be one that does not affect the validity of the EU measure at stake but rather "renders the provision consistent with primary law"[59] while taking into account the "the legitimate objective pursued by the establishment of that regime, namely the protection of the holders of copyright and related rights, guaranteed, as intellectual property rights, in Article 17(2) of the Charter."[60]

The Court confirmed the AG's assessment as to the limitation being "provided by law", noting that, even though the actual measures OCSSPs must take to avoid liability are not expressly indicated, "the requirement that any limitation on the exercise of a fundamental right must be provided for by law does not preclude the legislation containing that limitation from being formulated in terms which are sufficiently open to be able to keep pace with changing circumstances."[61]

The decision also follows the AG's findings in respect of the limitation not affecting the 'essence' of the right, again affirming the prevalence of the results obligation provided for in art. 17(7) and (9) over the 'best efforts' obligation provided for in art. 17(4), thereby confirming that OCSSPs "must comply with the right to freedom of expression and information of internet users and must, in particular, be strictly targeted in order to enable effective protection of copyright but without thereby affecting users who are lawfully using those providers' services."[62]

After confirming the AG's findings on the sub-condition of 'necessity' of the limitation, the Court goes on to examine the proportionality *stricto sensu* of the limitation.

In this context, the Court held that the law must be interpreted as laying down six safeguards which ensure that the limitation meets the conditions for proportionality:

1. First of all, the Court held that "the EU legislature laid down a clear and precise limit, […] by excluding, in particular, measures which filter and block lawful content when uploading." And therefore "a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be

[51] *Idem*, para. 165.
[52] *Idem*, para. 170-171.
[53] *Idem*, para. 197.
[54] *Idem*, para. 198.
[55] *Idem*, para. 201.
[56] CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297, para. 58.
[57] ECtHR, Decision of 18 December 2012, *Ahmet Yildirim v. Turkey*, CE:ECHR:2012:1218JUD000311110, para. 47, 64 and case-law cited therein.
[58] CJEU, Grand Chamber, Decision of 26 April 2022, *Republic of Poland v. European Parliament and Council of the European Union* (C-401/19), ECLI:EU:C:2022:297, para. 68.
[59] *Idem*, para. 70.
[60] *Idem*, para. 69.
[61] *Idem*, para. 74, citing ECtHR, Decision of 16 June 2015, *Delfi AS v. Estonia*, CE:ECHR:2015:0616JUD006456909, para. 121 and case-law cited therein.
[62] *Idem*, para. 81.

incompatible with the right to freedom of expression and information […] and would not respect the fair balance between that right and the right to intellectual property."[63]

2. Secondly, the Court confirmed that "the exceptions and limitations to copyright, […] confer rights on the users of works or of other protected subject matter" and that art. 17 made some of these, which were optional under Directive 2001/29, mandatory.[64] OCSSPs are also required to inform users of these rights.

3. Thirdly, the Court underlined that the OCSSP's obligation to monitor and block/remove can only be triggered when they are provided with "undoubtedly relevant and necessary information", in the absence of which, OCSSPs will not "be led to make the content concerned unavailable."[65]

4. Fourthly, the OCSSPs "cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright", the notification by rightholders needing to "contain sufficient information to enable the online content-sharing service provider to satisfy itself, without a detailed legal examination, that the communication of the content at issue is illegal and that removing that content is compatible with freedom of expression and information."[66]

5. Fifthly, the Court refers to the complaint mechanism that is to be made available to users, including the need for requests by rightholders to be "duly justified", the need to ensure that user complaints are processed "without undue delay and be subject to human review", the need to ensure access to out-of-court redress mechanisms as well as to a court or another judicial authority where users can "assert the use of an exception or limitation to copyright and related rights."[67]

6. Finally, the Court also refers to the obligation of the European Commission to organize stakeholder's dialogues and issue guidance on the application of art. 17(4) in particular.

3. Conclusions

The Court's decision on Poland's challenge against art. 17 appears to impose a high threshold for the preventive monitoring mechanisms (which everyone has agreed would mean, at least at this point in time, filtering software) to be employed by OCSSPs.

As some commentators have indicated,[68] the 'precision filtering' required by the Court's decision is only possible with today's filters in some cases and it is unclear who (EU institutions or Member States) will indicate what these filters should be and behave like in order to comply with the CJEU's decision. Member States seem to be waiting for Brussels to do that while the CJEU seems to have passed the ball to the Member States.

Meanwhile, Romania has transposed art. 17 by copy-pasting it in Law no. 69/2022,[69] which, according to some authors,[70] is the safest transposition method while awaiting that, by means of guidance, decision or legislation, the EU will, faced with either no application or a divergent approach by the Member States, take the Court's decision one step forward and more precisely indicate what these 'precision filters' should be like.

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[63] *Idem*, para. 85, 86.
[64] *Idem*, para. 87.
[65] *Idem*, para. 89.
[66] *Idem*, para. 90, 91.
[67] *Idem*, para. 93-95.
[68] Martin Husovec, *Internet filters do not infringe freedom of expression if they work well. But will they?*, in EurActiv, 2 May 2022, https://www.euractiv.com/section/digital/opinion/internet-filters-do-not-infringe-freedom-of-expression-if-they-work-well-but-will-they/, accessed 4 May 2022.
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INDICATIVE SIGNS - STANDARD OF QUALITY AND ORIGIN OF PRODUCTS IN THE EUROPEAN UNION

Adrian CURELEA*

Abstract

The study proposes an analysis of the main signs that define the quality, origin and production methods of food products and not only those that are regulated and protected in the European Union.

After clarifying the notion of indicative sign, without entering the polemic regarding their legal nature, the importance of indicative signs will be highlighted and the definitions for each of these signs will be analysed in light of the international treaties and regulations at European Union level, in order to highlight the legal regime of each of them, the similarities and differences between them and to conclude on the importance of their protection in the European Union.

Keywords: *geographical indications, designations of origin, names of traditional specialties guaranteed, mountain product, generic indications, indicative signs.*

1. Introduction

In the current competitive environment, in the context in which producers seek to promote their products and attract customers, it is undeniable that the origin, production method and environment in which the production takes place, offer many alternatives to the consumer, so that the symbols prove to be a determining factor in the choice, hence the importance of their protection at international, European and national level.

It is noteworthy that in recent years, there has been a tendency of consumers around the world to appreciate agricultural products the origin of which is determined, due to the fact that it bears a clear imprint of the area and conditions from which they come, hence the preference to consume new products with a history, a tradition, a specific form of processing and a special taste.

In the context of the globalized economy and the expansion of trade, the range of products offered to the consumer is wide and varied. In order to make a conscious choice about the characteristics of a product, it is imperative that those who are in this situation be able to perceive and compare information on the price, characteristics and qualities of an increasing number of goods.

However, the price or the basic characteristics of a product may not always be the only element on which consumers base their decisions, but also the authenticity of the product, a context in which it is necessary to give precedence to the label of the product that benefits from "added value".

Therefore, in the doctrine[1], it has often been stated that the origin of a product is an important element in the world trade, a very early attention being paid to the establishment of rules in a broad framework, the only one able to provide effective protection against unfair practices.

The studies[2] show that the region of origin has an indirect impact on consumer preferences that value the geographical origin of agri-food products, as they perceive the geographical origin as an indicator of quality and analyse it along with other available product information.

2. Content

2.1. The concept of indicative signs

The concept of an indicative sign should take shape and be differentiated in terms of protection, in the context of the case law of the CJEU which has often sanctioned the direct or indirect commercial use of a registered name for products not covered by registration if the products in question are comparable to those registered under that name or if such use exploits the reputation of the protected name and prevents any misuse, imitation or evocation, even if the

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[1] Romain-Prot V., *International protection of signs of agri-food quality*, these law, Nantes, 1997, p. 661; Lorvellec L., *Recent Aspects of the International Protection of Controlled Designations of Origin*, Melanges Burst, Paris, Litec, 1997, pp. 311-340; Rochard D., *La protection internationale des indications geographiques*, these droit, Poitiers, 1999, p. 594.

[2] In 1999, a study conducted in the European Union on 20,000 consumers on the purchase of products with a geographical indication found that the main motivation for purchasing for 37% of respondents was the guarantee of origin, for 35% was the expectation of a guaranteed quality, for 31% it was a determined place of production and production method and for 16% it was a tradition. Moreover, 51% of respondents were willing to pay between 10% and 20% more for a product with a geographical indication than for a similar product that does not have a geographical indication.

true origin of the products or services is indicated or if the protected name is translated or accompanied by words such as „gender", „type", „method", „as prepared at/in", „imitation" or other similar words, including when those products are used as ingredients.

The term indication has, among other things, the meaning of „information" or „indication", and according to an opinion[3], the use of the term to establish the meaning of the expression „geographical indications" is scientifically incorrect, in practice, the „indications" are explained by themselves, and not by their particular aspects.

It has been shown[4] that in order to have a correct distinctive and informative value, the geographical sign used must refer to a set of factors which may lead to identical qualities for the products so named. For example, for a noble wine, homogeneous, soil, subsoil, sun and rainfall comparisons are required.

On the other hand, as far as the name „Bordeaux" is concerned, this name has been a regional specificity for a long time, but now it is facing a certain diffusion in the neighbouring regions and even far beyond, up to Central Europe, in vineyards in reconstitution[5].

In French[6] law, it has been shown that the rights to distinctive signs do not have as their object a creation of the mind itself, but a sign having as its object, or even sometimes only with effect, to identify the products or services or activities of an economic operator in order to distinguish them from those of another. According to Jerome Passa, only the trademark falls into this category, because, although there are other types of distinctive signs, they are not strictly subject to a right and therefore cannot be qualified as industrial property rights in the strict sense.

As regards the character of the indicative sign, the name „Cassevert" is relevant, considering[7] that when the owner of the Cassevert estate stipulated at the time of its sale that he reserved the use of the name and trademark „Cassevert", the place name being entered in the cadastral matrix, so such a name could not be used to design wines other than those coming from that place.

In its case law, the Court of Justice of the European Union has established that there is a guaranteed geographical indication, designation of origin or traditional specialty only when a connection has been established in the minds of the public between the place of manufacture and characteristics related to either geographical factors or human factors; the recognized quality of the product being attached to the raw material supplied by a given region or country or even to the manufacturing processes whose value has been found over the years devoted to their practice by many producers concentrated in the same geographical area.

In doctrine[8], it has been argued that the designation of origin is not a mere indication of source; a certain idea of originality and quality is attached to it. Therefore, it is necessary to take into account in the designation of origin not only the geographical origin of the product but also certain specific qualities which constitute its originality, in other words the thesis that the idea of origin is not separated from the idea of quality is supported.

The quality of a product is related to a shape, given by the functionality or the manufacturing process; a specific origin of a product has *a priori* nothing to do with its quality. Indicating where a product comes from is objective information that can be provided to a consumer. This indication may be sufficient to motivate the consumer to buy[9].

That is why the Belgian legislator created the concept of 'product of differentiated quality', which is defined[10] as 'an agricultural product or foodstuff which is distinguished from a standard product which serves as a reference on the market by differentiating its mode of production or by a qualitative added value on the finished products and obtained in accordance with the agreed specifications"[11]. In other words, a product that is of interest through a number of identifiable characteristics related to its production or processing process, in accordance with the specifications in the specification conditions.

2.2. Indicative signs - standard of origin and quality

Due to the growing level of trade liberalization, including trade of agricultural and food products, trade between Member States of the European Union and third countries is becoming increasingly important in this context, the Union having, naturally, the role to promote the high quality standards of EU agricultural products and to encourage joint promotion programs

[3] Teodor Bodoaşcă, Andrei Murgu, *Aspects regarding the legal protection of geographical indications*, Romanian Journal of Intellectual Property Law no. 1/2018.
[4] Olszak Norbert, *Droit des appellations d'origine et indications de provenance*, Tec & Doc Lavoisier Publishing House, Paris, 2001, p. 50.
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[8] Tallon Alex, *Les appellations d'origine*, Larcier Publishing House, Bruxelles, 2016, p. 66.
[9] *Idem*, p. 12.
[10] The notion of „differentiated quality product" was first introduced in Belgium by the Decree of 19 December 2002 on the promotion of agriculture and the development of differentiated agricultural products.
[11] Tallon A, *op. cit.*, p. 41.

involving more than one Member State or more than one agricultural sector.

At the same time, it is necessary to provide for actions to enhance the authenticity of Union products in order to improve consumers' knowledge on the quality of genuine products in relation to imitations or counterfeit products.

It should be noted that information and promotion actions in favour of Union co-financed agricultural products are not specifically targeted at their specific origin. However, the indication of origin may have a leverage effect in promotional activities, especially in third countries.

The designation of origin is defined in art. 5 (1) of Regulation (EU) no. 1151/2012 as the designation which identifies a product originating in a particular place, region or, in exceptional cases, country, the quality of which or whose characteristics are mainly or exclusively due to a certain geographical environment with its own natural and human factors and whose production stages take place in the delimited geographical area.

However, the Regulation also provides derogations from those set out in art. 5 para. 1, stipulating in para. 3 that, without prejudice to the first paragraph, certain names are assimilated to designations of origin even if the raw materials of the products concerned come from a geographical area greater than or different from the defined geographical area, provided that: the production area of the raw materials is delimited, there are special conditions for the production of raw materials, there are control measures to ensure raw materials and the existence of special conditions for the production of raw materials.

Thus, in order to assimilate to designations of origin the names of products whose raw materials come from a geographical area greater than or different from the defined geographical area, the three conditions listed above must be met cumulatively, in addition to which it is necessary that the names have been recognized as such in the country of origin before May 1, 2014.

The geographical indication is defined by art. 5 para. 2 of Regulation (EU) 1151/2012, as a name that identifies a product originating in a certain place, region or country; where a certain quality, reputation or other characteristic may be attributed mainly to the geographical origin of the product and where at least one of the stages of production takes place in the defined geographical area.

It is noted that the Community legislator did not stipulate derogations in the case of geographical indication such as those established by art. 5 para. 3 of the Regulation in the case of designations of origin, but this aspect was not necessary in the context where in the case of geographical indication it is sufficient that at least one of the production stages to take place in the delimited geographical area.

The role of the geographical indication is to serve to „identification of a product", which aims to distinguish this product from other products of the same kind, being a sign applied to products that have a certain geographical origin, which have qualities or a reputation due to this place of origin.

In addition, in order to be considered a geographical indication, the sign in question must make it possible to identify a product originating in a particular place. The quality or reputation of the product must be mainly due to the place of origin. As quality is a function of the geographical place of manufacture or production, there is a link between the product and its original place of production or manufacture.

Agricultural products generally have qualities derived from the place where they are produced and are influenced by certain local geographical factors, such as climate and soil, so it is not surprising that most geographical indications, in countries, refer to agricultural products, food products, wine and spirits.

However, the use of geographical indications is not limited to agricultural products. These indications may also highlight the particular qualities of a product due to human factors present at the place of origin of the product, such as certain techniques and manufacturing traditions.

The geographical indication actually provides a precision on the geographical origin of a product, a choice that in theory may seem obvious, but in practice recognizes some nuances.

The geographical indication can characterize a product if the term used allows it to be correctly related to geography, so if it has a certain geographical quality[12]. This precision is given by the vocabulary, but in many cases it can also be given by non-verbal signs, by emblems, even by a characteristic shape of the container or the product itself.

It should be mentioned that a geographical indication or designation of origin which is no longer understood by the population of a Member State as indicating the special origin of a product, but which indicates a certain type or category of product, may cease to operate as an indicative sign.

The transformation of a geographical indication or a designation of origin into a generic term may take place in different countries and at different times. This can lead to situations where a particular indication is considered to be a geographical indication in certain

[12] Olszak Norbert, *op. cit.*, Tec & Doc Lavoisier Publishing House, Paris, 2001, p. 15.

countries (most often in the country of origin), while being considered a generic term in other countries.

The issue of generic geographical indications is the subject of much controversy and debate, with problems arising when products are marketed under a certain indication which is understood differently in different countries, a situation in which a fair balance must be found between the interests of consumers and producers from countries in which it is considered that the geographical indication indicates the geographical origin and particular qualities of a product, on the one hand, and those of producers and consumers in countries where this geographical indication has become a symbol of a kind of products and can be used freely by anyone.

Thus, art. 41 of Regulation (EU) no. 1151/2012 stipulates that, without prejudice to art. 13, the use of terms which are generic in the Union shall not be affected, even if the generic term is part of a name which is protected under a quality system.

The Regulation also sets out the conditions under which it may be considered whether or not a statement has become generic, indicating that all relevant factors will be taken into account, in particular: the existent situation in the consumption areas, relevant regulations at national or Union level.

2.3. Optional quality statements

Regulation (EU) no. 1151/2012 established a system of optional quality claims which aims to facilitate the communication in the internal market by producers of characteristics or properties which add value to agricultural products but which it does not refer to their particular geographical origin.

Thus, the following may constitute optional quality statements those that meet the criteria established by art. 29 of the Regulation, namely: the reference refers to a characteristic of one or more categories of products or to a property of agricultural production or processing that is applied in certain fields; the use of the word adds value to the product compared to similar products and the word has a European dimension.

In other words, these terms, at European level, must meet the following criteria: the term refers to a characteristic of one or more product categories or to a production or processing property that applies to specific areas; the use of the statement adds value to the product compared to comparable products and the statement has a European dimension.

Excluded from this system, according to art. 28 of the Regulation, are optional quality statements which describe the technical qualities of the product for the purpose of applying mandatory marketing standards and which do not have the role of informing the consumers about those qualities of the product.

At the same time, optional quality statements exclude optional reserved terms that support and complement specific marketing standards, established by sector or product category.

Pursuant to Regulation (EU) no. 1151/2012, the Commission is empowered to adopt delegated acts in accordance with art. 56 of the Regulation in order to reserve an additional optional quality statement and to establish the conditions for its use and to take into account customer expectations, scientific and technical progress, the market situation and developments in marketing and international standards.

On the other hand, Member States may maintain national rules, but only for optional quality terms which are not covered by the Regulation and provided that such rules comply with the Union law.

Thus, in the category of quality mentions can be included the traditional specialties guaranteed, products from island agriculture, mountain product, quality labels, products from organic agriculture.

Regulation (EU) no. 1151/2012 establishes a system for traditional specialties guaranteed, the aim of which is to protect traditional production methods and recipes by supporting producers of traditional products in their marketing and consumer information activities with properties that add value to their traditional recipes and products.

According to art. 18 (1) of Regulation (EU) no. 1151/2012, a name is eligible to be registered as a traditional specialty guaranteed when it describes a specific product or food that: results from a production process, processing or a composition which corresponds to traditional practice for the product or food in question or is produced from traditionally used raw materials or ingredients.

It is noted that in the case of traditional specialties guaranteed what is essential is that the name describes a specific product or food that is either the result of a production process, processing, or the result of a composition that corresponds to traditional practice or is produced from raw materials or ingredients used in the traditional way, without being altered by other factors.

In other words, a guaranteed traditional specialty name does not refer to an origin but aims to highlight a traditional composition or a traditional mode of production.

The guaranteed traditional specialty name certifies the continuous use, from one generation to the next, of certain raw materials and ingredients in the product that has added value, highlights traditional aspects, such as how the product is manufactured or its composition, without linking it to a certain geographical area, in other words, a product registered

as a traditional specialty guaranteed protects it against counterfeiting and misuse.

Aware of the depopulation of mountain areas and in order to encourage the consumption of mountain products, the European Union has created, by adopting Regulation (EU) no. 1151/2012, a new statement of optional quality, called „mountain product".

The potential for the development of food products in the mountain area is very high, as they have special qualities related to the region of origin, as well as traditional production and processing methods.

The mountain product is a quality scheme, recognized at European level, which gives mountain products a special place on the market.

The term offers the recognition of these products and a new opportunity for both producers and processors, as well as for consumers.

Mountain farms are a key contributor to food security, providing consumers with high-quality, diversified products that enhance the vitality of the mountain rural economy.

By creating this statement of optional quality, the European Commission wanted to avoid the abusive use of the term "mountain" and to regulate the fact that the product that obtained the right to use this statement is verified and certified as being from the mountain area.

As such, the term „mountain product" is established as an optional quality statement and is attributed to products intended for human consumption, in which case: the raw materials but also the feed for farm animals come from mountain areas; in the case of processed products, processing also takes place in the mountain areas, conditions which are stipulated by art. 31 of Regulation (EU) no. 1151/2012.

Thus, in order to benefit from the right to use the word „mountain product", the agri-food product must meet the conditions laid down in art. 31 of Regulation (EU) no. 1151/2012, those provided by the Delegated Regulation (EU) no. 665/2014 and those provided for in the specific procedure developed by each Member State.

It can get the statement of optional quality the „mountain product" obtained from mountain animals and which are processed in these areas, products obtained from animals raised in at least the last two thirds of their life in mountain areas, if the products are processed in these areas, products obtained from transhumant animals, a quarter of life in transhumance and grazed in mountain pastures, bee products, if bees collected the nectar and pollen only in mountain areas, products of plant origin, only if plants are grown in mountain areas.

With regard to processing operations outside the mountain areas, a derogation was allowed, namely that the slaughter of animals, the cutting and boning of carcases may take place outside the mountain areas, provided that the distance from the mountain area concerned does not exceed 30 km.

From the perspective of the advantages it offers, it is obvious that the consumption of mountain products contributes to the maintenance of traditional agricultural activities in the mountain area, to the development of mountain households, as well as to the maintenance of the population in mountain areas.

In its case law, the CJEU has observed that a national regulation, which concerned the general name of „mountain" and „Monts de Lacaune" and which confines itself to granting general protection to a name which evokes among consumers qualities related to the origin of products in mountain areas is too far removed from the material object of Regulation no. 2081/92 for the latter to oppose its maintenance[13].

Mountain areas within the Union are areas delimited within the meaning of art. 18 (1) of Regulation (EC) no. 1257/1999, and as regards products from third countries, mountain areas shall include areas officially designated as mountain areas by the third country or which meet criteria equivalent to those laid down in art. 18 (1) of Regulation (EC) no. 1257/1999.

Thus, art. 18 of EC Regulation no. 1257/1999 defines mountain areas as those areas characterized by a considerable limitation of land use possibilities and a significant increase in the costs of their exploitation due to: the existence, due to altitude, of very difficult climatic conditions, which have the effect of substantially reducing the growing season; the presence, at a low altitude, on most of that surface, of slopes which are too steep for the use of machinery or which require the use of very expensive special equipment or a combination of these two factors, where the difficulty of each factor taken separately is less serious, but by combining them an equivalent difficulty arises.

Of course, in duly justified cases and in order to take account of natural constraints affecting agricultural production in mountain areas, the Commission is empowered to adopt delegated acts laying down derogations from the conditions of use, in particular setting out the conditions under which non-mountain raw materials or fodder are allowed, the conditions under which the processing of products is permitted outside mountain areas, in a geographical area to be defined, the definition of that geographical area and the establishment of production methods and other relevant criteria for the application optional quality statements.

[13] CJEU, 7 May 1997, Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94, M. Pistre, M. Milhau, M. Oberti, Ms Barthes.

A mountain product will be seen by the buyer as a product of superior quality, with a recognized origin, obtained from an area with a low degree of pollution, so that when he takes off the product from the shelf with the logo „mountain product" must be assured that the product in question is indeed a product made in the mountains, from raw material from the mountain area.

The term „mountain product" is recognized at European level and supports both producers to encourage them to certify their products and help them to communicate their characteristics and properties on the market, which add value to their agricultural products, as well as support for consumers, to gain their trust, to provide them with a guarantee for consumption, as well as to facilitate the identification of quality products.

3. Conclusions

Indicative signs of agricultural products and foodstuffs are marketing tools especially for producers trying to market their products for the first time and give them the guarantee that the consumer's choice is made in full knowledge of the facts, especially in terms of origin, authenticity and qualities of those products.

In other words, the indicative signs guarantee to consumers that a particular product is manufactured in the region of origin and that it uses the production method and technique from that region.

According to a study[14] published on April 20, 2020 by the European Commission, agri-food products and beverages protected by the European Union as „geographical indications" represent a sales value of 74.76 billion euros.

More than a fifth of this amount comes from exports outside the European Union. The study found that the value of sales of a product with a protected name is, on average, twice as high as for similar products without any certification.

European food products have a reputation for being safe, nutritive and of high quality, and the traditional production methods contribute to the EU's goal of becoming the global standard for durability into the food production.

According to the study, there is a clear economic advantage for producers in terms of marketing and sales growth due to the outstanding quality and reputation of these products and the fact that consumers are willing to spend to obtain genuine products, with a significant increase in certified products sales, which is, on average, twice the value of the sale of similar products without any certification.

In this context, the study shows that geographical indications and traditional specialties guaranteed together accounted for an estimated sales of € 77.15 billion in 2017 and 7% of total sales of food and beverages in Europe, estimated at € 1.101 billion in 2017. Wines accounted for more than half of this value (€ 39.4 billion), agricultural products and food 35% (€ 27.34 billion) and spirits 13% (€ 10.35 billion). Of the 3,207 product names registered in 2017 (both GI and TSG), 49% were wines, 43% agri-food products and 8% spirits.

Also, the study concludes that every country from the Union European produce and launch on the market products of which designations are protected at EU level and serving as emblems for traditional culinary heritage of the regions and as business vectors for the national agri-food sector and that the geographic indications represents 15.5% of all agri-food products exports of the EU.

It is obvious that in the process of choosing the product on the market, both producers and consumers seek a benefit, on one hand, there is a net economic advantage for producers in terms of promotion, marketing and sales growth, due to the outstanding quality and reputation of these products and on the other hand, the consumer is guaranteed to be able to distinguish between safe, nutritious and high-quality food when he is put in a position to choose.

Indicative signs are clearly relevant for agricultural products and foodstuffs, for wines and other alcoholic beverages, if their geographical origin is linked to qualities due to either soil or climate or a combination of natural factors and traditional processing methods, deeply rooted in the traditions of local communities.

These aspects lead us to qualify the indicative signs as a symbol of official certification of geographical origin, traditional knowledge and authenticity, a „standard" of the quality of products that have added value.

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BRIEF CONSIDERATIONS REGARDING THE NOTION OF BAD FAITH AT EUROPEAN UNION LEVEL

George-Mihai IRIMESCU[*]

Abstract

Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks imposes that all Member States should provide for the invalidation of national trademark registrations that were filed in bad faith. It also leaves to the discretion of Member States the possibility to provide for bad faith as a basis for opposition. Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark establishes that European Union Trademarks can be invalidated if filed in bad faith. However, the notion of bad faith raises difficulties of interpretation, and case law came to determine both general principles in determining it, and specific situations of bad faith. This paper aims to analyse bad faith from the perspective of the most recent European case law.

Keywords: *bad faith, EU IPO, EU case-law, invalidation, opposition, bad faith.*

1. Introduction

The concept of „bad faith" does not enjoy a legal definition. However, both the EU and national legislations confer bad faith very significant consequences in terms of trademark protection.

Bad faith is generally associated with the lack of intention to use a registered trademark. However, as we will see below, the case law established more nuanced conditions to be fulfilled when it comes to having a trademark rejected or cancelled on bad faith grounds.

Moreover, the intention to use or not a trademark that has been registered or which is about to be registered is of a subjective nature. For this reason, it is often difficult to assess whether a certain filing has actually been made in bad faith. Consequently, the EU case law came to establish certain circumstances that, considering the particulars of each case, should be considered as indicative of bad faith.

Nevertheless, it should be mentioned that each situation should be carefully assessed on a case by case basis as determining a bad faith template and applying it to different matters could lead to incorrect findings.

It is also interesting to note that bad faith may be seen both as an absolute and a relative ground for refusal/cancellation of a trademark. To this end, a very interesting study conducted by Mariia Shipilina, debating whether the concept of bad faith represents „*a fair balance between the protection of exclusive rights conferred on the proprietor and free access to the European market*".[1] In other words, if it is rather a way to protect individual interests of trademark proprietors, or a general interest of all participants on the market.

The fact that protection against bad faith places itself at the crossroads between individual and public interest may represent the reason why it is a concept that has received numerous interpretations in time.

With this in mind, this paper will show the most relevant legal provisions in EU legislation in connection to bad faith, in order to show its practical importance, and furthermore, the most relevant case law that tried to define or describe the notion of bad faith.

2. EU legal provisions concerning bad faith

The concept of „bad faith" does not enjoy a legal definition. However, it is a specific concept in trademark protection and has serious consequences in terms of trademark protection.

Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks provides that "*It is important, for reasons of legal certainty to provide that, without prejudice to his interests as a proprietor of an earlier trademark, the latter may no longer request a declaration of invalidity or oppose the use of a trademark subsequent to his own trademark, of which he has knowingly tolerated the use for a substantial length of time, unless the application*

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[1] The complete article, namely Mariia Shipilina, *Trademark Law and the Concept of Bad Faith A fair balance between the protection of exclusive rights conferred on the proprietor and free access to the European market?*, could be consulted at the following link: https://www.diva-portal.org/smash/get/diva2:1439535/FULLTEXT01.pdf.

for the subsequent trademark was made in bad faith."[2] This is a first important provision concerning bad faith, as it sets as an exception to a possible defense based on acquiescence. Further, it establishes that "*A trademark shall be liable to be declared invalid where the application for registration of the trademark was made in bad faith by the applicant. Any Member State may also provide that such a trademark is not to be registered.*"[3] The Directive also states that "*Any Member State may provide that a trademark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that: c) the trademark is liable to be confused with an earlier trademark protected abroad, provided that, at the date of the application, the applicant was acting in bad faith.*"[4] Finally, it provides that "*Where, in a Member State, the proprietor of an earlier trademark as referred to in art. 5(2) or art. 5(3)(a) has acquiesced, for a period of five successive years, in the use of a later trademark registered in that Member State while being aware of such use, that proprietor shall no longer be entitled on the basis of the earlier trademark to apply for a declaration that the later trademark is invalid in respect of the goods or services for which the later trademark has been used, unless registration of the later trademark was applied for in bad faith.*"[5]

As for the Regulation, it establishes that "*An EU trademark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings: b) where the applicant was acting in bad faith when he filed the application for the trademark.*"[6] Art. 61 further provides that "*1. Where the proprietor of an EU trademark has acquiesced, for a period of five successive years, in the use of a later EU trademark in the Union while being aware of such use, he shall no longer be entitled on the basis of the earlier trademark to apply for a declaration that the later trademark is invalid in respect of the goods or services for which the later trademark has been used, unless registration of the later EU trademark was applied for in bad faith. 2. Where the proprietor of an earlier national trademark as referred to in art. 8(2) or of another earlier sign referred to in art. 8(4) has acquiesced, for a period of five successive years, in the use of a later EU trademark in the Member State in which the earlier trademark or the other earlier sign is protected while being aware of such use, he shall no longer be entitled on the basis of the earlier trademark or of the other earlier sign to apply for a declaration that the later trademark is invalid in respect of the goods or services for which the later trademark has been used, unless registration of the later EU trademark was applied for in bad faith.*"[7] Lastly, it is set that "*1. The proprietor of an earlier right which only applies to a particular locality may oppose the use of the EU trademark in the territory where his right is protected in so far as the law of the Member State concerned so permits. 2. Paragraph 1 shall cease to apply if the proprietor of the earlier right has acquiesced in the use of the EU trademark in the territory where his right is protected for a period of five successive years, being aware of such use, unless the EU trademark was applied for in bad faith.*"[8]

It can therefore be concluded that bad faith does not have a legal definition. However, case law has stated that "*the concept of 'bad faith', within the meaning of that provision, is an autonomous concept of European Union law which must be given a uniform interpretation in the European Union.*"[9] In other words, it is the task of case-law do determine the exact extent of the notions. To this end, the most relevant decisions issued at European level will be further analyzed.

3. Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH – one of the most important decisions in defining the conditions of bad faith

The *Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH* is considered one of the most important decisions in terms of determining the conditions of applicability of the legal provisions concerning cancellation on grounds of bad faith.

In this matter, the Court held the following: "*In order to determine whether the applicant is acting in bad faith within the meaning of art. 51(1)(b) of Council Regulation (EC) no. 40/94 of 20 December 1993 on the Community trademark, the national court must take into consideration all the relevant factors specific to the particular case which pertained at the time of filing the application for registration of the sign as a Community trademark, in particular:*

[2] Art. 29 of the preamble of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks, published in the Official Journal of the European Union of November 08, 2008.
[3] *Idem*, art. 4 para. 2).
[4] *Idem*, art. 5 para. 4) letter c).
[5] *Idem*, art. 9 para.1).
[6] Art. 59 para. 1) letter b) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark, published in OJ from June 16, 2017.
[7] *Idem*, art. 61 para. 1) and para. 2).
[8] *Idem*, art. 138 para. 1) and para. 2).
[9] Judgment of the Court (Fifth Chamber) of 27 June 2013 in case no. C-320/12 *Malaysia Dairy Industries Pte. Ltd v. Ankenævnet for Patenter og Varemærker*.

– the fact that the applicant knows or must know that a third party is using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought;

– the applicant's intention to prevent that third party from continuing to use such a sign; and

– the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought."[10]

The Court also held the following *„First, with regard to the expression 'must know' in the second question, a presumption of knowledge, by the applicant, of the use by a third party of an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought may arise, inter alia, from general knowledge in the economic sector concerned of such use, and that knowledge can be inferred, inter alia, from the duration of such use. The more that use is long-standing, the more probable it is that the applicant will, when filing the application for registration, have knowledge of it."*[11] Therefore, there may be situations in which the applicant who files for registration for a subsequent trademark may be presumed to have been aware of the existence of an earlier mark, even unregistered in the respective jurisdiction, but in other corners of the world. In fact, the Romanian High Court of Cassation and Justice maintained this view and held that „(...) *the registration was made in bad faith considering that the applicant company, as a distributor of such products and a connoisseur of the specialized market, knew at the time of the request of the registration of the trademark the cancellation of which is requested that the mark C. is the property of their company."*[12] Therefore, as regards participants in the same market, the existence of certain trademarks is presumed, whether registered or not.

It can therefore be concluded that one of the most important applications of those held by the court in this matter refer to finding possible remedies against the registration by third parties of certain trademarks that are known on the market, but still unregistered, for different reasons, by their right holders, in certain jurisdictions.

To this end, the doctrine summarized the disadvantages of the attributive system by outlining that registries may be "contaminated" (o.n. with unused trademarks, or blocking trademarks), that registrations may be made with bad faith, and also that they do not provide protection to those trademarks that are not registered, even if their use is obvious to everyone[13].

Thus, one of the disadvantages of the attributive system is that this protection system offers the possibility to register the "blocking trademarks". The register can be congested with trademarks that the holder does not intend to use, or with registered trademarks for far more products or services than those for which they are actually used by the holder. Even if there is a remedy for the revocation action, it is not within the reach of the interested persons until after a period of five years has elapsed since the registration of the trademark. Also, in addition to those held by the cited author, we mention that trademark owners can counteract the consequences of such an action by periodically redistributing, once every five years, the same blocking trademark. Then, for the holders who use the mark before registering it, the lapse of time between the moment of placing the trademark on the market and filing the trademark for registration before the competent registry allows bad faith third parties to request the registration of that trademark. The remedy provided by law against these third parties, namely the cancellation action for bad faith, is not always an easy ground to prove[14].

4. Is knowledge of the prior trademark sufficient to conclude that a filing was made in bad faith?

To this end, the EU case-law stated that this circumstance is not sufficient. In the Malaysia Dairy case, the Court held the following: "*2. Art. 4(4)(g) of Directive 2008/95 must be interpreted as meaning that, in order to permit the conclusion that the person making the application for registration of a trademark is acting in bad faith within the meaning of that provision, it is necessary to take into consideration all the relevant factors specific to the particular case which pertained at the time of filing the application for registration. The fact that the person making that application knows or should know that a third party is using a mark abroad at the time of filing his application which is liable to be confused with the mark whose*

[10] Judgment of the CJEU of 11 June 2009 in case no. C-529/07 *Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH*.

[11] Judgment of the CJEU of 11 June 2009 in case no. C-529/07 *Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH*, para. 39.

[12] Judgment of the HCCJ delivered on March 5, 2010 in case no. 1497/2010.

SC E.K. SRL v. SC C.A.S.V.T. and *SC H.P.I. SRL*, available on the court's website at the address: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=58991, accessed on 09.12.2019, 23:07.

[13] Tony Huydecoper, Constant van Nispen, Tobias Cohen Jehoram, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 15.

[14] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *Dreptul Proprietății Intelectuale. Dreptul Proprietății Industriale. Mărcile și indicațiile geografice,* All Beck Publishing, Bucharest, pp. 20 et seq.

registration has been applied for is not sufficient, in itself, to permit the conclusion that the person making that application is acting in bad faith within the meaning of that provision.

3. Art. 4(4)(g) of Directive 2008/95 must be interpreted as meaning that it does not allow Member States to introduce a system of specific protection of foreign marks which differs from the system established by that provision and which is based on the fact that the person making the application for registration of a mark knew or should have known of a foreign mark."[15]

The case-law therefore insists on the fact that, besides that specific knowledge, consideration must be given to the applicant's intention at the time when he files the application for registration of a mark, and this subjective factor which must be determined by reference to the objective circumstances of the particular case.

It should also be noted that, as it was held in an article following this decision, the Court established that Member States cannot legislate differently or tailor the grounds of refusal or invalidity as set out in the Directive in a manner that would provide for the introduction of a system for the specific protection of foreign marks, which is based on the fact that the applicant knew or should have known of a foreign mark.[16]

5. Good faith is, however, presumed

The General Court (Fifth chamber) has clearly stated that "It should first be observed that, as the Board of Appeal correctly stated in para. 27 of the contested decision, and as is clear from the case-law cited in para. 21 above, there is a presumption of good faith until proof to the contrary is adduced. Thus, contrary to the applicant's contention, Pelikan was not required to prove use of the contested Community trademark."[17]

It should therefore be noted that it seemed to be a fine line between the presumption of knowledge of a prior trademark used on the same market, as per the Lindt decision, and a possible "bad faith" presumption. This, actually, is in line with those held in the Malaysia Dairy decision. The knowledge of a prior mark does not necessarily lead to the conclusion of bad faith. The intention of the applicant at the moment of filing must also be proven, and this time it cannot be subject to a simple presumption, as it is the case for the knowledge of the prior trademark. The applicant's intention, which is, of course, a subjective factor, should be determined based on objectively proven facts and evidence.

In other words, the act of filing, in itself, cannot be considered to be made in bad faith, and all circumstances of the case should be taken into consideration in order to reach this possible conclusion.

6. Skykick and the importance of designating the right goods and services

Another scenario of fighting against filing for registration of a trademark without the intention to use it, as outlined by the European case law, concerns sanctioning the application for registration of a trademark for goods or services for which the applicant/holder does not intend to use that trademark.

In the SkyKick case, where, in his opinion, the Attorney General held that *„if registration can be obtained too easily and/or too widely, then the result will be mounting barriers to entry for third parties as the supply of suitable trademarks is diminished, increasing costs which may be passed on to consumers, and an erosion of the public domain; (…) If terms which are not applicable, but which anyway appear in the register, are vague and uncertain, then this will also lead to a dissuasive effect on competitors considering entering the market; (…) In certain circumstances, applying for registration of a trademark without any intention to use it in connection with the specified goods or services may constitute an element of bad faith, in particular where the sole objective of the applicant is to prevent a third party from entering the market, including where there is evidence of an abusive filing strategy, which it is for the referring court to ascertain"*[18]. This opinion, given in the context of analyzing the impact of trademarks filed for goods or services that do not have a clear scope, insofar as it will be applied by the court, may have major consequences for the strategies adopted by the applicants when selecting the goods or services designated under their trademark, as they must designate lists which are as specific as possible. Or, such an evolution would bring the attributive system closer to having the trademarks

[15] Judgment of the Court (Fifth Chamber) of 27 June 2013 in case no. C-320/12 *Malaysia Dairy Industries Pte. Ltd v. Ankenævnet for Patenter og Varemærker*.

[16] *CJEU rules prior knowledge of conflicting trademark does not amount to bad faith*, article published by the company McDermott Will & Emery o the website Lexology, available at the link https://www.lexology.com/library/detail.aspx?g=234e733e-4ca4-4455-b98f-80fa3c8b6e9a.

[17] Judgment of the General Court (Fifth Chamber) of 13 December 2012 in case no. T-136/11 *pelicantravel.com s.r.o.v. Office for Harmonisation in the Internal Market (Trademarks and Designs) (OHIM)*, p. 57.

[18] Opinion of the Advocate General Mr. Evgeni Tanchev of October 16, 2019, in Case C-371/18 Sky plc, Sky International AG, Sky UK Limited Vs. SkyKick UK Limited, SkyKick Inc, para. 62, 72, 143, consulted on the Curia website at the address: http://curia.europa.eu/juris/document/document.jsf?text=&docid=219223&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=7381341 on 14.12.2019, 3:23 pm.

protected specifically for those goods or services for which they were brought on the market, since the new trademark applications will have to reflect as accurately as possible the reality on the market, to avoid a potential cancellation on the grounds of bad faith.

Finally, the Court's decision was the following: **"***a trademark application made without any intention to use the trademark in relation to the goods and services covered by the registration constitutes bad faith, within the meaning of those provisions, if the applicant for registration of that mark had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trademark. When the absence of the intention to use the trademark in accordance with the essential functions of a trademark concerns only certain goods or services referred to in the application for registration, that application constitutes bad faith only in so far as it relates to those goods or service*". [19] As such, the doctrine (Walfisz, 2020) notes that in this context bad faith can be retained only to the extent that objective evidence can be provided regarding the applicant's intention to undermine the activity of third parties. However, as one of the practitioners called to comment on this decision in the quoted article very well points out, it remains to be seen how these conditions will be analyzed, related to the subjective attitude of the applicant. [20]

In principle, we agree with those held by the court. First, in this context, bad faith cannot be presumed. The fact that the trademark is registered for goods or services for which it is not, in fact, used, does not automatically lead to the conclusion that there is conduct in bad faith. Indeed, no one can assume that the applicant did not intend to use the trademark for all designated goods or services, as long as the law generally gives him a five-year grace period to use the trademark for those goods or services. We therefore agree that bad faith must be proved, which, according to the case law of the court, "*presupposes the presence of a dishonest state of mind or intention*"[21].

7. The Monopoly case

Also, as mentioned above, the application for the registration of a trademark which already has protection, for identical or similar products or services, was assessed by the European office as being a step taken in bad faith. In this regard, the European Office held that „*One of the European Union's fundamental principles is to promote and safeguard effective competition on the market*"[22] and also that „ *there is no justification for protecting EU trademarks or, as against them, any trademark which has been registered before them, except where the trademarks are actually used*"[23]. As such, the trademark must be effectively used in order to be protected under European law and the „*register cannot be regarded as a strategic and static depository granting an inactive proprietor a legal monopoly for an unlimited period*"[24]. It should also be noted that the aforementioned decision extends to all products and services identical and similar to those designated under the earlier trademark[25]. The General Court maintained this decision.[26] From this point of view, even if the new trademark designates a greater variety of products or services, a potential cancellation on grounds of bad faith must be assessed in relation to the products or services designated under the previous trademark.

Another interesting point that was underlined by the trademark practicians, in connection to this decision, is that the Monopoly case may transfer the burden of proof, in cases involving bad faith, from the claimant to the applicant. To this end, it is noted that "*According to Sarah Wright, head of IP at CMS Cameron McKenna Nabarro Olswang in London, there is a disconnect in the judgment.*

While para. 42 confirms that the good faith of an EUTM owner is presumed and it is the applicant seeking invalidity who must prove bad faith, para. 44

[19] Dispositive of the judgment of the Court of 20 January 2020 in Case C-371/18, in the Sky plc proceedings, Sky International AG, Sky UK Ltd v. SkyKick UK Ltd, SkyKick Inc.

[20] Jonathan Walfisz, *Sky v SkyKick: "sigh of relief" or "sting in the tail"? Legal experts react to CJEU's long-awaited decision*, article published by World Trademark Review on January 29, 2020, available at the link https://www.worldtrademarkreview.com/brand-management/sky-v-skykick-sigh-relief-or-sting-in-tail-legal-experts-react-cjeus-long, accessed on March 20, 2020, at 12:41.

[21] Para. 45 of the Court's decision of September 12, 2019 in the matter C-104/18 P, in the procedure Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ vs. European Union Intellectual Property Office (EUIPO), Joaquín Nadal Esteban.

[22] Decision of the 2nd EUIPO Appeals Board of July 22, 2019, in case R 1849 / 2017-2 regarding the conflict between Kreativni Dogadjaji d.o.o. and Hasbro, Inc., para. 29.

[23] Decision of the 2nd EUIPO Appeals Board of July 22, 2019, in case R 1849 / 2017-2 regarding the conflict between Kreativni Dogadjaji d.o.o. and Hasbro, Inc., para. 32.

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[25] Nedim Malovic, Board of EUIPO says re-filing of 'Monopoly' as EUTM is invalid due to bad faith, article published on August 31, 2019 on the IPKat website, at the following link: http://ipkitten.blogspot.com/2019/08/board-of-euipo-says-re-filing-of.html, accessed on 27.12.2019, 6 pm.

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notes that the EUTM owner is best placed to provide the EUIPO with information on their intention at time of filing.

"While the burden of proving bad faith has not formally shifted – there is now a greater onus on the proprietor to explain his intention at the time of filing and this will likely focus the minds of many brand owners and encourage them to document and record their intentions at time of filing," Wright says.

It is not hard to see why brand owners, or those in the IP team, may find this disconcerting."[27]

8. TARGET VENTURES case

Another example of the European courts' efforts to determine the meaning of bad faith is the judgment of the General Court in Case T-273/19. In this case, Target Partners GmbH registered the domain name 'targetventures.de', which was inactive and whose sole purpose was to redirect the public to the active site 'targetpartners.de'. The company then registered the name TARGET VENTURES as a European trademark. The plaintiff in this dispute was the Target Ventures Group Ltd, which claimed that it was also a venture capital fund. It claimed that it had been operating under the TARGET VENTURES sign on the Russian venture capital market since 2012 and on the European Union market since at least 8 March 2013. The European Office rejected the action for annulment of that mark, arguing that the use of the TARGET VENTURES sign in Europe, by the applicant or a third party was not of such a magnitude that it could reasonably be assumed that that sign was well known or recognized by the relevant public and competitors at the time the contested mark was applied for. Due to the relatively short duration of the use of the TARGET VENTURES sign in Europe before the registration date of the contested mark, the applicant should have demonstrated a strong intensity of use or at least a wide media coverage of its activities. However, the General Court contradicted those findings, concluding that "*bad faith involves conduct which departs from accepted principles of ethical behavior or honest commercial and business practices and presupposes a dishonest intention or other sinister motive, the Board of Appeal interpreted the concept of bad faith too restrictively. It is apparent (...) that the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trademark, in particular the essential function of indicating origin, may be sufficient for it to be held that the trademark applicant was acting in bad faith*". [28] Consequently, that judgment confirms the current practice that a registration made without the intention to use the mark in question is liable to be annulled on the basis of bad faith.

Therefore, through its case law, the European practice seeks remedies in combating the registration of blocking trademarks, or against any registrations made without the intention to use the mark.

9. Invoking priority from a potentially refused trademark

This issue has been raised in the VOODOO Decision, where the Court held the following: "As regards, next, the argument that the intervener claimed a right of priority, when he knew that the mark applied for at national level could not be registered, it should be noted that it is also based on the decision of June 12, 2007 of the Deutsche Patent- und Markenamt, which is subsequent to the date on which the trademark application was filed by the intervener, and that the objection decision of February 23, 2007 of the same Deutsche Patent- und Markenamt does not definitively conclude that the mark applied for at national level could not be registered. For the reasons indicated in the previous point, the intervener's bad faith cannot therefore be established either, and all the more so since, as OHIM rightly points out, in order to be able to claim its right of priority, the intervener could validly avail himself of the filing of a trademark application, whatever the fate reserved for this application. Indeed, in accordance with art. 29(3) of Regulation no. 207/2009, '[a] regular national filing is to be understood as any filing which is sufficient to establish the date on which the application was filed, whatever the future fate of this request."[29]

In other words, the court rejected the claim of bad faith on timing reasons, but not because of the reasoning itself. However, on a practical note, considering the length of examination proceedings, it is highly unlikely, if not impossible, that in 6 months after filing the trademark application, which could represent the basis of a potential priority, an office could issue a final decision rejecting that application. Even more, the conclusion remains that, without such a decision, the mere predictability that a certain application could be ultimately rejected does not constitute a certainty, and thus evidence of bad faith from the side of the applicant

[27] Walters, Max, *First Thoughts: 'Monopoly' Case May Shift Onus on Bad Faith*, published in *Managing Intellectual Property*, 5/17/2021, 2021.

[28] Decision of the General Court of October 28, 2020 in the matter T-273/19, Target Ventures Group Ltd v. European Union Intellectual Property Office (EUIPO) and Target Partners GmbH, para. 27.

[29] Judgment of the General Court of November 18, 2014 in the matter T-50/13, Think Schuhwerk GmbH v. European Union Intellectual Property Office (EUIPO) and Andreas Müller, para 59.

who files subsequently the same trademark in other jurisdictions claiming international priority.

10. Context is everything. Absolute or relative grounds? The KOTON decision

The European case-law also differentiates the cases where bad faith is invoked as an absolute ground, and where it is invoked as relative ground.

The Koton case is indicative to this end. The factual situation in this matter is that Nadal Esteban, natural person, applied for registration of the figurative trademark STYLO & KOTON in classes 25, 35 and 39 before the EUIPO. The textile company Koton filed opposition, an obtained the trademark's rejection in classes 25 and 35, but not in class 39 (transportation services), because of lack of similarity between the conflicting goods and services. The Board of Appeal upheld the decision. Koton then filed an application for a declaration of invalidity on grounds that the applicant had acted in bad faith when filing the trademark application. The action was rejected and ultimately reached the CJEU. The CJEU stated that the absolute ground for invalidity applies where it is apparent from evidence that the proprietor "*has filed the application for registration of that mark not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trademark*". It further noted that the intention of an applicant is a subjective factor which must "*be determined objectively by the competent administrative or judicial authorities*", based on an overall assessment of the case circumstances. Thus, the absolute ground for invalidity is fundamentally different from the relative ground for invalidity, "*since the latter provision presupposes the existence of an earlier trademark referred to in art. 8(2) of that regulation as well as the existence of a likelihood of confusion*". Therefore, there is no requirement that the applicant for that declaration be the proprietor of an earlier mark for identical or similar goods or services. Consequently, the court upheld KOTON's appeal.[30]

11. Reputation is also of relevance

This conclusion may be drawn, for example, from the NEYMAR case, where a natural person tried to register as a trademark the name of the well-known soccer player Neymar Da Silva Santos Júnior. In this particular case, the applicant argued that, at the time of filing the trademark application Neymar, he did not see any with the real person, and chose this sign for phonetical reasons. However, the court rejected that argument, and held that Neymar had already been recognized as a promising footballer at that date and compared with the most prestigious footballers at the time before joining FC Barcelona in 2013. Moreover, the Court noted that on the same day as the application for the word mark NEYMAR, the applicant also applied for registration of the word mark IKER CASILLAS – which is also the name of a famous footballer. Consequently, the applicant used to be acquainted with the football domain.[31]

It this therefore worth noting that the reputation of the prior trademark or better said name, in this particular case, was the one that determined the Court to presume that the applicant of the word mark NEYMAR had knowledge of this name at the filing date. Of course, the reputation of the name NEYMAR is also relevant in determining the applicant's dishonest intention at the time of filing the trademark application.

12. Filing with no intention to use the trademark – the LUCEO case and getting back to the priority issue

Recent European case law, however, has concluded the fact that conventional priority may be used in bad faith. According to the judgment of the General Court in Case T-82/14 in Germany and Austria, the granting of a filing date for applications for trademark registration does not depend on the payment of a registration fee. As such, the applicant successively applied for the registration of different trademarks in Germany and Austria, while pursuing third-party applications for similar European trademark applications. Following nine previous alternative applications in Germany and Austria for the sign "Luceo", he finally filed an application for the registration of a European trademark, claiming priority after being notified that a third party had filed an application for the registration of "Lucea Led" as a European Union trademark. That person then objected to the subsequent registration of the European trademark, while making an offer to the proprietor for the transfer of his mark. In this regard, the General Court, citing a number of previous judgments, held the following: „*Therefore, it must be noted that not only the filing strategy practiced by Mr A. is incompatible with*

[30] Judgment of the Court of September 12, 2019 in the matter T-104/18 P, Koton Mağazacilik Tekstil Sanayi v. Ticaret AŞ v. European Union Intellectual Property Office (EUIPO) and Joaquín Nadal Esteban, para. 33 – the end.

[31] Judgment of the General Court (Third Chamber) of May 14, 2019 in the matter T-795/17, Carlos Moreira v. European Union Intellectual Property Office (EUIPO).

the objectives pursued by Regulation no. 207/2009, but that it is not unlike the cases of 'abuse of law', which are characterised by circumstances in which, first, despite formal observance of the conditions laid down by European Union rules, the purpose of those rules has not been achieved, and, secondly, there exists an intention to obtain an advantage from those rules by creating artificially the conditions laid down for obtaining it (judgments of 14 December 2000 in Emsland-Stärke, C-110/99, EU:C:2000:695, para. 52 and 53, and of 21 July 2005 in Eichsfelder Schlachtbetrieb, C-515/03, EU:C:2005:491, para. 39).."This mechanism is briefly described by the General Court: „(…) It must be noted that the successive chain of applications for registration of national trademarks for the same sign in respect of goods and services covered by classes which are at least partially identical seeks to grant Mr A. a blocking position. When a third party files an application for registration of an identical or similar European Union trademark, Mr A. applies for registration of a European Union trademark, claims priority for it by relying on the last link of the chain of applications for registration of national trademarks and brings opposition proceedings on the basis of that application for a European Union trademark. The successive chain of applications for registration of national trademarks is designed therefore to grant him a blocking position for a period exceeding the six-month period of reflection provided for by art. 29(1) of Regulation no. 207/2009 and even the five-year grace period provided for by art. 51(1)(a) of that regulation."[32]

That said, in this particular case it became obvious that using the mechanism of the conventional priority was made in bad faith, as the filings where not made with the purpose of using said trademarks according to their role and purpose, but only to interfere with other participants on the market.

13. Prior knowledge of the trademark – CAFÉ DEL MAR case

Case-law determined that prior business relationships also constitute knowledge of a prior trademark and may lead to bad faith filings. In this particular case, the two plaintiffs and the defendant were the three founders of the bar *Café del Mar*, starting with 1980. In 1999 the defendant filed two applications for the trademark "Cafe del Mar" in his own name. The two applicants filed an application for annulment.

The plaintiffs held that the trademark applicant knew that a third party was using an identical or similar sign. The CJEU held that the contested mark did lead to confusion with the earlier sign *Cafe del Mar*, and that the defendant, by filing the contested mark in its own name, which is confused with the earlier sign Café del Mar, also being a representative of one of the companies which used that sign, acted in a manner that was considered to be beyond ethical conduct or decent practices in commerce. Even if Café del Mar did not legally exist at the time of filing the contested trademark application, the commercial use of the earlier sign Café del Mar was nevertheless sufficient to establish that the defendant was not entitled to register that sign exclusively under its own name. The defendant therefore acted in bad faith.[33]

It is also interesting to note that, at first sight, this interpretation of the Court overlaps with the scope of protection granted against an unauthorized filing by agents of the TM proprietor [art. 8(3) EUTMR]. It should be noted however that there are a couple if differences between the two. First of all, procedure-wise, while the scenario at art. 8(3) can also be invoked in opposition proceedings, bad faith is only grounds for an invalidation action. On the merits, however, it may not be wrong to assess that the unauthorized filing by the agent may be considered a special case of bad faith filing. Nevertheless, the unauthorized filing by the agent will be analyzed as a relative ground for refusal, with all legal consequences that follow, whereas, according to the EU legislation, bad faith remains an absolute ground invalidation action, despite the fact that in many cases it is used by particulars to protect their own rights.

14. Conclusions

It is therefore apparent that the notion of bad faith is one of the most dynamic notions in trademark protection.

Without enjoying a legal definition, it is up to the case law to determine, on a case by case basis, which are the circumstances that could lead to the conclusion that a trademark was filed in bad faith.

Although the case law is very diverse on this issue, one general take-away could be retained: knowledge of the prior trademark, whether registered in other jurisdictions or simply used, is indeed an important element when determining that a filing was made in bad faith. Even more, under certain circumstances, such as operating in the same business

[32] Judgment of the General Court of 7 July 2016 in Case T-82/14 concerning the dispute between Copernicus-Trademarks Ltd and the European Union Intellectual Property Office (EUIPO) and Maquet GmbH, in particular para. 51-52.

[33] Judgments of the General Court of 12 July 2019 in Cases T – 772/17, T – 773/17 and T-774/17 concerning the dispute between Café del Mar, S.C., José Les Viamonte, Carlos Andrea González and the European Union Intellectual Property Office (EUIPO).

sector, it can be assumed that the applicant must be aware of a particular sign, that it subsequently chooses to register in its own name.

However, this aspect cannot be enough, and additional factual evidence, which show the intentions of the applicant at the date of filing, should be analysed.

This being said, although the case law has shed some light on the general conditions to be analysed when bad faith is claimed and took even courageous steps in determining that certain situations are deemed to represent bad faith filings, this notion is still open to new interpretations. Therefore, one can only expect further decisions that will showcase new situations of bad faith filing.

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QUOTATION AND USE OF THE RIGHT TO QUOTE IN DOCTORAL THESES. QUOTATION SYSTEMS USED IN SCIENTIFIC WORKS IN THE FIELD OF LAW

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Abstract

The quotation represents both a right and an obligation of any author, even more so of the aspirants for the title of doctor. In order to be able to write a scientific paper, a detailed study of national and international law, quotation rules and the use of a quotation system approved by the scientific community is required.

It is obvious that a study on a topic that has been debated before should start with the analysis of previous specialized papers, and the quotation of the opinions, theories and conclusions of our predecessors appears as a mandatory element, as long as the new scientific paper considers similar coordinates.

At the same time, the quotation must be made in accordance with good conduct in scientific research, so as not to prejudice in any way the moral rights of the original author, which is why the sources must be indicated, the reproductions must be short and not alter in any way the quoted text.

The author of a paper must use one of the quotation systems recognized by the international community, and in the particular case of scientific works in the field of law the most used is the Chicago Manual of Style, the advantages of using this system being, among others: simplicity of quotation with which the work can be completed, the possibility of quickly verifying any similarities or the ease footnotes can be used with.

Keywords: *quotation, right to quote, quotation system, Chicago Manual of Style, good conduct.*

1. Introduction

Quotation and the correct use of the quotation right are concerns that any author who writes a new study should have. The particularities of quotation in doctoral theses, even if they result largely from national and international norms regarding copyright or good conduct in scientific research, have not been analyzed in the specialised literature as a separate study. Indicating quotation rules in the various guidelines for writing scientific papers is a necessary step for PhD students but insufficient, as long as only technical clarifications are made.

In the context of the numerous accusations of plagiarism present in the Romanian public space, which come largely from the faulty (sometimes even fraudulent) use of the quotation right in the various doctoral theses, an applied analysis of this subject appears to be necessary and useful, both for future doctoral students and for those who analyze this type of works - from the point of view of respecting the good conduct in the scientific research activity.

The approach chosen in this article is to place both the right to quote between the limitations of the exercise of copyright and the obligation to cite - which derives from the impossibility of dealing with a known subject without recalling the theories or opinions of established and respected authors by the scientific community in the field.

2. Quotation - Notion and regulation

The term „quotation" is defined in the Explanatory Dictionary of the Romanian Language as the reproduction of a passage from a writing, respectively *„to reproduce exactly what someone said or wrote"*[1]. Much more appropriate to this paper is the definition identified on the dictionarroman.ro website, where it is shown that quoting means *„to reproduce literally (indicating the source)*".

In fact, this is - in my opinion - the essence of this article, independently from other structural and formal aspects involved in the study and development of the chosen subject: in order to be in the presence of a quotation and not a simple copy/ plagiarism it is necessary, mainly, to reproduce literally the material which inspired the „new" author and to mention the source of the quotation, whether we are talking about a doctoral thesis, a paper or a simple essay.

From a legal point of view, the right of quotation is defined as *„the right of limited reproduction, without the consent of the cited author, of a work brought to the public's notice"*[2].

In Romania, the first mention regarding the right of quotation appears in Law no. 126 of 28 June 1923[3]

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[1] https://dexonline.ro.

[2] V. Roș, *Intellectual Property Law*, C.H. Beck Publishing House, Bucharest, 2016, vol. I, p. 372.

[3] http://legislatie.just.ro.

which stated (*inter alia*) in art. 20 that it did not constitute an infringement of the right to property:

„The literal quotations of some isolated passages from an already published writing, in the reports or critical and polemical studies that are made on this work; indication and summary of the contents of a written publication, of a public speech or conference; reproduction in textbooks: anthologies, chrestomathy, publications for school culture, reading books, compositions, grammars, dictionaries, etc., of isolated passages, poems and small literary or scientific pieces, in whole or in summary, with the obligation to show the author's name and the title of the work from which the reproduction or summary was made".

Currently, in our legislation, the possibility of quotation is provided in art. 35 para. 1 letter b of Law no. 8/1996[4] which stipulates that „*the use of short quotations from a work is permitted, for the purpose of analysis, commentary or criticism or as an example, insofar as their use justifies the length of the quotation*". This quotation is permitted even without the consent of the author of the work and without receiving any remuneration, but only if the quotations are in accordance with good practice and if by use of part of the work its author is not prejudiced.

According to art. 4 para. 1 letter d of Law no. 206 of 2004 on good conduct in scientific research, technological development and innovation,[5] plagiarism is defined as „*the presentation in a written work or oral communication, including in electronic format, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, by other authors, without mentioning this and without referring to the original sources"*, the natural conclusion being that a quotation that would respect the mentioned rigors (mentioning the original sources, etc.) and could be sanctioned.

Regarding the quotation in the doctoral theses, art. 65 para. 5 of Government Decision number 681 of June 29, 2011[6] regarding the approval of the Code of doctoral studies stipulates that: „*The doctoral thesis is an original paper, being mandatory to mention the source for any material taken .*"

The applicable international law for the right of quotation is provided for in Article 10 paragraphs 1 and 3 of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886[7] (to which Romania acceded by Law no. 77/1998) which provides that:

„*1. Quotations taken from a work already made known to the public by law shall be permitted, provided that they are in accordance with good practice and to the extent justified by the purpose pursued, including quotations from articles in journals and periodicals, in the form of press review.*

3. The quotations and uses referred to in the preceding paragraphs shall state the source and the name of the author, if such name appears in the source used."

According to art. 10 of the World Intellectual Property Organization Copyright Treaty[8] (Geneva, 1996):

„*The Contracting Parties may provide in their legislation for limitations or exceptions to the rights conferred on authors of literary and artistic works under this Treaty in certain special cases where the normal operation of the work is not prejudiced or unjustifiably harms the legitimate interests of the author*".

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2021 on the harmonization of certain aspects of copyright and related rights in the information society[9] (Chapter II – art. 5 (3) (d) provides that Member States may provide for exceptions or limitations to copyright in national law, including by „*using quotations for the purpose of criticism or review, provided that they refer to a work or other protected object which has already been lawfully made available to the public, the source must be indicated, including the author's name, unless this proves impossible, and their use must be in accordance with good practice and to the extent justified by certain special purposes".*

There is a correlation of the provisions of Romanian legislation with those provided by the conventions, treaties and directives cited, so it is not necessary to invoke, by practitioners, the provisions of art. 11 of the Romanian Constitution to justify the partial reproduction of passages from published works.

3. The right of quotation

Beyond the legislative aspects indicated above, in the context in which tens, hundreds or thousands of papers have been written in most subjects and specialties - namely courses, treaties, articles, reviews or essays, it is almost impossible for a person who chooses to write on a subject which has already been

[4] *Ibidem.*
[5] *Ibidem.*
[6] *Ibidem.*
[7] *Ibidem.*
[8] https://eur-lex.europa.eu.
[9] *Ibidem.*

much debated not to reproduce, at least in part, the ideas expressed in writing by his predecessors.

In addition, the knowledge interests of the society and the need to use the works according to their destination have imposed, over time, limitations on copyright, including quotation - in accordance with good practice.

The right to quote has been recognized in the French doctrine since the early 19th century, with the French writer Jean Charles Emmanuel Nodier arguing in an 1812 paper[10] that: „*any borrowings from previous works, with the exception of quotations, cannot be excused*." It should be noted that, according to some opinion[11], the quoted French author himself would have "borrowed" several ideas and passages from previous works, and not in the sense of quoting!!!

Even in everyday life we often reproduce quotes of old personalities, without respecting their copyright: „*To be or not to be*", „*I give a kingdom for a horse*" or „The *dice have been thrown*" are just some random examples of expressions used even by people who don't even know who they are quoting!

In matters where there are established works by famous authors and recognized by all specialists as undisputed authorities in the field, when the „new" author tries to refer to the same subject, the right of quotation appears to be natural. Reproduction of quotations from well-known authors is all the more necessary because the one who does it realizes that he cannot, through a personal idea, be more valuable than his predecessors, and the attempt to translate in his own words the idea expressed by the original author would only diminish the value of his work.

In this context, it was rightly argued that in addition to the right of quotation, there is the correlative obligation to reproduce in full some consecrated texts, as long as the author of the subsequent work was inspired by an existing work [12].

For a correct, lawful quotation, it is necessary to observe some **substantive and formal conditions** . These have been treated extensively in the literature and, in order not to be put in the situation of "quoting" them in full, I will present only the conditions that I consider mandatory, whether they result from our legislation, European rules or doctrine:

A. The quotation must refer to a work brought to the public's attention legally, as provided in art. 10 paragraph 1 of the Berne Convention and art. 5 para. 3 letter d (Chapter II) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2021. This condition implicitly results from the provisions of art. 10 letter a of Law no. 8/1996 on copyright and related rights, all the more so as, according to art. 196 para. 1 letter a of the same normative act, the unlawful reproduction of a work constitutes a crime. It is the absolute right of the author to decide if and when he will make his work known to the public, an aspect recognized by both national and European legislation.

It should be mentioned here that the doctrine considers that this requirement was established because the legislator assumed that, with the publication of his work, the author assumed the possibility of its use by other persons[13].

B. The second condition is the mention of the cited source, as it results from the provisions of art. 10 para. 3 of the Berne Convention and art. 5 para. 3 letter (Chapter II) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001. The passage in which the quotation was made must be identifiable in the new work so that it deals with a creation of the „*new*" author. The use of quotation marks (also called citation marks [14]) is the easiest way to delimit the quotation in the new creation, thus avoiding any confusion or subsequent accusations of plagiarism.

C. Identical reproduction[15] of the quoted passage is required. Modifying the meaning or idea of the original work by a truncated quotation or removing contextual statements to demonstrate a thesis diametrically opposed to the one cited by the quoted author is merely a violation of copyright and „*good practice*" referred to in art. 10 of the Berne Convention.

D. The size of the quotation must be a reasonable one, as it results from art. 35 para. 1 letter b of Law no. 8/1996, which provides that it is possible to use „*short quotes*". The Romanian legislator also provided an additional criterion in the mentioned article, in the sense that the „*extent of the quotation*" must be justified by its use. In other words, the size of the reproduction will be directly proportional to the contribution in the literary, scientific, artistic realization generated by the content of the respective quote.

E. The purpose of the quotation is a condition mentioned in both national and European law and should cover criticism, review, analysis, exemplification or commentary. If, by way of quotation, it is intended to create a competition between the previous work and the one in which the quotation is reproduced, we would be dealing with a copyright

[10] cited V. Roș, in *Intellectual Property Law*, C.H. Beck Publishing House, Bucharest, 2016, vol. I, p. 369 quoting Ch. Nodier, *Questions de litterature legal*, Barbra Libraire, Paris, 1812.
[11] Al. Dobrescu, *Corsairs of the mind, The illustrated history of plagiarism in Romanian*, Emolis Publishing House, 2017, p. 254.
[12] B. Florea, *Reflections on plagiarism*, Hamangiu Publishing House, Bucharest, 2018, p. 56.
[13] T. Bodoașcă, L.-I. Târnu, *Intellectual Property Law*, Universul Juridic Publishing House, Bucharest, 2021, p. 92.
[14] https://dexonline.ro.
[15] V. Roș, *Intellectual Property Law*, C.H. Beck Publishing House, Bucharest, 2016, vol. I, p. 369.

infringement.[16] The purpose of the quotation is not, in this case, limited to criticism, analysis or exemplification. In the case of a bachelor's thesis, the well-known writer and philosopher Umberto Eco suggests quoting texts from the critical literature only when „*... their authority is corroborated or confirms our assertion.*[17]"

F. The quotation must not prejudice the normal operation of the original work nor cause any unjustified damage to the legitimate interests of the author, as provided in art. 10 of the World Intellectual Property Organization Treaty on Copyright[18] (Geneva, 1996).

For example, the quotation of an important part of the original work may be prejudicial to the first author because, on the one hand, it would seem unnecessary to go through the original creation and, on the other hand, it may include the violation of the moral right to the integrity of the work.

4. Peculiarities regarding the quotation and the use of the quotation right in the doctoral theses

It is impossible to write a doctoral dissertation without a large body of documentation whose role " is to help doctoral students both to acquire the knowledge acquired by previous generations and to transform them into a tool designed to increase scientific knowledge in the field It is obvious that,[19] according to the actual documentation, some of the studied materials will be cited in the doctoral thesis, insofar as they can contribute to the achievement of the proposed purpose, the use of quotations being "absolutely necessary in case of the different authors and where their most representative opinions must be presented correctly and with their original meaning"[20].

The author of a doctoral thesis cannot disregard, at the time of writing, the general rules on quotation (briefly stated in the previous chapter), but the requirements applicable to such a study will be additional.

If in the case of a paper, article or essay, the amount of quotations and their size are not very relevant, compared to the original ideas of the author expressed in that material, in the case of a doctoral thesis the creative contribution of the doctoral student is essential. In this sense, it has been argued in the literature that excessive quotation should be avoided because „Very long quotations that approach the maximum limit of one page, give the impression that the author did not insist on the text, that he did not succeed or did not propose to take the idea out of words"[21], the same author further quoting Mircea Eliade who stated in a letter addressed to Princess Elena that „A quote is valuable in the reader's consciousness insofar as it is short, dense, bright. An entire quoted page cancels this image."[22]

As long as the doctoral dissertation "abounds" in quotations and takeovers of the ideas previously expressed, its originality will show weakness, as „The quotation must be an accessory in the new work, to have its own physiognomy, substance and value even in the absence of the quotation."[23]

The person reading a doctoral dissertation expects to identify in that creation elements of novelty and even innovation (in the case of technical subjects) and not a „collection" of quotes and opinions of others. Comparing with literature, the story books written by Ion Creangă or Petre Ispirescu made our childhood more beautiful, although they were, for the most part, popular narratives transposed by the two great writers and collectors, and not their creations. If Ispirescu and Creangă could have always received awards for style or storytelling talent, they would not have even been able to participate in a creative contest – regarding the stories collected from folklore.

There are also authors[24] who admit the theory according to which **there is originality even in the choice of quotations**, indicating also the legislation that confirms such a theory: „It is also admitted that the selection of quotations also bears the personal imprint of the author. According to Hélène Maurel-Indart (2012: 61), the choice of quotations is likely to be considered as a personal imprint of the researcher. Thus, in France, for example, the selection of extracts, quotations and their order in the work are protected by the Intellectual Property Code". Studying this theory, I remembered a discussion held many years ago with the great poet Adrian Păunescu, who claimed that, although spontaneity is a native, original quality, it can be

[16] C. Colombet, *Literary and artistic property and related rights*, Dalloz, Paris, 1999, p. 173.
[17] U. Eco, *How to elaborate a bachelor's thesis*, Polirom Publishing House, Bucharest, 2006, p. 221.
[18] https://eur-lex.europa.eu.
[19] D. Vătăman, *Scientific research methodology: course support for doctoral studies*, Pro Universitaria Publishing House, Bucharest, 2019, p. 31.
[20] C. Basno, N. Dardac, *Consultations on the diploma thesis in economic higher education*, Didactic and Pedagogical Publishing House, Bucharest, 1996, p. 12.
[21] S. Chelcea, *How to write a bachelor's thesis, a doctoral thesis, a scientific article in the field of socio-human sciences*, Comunicare.ro Publishing House, Bucharest, 2007, p. 86.
[22] M. Eliade, *Letter to Princess Ileana of Romania*, Aldine, 1998, 2002, p. 4 cited S. Chelcea, *How to elaborate a bachelor's thesis, a doctoral thesis, a scientific article in the field of socio-human sciences*, Comunicare.ro Publishing House, Bucharest, 2007, p. 86.
[23] V. Roș, *Intellectual Property Law*, C.H. Beck Publishing House, Bucharest, 2016, vol. I, p. 374.
[24] M.Șt. Rădulescu, *The concept of originality in the field of scientific research*, https://www.diacronia.ro, p. 41.

cultivated. Undoubtedly, the selection of quotes and their ordering is a job that we must appreciate and even protect, we could make rankings and reward those who find the most „appropriate" quotes. It is not easy to read hundreds of treaties, studies, essays or articles and to choose the most appropriate reproductions for a work with a complex subject, but such a „seeker" cannot be appreciated for its originality, just as a person who "trains" his spontaneity does not really have this quality.

In the elaboration of the doctoral thesis, the indication of the quotation sources is an essential element, especially since lately there have been many accusations of plagiarism, being withdrawn several doctoral degrees, and the guides that indicate the way of elaboration of this genre (including scientific ones) consider that any non-compliance with the quotation rules is plagiarized[25]. Without going into the debates that go beyond the chosen topic, I consider necessary to make a brief distinction between inappropriate quotation and plagiarism, in the light of what is presented in this essay:

I believe that not every reproduction of a part of a work without explicitly indicating the source is a plagiarism that must be condemned. There are several situations in which such an "error" can be excused: the case that a person forgets that he read a certain opinion somewhere and reproduces it without knowing that it was written before (scientifically called cryptomnesia), the misuse of the quotation system due to ignorance of the respective techniques or the reproduction of a considerable part of a previous work (even with the indication of the sources). These must be checked on a case-by-case basis until a definitive conclusion is reached, the consequences of which may be irreversible. Let's not forget that even the pioneer of intellectual property law in Romania, Constantin Hamangiu, is still accused of plagiarism[26], while, fed up with unfounded accusations, the famous writer Cezar Petrescu declares himself a humble plagiarist[27], and I.L. Caragiale, unjustly accused of having plagiarized one of his short stories (The Scourge) losing the case against his slanderer, he chose the path of exile.

In the case of an inappropriate quotation by the multitude of reproductions of previous texts or even by copying in full an earlier text (provided that the source is indicated - even at the end, in the bibliography) we are dealing, rather, with a case of lack of originality, of substance and not with a plagiarism. Even if the „new work" cannot be considered a scientific work - in the true sense of the word - its author can be categorized as incapable rather than „plagiarist".

Less common in practice is the situation in which, in order to confirm an idea or a claim, the author uses an unrealistic quote from a known creator, attributing to the latter ideas that he never had. It is a false ennobling of one's own thinking which represents (unlike plagiarism) not a theft of ideas or a lack of originality but rather a lack of confidence on the part of the author who believes that without the confirmation over time of a „classic", his idea will not have a favorable impact. Such a „maneuver" resembles the truncation or modification of a reproduction, so that it does not correspond to the original idea of the author, which is also a violation of the rules of quotation as „counterfeiting can take the form of illegal quotation and distortion or modification of foreign works"[28].

Another particular element regarding the elaboration of doctoral theses is **the quotation of ideas**. If, in the case of other creations protected by copyright, there is no question of protecting ideas (since such a provision could have detrimental consequences for the development of science and culture[29]), regarding the doctoral theses Law no. 206 of 2004 (art. 4 para. 1 letter d) regarding the good conduct in scientific research obliges us to indicate including the source of the ideas presented in the scientific papers.

As stated in theory, ideas can be taken without quoting them faithfully, in full, in quotation marks, but the same author further states that „Taking ideas from pre-existing works must be done respecting the note of simplicity and balance, relating to the models imposed by the well-known specialists in the field"[30].

There are, in principle, no exceptions to the rule on citing sources in doctoral theses. And in the case of case law, it must be cited with full references to the number of the judgment, the court, the section, and its year. Whenever a court solution is cited, the source of the takeover must be indicated, and if the case comes from the personal archive of the author or another person and has not been published, this statement must be made.

In doctrine[31] it is accepted, however, that in the case of public or private law certain generally valid expressions may be indicated without specifying the original author, all the more so as that quotation has

[25] A. Livădariu, *Plagiarism. Short considerations from a legal perspective*, in Romanian Journal of Intellectual Property Law no. 1/2015, pp. 35-36.
[26] Al. Dobrescu, *Corsairs of the mind, The illustrated history of plagiarism in Romanian*, Emolis Publishing House, 2017, pp. 243-254.
[27] C. Petrescu, *Copy and plagiarism in Literary crime: imitation, copy, plagiarism*, anthology by Mircea Coloșenco, Timpul Publishing House, Iași, 2011, p. 25.
[28] Y. Eminescu, *Copyright*, Lumina Lex Publishing House, Bucharest, 1997, p. 197.
[29] V. Roș, *Plagiarism, plagiomania and deontology*, https://www.juridice.ro.
[30] B. Florea, *Reflections on plagiarism*, Hamangiu Publishing House, Bucharest, 2018, p. 56.
[31] *Ibidem.*

already entered the usual legal language, for example the use of the *ne bis in idem* rule, which was taken from Iulian's Digests, in the conditions in which the original author (Ulpian) is not mentioned. Obviously, such an exception does not alter the general rule of quotation, nor the copyright obligations, especially since it would be quite difficult to identify Ulpian's descendants who would consider themselves harmed by the reproduction of the respective text ...

Exceptionally, simple data can be indicated without the need to be quoted, and in the event that an article from a law is reproduced, the source of the quotation will be indicated, but if the law discussed (in a generic way) without a specific article is reproduced (or part of the article in the normative act), the quotation is not required as it is assumed that the law is known to all. In this situation the principle *nemo consetur legem ignorare* can be invoked in favor of the author!

There is no question that, by observing the quotation rules, the freedom of the doctoral student to choose the way of writing the work and the authors whose ideas or works will be reproduced in the doctoral thesis is limited, but this must be limited to the obligations listed in the legislation and in the specialized papers that have been briefly presented in this article.

5. Quotation systems used in practice

Regardless of the work to be written, as long as it also contains reproductions of texts, the author will have to use one of the recognized quotation systems, thus allowing the reader to identify where he can find the source of the quoted idea or information.

Each higher education unit indicates, in principle, the quotation system that is agreed to be considered by the editors of the specialized works, taking into account the method of anti-plagiarism verification, the relationship with the publishing house to publish the respective texts, the practice of quotation in the respective specialty or the rigors established by the scientific management. For example, on the website of the University of Oradea, depending on the agreed field of research, 9 different quotation systems are indicated, each faculty within this University indicating to the students which style is recommended.

Among the quotation systems (styles) known and used today are: Chicago Manual of Style, APA (American Psychological Association), Harvard, Romanian Academy style, MLA (Modern Language Association), IEEE (Institute of Electrical and Electronics Engineers).

In university studies in Romania, the most commonly used quotation systems are Chicago Manual of Style and APA, the latter being more common (due to the specifics - which I will explain below) in the social sciences, behavioral, economics and education.

The Chicago-style quote was first published[32] in 1902 by the University of Chicago Press, being the best known and most respected system of its kind in the United States. I will not go into technical details, especially since, when referring to this quotation system, the specialized papers or the guidelines for the elaboration of doctoral theses refer directly to the source http://www.chicagomanualofstyle.org.

The main difference (in my opinion) between the Chicago quotation system and the APA is the non-use of footnotes (in the case of the APA quotation) - as a general rule. In addition, Latinisms do not (generally) agree with the APA system - for example *idem* or *op. cit.*[33]

Chicago Manual of Style[34] propose two variants of writing scientific papers: the quotation with footnotes and bibliography and the one with author-date, the first variant being more often used in practice. In the version containing footnotes and bibliography, it is necessary to indicate in the *footnote* the author (first and last name), the full title of the publication - including the place of publication, the publisher and the year of publication and the page (s) of where the quotation was made, in this order, this being, in fact, the variant chosen for the formulation of this essay.

The advantages of using the Chicago quotation system are obvious:

- the work can be read easily, without the person reading it having to go over the parentheses in which the authors of the cited works are indicated, the index mentioned in the case of a reproduction not affecting the cursiveness of the study;

- the identification of the cited author and the publication is very simple for a person who wants to verify the reproduction or to study additional information in the initial source, it is not necessary to go through the entire bibliography at the end of the paper;

- indicating the author, the publication and the quotation sheet in the footer of each page of the paper facilitates any plagiarism checks or other similar analyzes;

[32] https://en.wikipedia.org.
[33] https://redactareacademica.wordpress.com.
[34] http://www.chicagomanualofstyle.org.

- the author of the paper will use less time to arrange the page and will be able to focus more on processing ideas[35];

- footnote numbering is done automatically using the keyboard specifications, respectively „references" and „insert footnote", which makes the author's work easier, the fluency of the writing being not affected at all;

- the appearance of the paper is a pleasant one, not being affected by the interferences related to the indication of the authors and of the cited studies, which appear indicated only at the bottom of the page.

In fact, the Chicago Handbook of Style is considered the „*bible*" of the academic quotation system and references by the University of Chicago[36], while the authors at the University of Cambridge believe that anyone who wants to write a book must use the Chicago system[37].

Beyond the particularities of each quotation system, which are determined by several criteria (as mentioned above), it is essential that the editor of a scientific paper knows at least two of the established quotation styles[38] and knows how to use at least one very well. I consider that, for a fluency of writing but also for an easier reading, it is necessary that, in general, a work does not combine several styles of quotation.

6. Conclusions

As I mentioned in the first part of this article, quotation has an essential role in the rules for writing a doctoral thesis, as it is impossible to analyze a scientific topic without taking into account the opinions of predecessors (regardless of whether we are talking about Romanian or foreign authors) and to indicate, at least partially, the point of view expressed by them regarding the essential parts of the topic that was considered by the doctoral student at the time of choosing the subject to be developed. Obviously, before the actual quotation, a documentation and information activity is required (which is an intrinsic part of the scientific research process[39]), the selection of the works or studies to be cited having a special relevance in the overall appreciation of the scientific value of the doctoral thesis.

The premise from which the doctoral student must start when writing the paper is that the use of quotations is certainly a limitation of copyright „*justified by the critical, polemical, pedagogical, scientific or informative nature of the work in which quotes are incorporated.*"[40].

Failure to indicate the source of the quotation, truncation, distortion or alteration of a work by improper quotation, use of very long reproductions of another person's creation or misrepresentation of the author of a writing is not merely a breach of the rules of writing a scientific paper, but also the flagrant violation of the moral rights of the author - respectively the right to paternity and integrity of the work.

I emphasize that non-compliance with the quotation rights in the case of a doctoral thesis can lead not only to criminal or civil sanctions (as in the case of non-compliance with copyright - in general) but non-recognition of the doctoral degree or its withdrawal, which is why there are additional penalties on good conduct in scientific research.

In this paper I did not intend (and I did not succeed , of course) to exhaust the chosen subject but, as I stated at the beginning, I consider it necessary for doctoral students to consider (when using quotes in their work) not only the basic rules mentioned in the guides written by the universities where they study, but also aspects related to the analysis of all the elements that can lead to a quotation that respects the good conduct in scientific research, regardless of the notion, history or modern quotation systems.

The appearance of scientific papers that take into account all the particularities regarding the quotation and use of the quotation right in doctoral theses, but also the analysis of quotation systems used in scientific papers in the field of law would be useful not only for writing doctoral theses, but also for the prevention of violations of deontology by the authors of the new legal studies.

I conclude this article with a quote [41]that, although not „*short*" (there is a risk of contradicting the principles set out in this paper) seems to me exemplary for the chosen topic, while acknowledging the impossibility of formulating a conclusion of the same level. which I will reproduce below:

„*To read those who have written before in a field in which you really want to assert yourself, or to write*

[35] K.L. Turabian, *A Manual for Writers of Term Papers, Theses and Disertation*, The University of Chicago Press, Chicago, 6th ed., 1996, preface.

[36] Ch. Lipson, *Cite Right - A Quick Guide to Quotation Styles*, The University of Chicago Press, Chicago, 2nd ed., 2011, Chapter 3, p. 1.

[37] B. Luey, *Handbook for Academic Authors*, Cambridge Press University, Cambridge, 4th ed., 2002, p. 4.

[38] E.E. Ștefan, *Methodology for elaborating scientific papers*, Pro Universitaria Publishing House, Bucharest, 2019, p. 185.

[39] D. Vătăman, *Methodology of scientific research: course support for doctoral studies*, Pro Universitaria Publishing House, Bucharest, 2019, p. 30.

[40] V. Roș, *Intellectual Property Law*, University Course, Global Lex Publishing House, Bucharest, 2001, p. 158.

[41] V. Roș, C.R. Romițan, *Hatred, plagiarism blasphemy, education*, in Controversies in intellectual property, Universul Juridic Publishing House, Bucharest, 2019.

simply by exercising your right to free speech, is necessary first of all to identify the stage of your knowledge and decide if you can add something to what exists. Recall those we read in our papers, it is not only a duty of common sense, but it is also a moral obligation, and it is our form of respect for those who have written, whether we like it or not."

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MORAL RIGHTS UNDER EU COPYRIGHT LAW

Ruxandra VIȘOIU*

Abstract

Moral rights have a long history of being left aside, or even ignored altogether, in comparison to their patrimonial counterparts in copyright law. The purpose of this paper is to analyze the legal framework of moral rights, both in national copyright law and international law, with an emphasis on EU regulations (or, rather, lack thereof). We will present possible reasons why EU law has avoided this subject until now, with both advantages and disadvantages of this evasive approach. We will continue with suggestions de lege ferenda which could bridge the gap between national and international regulations, with EU law in between.

Keywords: *moral rights, copyright, patrimonial rights, European law, Berne Convention.*

1. Introduction

"Where the spirit does not work with the hand, there is no art." - these are the wise words of the well-known artist and scientist Leonardo da Vinci. Therefore, we dare to believe that da Vinci had understood the existence of moral copyright even since the 15th century, almost 400 years before it was first recognized by French jurisprudence.

Moral rights are a category of non-patrimonial personal rights, belonging to authors of literary, artistic or scientific works, performers and authors of industrial creations[1]. In this paper, we will refer strictly to moral rights in copyright and the way they are regulated or, more precisely, their lack of regulation in European legislation.

This special type of rights can be found at an international level, in art. 6 bis para. (1) of the Berne Convention, introduced by the Rome Act of 1928: „Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

Therefore, the Berne Convention introduces 2 moral rights: the right to authorship of the work and the right of the author to oppose any change which would harm his honor or reputation.

Furthermore, moral rights are found in the national legislation of the signatory parties to the Convention, including Romania, which was one of the first countries to adopt legislation recognizing moral rights[2]. In art. 10 of Romanian Law no. 8/1996 on copyright we find the five moral rights: the right to disclosure, the right to name, paternity, integrity of the work and the right to revocation of the work. These rights have some special characteristics, being closely related to the person of the author, inalienable, imperceptible, perpetual and imprescriptible.

Of course, we also find moral rights in the national law of other signatory countries, both EU and non-EU. By example, the French Intellectual Property Code of 1992[3] mentions in art. 121-2 that only the author may decide to disclose his work, as well as the manner in which he will do so, and Art. 121-4 refers to the author's right to withdraw or modify his work, with the condition that proper compensation is offered to the person to whom these rights have already been transferred. And by art. 12 et seq. of the German Copyright and Related Rights Act of 1965[4], the author is granted the right to publish the work (an equivalent of the right to disclosure under Romanian law), the right to be recognized as the author, and the right to not modify the work (an equivalent of the right to integrity under Romanian law).

Therefore, moral rights are found in two sources: international conventions and national regulations. What is missing, however, is a key element, which would provide a much deeper degree of coherence at the level of European countries: the regulation of moral rights at EU level. EU law makes certain references to moral rights, but they are sporadic at most and do not represent proper regulations in this area, as we explain below.

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[1] B. Florea, *Dictionary of Intellectual Property Law*, Universul Juridic Publishing House, Bucharest, 2012, p. 101.

[2] For a detailed discussion on the topic of moral rights in Law no. 8/1996 and the history of these regulations see C.R. Romițan, *Moral copyright under the rule of Law no. 8/1996*, in Romanian Journal of Intellectual Property Law no. 1/2007, p. 138.

[3] https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf accessed on 07.03.2021.

[4] http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0058 accessed on 07.03.2021.

2. Treaty on the Functioning of the European Union

The first source of European intellectual property law is the Treaty on the Functioning of the European Union (TFEU)[5].

Art. 118 TFEU[6] gives the European Parliament and the Council relatively high powers in the field of intellectual property. These European institutions will take measures in order to create European intellectual property rights, as well as set up centralized Union-wide authorization, coordination and supervision arrangements. The aim is to provide uniform protection of intellectual property rights throughout the EU, a natural objective which is also found in all areas where European regulations are involved.

Introduction of this text in the TFEU implicitly recognizes the high importance of intellectual property rights for the harmonious and sustainable development of EU member states. Also, compared to most provisions of the TFEU, which have an equivalent in the old Treaty establishing the European Community (TEC), the intellectual property regulations are not found in the latter. This is a new text, introduced with the signing of the new treaty, a fact which highlights the growing importance of intellectual property in the evolving European community.

However, we cannot ignore the fact that art. 118 provides a very general wording. Notions such as "European intellectual property rights" or "centralized authorization systems" do not offer much clarification, but are rather vague expressions (we might even call them unassuming) about the actual measures to be taken by the European institutions in the field of intellectual property. We can compare this text with the more specific and detailed expressions of the TFEU in other chapters, such as EU monetary policy or the EU customs union.

Given this lack of particularity, there was no expectation that the legal text would mention copyright, much less moral copyright. The notion of "European protection rights", especially the manner in which it was later translated[7], leads us to think rather of industrial property, trademarks and patents, not copyright, which does not require a "title" or official recognition from an authority in order to receive legal protection.

Therefore, TFEU appears to ignore the existence of copyright altogether. And even the positioning of art. 118 does not help much in this regard. The text is introduced in Part Three of TFEU, Union policies and internal actions, namely Title VII Common Rules on Competition, Taxation and Approximation Of Laws, Chapter 3, Approximation of laws.

This chapter itself has a high degree of generality. The notion of "legislative approximation" refers to a goal that can be applied in any field, nothing specific to intellectual property or, even less so to copyright. And the fact that the text only refers to "approximating" the law, not standardizing it, only confirms that EU law does not pursue and will probably never pursue a legislative uniformity in the field of copyright at Member State level, because an "approximate legislation" is more than enough.

On the other hand, we recognize that, through these vague and general expressions, TFEU leaves the member states more "room for maneuver" in the field of intellectual property, which can be seen as an advantage. Also, the fact that EU institutions with powers in the field of intellectual property regulation are expressly indicated, *i.e.* The European Parliament and the Council, is a plus.

We also find provisions on intellectual property in art. 207 para. (1)[8] of TFEU, which shows that the EU's common commercial policy is based on uniform principles in areas such as exports, foreign investment, but also trade in intellectual property. Although the text refers in general terms to intellectual property, it does not provide actual rules for enforcement in the field of copyright.

The text can be found in Part Five, Title II of TFEU - Common commercial policy. When we think of intellectual property in the field of "commercial policies" we will mainly consider trademarks, as distinctive signs of the trader, not copyright. Trademarks have a significant importance in commerce and protecting them may become equivalent to protecting the business itself.

In addition, even if we ignored the impact of trademarks, the text would still not become applicable to moral copyright. The notion of "trade" is very broad, it can include trade in the field of art, books, videos, all of which are deeply affected by the copyright regime. But regulations would rather concern patrimonial rights

[5] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12016E/TXT&from=RO, according to the updates in 2016.

[6] Art. 118 TFEU: *"In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. "*

[7] In the Romanian version of TFUE, EU intellectual property rights was translated as "titluri europene de proprietate intelectuală".

[8] Art. 207 TFEU (ex art. 133 TEC) para. (1): *"The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. "*

in the field of copyright, not moral rights. By patrimonial copyright we refer to rights that take a pecuniary form[9]. On the other hand, moral rights are more subjective rights, that cannot take a monetary form[10], being closely linked to the personality of the author and their inner forum, with a much lower importance in the field of trade.

On the other hand, trade is not entirely alien to moral rights, a correlation between these notions exists as well. Resale of a work can be done only after the author's right to disclosure has been exercised in a positive manner and as long as they have not exercised their right of withdrawal. Also, the sale of a work will always be done under the name chosen by the author and abiding by their right to paternity. And regarding the manner of commercialization, the right to integrity of the work must always be respected, as one cannot commercialize works with changes that would harm the honor or reputation of the author.

But the above aspects are not expressed strongly enough, in order to state that art. 207 para. 1 of TFEU affects the legal regime of moral copyright in any way. A similar regime applies to art. 207 para. (4) TFEU[11], which mentions that when negotiating and concluding agreements on commercial matters of intellectual property, the Council shall take decisions by unanimous vote, if they concern provisions which require unanimity in the adoption of internal rules. As in the case of para. (1) of the same article, the legal text does not consider moral rights in any way, but only the commercial, pecuniary aspects of intellectual property.

We also find references to intellectual property in TFEU at art. 262[12], more precisely regarding litigations on intellectual property rights. As we showed when we referred to art. 118 TFEU, we consider that the concept of intellectual property rights refers rather to industrial property, such as trademarks or designs. According to art. 1 para. (2) of Law no. 8/1996, "The work of intellectual creation is recognized and protected, regardless of bringing it to public knowledge, by the simple fact of its realization, even in unfinished form". *Per a contrario*, the protection is recognized from the moment the work is created, even in absence of registration formalities[13]. This category of formalities would also include the rights mentioned at art. 262 TFEU.

3. Copyright Directives

In addition to the provisions of TFEU, we also find copyright provisions in various directives, from which we will choose the most relevant legal texts for further analysis.

3.1. Directive 2009/24/EC on the legal protection of computer programs

Directive 2009/24/EC on the legal protection of computer programs states even from its preamble[14] that member states should protect computer programs as literary works, under copyright law. This solves the "problem" posed by these rather atypical computer creations. At first glance, we cannot easily fit them into a set category, they seem to fall somewhere between artwork and invention, also excluding from protection the ideas or principles underlying the program itself[15].

The Directive does not mention in any article the notion of moral or non-patrimonial copyright. However, we consider there is an implicit inclusion of these rights by reference to the Berne Convention, which is the main document that imposes moral copyright to an international level. Art. 1 para. (1) states that member states must protect computer programs by copyright, which are literary works in accordance with the Berne Convention. And in art. 7 para. (3) it is mentioned that special rights to decompile programs must not be interpreted in a way that is prejudicial to the legitimate interests of the copyright holder or the normal operation of the program in accordance with the Berne Convention. In other words, as long as the reference to the Convention is so general, including all the rights contained by it (including copyright), we can state that the Directive has also been issued with

[9] L. Cătună, *Civil Law. Intellectual property*, All Beck Publishing House, Bucharest, 2013, p. 78.
[10] *Idem*, p. 70.
[11] Art. 207 TFEU para. (4): *"(...) For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules."*
[12] Art. 262 TFEU (ex-art. 229 ECT): *"Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."*
[13] N.R. Dominte, *Intellectual Property Law. Legal protection*, Solomon Publishing House, Bucharest, 2021, p. 244.
[14] Directive 2009/24/EC, preamble, para. (6): *"The Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorise or prohibit certain acts and for how long the protection should apply."*
[15] Directive 2009/24/EC, art. 1 para. (2): "Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."

reference to them. But the connection is so weak, that it is almost not worth mentioning.

On the other hand, the Directive makes numerous references to patrimonial copyrights, both expressly in art. 2 para. (3)[16], as well as indirectly, by reference to the rights of reproduction, translation, adaptation and public distribution in art. 4, which are all patrimonial rights, for which we find a Romanian equivalent in art. 13 of Law no. 8/1996.

Therefore, we can conclude that the Computer Programs Directive does not contribute to the protection of moral rights, because the connection with these rights is rather speculative and indirect, strictly considering the general references to the Berne Convention.

3.2. Directive 2006/115/EC on rental and lending

Another resource on European copyright law is Directive 2006/115/EC on rental and lending rights and certain intellectual property rights in the field of intellectual property. The aim of this directive is to strengthen the fight against piracy, which is becoming more and more common and harmful, as mentioned in the Recitals at para. (2). The legal text also provides effective ways to continue the lending and rental business for video and audio works, in a safe and legal manner.

Similar to Directive 2009/24/EC, the document does not mention in any way the notion of moral or non-patrimonial rights. Moreover, there is no mention of the Berne Convention, so we do not even find an indirect reference to moral copyright. However, this is to be expected, especially given the title of the directive: the right to borrow and rent creative works are patrimonial rights, not moral ones, as is expressly mentioned in Law no. 8/1996 at art. 13 letter d) and e).

According to the doctrine[17], the right to rent means making a work or its protected copies available for use, for a limited time and for an economic or commercial advantage, either directly or indirectly. And loaning works also means making them available for use, for a limited time, but without economic or commercial advantage, through an institution that allows public access for this specific purpose[18].

Of course, the exercise of these two rights can only be achieved after the moral right to disclosure has been exercised in a positive manner, with the recognition of the real author and under the name they have chosen, without harmful changes and as long as the work is not withdrawn from the market. But these requirements are found in national legislation and in the Berne Convention, not in the text of Directive 2009/24/EC.

We can thus say that Directive 2006/115/EC does not contribute to the protection or regulation of a framework for protecting moral rights, but solely for certain patrimonial rights.

3.3. Council Directive 93/83/EEC on satellite programs and cable retransmission

Compared to the above-mentioned directives, Council Directive 93/83/EEC on the coordination of certain rules relating to copyright and related rights applicable to satellite and cable television broadcasts makes a brief reference to moral rights. This does not mean, however, that the legal text brings something new in this field. The reference is included in the Recitals of the Directive, at para. (28), which states only that this Directive is without prejudice to the exercise of moral rights.

The document refers to copyright in satellite and cable programs, as its name implies. Specifically, the problematic situation in which TV broadcasts take place not only within a single country, but also across borders, in other EU member states, which of course have other copyright laws. And in order to protect the authors of these audiovisual works, it was necessary to issue regulations in this field. Therefore, the text does not center around non-patrimonial rights, but rather patrimonial rights that we also find in art. 13 letters g and h of Law no. 8/1996: broadcasting and cable retransmission of the work.

In this directive, the preamble is very extensive and detailed, almost equal in size to the enacting terms themselves. Which means that the recitals are of high importance and the brief reference to moral rights, even if made in the preamble, should not be overlooked.

However, we must conclude that we are, again, in the presence of a document that does not provide regulations in the field of moral rights.

3.4. Other copyright directives

In addition to the three texts mentioned above, we can identify other directives in the field of copyright, which we will refer to briefly. Directive 2006/116/EC on the term of protection of copyright and certain related rights seems to include a wider range of copyright, according to the title, but in fact it only applies to patrimonial rights, as specified expressly in para. (20) of its preamble: "It should be made clear that this Directive does not apply to moral rights".

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[16] Directive 2009/24 / EC, art. 2 para. (3): "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract."

[17] V. Roş, *Intellectual Property Law*, vol. 1, C.H. Beck Publishing House, Bucharest, 2016, p. 334.

[18] *Idem*, p. 335.

On the other hand, Directive 96/9/EC on the legal protection of databases makes a relatively extensive reference to copyright in para. (28) of its preamble: „Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive". But, as it can be seen, this legal text does not add to the regulation of moral rights.

In a similar way, Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society excludes moral rights from its regulations, as shown in para. 19 of the recitals: "The moral rights of right holders should be exercised in accordance with the laws of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty and the WIPO Performances and Phonograms. Such moral rights do not fall within the scope of this Directive."

Another European document on copyright, Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, does not refer to moral rights, either. However, this was to be expected, starting from the very title of the document: the resale right is a patrimonial right, also found in art. 24 of Law no. 8/1996.

Although its title is much more general, not limited to property rights such as the legal text mentioned above, Directive 2004/48/EC on the enforcement of intellectual property rights does not even refer to moral rights. These are not even taken into account, in order to expressly exclude them, to emphasize that the legal text does not apply to them, as is the case with other directives analyzed above.

The same approach was chosen in Directive 2012/28/EU on certain permitted uses of orphan works, by completely ignoring the existence of copyright, without even a single reference to them. And Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, also does not mention moral rights or the Berne Convention. Although according to Romanian law, the contribution of collective management bodies is quite important in the field of moral rights - based on art. 11 para. (2) of Law no. 8/1996, they are responsible for the exercise of the rights in question, if the author dies and has no heirs.

4. The need for EU regulations on moral rights

We do consider that the lack of EU regulations in the field of moral rights has a number of advantages. Member states have much more freedom to impose their own rules on moral rights, such as the number of rights they recognize, the duration of protection, the legal regime, and so on. And the fact that an international treaty on moral rights already exists, *i.e.* the Berne Convention, might make potential EU legislation seem redundant.

On the other hand, we believe that the mere existence of an international treaty to which, incidentally, all EU Member States are parties, would not be an impediment to the existence of European regulations. This even more so, since EU law imposes more drastic measures when not complied with, like the infringement procedure.

By contrast, international conventions do not always impose clear sanctions for non-compliance, a relevant example being the Berne Convention itself. The United Kingdom signed the Convention in 1887 but did not make the necessary implementations until 100 years later, with the adoption of the Copyright, Designs and Patents Act in 1988[19]. And an even more problematic case is the United States of America which, although party to the Convention since 1988, has not yet fully implemented its provisions[20]. As the doctrine shows, „those schooled in the United States may find moral rights to be quite a foreign concept"[21].

In the US, moral rights are recognized only in the field of visual arts, such as paintings, sculptures, drawings, limited edition photographs by the VARA - Visual Artists Rights Act, passed in 1990. And before adhering to Berne, the United States had relied for international copyright protection on its bilateral treaties and on the Universal Copyright Convention (UCC), neither of them requiring any moral rights protection[22].

Also, US case law is highly contradictory: while some judgments even refer to moral rights, others expressly state that such rights are incompatible with existing law. However, the US has not been subject to any sanctions for non-compliance with the Berne Convention, and the situation remains unresolved to the present date.

[19] https://en.wikipedia.org/wiki/Berne_Convention.

[20] For detailed considerations on the US position on the Berne Convention, see A. Speriusi Vlad, *On interim measures in the field of intellectual property from general to private (I)*, in Romanian Journal of Intellectual Property Law no. 3/2021, p. 179.

[21] S.P. Liemer, *Understanding artists' moral rights: A primer*, in Boston University Public Interest Law Journal, vol. 7, 1998, p. 42.

[22] The Register of Copyright of the United States of America, *Waiver of moral rights in visual artworks*, Library of Congress Department 17, Washington DC, p. 8.

Of course, the US is not an EU member state. But the example above tends to show that it may be easier to disregard obligations under an international treaty than those under European law. So, the mere existence of the Berne Convention should not discourage an initiative for European legislation on copyright.

In addition, a directive on this matter could have a much more organized content, adapted to European realities. EU member states benefit from a certain coherence, a congruity, which we could hardly see with countries outside the EU. The Berne Convention needed to have a text that would perfectly apply not only to European countries, but also to countries in the continents of Africa, Asia, North America, Central and South, even Australia. Such a convention will certainly have a high degree of generality, which will substantially dilute the respective provisions. As proof, the implementation of this Convention has been rather a challenge, as it lacks an effective mechanism for prosecuting states that have not complied with its provisions.

5. Possible approaches to EU regulations

A first step towards a unitary EU law would be to stop ignoring moral copyright, namely the lack of its mentioning in legal documents.

From the ten EU Directives analyzed above, only two expressly stated that moral rights are subject to national law and/or the Berne Convention (Directive 96/9/EC and Directive 2001/29/EC). Two other texts, although they did not refer to the Berne Convention itself, expressly stated that the document did not apply to moral rights (Council Directive 93/83/EEC and Directive 2006/116/EC). And of the remaining directives, only one mentioned the Berne Convention without any particular reference to moral rights (Directive 2009/24/EC) and the rest of the legislation had no mentions of the Convention or moral rights.

Given this inconsistent approach, a step forward would be for each of the legal documents in the field of intellectual property to mention that it does not apply to moral rights, in order to eliminate any possible confusion. As we find in Directive 2006/116/EC, a short text may be inserted in the body of the Directive or at least in the preamble: "It should be made clear that this Directive does not apply to moral rights". Although this would be the most conservative approach, it is still one step forward in the right direction.

A more direct approach would be expressly referring to the Berne Convention, as mentioned by Directive 2001/29/EC: „The moral rights of right holders should be exercised in accordance with the laws of the Member States and the provisions of the Berne Convention". We consider that such a short text would clarify for any reader not only that moral rights are not subject to the directive, but also that in order to find out the legal regime of these rights, one has to consider national law and, of course, the Berne Convention.

And, going further, a bolder and very welcomed step would be the adoption of European copyright regulations, which would bring more coherence and clarity on the matter. Such a document could not take any other form than a Directive, as done in the other intellectual property matters mentioned above. Of course, we cannot consider moral rights to be more important in EU law than property rights themselves. The EU will always focus on trade, the single market, the pecuniary part of intellectual property. But ignoring these rights is certainly not the right approach, either.

6. Conclusions

We are convinced that the importance of intellectual property will increase even more in the years to come, especially considering the various technological developments and the fact that we are becoming increasingly connected to each other. A connection that also brings numerous disadvantages, including the difficulty to respect the rights of the work's true author, especially their moral rights.

It is true that documents generally emphasize the "pecuniary" part of these difficulties, more precisely patrimonial rights, not necessarily moral rights. However, slowly but surely, it seems that the focus is starting to move towards non-patrimonial rights of individuals, on obvious example being the very impact that GDPR has brought in recent years. When we think of GDPR, we refer to very strong European legislation in an area that is closely related to the rights of individuals, and which is subject to complex and strict regulations.

So why not pay the same attention to the creative activity of humans as we have recently started to pay to the human being himself? Attention that can be found in European regulations, the missing link between the already existing legislation through the Berne Convention and internal regulations of the Member States.

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THE FAIR VALUE OF DEFERRED REVENUE

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Abstract

Deferred income has been recognized by the acquiring entity or by the acquirer on their balance prior to the combination. During the deal, deferred revenue must be recorded at fair value according to GAAP . The amount of these deferred income liabilities should be reflected in the financial statements. Recommendations on this topic are covered in the FASB Coding Accounting Standard (AUC) Topic 805, Business Combinations. This rule eliminates some book-tax timing differences regarding unearned revenue, also known as deferred revenue. It is known that the Financial Accounting Standards (SFAS) 141 (R), Business Combinations, was issued in December 2007, in force for the annual reporting periods from 15 December 2008. Since then, paragraph 20 of SFAS 141 (R) (AUC 805- 20-30-1) requires that "the acquirer must measure the identifiable assets acquired, the assumed liabilities and any uncontrolled interest in the entity acquired at fair value at the date of acquisition". The guidelines impose two facts: estimating the fair value at the time of acquisition and recognizing liability when the obligation to perform exists. These deferred income debts that were recognized by the acquired entity or by the acquirer on their pre-combination balance sheets do not appear as deferred income liabilities in the post-business period of the acquirer combined financial statements. Performance obligations and fair market values affect the value of deferred income debts that an acquirer would recognize in post-business combination accounting. Thus, the combined income from the post-business combination of companies is significantly lower than total revenue between the two companies if they didn't have been merged. Moreover, the rights regained it doesn't just interact with the deferred amount income liabilities and income during the period post-combination business period, but influences revenue through additional expenses or income.

Keywords: *deferred revenue, liability, fair value, accounting, purchase accounting, acquisition accounting, private venture, venture equity.*

1. Introduction

Developments in generally accepted accounting principles (GAAP) for business combinations have, among other things, evolved the application of fair value accounting. It is important to know the impact of the business combination guidelines on the tendencies of post-business combination accounts.

This is based on what it will cost to deliver the service or goods. The cost is less than the amount that was received for it. When the deferred revenue is adjusted down in purchase accounting, there is a sum that never gets recorded as revenue in the future. We notice, for a supplementary consideration, when there are advance billing customers close to an acquisition this situation has an impact on future revenue recognition.

Let us talk about the deferred debt receivables in the post-business combination accounts in the financial statements of the acquirer. Now we will focus mainly on software companies; however, many of these concepts are easily translated into other industries.

The sheets do not necessarily qualify as deferred income liabilities in the acquirer's post-combined financial statements. An acquirer must determine whether the debt recognized by the acquired entity is a post-combination performance obligation.

Payment made to a buyer for an unearned income account is gross income for the buyer for tax purposes, which is eligible for deferral. The buyer is also required to capitalize the costs of servicing the contracts corresponding to the uncollected revenue, as these are paid as debts incurred in the transaction.

The sheets do not necessarily qualify as deferred income liabilities in the acquirer's post-combined financial statements. An acquirer must determine whether the debt recognized by the acquired entity is a post-combination performance obligation. If so, the amount of these deferred income liabilities should be reflected in the financial statements. Recommendations on this topic are covered in the FASB Coding Accounting Standard (AUC) Topic 805, Business Combinations.

Acquisitions or business combinations represent activities in the transaction settlement area of private equity (PE) and venture capital (VC) firms record that are increase. It must be known that transactions have a significant impact on the financial statements of the companies they have acquired.

It is critical to properly phrase the language in purchase agreements dealing with the tax treatment of deferred revenue accounts to support avoid surprises after closing, whether the adviser signifies the buyer or the seller in an M&A transaction. The treatment of unearned revenue can have a material impact not only

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on taxes, revenue recognized by the seller, and revenue recognized by the buyer, but also on the value of the working capital target in M&A transactions. Buyers and sellers should be wise to work together and get more certainty to their intended tax treatment for unearned revenue for purposes of both tax and target working capital.

Taxpayers can defer income recognition based on how the income is recognized in their applicable financial statements. The new rules provide that accrual-method taxpayers receiving advance payments have to recognize them as gross income in the year of receipt unless the taxpayer makes an election to defer the income.

During mergers or acquisitions, deferred revenue in purchase accounting is to be vanished.

2. Fair Value and Deferred Revenue Liabilities

An acquired company records deferred income passive for several reasons. Deferred income represents advance payments for services or products that have not yet been delivered. Deferred income is payments for goods or services delivered sold as part of a multiple item arrangement that cannot be accounted for separate from items not delivered in the same arrangement. For example, the acquired entity does not have objective specific vendor evidence (VSOE) according to the AUC 605-25-30-8 to be able to observe income associated with various items separately in a multi-item arrangement contract.

An acquirer will reflect deferred income of the entity acquired at fair value post-business combination, if represent obligations to supply the products or customer service. In cases in which an acquired entity records deferrals income debt and not the acquirer they necessarily have a delivery obligation any goods and services. For example, the acquired entity has recorded an income transaction as deferred income, and the transaction did not reach revenue recognition criteria for reasonable assurance of collectibility or lack of VSOE. Thus, the acquirer does not force to execute a deferred income liability of the acquired entity. So no one will register deferred income in the post-operative period combined financial statements.

The acquirer will record debts for deferred income based on the fair the amount of the obligation at the date of acquisition.

This amount is different from the amount previously recognized by the acquiree. The deferred income that an acquired company has admitted is generally the cash that received and does not necessarily reflect the fair value at the time of purchase. The fair value of deferred income debts for an acquirer generally represents the amount that the acquirer pays a third party to assume such obligations.

Two different methods are known for determining the fair value of deferred income. The first method is called the bottom-up approach, and the second method is called top-down approach.

In the case of a bottom-up approach (The literature also referred to this method as “increasing costs approach”), the deferred income debt it is measured by direct costs, any incremental costs (such as overheads), a reasonable profit margin and any additional premium cost for price variability. In the case of the first two, we have the obligation of performance remaining after the merger and not everything in advance expenses incurred before business combination. A reasonable profit margin is the profit that a market participant earns for completion of activities related to deferred income debts.

In the case of the top-down method, the approach is based on market indicators to estimate expected revenues for deferred income obligations. Here, we notice that the acquirer measures the fair value of the obligation on the basis the estimated selling price for products and services, less any selling effort and profit on it.

The acquirer must also consider "Unit of account" in certain multi-item arrangements when measured the fair value of deferred income. Take, for example, a software company that offers one-year maintenance or post-contract (PCS) services for its customers. As part from this arrangement, the company offers unlimited bug fixes, telephone support and unspecified software upgrades and enhancements. The acquirer has the following two options:

- The accounting unit measures the fair value of each item separately and on its own. In this method, upgrades when and if available are not performance obligations considered, because there is no contractual obligation from the seller to deliver in this way products.
- Considering in ASC 985-605 (previous statement of position 97-2, Software Revenue Recognition) the whole the PCS arrangement would be considered fair the lowest level of an accounting unit. Deferred PCS fair value revenue is equal to all estimated costs (*i.e.* the costs of providing support services and bug fixes, as well as cost development of upgrades and enhancements), plus a normal profit margin.

In general, both methods are recognized as long as they are applied in a consistent manner.

An acquirer regains a right that he had previously given it to an acquirer. An example is the technology rights of the acquirer under a technology license agreement for a certain period of time, for an advance fee and a certain amount of royalties. In post-business

combination accounting, it is usually recognized the acquirer has rights acquired as intangible assets separate from goodwill (AUC 805-20-25-14). When an acquirer regains a previously granted right, it will recognize and measure the fair value on the basis of the remaining life of the contract without regard to consider any expected renewals or extensions. Para. 55 of IFRS 3, Business Combinations, contains similar guidelines.

Valuation of acquired rights compared to other assets that are based on market share assumptions represents estimated cash flows over the remaining life of the contract (ASC 805-20-30-20). Thus, there is a difference between values derived from market share assumptions ("at market value") and fair values based on cash flow. This difference ('out of market' value) shows an acquired right or something unfavorable from the perspective of the acquirer. We note that, the fair value of a contract consists of an element outside the market in addition to an element inherent in the market.

ASC 805-10-55-20 and 21 show that an acquirer must recognize a gain or loss for the effective settlement of a pre-existing relationship based on the lowest amount of the contract favorable or unfavorable from the perspective of the acquirer in comparison with prices for regular market transactions for identical or similar items. An acquirer must record debts for deferred income based on the fair value of the obligation on date of purchase.

The gain or loss on the pre-existing relationship is adjusted for the amount previously recognized. The amount of any settlement declared by the provisions of the contract is available counterparty whose contract is unfavorable. If this amount is less than the amount mentioned above, the difference must be included in the combined business accounting.

In para. 17 and 18 of November 2010 International Accounting Standards The Council's staff document (IASB) states that paragraph B52 of IFRS 3 (www.ifrs.org/NR/rdonlyres/F98BBE13-7C2E-416E-973B-2FC95DF07629 / 0 / 1011obs15IFRS3Effective settlement mentofapreexistingrelationship.pdf). A business combination does not stop the relationship between the acquirer and acquired in itself, but represents what it is the off-market part of the relationship.

The value assigned to the acquired rights any amounts recognized as a gain or loss on settlement and is limited to the associated value with the remaining contractual terms and current market conditions. Then, the amount of any gain or loss on settlement it must not affect the measurement the fair value of any related intangible asset to the acquired rights.

The acquirer must record debts for deferred income based the fair value of the obligation on date of purchase.

3. Conclusions

These deferred income debts that were recognized by the acquired entity or by the acquirer on their pre-combination balance sheets do not appear as deferred income liabilities in the post-business period of the acquirer combined financial statements.

Performance obligations and fair market values affect the value of deferred income debts that an acquirer would recognize in post-business combination accounting.

Thus, the combined income from the post-business combination of companies is significantly lower than total revenue between the two companies if they didn't have been merged. Moreover, the rights regained it doesn't just interact with the deferred amount income liabilities and income during the period post-combination business period, but influences revenue through additional expenses or income.

Valuation of acquired rights compared to other assets that are based on market share assumptions represents estimated cash flows over the remaining life of the contract (ASC 805-20-30-20). Thus, there is a difference between values derived from market share assumptions ("at market value") and fair values based on cash flow. This difference ('out of market' value) shows an acquired right or something unfavorable from the perspective of the acquirer. We note that, the fair value of a contract consists of an element outside the market in addition to an element inherent in the market.

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Deferred income that has been recognized by the acquiring entity or by the acquirer on their balance prior to the combination. During the deal, deferred revenue must be recorded at fair value according to GAAP. *The amount of these deferred income liabilities should be reflected in the financial statements. Recommendations on this topic are covered in the FASB Coding Accounting Standard (AUC) Topic 805, Business Combinations. This rule eliminates some book-tax timing differences regarding unearned revenue, also known as deferred revenue.* It is known that the

Financial Accounting Standards (SFAS) 141 (R), Business Combinations, was issued in December 2007, in force for the annual reporting periods from 15 December 2008. Since then, para. 20 of SFAS 141 (R) (AUC 805- 20-30-1) requires that "the acquirer must measure the identifiable assets acquired, the assumed liabilities and any uncontrolled interest in the entity acquired at fair value at the date of acquisition." The guidelines impose two facts: estimating the fair value at the time of acquisition and recognizing liability when the obligation to perform exists.

The acquirer will record debts for deferred income based on the fair the amount of the obligation at the date of acquisition.

This amount is different from the amount previously recognized by the acquiree. The deferred income that an acquired company has admitted is generally the cash that received and does not necessarily reflect the fair value at the time of purchase. The fair value of deferred income debts for an acquirer generally represents the amount that the acquirer pays a third party to assume such obligations.

Two different methods are known for determining the fair value of deferred income. The first method is called the bottom-up approach, and the second method is called top-down approach.

In the case of a bottom-up approach (The literature also referred to this method as "increasing costs approach"), the deferred income debt it is measured by direct costs, any incremental costs (such as overheads), a reasonable profit margin and any additional premium cost for price variability. In the case of the first two, we have the obligation of performance remaining after the merger and not everything in advance expenses incurred before business combination. A reasonable profit margin is the profit that a market participant earns for completion of activities related to deferred income debts.

In the case of the top-down method, the approach is based on market indicators to estimate expected revenues for deferred income obligations. Here, we notice that the acquirer measures the fair value of the obligation on the basis the estimated selling price for products and services, less any selling effort and profit on it.

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DEFERRED REVENUE ACCOUNTING

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Abstract

Torosyan and Razani[1] said that the Tax Cuts and Jobs Act amended Sec. 451 to allow accrual-basis taxpayers to defer recognizing income until it is considered in their applicable financial statements. This rule eliminates some book-tax timing differences regarding unearned revenue, also known as deferred revenue. Payment made to a buyer for an unearned income account is gross income for the buyer for tax purposes, which is eligible for deferral. The buyer is also required to capitalize the costs of servicing the contracts corresponding to the uncollected revenue, as these are paid as debts incurred in the transaction. A risk problem with deferred revenue in purchase accounting is the tendency for it to vanish during mergers or acquisitions. During the deal, deferred revenue must be recorded at fair value according to GAAP. This is based on what it will cost to deliver the service or goods. The cost is less than the amount that was received for it. When the deferred revenue is adjusted down in purchase accounting, there is a sum that never gets recorded as revenue in the future. We notice, for a supplementary consideration, when there are advance billing customers close to an acquisition this situation has an impact on future revenue recognition.

Keywords: *deferred revenue, liability, accounting, fair value, purchase accounting, acquisition accounting, private venture, venture equity.*

1. Introduction

Private equity (PE) and venture capital (VC) firms record an increase in activity in the transaction settlement area, including acquisitions or business combinations. It is good to know the accounting rules for such transactions, as they have a significant impact on the financial statements of the companies they have acquired.

Upon completion of a business acquisition, the purchaser will complete the acquisition accounting as part of the entity's financial statement reporting requirements in accordance with the generally accepted accounting principles (GAAP) of the United States. An essential and often omitted element of this process is the accounting of deferred income in the accounting of purchases. I will supplement with useful tips for companies to better perceive deferred income and how to avoid common mistakes that could complicate the accounting of acquisitions.

Torosyan and Razani said in 2019, that the Tax Cuts and Jobs Act amended Sec. 451 to allow accrual-basis taxpayers to defer recognizing income until it is considered in their applicable financial statements. This rule eliminates some book-tax timing differences regarding unearned revenue, also known as deferred revenue. Payment made to a buyer for an unearned income account is gross income for the buyer for tax purposes, which is eligible for deferral. The buyer is also required to capitalize the costs of servicing the contracts corresponding to the uncollected revenue, as these are paid as debts incurred in the transaction. A risk problem with deferred revenue in purchase accounting is the tendency for it to vanish during mergers or acquisitions. During the deal, deferred revenue must be recorded at fair value according to GAAP. This is based on what it will cost to deliver the service or goods. The cost is less than the amount that was received for it. When the deferred revenue is adjusted down in purchase accounting, there is a sum that never gets recorded as revenue in the future. We notice, for a supplementary consideration, when there are advance billing customers close to an acquisition this situation has an impact on future revenue recognition.

An important issue to be known is when the company acquired had advance billed its customers but had not yet received the cash.

2. Deferred revenue concept

The deferred revenue is considered a liability because it has not yet been earned. The product or service is still owed to the customer. When the product or service is delivered, the value of deferred revenue liability decreases and would become revenue on the company’s income statement.

From an accounting point of view, cash is deferred rather than immediate income. Then, deferred income is a credit (right) entry, reported on the credit (right) side of the balance sheet, below the taxpayer's

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[1] Torosyan, Andy A. and Razani, Shahab, *The Cost of Deferred Revenue* (July 1, 2019). Available at SSRN: https://ssrn.com/abstract=3435401 or http://dx.doi.org/10.2139/ssrn.3435401.

liabilities, and equity accounts are considered to improve net worth.

Using GAAP, the acquiree would have registered a receivable and deferred revenue only if the company had the right to invoice and receive payment in advance and the billings were made. Then the acquiree's deferred revenue would be subject to the haircut. The acquiree had advance billed and the customer was not obligated under the contract to pay such advance billing. My opinion is the deferred revenue and accounts receivable would be netted and there is no haircut on the deferred revenue in purchase accounting. When we have additional consideration when there are advance billing customers close to an acquisition. At this situation, we have an impact on future revenue recognition.

In actual law, taxpayers receive cash but not pay tax on it because the cash is deemed deferred revenue. When a taxpayer writes an option or sells stock short the taxpayer receives cash, but the cash is not considered gain or loss until the option is obtained or until the short sale stock is changed.

We give the following examples.

Example 1: Firm X

Basic income Statement of Target

Revenue	$ 100,000	100.0%
COGS	75,000	75.0%
Gross Profit	2,500	25.0%
SG&A Expense	1,500	15.0%
EBIT	1,000	10.0%

Example 2. Cash-method corporation: Firm T provides software services. In year 1, Customer L pays firm T $10,000 for the right to use its software for the next four years. It costs firm T $800 per year to maintain its software per customer. Under the cash method of accounting, firm T recognizes $10,000 of revenue, matching the cash collected, and recognizes $800 of expense in year 1. The net income under the cash method would be $9200 and, in years 2 through 4, firm T incurs losses totaling $2,400. The total net activity over the five years would be $7000 of net income.

Example 3. Accrual-method corporation: Using the same facts from Example 2, except, we apply the accrual method for firm T. Firm T records a debit to cash and a credit to unearned revenue upon the receipt of $10,000 cash. This establishes an asset on the balance sheet and a corresponding liability. The liability shows that the obligation to the customer has not been completed. In many cases, depending on the terms of the underlying contract, customers may even have the right to a full cash refund if they do not collect what they were promised. In year 1, an entry must be made to recognize the revenue earned for the period by making a debit to deferred revenue of $2,000 and a credit to revenue. regardless of whether firm T uses the cash or accrual method, the total net income over the four years is $7,000.

Torosyan and Razani said that $1,406,789 was paid by the Prairie Farmer Publishing Co. to Pierce Corp. in 1957, in cash to acquire its assets. The obligation of Pierce Corp. was took by Prairie to publish its Wallaces' Farmer and Iowa Homestead newspaper and agreed to carry out the terms of all subscription contracts in force as of the date of closing for the unexpired subscriptions. Then, the $436,359 was considered as an adjustment to the cash paid by Prairie. Then, that amount was paid more in cash by Prairie to Pierce Corp. if Pierce Corp. paid off the reserves before closing.

Pierce Corp. did not write down any of the reserves as gain on the sale on its 1957 income tax returns.

The Tax Court sided with the IRS and held that the assumption of the reserves by Prairie was the appropriate time for Pierce Corp. to recognize income. The Eighth Circuit accepted with the Tax Court that the reserves were includible in income because the seller's obligation to perform services had stopped. Even using GAAP matching principles, one can accept with this outcome. Pierce Corp. had got the cash, and it no longer was going to perform on the contract. The income deferral period would stop with the extinguishment of the obligation. We note that the recognition of income causes the reserve account for unearned revenue to become zero.

The Tax Court had refused Pierce Corp.'s argument to be allowed a deduction for the reduction in price caused by the reserves. This is acceptable outcome because a taxpayer would not be allowed to claim a deduction for a payment in which the taxpayer has not established basis for tax purposes. Taxpayers who donate their time for charitable work should not be allowed a deduction unless they recognize income for a salary. Then, the seller would not get a deduction unless it also admits the income associated with the obligation assumed by the buyer.

An important issue to be known is when the company acquired had advance billed its customers but had not yet received the cash.

2.1. Deferred revenue in acquisition accounting

A risk problem with deferred revenue in purchase accounting is the tendency for it to vanish during mergers or acquisitions. During the deal, deferred

revenue must be recorded at fair value according to GAAP. This is based on what it will cost to deliver the service or goods. The cost is less than the amount that was received for it. When the deferred revenue is adjusted down in purchase accounting, there is a sum that never gets recorded as revenue in the future. We notice, for a supplementary consideration, when there are advance billing customers close to an acquisition this situation has an impact on future revenue recognition.

Managers have to be careful during diligence phases so that forecasted amounts of top-line revenue can be made accurately. If a deal received meaningful prepayments that have not yet been admitted in the acquiree's financial statements, this could have a significant impact on the sum of revenue recorded post-acquisition as all the deferred revenue does not survive in purchase accounting and therefore is not admitted as revenue in the future.

Other issue to be known of is when the company acquired had advance billed its customers but had not yet received the cash.

One way to avoid some of the usual pitfalls is to work with an accounting expert to review your liabilities and assets involving deferred revenue. Accounting providers must also help ensure any recent accounting standard changes – such as those recently decreed to revenue recognition accounting under ASC Topic 606 – implement to your situation, and advise you through this sometimes-complex step of the process.

Then, the contract with the "perpetual" subscribers gave the subscribers and their heirs the right to redeem nine-tenths of the price of the contract. Thus, the buyer had become directly obligated to incur a cost to the subscribers without any additional cash payment from them.

If the buyer was unable to perform, it would likely have to refund the balance to the subscriber. This obligation for the buyer was a reserve for a future expense and different from the unearned revenue balance that was used to track the seller's unrecognized income.

Properly, for tax purposes, the seller assumed income for the entire unearned revenue balance, and this was never in dispute.

The Eighth Circuit continued on to explain that the buyer's obligation to subscribers did not cease when the seller recognized revenue. Because the buyer and seller decreased the purchase price by the liability assumed, the seller was treated as making a payment to the buyer for the assumption of the subscription liability. This considered payment obtained in a deduction under Sec. 162 for the seller, but the court did not explain why the seller obtained a deduction without first creating basis in the deduction for tax purposes.

In some cases, the taxpayer may also postpone advance payments received for future goods or services.

The proposal treats uniformly the deferred income account as if it were cash received when the offsetting obligation terminates. Then, if is assumed, or is accomplished or when it is no longer appropriate for the revenue to be deferred. At very latest, the deferred revenue has to be closed into a revenue account at death or liquidation of the taxpayer. The cash must be income, sometimes a reduction of basis or cost, and sometimes a part of amount realized. The proposal builds a framework that does not propose substantive law on how then cash should be treated, but only insists that the closing of the deferred revenue account be treated as cash received.

Taxpayers have based on Rev. Proc. 2004-34 to defer the recognition of income for tax purposes on prepayments. In general, taxpayers could defer income from advance payments for tax purposes if they adopted the accrual method and deferred the income for financial reporting purposes. However, taxpayers generally cannot defer the income recognition beyond the year following the year of receipt.

As discussed above, the TCJA has changed Sec. 451 by effectively codifying the principles of Rev. Proc. 2004-34. Taxpayers can defer income recognition based on how the income is recognized in their applicable financial statements. The new rules provide that accrual-method taxpayers receiving advance payments have to recognize them as gross income in the year of receipt unless the taxpayer makes an election to defer the income.

The deferred income has to be recognized in the tax year following the year of receipt. The deferral is also speed up in a year in which the taxpayer ceases to exist.

One major obstacle is the GAAP treatment of unearned revenue in M&A transactions. Then, when a target company is acquired, the GAAP reporting period does not stop. The GAAP financials are center on the target company's financial performance without regard to who the owner is.

In a purchase, GAAP will need all assets acquired and liabilities assumed in a business combination to be recorded at their respective fair values. As a result, the target will standardize its gross margin, which will permit the target to recognize future revenue as the deferred revenue is earned subsequent to the acquisition date. GAAP will not need the seller to speed up revenue recognition when a company is sold, nor will it require the buyer to capitalize costs post-closing. This will build up book-tax differences, which must be carefully analyzed, documented, and tracked.

It is critical to properly phrase the language in purchase agreements dealing with the tax treatment of deferred revenue accounts to support avoid surprises after closing, whether the adviser signifies the buyer or the seller in an M&A transaction. The treatment of unearned revenue can have a material impact not only on taxes, revenue recognized by the seller, and revenue recognized by the buyer, but also on the value of the working capital target in M&A transactions. Buyers and sellers should be wise to work together and get more certainty to their intended tax treatment for unearned revenue for purposes of both tax and target working capital.

3. Conclusions

A risk problem with deferred revenue in purchase accounting is the tendency for it to vanish during mergers or acquisitions. During the deal, deferred revenue must be recorded at fair value according to GAAP. This is based on what it will cost to deliver the service or goods. The cost is less than the amount that was received for it. When the deferred revenue is adjusted down in purchase accounting, there is a sum that never gets recorded as revenue in the future. We notice, for a supplementary consideration, when there are advance billing customers close to an acquisition this situation has an impact on future revenue recognition.

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Taxpayers can defer income recognition based on how the income is recognized in their applicable financial statements. The new rules provide that accrual-method taxpayers receiving advance payments have to recognize them as gross income in the year of receipt unless the taxpayer makes an election to defer the income.

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WATER COLLECTION, TREATMENT AND SUPPLY AS AN ESSENTIAL SERVICE AND ENGINE FOR SUSTAINABLE AND RESILIENT DEVELOPMENT IN POST PANDEMIC PERIOD. ECONOMIC PERFORMANCE V. SOCIAL RESPONSIBILITY

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Abstract

Communities are becoming active partners in economic development, and increasing the quality of life is the main expectation of locals. Water supply is essential for any activity, in the business environment or at the household level. In addition, the quality of the water supplied and the price can influence the health of the inhabitants. As an essential resource during the pandemic, water distribution was one of the facilitators for observing the restrictions and maintaining the conditions of hygiene and self-protection. Using quantitative and qualitative data on the availability and efficient use of local drinking water services, in our study we found that, as an essential service, the role of water distribution companies is to find a balance between supply and demand closing the gap of market deficit at the local level and to promote the increase of social profit but not only of monetary profitability. Based on the enterprise statistics, we highlighted the economic and financial performance of the Romanian companies compared to those from other EU-27 member countries, we identified the performance adjustment factors and we formulated some policy recommendations that would allow a sustainable and resilient development during post pandemic.

Keywords*: water distribution services, social profit, economic profitability, digitalization, pandemic.*

1. Introduction

The provision of drinking water to households and companies is a requirement of development and quality of life, it is incident with SDGs 6, 7, 11, 12, 13 and 15. The availability and access to water resources and the water quality are among the main challenges of modern society in which climate change and pollution require additional measures (technological, organizational and financial) to ensure safe water. According to The United States Geological Society safe water means "Water that will not harm you if you come in contact with it". In 2010 UN underlined that every person "has the right to sufficient, continuous, safe, acceptable, physically accessible, and affordable water for personal and domestic use" and states that a „better management of water resources, can boost countries' economic growth and can contribute greatly to poverty reduction". In this context, the responsibility of local communities is to support the provision of drinking water distribution services, quality water delivery for individual consumption and in the quantities necessary for the current consumption of households and for the business environment - companies, organizations, associations, actors of civil society etc.

This type of service is characterized by a specific profile of the business environment, because the social responsibility of the companies also targets the beneficiaries of the drinking water distribution services that serve them. Quality and affordability issues are connected with particular challenges of the industry development and performance, based on climate change and water pollution.

The purpose of this paper is to highlight the performance of companies operating in the water collection, treatment and supply (WCTS) sector in Romania, in the EU-27 spatial comparative analysis over the last decade, and to identify the positive and negative externalities of water management policy. Finally, we inventoried possible directions for sustainable development and resilience of companies, taking into account the demographic challenges, economic performance and increasing demand for drinking water, and also the social responsibility of companies for water inclusion (network expansion and affordable prices). At the same time, we highlighted some aspects related to the digital transformation of the sector, as a factor to increase the company's performance, both from the perspective of business management and the improvement of communication with customers.

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2. Literature review

The market for water distribution services is an emerging one, heavily dependent on demographic growth, increasing food needs and agriculture development and of the (higher) living standards of everyone. For economic agents, this means both capital and operating expenses for the capture, treatment and transportation of water by municipal, industrial, commercial, and residential users. In this context, the economic agents dealing with water distribution services will not only have a constantly growing market, but also the requirements for clean water, distribution in the requested quantities and with affordable prices will increase. The expansion of drinking water distribution networks in rural areas, in less developed countries, such as Romania, as well as the modernization of the distribution network will be the main challenges both for the public authorities and the business sector.

In our research, we started with a literature review based on the scientific papers published in the last decade in the Web of Science database using the VoxViewer program, focusing on market (supply and demand) and water efficiency.

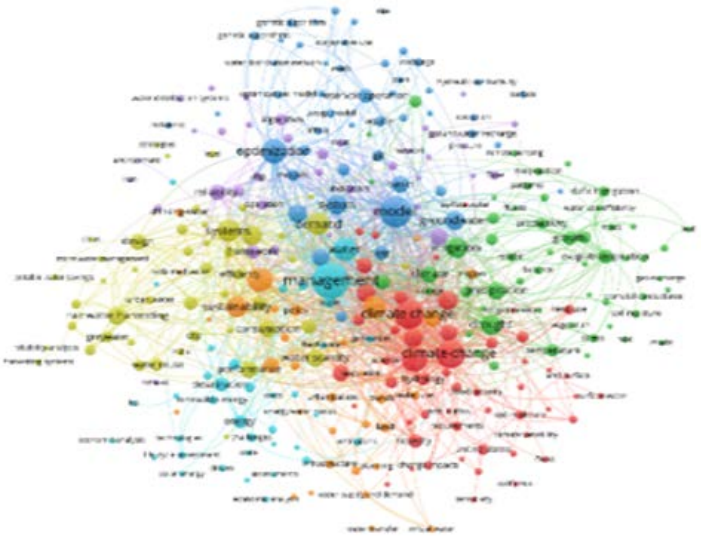
A bibliometric analysis on the market of the water distribution sector, *Water supply - water demand*, indicates 1681 articles published in WoS, in the last decade, of which 16% in 2021. Therefore, the interest to ensure the needs of the market and reduce the gap between the demand and supply of water management services is a constant issue of the market operators, as well as identifying the push and pull factors for economic and financial efficiency.

In addition, water efficiency has been analysed in 877 papers of which 19% published just in the last year. Main correlated keywords and content topic analysed in those papers are presented in figure 1.

Regarding the sustainability of water distribution services, the analysis of the activity is not limited only to water management (model) - water sector efficiency - water sustainability, but also takes into account the resources in correlation with climate change and water scarcity, the entrepreneurial model associated with adaptive local governance, water quality and expansion of the water transport network.

Figure 1. The topic of water distribution market and business efficiency in the specialists' research works in the last decade, based on WoS database

Topic: WCTS market: water supply and water demand (5)

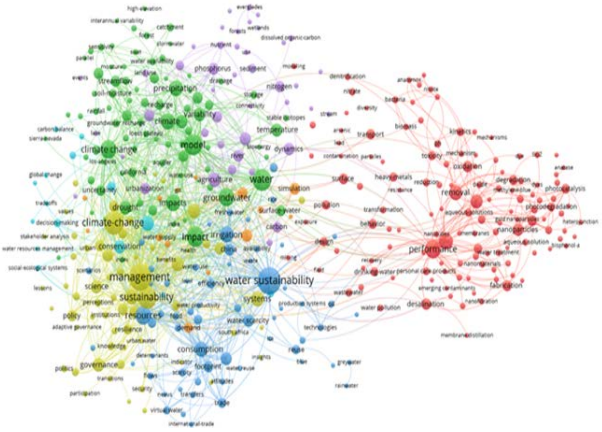


Topic: WCTS industry efficiency : water efficiency (5)

Source: Authors' contribution based on bibliometric analysis of the papers published in Web of Science database in the last decade, using VOSviewer; The WoS database was accessed on March 18, 2022

The total number of published papers in WoS identified in the last decade was 1184, of which 15% in 2021- see figure 2.

Figure 2. The topic of water distribution market and business efficiency in the concerns of specialists' research works from the last decade (5)



Source: Authors' contribution based on bibliometric analysis of the papers published in Web of Science database in the last decade, using VOSviewer; The WoS database was accessed on March 18, 2022

The reform of the entrepreneurial water management model, in the conditions of the increase of the supply deficit, of the increase of the exploitation cost and of the challenges of the COVID-19 crisis focused on two important aspects, namely: digitizing the relationship with customers and ensuring the quality of services - quantitative and qualitative, in order to respond to measures to counteract the spread of the virus.

Moreover, there has been increasing interest in water poverty analysis, of the multidimensional aspects related to households' access to water quality (Sullivan 2002, Sullivan et al, 2006; Subbaraman, 2015), for geographical distribution of water poverty as main factors for local planning development of the localities (Kini 2017; Wilk, 2013) and of inclusion measures for increasing water security, in the last two years over 35 WoS indexed articles analyzing such aspects. Water stress and scarcity have also become an issue associated with water availability and accessibility analysis, but also with development capacity, all of which have a significant impact on human development (Ladi et al 2021, Koirala 2020), of water sector planning as an integrated part of the strategic development profile at local level.

From a company perspective, water supply in the desired quantities, flow and quality requires both a high-performance technological infrastructure - the network of pipelines and treatment plants -, adequate green water treatment technology, as well as an expenditure budget and a level of unit cost of production designed to ensure a comfortable return that would allow financing the development of the business from its own resources. On the one hand, there is the cost of material and human resources and, on the other hand, the expansion of the specific market, targeting all categories of consumers, in urban and rural areas.

Even if Romania had a low level of water stress - 6% in the year 2018 (Sustainable Development Goal (SDG) 6.4.2) - comparing to the Europe and Northern America (7%), the share of the population with access to safety managed drinking water services (SDG 6.1.1.) in 2020 was much lower, of 82% against 96% for comparative region. According to UN Water 2021 report, the performances are higher for: a) water quality, with 84% as against 76% of monitored water bodies that has good ambient water quality, SDG 6.3.2.; and b) the degree of integrated water resources management implementation was little higher, 77% as against 72%, SDG 6.5.1. By the contrary, a lower economic performance was registered by Romania in 2018 at the efficiency measured as the value added from the use of water by people and economic agents, reaching only half of the regional level of 56 USD/m^3, (SDG 6.4.1), (UN Water 2021).

The pandemic restrictions disrupted the technological value chain, „reducing face-to-face contact with customers, adjusting workflow to ensure social distancing" and „led to a sudden spatial and temporal shift in drinking water demand". A qualitative research conducted by Spearing (et al, 2021) on the managers of drinking water management companies in the USA, highlighted the need to increase the resilience of the water sector to future challenges by planning to urgently solve existing problems - infrastructure modernization, employee reskilling, operational issues, funding deficit for water quality distribution, risk assessment, equity in water distribution etc. The future efficient management of water distribution involves a fair and smart use of water resources by monitoring water footprint (personal & product) and changing the model in which the water is used for different purposes.

3. Methodology and database

We conducted a statistical analysis of the main indicators that define the size and performance of the drinking water distribution sector at the level of EU member states and the comparative position of Romania. Finally, based on a qualitative assessment of the partial information available for the pandemic, we identified post-pandemic recommendations. The main limitation of the analysis is the availability of statistical data for 2020 (partially) and 2021, from Eurostat enterprise statistics, as well as the lack of detailed comparative data at micro level, for companies in the drinking water distribution sector in Romania, for the period analysed.

4. Results and comments

4.1. Business sector performance

The economic performance of the WCTS sector highlights significant differences at regional level, from different perspectives: a) in terms of supply - respectively available resources, business model and availability of financial resources of economic agents but also b) in terms of the demand, respectively of the structure of the consumers, according to the average level of consumption and their purchasing power.

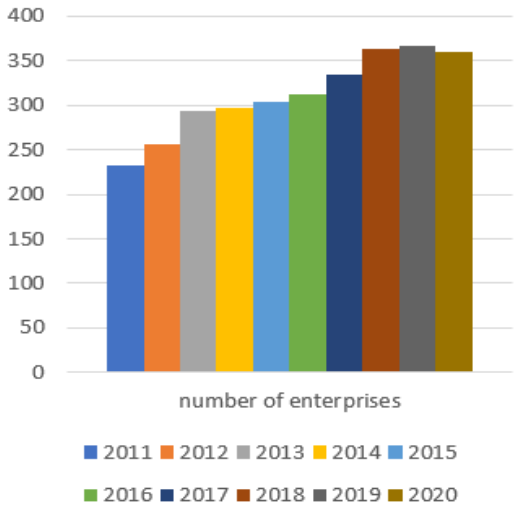
According to Eurostat database (2022), WCTS sector represents less than 1% of the total number of companies in the EU-27. In Romania, in 2020, 0.071% of total registered companies in the business sector were active in WCTS, respectively a number of 359 companies, increasing compared to 2011 by over 50%, but, against 2019 figures, their number decreased by 8.

The firms in the WCTS sector are mainly small and medium sized companies, with an average number of persons employed per enterprise in 2020, between 10 (Sweden) and 272 (Bulgaria). In Norway, Denmark, Austria and Finland the average persons employed by company in WCTS industry is even lower, with up to an average of 4 persons per enterprise. In Bulgaria, the Netherlands, Slovakia, Belgium and Hungary the average number of employees is much higher, over 100 persons, which indicates a higher number of medium and large companies.

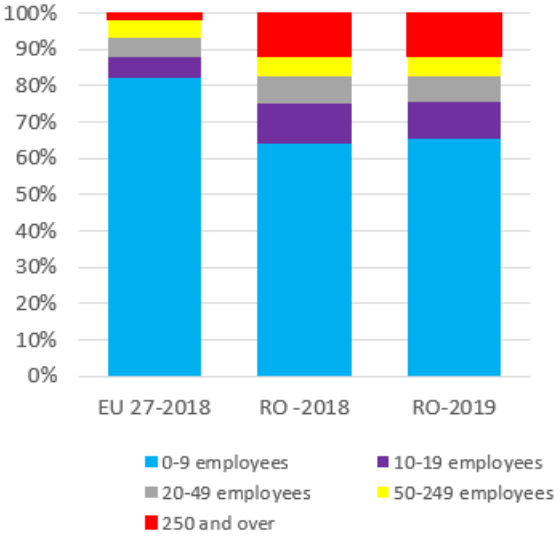
In Romania, the average number was around 150 people in 2011 and decreased below 100 in 2020, with a structure based more on medium and large enterprises, respectively with 17.5% of companies with over 50 employees (at the level of EU-27, their share is below 7%) Figure 3.

Figure 3. WCTS sector, by firm number and structure

Dynamics of the number of companies in WCTS industry, in Romania, after 2011



WCTS sector, by companies' size, last available data, in Romania and at EU-27 level



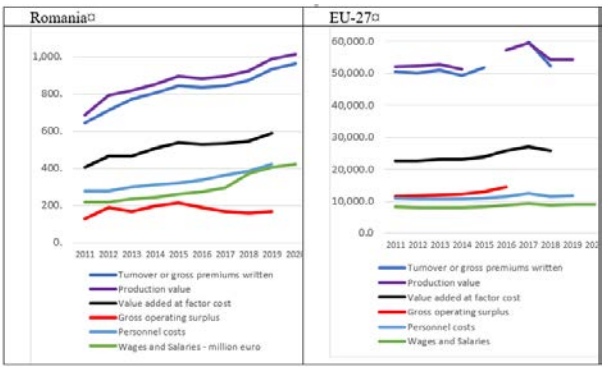
Source: Eurostat database, Annual enterprise statistics by size class for special aggregates of activities, accessed on March 19, 2022

The Eurostat database allows us a comparative analysis of the main performance indicators, of the activity results, of the main cost components and of some efficiency rates.

If we analyse the main result indicators, respectively turnover and production value, we find that their dynamics was more accentuated in Romania than on the EU-27 as a whole, evolution justified by the extension of the distribution network and the increase of consumption (Figure 4).

It is found that Romania has a model of cost structure different from other EU-27 countries. On average, the ratio between added value and production value is higher for Romania which means less material consumption, that could be explained by different technologies for water treatment and / or different maintenance cost for tangible assets. Another difference is related to the ratio between gross operating surplus and labour force cost, in Romania wages and total personnel cost are higher than at EU-27 average. This could be explained by a higher number of people employed in this sector in Romania than at EU-27 level, which demonstrated that the technology is less efficient and / or that for the maintenance of equipment (capture, water treatment and transport) more employees are needed, the repair and maintenance activities being carried out mainly on their own (without or with a lower degree of outsourcing of these services).

Figure 4. Main performance indicators for WCTS industry (million euro)



Source: Eurostat database, Annual enterprise statistics by size class for special aggregates of activities, accessed on March 19, 2022

The following aspects also support these assessments:

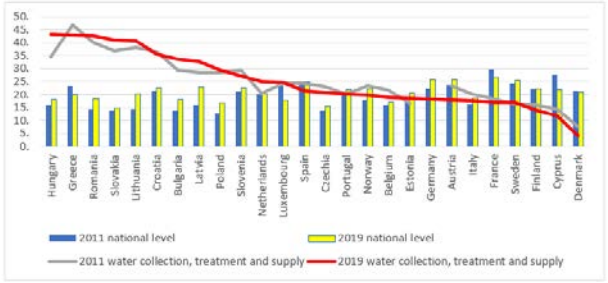
- The average number of persons employed per company at EU-27 was in the period analysed on average of 24 persons but in Romania the registered number was substantially higher - about 6 times higher in 2011, it was reduced in the analysed period to a rate from 1 to 4. Therefore, the average number decreased from about 153 people in 2011 to 98 in 2020 but is not associated proportionally with investments in technology, as we will see later.

- Apparent labour productivity calculated as gross value added per person employed is significantly lower in Romania WCTS industry than at EU-27 level, even if, in the analysed period, it increased by 60%. At the level of 2019 the apparent labour productivity in Romania was less than 40% of the EU-27 level, *i.e.* the value was 20.2 thousand euro per person employed in Romania and, respectively of 52.1 in EU-27

- Turnover per person employed was more than 6 times lower in Romania for the entire analysed period, but with a slight closing gap, from 1: 6.85 in 2011 to 1: 6.11 in 2018. It should be noticed that the production factor remuneration policy is different at EU-27 country levels.

If we analyse the share of personnel costs in production in 2019, we find that it was between 4.0 percent in Denmark and 43.5 percent in Hungary. The evolutions in 2019 compared to 2011 are different by country, with dynamics in both directions, determined by factors such as the level of economic development and the social model, transposed into policy measures. The differences between the national level, respectively "total business economy; repair of computers, personal and household goods; except financial and insurance activities" (Eurostat database) and WCTS industry is explained not only by the technological level and the specific model of combining the factors of production, but also by the salary policy on trades and professions promoted in each country, and / or depending the level of the minimum wage negotiated at the level of the activity sector.

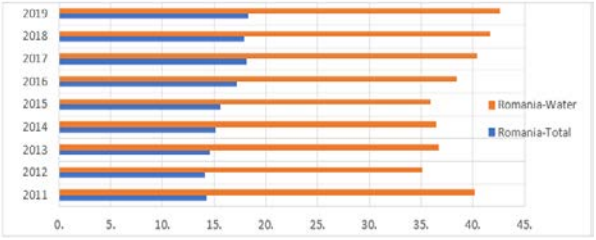
Figure 5. Share of personnel costs in production value, in EU-27 and Romania, in 2011 and 2019 (%)



Source: Eurostat database, Annual enterprise statistics by size class for special aggregates of activities, accessed on March 19, 2022

In Romania, the share of personnel costs in WCTS is almost double the national average (figure 6), a situation similar to most of the less developed countries in the EU (figure 5). The positive dynamics of personnel costs in the period 2012-2019 was mainly due to the increase in the national minimum wage, on the background of a relatively sustained economic growth, based on consumption. The local monopoly position of WCTS companies and the relatively high costs for investments in facilities that provide individual sources of water capture and treatment have allowed companies to negotiate quite differentiated salaries. It is one of the reasons why the tariffs for these services differ quite a lot by companies and geographical areas. For example, at present, according to ANRSC (National Romanian Regulator for Public Services), the tariff for water distribution services differs from a maximum of RON 6.88 / m^3 - around 1.4 euro / m^3 (SC AQUAVAS SA Vaslui) to a minimum of 3.75 RON / m^3 (around 0.75 Euro / m^3) (COMPANIA DE APĂ SOMEŞ SA Cluj Napoca)

Figure 6. Share of personnel costs in production in Romania in WCTS, in the period 2011-2019 (%)



Source: Eurostat database, Annual enterprise statistics by size class for special aggregates of activities, accessed on March 19, 2022

In the last decade, gross operating rate measured as ratio between gross operating surplus and turnover at

EU-27 level increased with around 5 p.p., reaching 27.8% in 2018. By countries, the rate fluctuated in both directions, respectively increased by more than 10 p.p. in Italy, Belgium and France, and decreased with 13 p.p. in Hungary, which in 2019 registered the lowest gross operating rate, of 2.9 percentage. Romania, with 17.7 percent is among the poorest performing countries (along with Slovakia, Slovenia and Hungary), and in the analysed period the situation has deteriorated, registering a reduction of 2 pp in 2019 compared to 2011 (Figure 7)

Figure 7. Gross operating rate of WCTS sector in Romania and EU-27, the first and the last 3 performers

Source: Eurostat database, Annual enterprise statistics for special aggregates of activities (NACE Rev. 2), accessed on March 19, 2022

All these results show the strong dependence of the development of the WCTS sector on the local conditions and the national policy for the development of services of public interest, but also on the power of the local authority to promote a model of services of local interest based on large providers or, on the contrary, on the encouragement of small businesses and local competition.

4.2. Digital transformation impact on business model

The economic performance of the business environment in today's society is based on two technical-organizational pillars, on the one hand, on the modernization of specific technologies to ensure the comparative advantages between the partners on the specific market and, on the other hand, on the promotion of a competitive business model, with as low managerial costs as possible. In both cases, the digital transformation can provide cost savings at the company level and facilitate the application of modern business management methods by refining the principles of total quality management and adapting successful management models in this field of water management, such as the Lean 6 Sigma method or using artificial intelligence techniques. (Tsironis et al, 2016; Miguel et al, 2014; AlDairi, 2021; Xiang 2021, Naeemah, 2021). According to the MKPR 2021 study, about 1/3 of Romanian companies had benefits from digitizing some activities „the turnover increased by 10-19%", i.e. financial performance in cost reduction and increased in turnover or profit. The availability of financial resources for digital infrastructure and reskilled human resources were the main challenges, but the pandemic accelerated the reshaping of the digital side of the business model.

The first results showed that the investment efforts can be amortized in the medium term, and the post-pandemic benefits can be maintained, including with the consolidation of the market segments gained during the pandemic. If the pandemic forced digitalization, according to the same study, the capitalization of digital reform at the company level can be achieved by continuing investments in digital technology and the gradual development of a "digital ecosystem based on specific functionalities of digitalization solutions, communication platforms and internally develop digitalization solutions tailored to specific business needs". According to McKinsey analysis (Novak et al 2018) automatization potential in utilities, process monitoring, e-commerce for services and advanced analytics for decision making could be drivers for increasing financial performance and also competitiveness at firm's level (Valoria Study, 2020), including for business sector in water management.

The Covid crisis has accelerated digitalisation and the pace of change in the business model and also in labour market jobs structure. Generally, the digital transformation makes life easier, increases the security of service quality, eliminates time-consuming repetitive activities and saves resources, facilitates the increase of time for personal life, increases the quality of life as a whole.

Even in some industries the transformation is limited, this fundamentally changes the company's cost structure and job categories. New jobs will emerge, routine jobs are at risk and reskilling / upskilling the soft skills will be necessary for all categories of labour force (FEPS, 2022). Is a good opportunity to change, adapt / reshape also the business model. From the perspective of water distribution services, the digital transition means at least three levels of intervention: a) digital monitoring of technological processes of water treatment, but also of the operation of the distribution network, with permanent quality control of the transport network functionality, to limit the effects on costs of the malfunctions in operation; b) reorganization and optimization of jobs, by promoting hybrid work, where possible, and reducing the total cost of company staff - digitization of administrative services - accounting, staff etc.; c) reshaping the relationship with the clients, by gradually switching to digital communication, for the entire flow of relationships - from the selection of the service contract

to the payment and the monitoring of the quality of the services.

The cost management and the increase of profitability in terms of ensuring access to affordable water services from a financial point of view, for all categories of consumers, are dependent on both internal and external factors. Internal factors take into account:

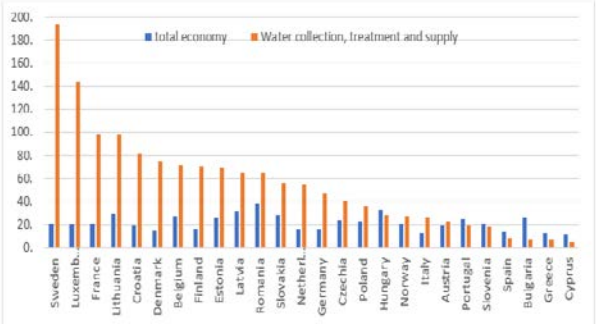
- Technological modernization of the systems for monitoring the processes of capture, treatment, distribution, purification and verification of water quality, including through digital monitoring
- Reducing the costs of technical interventions in case of network failures through digital surveillance - minimizing water losses in case of technological failures by reducing response time
- Diminishing the costs of managing the relationship with customers, industrial or domestic, by differentiating contract management services by customer categories - from the application of classic methods of collaboration in the case of elderly and / or poor customers, without access to digital services, up to complete digitization of contractual relations, in the case of industrial and domestic consumers with full access to digital services.
- Digitization of customer relationship management at company level and operational monitoring of payments for services, with the promotion of billing discounts or other facilities for payment of services and reducing the physical circulation of documents - digital invoices, online payment, etc. that should involve consistent alternative clients centered business model which involves transparency, accountability, different choices, open-source software and better standards for users.
- Expanding the network of service beneficiaries by increasing competitiveness based on digital platform development for customers.

Such transformations at company level are also dependent on a series of external factors, among which: a) financial inclusion; b) the level of economic and social development of the localities served; the existence of water resources and accessibility to other sources of drinking water - individual deep wells, financial capacity for local / individual water capture and treatment plants, water transport networks etc.; c) the policy of the local authority to support the distribution of drinking water through common networks, managed by specialized companies; d) the real-life, day-to-day implementation of the EU Declaration on digital principles (EC, 2022), i.e. accessible and human-centric digital services and of the 2030 European Digital Compass (EC, 2021), based on digital business enforcing.

If we position ourselves at the level of companies, it is important to ensure the sustainability of the business and the resilience of companies by financing the modernization of infrastructure, as the main component that determines water quality and decent tariffs, facilitating the reduction of water footprint and water inclusion, in the conditions of supporting the digital transition.

As future development programs for sustainable business we can consider the investment rate, calculated as share of the investments in value added at factor cost. According to available data for 2019, the investment effort of the analysed activity is much higher than the average at national level in Sweden and Luxembourg, and less than half of national level in Bulgaria and Cyprus with just 2/3 in Greece and Spain. In Romania, the investments are 1.7 times higher than average economy level, but even so, the water infrastructure is old and the water quality is affected in many cases (Figure 8).

Figure 8. Investment rate in EU countries, in 2019 (%)



Source: Eurostat database, Annual enterprise statistics for special aggregates of activities (NACE Rev. 2), accessed on March 19, 2022

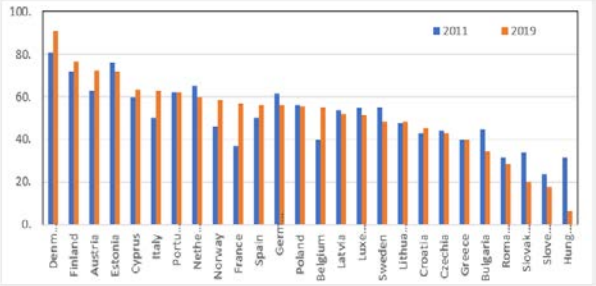
Under these conditions, it will be difficult to ensure the modernization of the water transport and treatment network, but also to expand the network, according to the future demand for services.

External sources of financing (loans) are generally expensive and therefore two can be sources of financing, namely the addition of capital by attracting external investors (FDI) or from own sources, respectively from profit. Another possible source is non-reimbursable financing, through structural funds or other lines of financing that support social objectives such as social and societal inclusion for all i.e. Green Deal or Horizon Europe Program

The share of gross operating surplus in total value added we have to mention that for all countries in water sector registered higher share than the national average level for all activities, in 2019 against 2011, except several new member state Czech Republic, Bulgaria, Slovakia, Slovenia, Hungary and Romania. It is worth mentioning the big differences between the countries, which can be explained by the technological level, the degree of automatization and the managerial

model, but also depending on the level of personnel expenses (salaries and contributions) and the purchasing power of the beneficiaries. An increase of 10-20 p.p. have been registered in developed EU countries - France, Belgium, Italy, Norway, Denmark and Austria- figure 9.

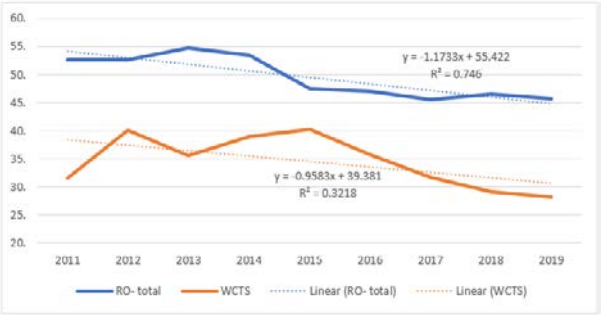
Figure 9. Share of gross operating surplus in value added in 2011 and 2019 in WCTS sector (%)



Source: Authors selection based on Eurostat database, Annual enterprise statistics for special aggregates of activities (NACE Rev. 2), accessed on March 19, 2022

If we analyse the level and evolution of capital remuneration, measured as share of gross operating surplus in value added for Romania, we find that in the period 2011-2019, in WCTS industry there are 2 distinct and opposite stages as dynamics, with a general downward trend- figure 10.

Figure 10. Share of gross operating surplus in value added in Romania, in 2011-2019 (%)



Source: Authors contribution based on Eurostat database, Annual enterprise statistics for special aggregates of activities (NACE Rev. 2), accessed on March 19, 2022

Until 2015, there is an oscillating evolution with an increasing trend that means a volatility of performance and prices, and after 2015, a reduction of the general profitability, mainly due to the increase of the minimum wage and of the other operational costs.

4.3. The effects of the pandemic on essential services. Peculiarities for the WCTS sector

The pandemic had disproportionate effects on economic activities, affecting individuals, households and businesses. If some activities were able to be reduced, temporarily closed or closed during the lockdown period, the essential services continued their activity, some of which also had an increase in demand. This is also the case for drinking water distribution services. Pandemic restrictions have imposed strict sanitary rules that have generated increased water consumption for repeated disinfection, cleaning services, etc. Also, the structure of water consumption by categories of consumers has changed significantly, there have been reductions in the case of economic activities and a general increase in the case of households (Kalbusch et al, 2020; Brauer et al, 2020; Cahill et al, 2022; Campos et al, 2021).

The period of the already two years of pandemic reiterated the importance of water supply inclusion as a driven factor for economic development and quality of life improvement. The pandemic has shown the higher importance of water supply management but also companies and households ability to cope with pressure for affordability prices for these services. It is mainly about ensuring cost-benefit efficiency in drinking water distribution services on the one hand, and the ability of consumers to pay, on the other hand.

According to the literature analysis, the pandemic has changed consumer behavior for drinking water use - laundry and higher consumption of cleaning materials, washing food with plenty of water, as a precaution against the risk of infection, reducing water consumption in households in the morning and the increase throughout the day, especially in the case of the workforce working remotely, the increase in consumption in residential areas during the week and the reduction during the weekend; the increase of consumption in the agglomerated residential areas and only a slight change in consumption in the more isolated inhabited areas, without important human interaction.

All of these changes have highlighted the volatility of the water consumption pattern and its strong dependence on unforeseen events, such as the pandemic. It's also highlighted the increasing trend of water dependence, such as the correlation with changes in ambient temperature - global warming, or depending on changed employment model (hybrid or remote) and / or related to household structure, which supports the model of water demand future increase for ordinary events and water consumption practices.

Regional differences and by categories of consumers will be maintained and will even increase if no measures are initiated to close the regional gaps regarding the access and price of water management

services. The post-pandemic period may lead to a reduction in water consumption for the financially vulnerable, even if the general trend of water consumption remains on the rise.

5. Conclusions and policy recommendations

The need for drinking water is essential, and the pandemic highlighted the importance of the three factors analysed in the paper - quality and affordable services for all, digital & financial inclusion, business management innovation. Ensuring these components at the company level in the WCTS industry requires micro-level measures to reduce costs, financial performance to facilitate infrastructure investments and personal reskills for soft competences able to facilitate full digital communication with customers.

The digital transformation of drinking water distribution services will determine a positive outcome for firms and citizens *i.e.* access and affordable essential services, saving time with managing contractual relations, lower costs and quality of water consumed. From the perspective of WCTS industry in Romania and the analysis of the economic performance of the companies active in this sector, a series of recommendations are necessary, namely:

a) Proposals for the modernization of the digital management of water services through: artificial intelligence to monitor the technological process of supplying drinking water - surveillance of water processes and distribution; managing customer relations with facilitation provided by the use of database and cloud-computing capabilities; promoting affordable tariffs for services provided through consumer-centered contracts and discount for digital and advance payments

b) Stimulating FDI in water supply services based on the expected outcomes in distribution network investment for replacement / modernization and in the implementation of good practices in digitalized systems for monitoring the state of the network and water quality;

c) Cost benefit analysis at firm level and increasing companies 'social responsibility.

d) Providing public-private partnership in the local strategy for increasing the quality of living condition in the locality, based on access for all for WCTS services, in the benefit for the future generation and a greener environment for all.

In order to increase the efficiency and accessibility of water services, a change of approach is needed, a fundamental shift in how companies / providers understand, values and manage water resources.

Policy orientation for the post-pandemic better normal targeting closing water inclusion and demand and supply gap are oriented, among others, toward:

a) Extending the water distribution network to reduce the market gap between supply and demand

b) Identification of alternative water sources to meet the needs of industrial and domestic consumption in parallel with ensuring the quality of distributed water

c) Promoting affordable prices for consumers to increase access to quality water sources, including vulnerable groups, poor households or those located in hard-to-reach geographical areas

d) Increasing the internal efficiency of the companies that manage the water supply by adjusting the business model, with the promotion of digital transformation and / or hybrid system activities, development of water distribution monitoring services to reduce the risks of water transport or network failures;

e) Flexible working arrangements and hybrid employment; closing access gender gap to decent employment / jobs; digital inclusion and financial inclusion of all categories of customers; reduced informal employment and a wider cover by job retention schemes for the youth in local essential jobs employment such in WCTS sector;

f) Promoting the public-private partnership in the management of drinking water distribution services and attracting foreign direct investment for the modernization of the water transport network, the technological upgrade of the water capture and treatment plants.

The limits of the present research are given by the lack of microdata for the last years for the comparative analysis of the economic-financial performances of the companies operating in WCTS sector at regional level in Romania and for a detailed correlation analysis based on territorial gaps in network development, companies' efficiency and supply deficit, considering the geographical boundaries, operating cost restrictions and affordability prices for services. In future research we will focus on comparative analysis at the regional level, as well as on the analysis of externalities generated by the pandemic period on the digitalization

of relations between water service providers and beneficiaries, including the analysis of the financial impact.

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THE COVID-19 PANDEMIC IMPACT ON LIFE AND HEALTH INSURANCE

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Abstract

Prevention has never been the strong point of Eastern European citizens compared to Western nationalities. But since the COVID19 pandemic, our appetite, Romanians', to generate protection for both ourselves and those close to us has grown exponentially. Another segment in which there were increases was that of legal entities (employers) that began to offer insurance as part of the salary package. Thus, starting with 2020 until now, the majority of insurers owning in their portfolio health insurance products or products with capitalization have reported increases in gross written premiums and obviously in the level of premiums collected. By using the quantitative research method (empirical data, from official open sources on the insurance market), we shall follow the evolution of the insurance companies' portfolio and identify the changing needs of the consumer of such products. The analysis carried out among customers shows people's needs to be protected both from the disease and from financial challenges (cases where the pandemic also hit social, thus generating job losses and ultimately depriving entire families of income). If by 2020 the major players in the insurance market were making enormous efforts to achieve their sales goals at the level of Life's portfolio, in 2021 most of them managed to develop their customer portfolio and offer insurance solutions to everyone, in a sustainable way.

Keywords: *insurance, pandemic, protection, benefits, health.*

1. Introduction

The COVID19 pandemic has significantly affected both people's lives and the global economy. Regarded as safety nets, insurance companies have been put under scrutiny, with concerns about their solvency.

Consequently, the European Insurance and Occupational Pensions Authority (EIOPA), based in Germany, has launched an analysis process, carried out in collaboration with national supervisory authorities, in order to support the effort to cover the risks caused by the pandemic, and to reduce the negative effects of COVID19 on the private insurance sector, especially life and health insurance. On this matter, Gabriel Bernardino[11], President of EIOPA, stated: "The insurance industry has to deal with difficult market conditions and maintain operations, while protecting its employees and policyholders." Moreover, the pandemic affected the normal operation of insurance companies, the one set by the actuarial conditions, forcing them to compensate an exceedingly large amount of damages at a much higher level than expected, thus destabilizing assets reserves and shortening the road recourse to reinsurance companies.

Thus, the risk exposure of insurance companies experienced a forced increase during the pandemic, companies being forced to adapt, by modifying existing products or creating new products, designed to identify, understand and serve the needs of the population at risk due to the pandemic.

The evolution of the insurance market during the pandemic, as shown in the reports of the financial years declared, indicates a rather negative scenario related to the ratio between the assets and liabilities of insurers. The negative developments registered on the market during the pandemic reveal that we can expect a decrease in assets relative to debt, caused by declining liquidity and increasing outstanding debt.

The present paper we analyze the effects of the COVID 19 pandemic on European and Romanian insurance companies. The economic stalemate imposed by the authorities during emergency states, isolation, quarantine and the number of registered medical cases have reached unprecedented levels, destabilizing the entire financial system, especially the insurance system, the mainstay of the economic system.

2. The insurance market in the context of the COVID pandemic 19. Empirical analysis

2.1. General context

A well-developed and stable insurance industry is a pillar of support in a country's economic situation.

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[1] https://www.eiopa.europa.eu/media/speeches-presentations/interview/eiopas-response-coronavirus-crisis_en, accessed on 28.03.2022.

The financial performance of insurance companies has a direct impact on the population, covering the full spectrum from policyholders, employees, intermediaries, company shareholders to financial supervisors.

The market shocks experienced at the outbreak of the March 2020 crisis were unprecedented, shifting yield curves to new all-time highs, putting pressure on profitability and solvency positions, especially for life insurance. However, European insurers have managed to cope with this situation.

The European insurance sector has overcome the situation due to the fact that it has entered a crisis in good shape. Although the industry may still face some consequences of the crisis, such as potential financial market corrections or increased credit risk when certain tax safeguards are exhausted, the likelihood of any major failure has decreased significantly. EIOPA is currently conducting an EU-wide stress test, which will provide more information on insurers' vulnerabilities. In addition, EIOPA will continue to monitor market developments in order to address any risks to financial stability that may arise before they materialize, "Petr Jacubik, director of Xprimm[2], said in an interview.

According to the European Central Bank, the insurance sector manages more than 7 trillion euros in assets worth about 1 million individuals, in addition to independent collaborators and intermediaries.

The results for the second quarter of 2020 were severely affected by the effects of the crisis caused by the COVID-19 pandemic, the period in which the most severe contractions were recorded in 1995, since the introduction of the data series, according to Eurostat. The economy of the European Union registered a decrease of -11.1% compared to the previous quarter, the economic contraction in the euro area being slightly wider (-11.5%). The gradual relaxation of quarantine and isolation measures, which took place in the summer of 2020, created the conditions for economic recovery, with the EU and euro area economies registering significant increases of 11.7% and 12.6% respectively in the third quarter of 2020. The IVth semester of 2020 was marked by the outbreak of the second wave of the pandemic, with an increase in the number of infections and the emergence of new strains of coronavirus, which led to the re-imposition of isolation and quarantine measures, with an impact on economic results in the fourth quarter. According to Eurostat data, there was a contraction of -0.4% in the EU and -0.6% in the euro area in the fourth quarter of 2020 compared to the previous quarter. Compared to the same period of the previous year, the EU and the euro area economy decreased by -1.3% in the first quarter of 2021. Stronger contractions compared to European averages were recorded in Portugal (-5.3%), Austria (-4.5%), Spain (-4.2%), Germany (-3.1%), Czech Republic (-2.4%), Greece and the Netherlands (-2.3%), Malta (-2.0%), Bulgaria (-1.8%), Cyprus and Hungary (-1.6%), Poland and Finland (- 1.4%), while at the opposite end are countries such as Ireland (9.9%), Estonia (+ 5.0%), Luxembourg (+ 4.9%), Slovenia (+ 2.3 %), Lithuania (+ 1.4%), France (+ 1.2%), Slovakia (+ 0.3%) and Romania (+ 0.1%). In terms of short- and medium-term developments, according to the European Commission's summer economic forecasts, the impact of the COVID-19 pandemic on economic activity in 2021 was estimated to be less significant than expected in the spring economic forecast. The euro area economy grew by 4.8% in 2021, an upward revision compared to the previous scenario (+ 4.3%), and estimates for the EU economy indicated an increase of 4.8% in 2021 compared to 4, 2% (economic forecasts for spring 2021). The economic forecasts for 2022 indicate the recovery of the EU and euro area economies, being revised upwards to 4.5% for both areas, 0.1 pp more, from 4.4% in the previous scenario. At the local level, the National Commission for Strategy and Forecast positively revised the economic growth forecast for 2021, to 5% (from 4.3% according to the preliminary winter forecast of CNSP), amid the return of activity in industry (+5 , 8%), agriculture (+ 14.8%), constructions (+ 6.1%) and services (+ 3.9%) compared to 2020. For 2022, CNSP estimates a recovery of the Romanian economy, with an advance of 4.8%.

The shock generated by the COVID-19 pandemic has overlapped with a number of vulnerabilities in the global economy related to the slowdown in growth rates of previous years and the very high level of government debt, which reduces room for maneuver in dealing with shocks. The share of government debt in GDP is 98.1% in the euro area for the fourth quarter of 2020, higher when compared to the level recorded in the fourth quarter of 2019 (84.0%). At the level of EU Member States, there is a considerable heterogeneity of the level of indebtedness, with the share of public debt in GDP ranging from 18.2% (Estonia) to 205.6% (Greece). Romania is among the EU member states with a low level of indebtedness (47.3%), below the average indebtedness of EU member states of 90.8% of GDP. In April 2021, Romania's public administration debt stood at 526.70 billion lei, up from the end of 2019 (373.5 billion lei), representing 49.9% of GDP. (ASF, Financial Reports).

Although insurers have reported damage claims at an unprecedented level, there has also been a positive scenario, in which the pandemic has prompted the

[2] Information taken from the interview for EIOPA https://www.eiopa.europa.eu/media/speeches-presentations/interview/european-insurers-during-covid-crisis_en, accessed online on 27.03.2022.

population to become aware of the risk of disease and the need to access medical services, especially in private hospitals, where individual access is increasingly difficult to sustain financially.

According to the reports published by the Financial Supervisory Authority, during the year 2020, the persistence of the low level of annual inflation rates, the tendency to increase the unemployment rate and a change in consumer behavior towards the contraction of aggregate demand, as a result of reduced incomes. available population and increase savings were noted. The second quarter of 2020 was the worst affected by the effects of the COVID-19 pandemic, with the EU and Eurozone economies contracting the most severe contractions since 1995, with the introduction of the -14.6% data series. respectively -13.8% compared to the similar period of the previous year. The results obtained in the third quarter of 2020 marked a recovery: the euro area economy returned to a growth rate of 12.5% (seasonally adjusted series) and the GDP of the European Union increased by 11.6% compared to the previous quarter, amid the gradual lifting of restrictions and the relaxation of measures implemented to prevent the spread of COVID-19. Compared to the same period of the previous year, the EU and euro area economies decreased significantly in the fourth quarter of 2020, by -4.4% and -4.7%, respectively. More severe contractions compared to European averages were recorded in Spain (-8.9%), Malta (-7.7%), Greece and Croatia (both -6.9%), Italy (-6.5%) , Portugal (-6.1%), Austria (-5.9%), Belgium (-4.9%), Czech Republic and Slovenia (both -4.8%), while at the opposite end are Lithuania (-1.1%), Finland (-1.6%) and Romania (-2%), which recorded the lowest economic contractions compared to other Member States. According to Eurostat data, the Eurozone economy contracted by 6.5% in 2020, and the EU economy declined by -6.1%.

In terms of short- and medium-term developments, according to the European Commission[3], the impact of the COVID-19 pandemic on economic activity in 2021 is estimated to be less significant than expected in the autumn economic forecast. According to the same data, the euro area economy grew by 4.3% in 2021, an upward revision compared to the previous scenario (4.2%) and estimates for the EU economy indicate an advance of 4.2% in 2021 compared to 4.1% (economic forecasts for autumn 2020).

The year 2020 tested the ability of markets and participants to adapt to unwanted and unexpected challenges caused by the COVID-19 pandemic. The shock was felt globally and locally in most economic and financial branches, while affecting each individual. In this volatile context, characterized by uncertainty, the non-banking financial markets in Romania, regulated and supervised by the Financial Supervisory Authority, showed good resilience last year, even if at the beginning of the pandemic they were affected in the short term by shocks propagated by financial markets. Thus, the capital market registered sharp decreases between March and April 2020, amid the manifestation of contagion effects, but followed by a return in the next period and a stabilization by the end of the year.

Thus, life and health insurance have enjoyed an increase as a result of the coronavirus pandemic. Consumers, especially younger contributors to the development of the labor market, have accessed a much larger number of health care products brokered by insurers, as the number of illnesses has risen and a record number of deaths have been recorded since the beginning of the pandemic. The increase in health and life policy underwriting is considered by experts to be a normal result, given the basic risk of life insurance, namely the financial protection of the family in the event of the death of the family pillar.

The COVID19 pandemic has forced the consumer's mind to realize the need for financial protection against illness and / or death, by designing scenarios such as: "What happens if the family supporter dies unexpectedly because of Covid19?" "What will happen to his family?"

Health and life insurance is intended to cover that immediate risk of financial destabilization and to support the standard of living that the family is accustomed to for a period of time allowing thus reanalyzing the financial priorities and the acquisition of new income.

An analysis of Google traffic found that in 2020, indexed searches for the word group "life insurance" increased by 50% compared to the same period last year.

Most companies with life and health insurance products and / or mixed products in their portfolio recorded increases between 15-30 percent in gross written premiums, compared to the same period of the pre-pandemic years.

2.2. The evolution of insurance on the Romanian market

Approximately 85% of Romanians paid for products that cover their basic needs, those aimed at survival, safety and health, starting with the decree of the state of emergency imposed by the spread of the new coronavirus, according to a study conducted by AEGON Romania in the first mid-April.

[3] Detailed forecasts for autumn 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5883, accessed online on 28.03.2022.

In terms of emotional priorities, it was found that the majority of participants, 84%, were equally divided between those who were focused on overcoming difficulties and those who remained on watch. Thus, the results show that approximately 42% of respondents during this period focused on values such as care, stability and learning, and another 42% adopted a mentality based on overcoming obstacles, exploration and entertainment, in order to manage to relax. The main objectives of the research included determining how Romanians have adapted to the current situation, the changes that have taken place in their consumption behavior, the perception that respondents have about the future, and identifying the level of interest in life insurance. The same research, conducted by Aegon ROMANIA, shows that the outbreak of the epidemic and concerns about health and job stability led 55% of respondents to consider it necessary to take out life insurance. Out of the total number of participants in the study, the idea of having a life insurance aroused the highest interest for people aged between 25 and 44, with secondary or higher education, middle or high income and with children up to 14 years. Thus, 62% of respondents from this category consider it necessary to take out life insurance. This perception is also shared by 63% of middle-aged, unmarried and childless adults.

The study showed a significant openness to buying insurance online even after lifting restrictions. Thus, 43% of respondents state that they would prefer to purchase life insurance online. Women have shown interest in buying insurance online in a percentage of 48%. Also, 4 out of 10 respondents would still prefer to go to the offices of banks or brokers, especially men (45%).

The increases of gross written premiums in the period 2019-2021 reported by the big insurance companies, confirm the trend outlined on the Romanian insurance market, as follows:

- Groupama Asigurări, one of the leaders in the Romanian insurance market, recorded a 30% increase last year compared to 2019 in the line of life insurance (individual and group), the total value of gross premiums written on this line being 46 million lei.
- in the life insurance segment, UNIQA continued to consolidate its results, with an advance of 40% on gross written premiums reported for 2021, compared to the previous year. The company reported sustained increases in both life insurance for credit products and traditional life insurance.
- within the Allianz-Țiriac portfolio, the total life insurance underwritings increased by approximately 40% and exceeded 277 million lei.
- signal Iduna Asigurare Reasigurare ended 2020 with a 27% increase in the volume of gross written premiums compared to the previous year, thus exceeding the value of 120 million lei. The company remains the leader in the health insurance market, according to the latest report issued by the Financial Supervisory Authority.

3. Conclusions

Although they have emerged out of a difficult time globally, both financially and socially, the major insurance companies have managed to close the annual financial years on a positive note, in terms of underwriting life and health insurance.

Changes in portfolios and product levels have been observed, with companies trying to provide customers with relevant coverage, reported and adapted in near real time to crisis situations in the medical system.

It was found that the existing insurance products did not adequately serve the needs of individuals and thus there were major changes in the area of risks covered, with international expansions and risk transfer between insurance companies.

The companies that until now did not serve the field of life and health insurance, registered in order to deliver services within this range, identifying thus the earning opportunity that arose from the context generated by the Covid crisis19.

The segment of clients who accessed life and health insurance was mainly made up of young adults, aged between 25 and 45, suggesting the need for protection, both individually and at the family level.

The recommendations towards insurance companies fall into the category of those in the legal framework, namely contractual exclusions which are in most cases far too demanding and exhaustive. Clients are always concerned about the terms of the contract, so the recommendations include: withdrawal or reduction of the waiting period for hospital or surgical benefits, including the risk of medical coverage in case of involuntary intoxication with drugs or alcohol, creation of multidisciplinary risk coverage packages, directly proportional, from a financial point of view, to the existing social classes in Romania at the moment and offering the possibility to young people up to 18 years of age to conclude individual protection contracts.

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LEVERS FOR THE MACROSTABILIZATION OF ECONOMY AVAILABLE TO THE MONETARY AUTHORITY AND ACTUAL MEASURES ADOPTED IN THE CONTEXT OF THE COVID-19 PANDEMIC

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Nicoleta PANAIT**

Abstract

Measures taken by states, in the context of epidemiological situation, to reduce the effects of the health crisis have been severe, the most important being stopping non-essential activities, restricting travel and banning travel to and from certain countries and causing shocks in production and distribution chains, but also a sharp contraction in demand for a wide range of goods and services. Given the difficult economic context created by the COVID-19 pandemic, which impacted both the national and global economy, one of the objectives adopted by the Romanian monetary authority in the first half of 2020 was to maintain the stability and liquidity of the banking system for proper functioning of public finance and the real economy. As a state of emergency was declared as of March 16 2020, and considering that the main fiscal response in Romania came from the national budget, the NBR collaborated with the Government in order to avoid a potential conflict between government measures and fiscal measures. One of the unconventional measures "quantitative easing" which involves the basic injection of money into the market in exchange for various financial assets was used by the monetary authorities, including in emerging economies, such as NBR. This paper focuses on the measures and effectiveness of the monetary policy of the national monetary authority in order to reduce the negative effects of the crisis caused by the COVID-19 pandemic.

Keywords: *monetary policy, monetary policy interest rate, exchange rate, capital flows, monetary aggregates, inflation.*

1. Introduction

According to its statute, the NBR's fundamental objective is to ensure and maintain price stability. In the short run, the evolution of prices is subject to multiple influences generated by internal and external factors that act on aggregate demand and supply. In the medium and long run, monetary policy plays a key role in ensuring price stability.

As regards the monetary policy as a nominal macro-stabilization anchor, it is well known that the difficulties of macro-economic stabilization, where market forces failed to play any role in the efficient allocation of resources and/or governments failed to support market mechanisms for a long period of time, are amplified by strong distortions and major imbalances that characterize the economies of those countries.

Under such circumstances, even small changes in the real values of the economic variables lead to very ample variations of the nominal values of these variables. In this context, in order to reduce inflation, measures are often adopted to stabilize the nominal values. Once inflation is reduced, the changes produced by the real demand for money, the real exchange rate, the relative prices are no longer, for the most part, affected by ample changes in the nominal values and it is no longer necessary to maintain the nominal anchor.

Regarding foreign capital flows to countries with structural reform programs, they are determined by a multitude of factors: lack of alternative profitable investments in many countries; the interest rate difference between the interest rate on the national currency and the interest rate on the international capital market, in particular when the real exchange rate is expected to appreciate; fiscal and monetary restrictions in the country of origin compared to the country of investment; massive privatizations; liberalization of large markets with unsatisfied demand; anticipating significant improvements in marginal capital productivity; the success of macrostabilization and the takeover of economic growth. Capital flows have external causes (such as low interest rates in other areas, expected to generate highly volatile speculative capital flows) and internal causes (such as high marginal return on capital) that generate these stable capital flows representing direct investment - if the stabilization was successful - or speculative-stabilizing flows that seek to obtain benefits from existing imbalances, anticipating the success of stabilization.

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Experience shows that stable flows only occurred after a responsible fiscal policy has been consolidated, in the context of maintaining a very restrictive monetary policy. The speculative-stabilizing flows have a positive role in the quick removal of distortions generated by a monetary policy. They generate an increase in the demand for money and an increase in interest rates, which leads to increased savings without stimulating the demand for goods and services, therefore without exerting pressure on prices. If inflows are the result of borrowing for increased consumption, then the balance of payments account surplus will be reflected in a comparable current account deficit and again the price level will remain largely unaffected. Part of the money will inevitably be used for the consumption of goods and services that are not subject to international trade.

In this case, it is necessary to appreciate the national currency in order to redirect consumption to imported or exportable goods and to cancel to a certain extent the effect of increasing domestic prices. If capital inflows are excessively large, regardless of their nature and purpose, and exceed the possibilities to increase the production capacity, the optimal answer to prevent economy overheating and rising prices is a restrictive fiscal policy.

In most cases, however, governments and central banks try to control the current account deficit of the balance of payments, regardless of the level of limitation of loans to domestic market beneficiaries (enterprises, population, government agencies and public institutions). This prevents the uniform intratemporary allocation of the level of consumption.

Where there are significant devaluations or where there is a significant depreciation of the exchange rate, the authorities are not willing to accept a real appreciation of the national currency by appreciating the nominal exchange rate. In such situations, a policy of sterilizing capital inflows is used.

When sterilization is not successful, the effects of capital inflows are seen in the price level, the appreciation of the national currency taking place through inflation and not through the appreciation of the nominal exchange rate. This is a blow to the credibility of monetary policy, since the very purpose of initiating sterilization, i.e. to maintain price stability, was sacrificed in favor of defending the nominal exchange rate and of controlling the current account deficit of the balance of payments.

The high quasi-fiscal costs of sterilization mean that countries that have adopted this mechanism will eventually abandon it. The quasi-fiscal cost of sterilization is borne by the central bank through interest paid on securities denominated in national currency, issued with a risk premium on market interest, in exchange for the currency purchased by the central bank and commercial banks by the tax implicitly applied on them, if required reserves grow and are remunerated at an interest rate lower than the market interest rate.

With inefficient sterilization, in the absence of a restrictive fiscal policy, the currency appreciates externally in real terms through inflation, the volume of lending decreases, and the level of interest rates is higher than in the absence of sterilization. If capital inflows were allowed to increase the money supply in response to increased demand, interest rates would fall, the volume of lending would increase, the impact on prices would be insignificant, and the national currency would appreciate to a certain extent in nominal terms. This argument is convincing enough against attempts to sterilize capital inflows.

Regarding the capital inflows in 2021, in our country, investor interest is still very low and is more focused on the speculative component, with IIF data indicating high volatility. Emerging markets in Europe saw a massive decline in capital inflows in the first eight months of 2021 compared to the same period in 2020, by 63.6%, as net inflows from equity portfolios decreased by 75%, up to $12.5 billion, and net bond inflows decreased by 52.6% to $24.6 billion. In the context of deepening economic imbalances, of the political crisis and of inflationary pressures, the negative outlook on capital flows remains.

2. Content

NBR's monetary policy strategy is to directly target inflation. " Inflation is always and everywhere a monetary phenomenon"[1].In order to counterbalance the limitations of using monetary aggregates as a nominal anchor and the lack of effect of pre-announcing their target levels, a pre-announced level of inflation is used. Monetary policy thus focuses on the ultimate goal and not on an intermediate target. "Inflation expectations matter in two important areas. First, they influence the level of real interest rates and so determine the impact of any specific nominal interest rate. Second, they influence price and money wage-setting and so feed through into actual inflation in subsequent periods. We discuss each of these in turn"[2]. For this policy to bear fruit, it is necessary to have a real independence of the central bank and the monetary policy needs to be very well correlated with the fiscal policy. The use of inflation control as the ultimate goal must give the central bank enough freedom so that when inflation is

[1] Bank of England, "The transmission of Monetary Policy", 2000.
[2] *Ibidem* 3.

generated by shocks other than monetary, it can allow the shock to be consumed by inflation, ensuring that the return to the desired level is made as quickly as possible, once the shock is consumed. These elements make it difficult to use inflation as a direct objective of monetary policy.

According to the projections made, the annual rate of CPI inflation would have reached 3.8% at the end of 2019, 3.1% at the end of 2020 and 3.2% at the horizon of the projection (Q3 2021). In contrast, although the stationary inflation target is 2.5 percent ± 1 percentage point, the annual inflation rate in 2019 reached 4.04%, mainly due to shocks on the supply side of certain agri-food products (pork and fresh fruit) caused by the global African swine fever epidemic, respectively the unfavorable weather conditions in the region, the decrease in thermal energy prices in November as a result of subsidies to the population, the slight depreciation of the leu against major currencies, and a persistent aggregate demand surplus. In November 2019 alone, the annual inflation rate, which measures the evolution of consumer prices in the last year, increased to 3.77%, given that food prices rose by 4.9%. Non-food product prices increased by 2.83%, and the price of services increased by 4.19%, according to data from the National Institute of Statistics (INS).

According to the World Economic Outlook report updated and published by the International Monetary Fund (IMF) in July 2019, the outlook for the global economy has been revised downwards under the influence of the slowdown in global economic growth since early 2019. This situation is largely due to worsening geopolitical and trade tensions and worsening financial conditions in developed countries. Under these conditions, the trend towards investments and the demand for durable goods have decreased and, thus, led to the moderation of economic activity.

In Eurozone countries, economic growth has slowed more than expected as a result of weakening consumer and business perceptions, delays in introducing new fuel emission standards for diesel-powered vehicles in Germany, uncertainty over fiscal policy, and street protests in France that disrupted retail and impacted consumption.

In Romania, the year 2019 was characterized by 4.1% economic growth - unsustainable growth considering the increase of the budget deficit and external deficit, by an inflation at the end of the year of 4.04%, but higher than the admissible 3% limit in the EU area. There was a low unemployment rate of the International Labor Office - ILO (3.9%), but also a growing trade deficit of the current account expressed as a percentage of GDP (-4.7%) which remained negative in terms of value in the last three decades.

In 2019, Romania had a relatively low public debt (approximately 35% of GDP) and a total (public and private) external debt of approximately 48% of GDP, of which 2/3 belonged to the private sector. Reinhart and Rogoff[3] found out that the emerging markets face lower thresholds for external debt (public and private). When external debt reaches 60 percent of GDP, annual growth declines by about two percent, but for higher levels, growth rates are roughly cut in half.

The increase in public debt as a result of permanent expenditures, such as the increase in the pension point, and low budget revenues can further damage the situation of public finance, and the cost of financing will depend on the evolution of deficits, exchange rate pressures and inflationary expectations.

According to the SEC 2010 methodology, the general consolidated budget deficit increased in 2019, reaching 4.3% of GDP compared to 2.9% of GDP in 2018 and exceeding the 3% limit set by the Maastricht Treaty. Among the member states of the European Union, our country registered the largest budget deficit expressed as a percentage of GDP. Also, the primary budget deficit expressed as a percentage of GDP reached 3.1%, our country registering, for the third consecutive year, the largest imbalance in the European Union

In the economic boom years, the monetary policy pursued by the NBR was countercyclical, and after the outbreak of the global crisis of 2008-2009 it became expansionary, by reducing the monetary policy interest rate and minimum required reserves in response to declining interest rates on new loans granted in the national currency.

At the beginning of 2019, the NBR maintained the monetary policy interest rate at 2.50% per annum, as well as the interest rates on deposit and loan facilities at 1.50% and 3.50% per annum, respectively, as well as the levels in force of the minimum required reserve ratios (RMO) applicable to the liabilities in lei and foreign currency of the credit institutions (8% and 6% starting with the application period February 24 - March 23, 2020).

The new coronavirus (***COVID19***), which was discovered in China in late 2019 and turned into an epidemic since January 2020, has severely affected the entire world economy. By spring 2020, more than half of the world's population had experienced a lockdown with strong containment measures. The measures taken by the states to reduce the effects of the health crisis were severe, among the most important being stopping non-essential activities, restricting travel and banning

[3] Carmen M. Reinhart and Kenneth S. Rogoff, *Growth in a Time of Debt*, NBER Working Paper no. 15639 January 2010, Revised January 2010.

travel to and from certain countries, which caused shocks in production and distribution chains, but also a strong contraction of demand for a wide range of goods and services.

In order to reduce the negative effects of the pandemic crisis, the central bank has adopted a series of measures, among which we mention[4]:

- monetary policy measures consisting of reducing the monetary policy interest rate by 0.5 percentage points from 2.5% to 2% and narrowing the interest rate corridor of permanent facilities around the monetary policy interest rate to ±0.5 points percentage points from ±1 percentage point. As such, the interest rate for the deposit facilities remains at 1.5%, and the Lombard interest rate is reduced to 2.5% from 3.5%. These measures have led to a reduction in interest rates on loans to individuals and legal entities. Two other measures adopted were the provision of cash to credit institutions through repo operations (these are reversible operations with government securities) in order to ensure the smooth functioning of the money market and other segments of the financial market, as well as the purchase of government securities on the secondary market in order to increase the money supply.
- establishing measures to make the regulatory framework more flexible so that credit institutions and NFIs are able to support individuals and companies with existing loans: creditors were able to defer the payment of the loans of any natural and legal person affected by the COVID- 19 epidemic, without applying the conditions regarding the indebtedness level, the limitation of loan amount depending on the value of the guarantee and the maximum duration of the consumer loan.
- measures regarding the bank resolution by which the term for collecting the annual contributions to the bank resolution fund for 2020 was extended by 3 months, up to a maximum of 6 months, and the postponement of the deadlines for reporting information related to resolution planning.
- operational measures aimed at ensuring the proper functioning of the payment and settlement systems in the national currency, in order to carry out the normal commercial and financial transactions. The central bank provided banks with uninterrupted cash flows for all operations, including ATM cash.

It is important to note that the central bank, by acquiring government securities on the secondary market for the purpose of injecting liquidity into the market, used, for the first time, a non-standard monetary policy instrument such as quantitative easing (Quantitative Easing - QE), as well as forward guidance, an indication of the expected level of interest.

Over the last decade, the ECB and the Federal Reserve have pursued very low monetary policy rates (even negative ones, in the case of the ECB), on the one hand to avoid deflation and on the other to avoid a possible collapse of banking systems, as was the case in the 2008-2009 crisis caused by the failure of companies that had invested in subprime mortgages (high risk). Bank of America estimates that after the bankruptcy of Lehman Brothers and to date, central banks have injected $ 23 trillion into the economy through various monetary policy instruments such as quantitative relaxation and the purchase of financial assets in areas of strategic importance. These unconventional measures (Quantitative Easing - QE) have been adopted by other central banks, such as the ECB, the Fed, the Bank of England, the Bank of Japan, etc.) which have targeted the purchase of financial assets and very advantageous financing lines for banking systems in order to boost lending. This "quantitative easing" which involves the basic injection of money into the market in exchange for various financial assets should not be confused with the "open-market" monetary policy instrument used by the monetary authorities, including in emerging economies, such as NBR. The use of this measure involves some risks in the case of an emerging economy compared to developed economies and this is due to distinct features. When it comes to cushioning strong shocks, the autonomy and effectiveness of monetary policy are limited as no reserve currency is issued. In addition, in an economy such as the Romanian one, in which the Euro-ization[5] is significant, a major depreciation of the currency has significant balance sheet effects and a major impact on inflation. It should not be overlooked that the local capital market, which barely exceeded its "border market" status in September 2020, and, although included in the category of emerging markets, is not yet sufficiently developed and the financial market cannot absorb large issues of sovereign bonds, as there are limits on the exposure of financiers to local sovereign bonds. In contrast, in economies where domestic transactions are highly de-Euro-ized, inflation is at an acceptable level, deficits are significantly reduced, there are significant foreign exchange reserves and financial markets are developed, the monetary authorities have room for maneuver relevant for the adoption of such unconventional measures.

Central banks also reacted promptly, as did the Fed, which reduced the key interest rate to a positive lower limit and implemented large asset acquisitions.

[4] National Bank of Romania - COVID-19 (bnr.ro).
[5] daianu-1.07.2020.pdf (consiliulfiscal.ro).

The ECB has considerably eased its monetary policy stance to counteract the negative effects on the Eurozone economy, through a series of measures with the specification that monetary policy interest rate is at zero, being maintained at that value.

During the first period of the crisis, there was an appreciation of the US dollar, the fluctuations in relation to the single European currency being relatively modest, this being a typical evolution for the periods of economic stress. Thus, the EUR/USD exchange rate was slightly below the level of 1.10 for most of the February-May period, while in the previous months it was around the level of 1.11. Subsequently, as a result of the reduction in international risk aversion and the reduction of the interest rate differential between the two currencies, the European currency positioned itself, with the adoption of monetary policy stimulus measures, on a gradual upward trajectory, and in relation to the US dollar exceeded the 1.20 level in the latter part of 2020 and at the beginning of the following year.

The evolution of the RON/EUR exchange rate, as a mechanism for transmitting monetary policy in the economy, has received the impact of worsening sentiment of financial investors towards emerging financial markets. One cause of inflation is the depreciation of the national currency against the euro. During October 2019-January 2022, it is on an ascending trend (4.7486 on 9 October 2019 to 4.9449 on 18 January 2022, the maximum being 4.9510 reached on 30 November 2021). Also, the exchange rate changes have an impact on the economy in terms of capital flows, because a relatively stable currency will attract foreign investors. Otherwise, the prospect of losses from currency depreciation may discourage foreign investors.

According to the Fiscal-Budgetary Strategy[6] approved by the government in December 2019, economic growth for 2020 was estimated at 4.1% by the contribution of domestic demand which is the engine of economic growth especially by increasing gross fixed capital formation, with a higher dynamics than end consumption, respectively 6.8% compared to 4.5%, and on the supply side, an improvement of the economic activity in all sectors was estimated, especially in the services sector and in the industries with high export potential.

These forecasts did not come true, as a result of the COVID-19 pandemic, the Romanian economy contracting by 3.9% in real terms. The measures taken by the states to reduce the effects of the health crisis were severe, among the most important being stopping non-essential activities, restricting travel and banning travel to and from certain countries, which caused shocks in production and distribution chains, but also a strong contraction of demand for a wide range of goods and services. As such, in Romania as well, the year 2020 was characterized by a sudden decrease of private consumption during spring and a negative impact on exports. Imports decreased less than exports, which led to a further deterioration in the trade balance. The nominal depreciation of the national currency, over 1.9%, was also reflected in inflation. In July 2020, the public debt reached 42.2% of GDP, increasing by RON 71 billion since the beginning of 2020, and in November 2021 it reached 48.7% of GDP. If the indebtedness exceeds 50% of GDP, the Government must resort to freezing public sector wages and, eventually, adopt additional debt reduction measures, according to the Fiscal-Budgetary Responsibility Law (LRFB) amended at the end of 2013. Between January and November 2021, the total external debt increased by EUR 6.430 million. Long-term external debt amounted to EUR 96.501 million as at November 30, 2021 (72.4 percent of total external debt), an increase of 3.2 percent compared to December 31, 2020. Short-term external debt was EUR 36.736 million (27.6 percent of the total external debt) on November 30, 2021, increasing by 10.4 percent as compared to December 31, 2020.

The effect of fiscal measures taken during the state of emergency and the state of alert on the public budget was almost 1.5% of GDP, which is added to the budget deficit of 4.6% in 2019 as a result of a poor collection of budget revenues, the high share of rigid expenditures in tax revenues, but also a lower collection of dividends from state-owned companies and the payment of state debts to private companies. The widening of the deficit from 2.8% of GDP in 2018 to 4.6% was determined by a decrease in total revenues of 0.1 percentage points and an increase in total expenditures by 1.7 percentage points. The increase of the budget deficit has been one of the main drivers of the deepening of the current account deficit in recent years, the fiscal relaxation leading to an increase of the population's income over the capacity of the internal supply. In February 2020, the European Commission initiated the excessive deficit procedure against Romania. The Excessive Deficit Procedure was carried out under the general clause derogating from the provisions of the Pact and allowed for a fiscal policy that would support the economy. Some of the measures adopted in 2020 aimed at combating the effects of the pandemic continued in 2021, such as those applied in the field of social protection or those addressed to companies in the form of state aid. Romania is at the point where the current account deficit is higher than the public deficit.

[6] SFB 2020-2022 -11 December - 12:00 (gov.ro).

The reduction of the monetary policy interest rate, in three stages, confirmed the decrease of inflation in the medium and long term, at the end of 2020, the annual inflation rate being 2.1%, the lowest in the last three years. Unlike Eurozone countries that have experienced deflation during periods of recession, emerging countries have experienced growth rates and therefore inflation. Romania also had deflation (-1.5%), the decrease of prices being artificially determined by the reduction of taxes, especially of VAT. It is more difficult to control deflation, which can lead to recession, as compared to inflation. A drop in prices may sound encouraging, but the effects of deflation are a decrease in consumption in favor of saving, an increase in the burden of public debt, a decrease in the value of assets and an increase in real interest rates. As in the case of other economies, the Romanian economy also depends heavily on exports and consumption.

Regarding the evolution of GDP, except for the economic performance in the first two months of 2020, the impact of the pandemic and the state of emergency established by the Romanian authorities since March was felt, thus canceling that strong start. The first quarter of 2020 brought an economic stagnation (-0.04%, revised data) compared to the level of GDP in the last quarter of 2019.

According to the National Institute of Statistics, the second quarter of 2020 was the worst affected by the pandemic, bringing a record economic decline of 12.2% compared to the first quarter. This figure represents the largest decrease in the quarterly GDP of the Romanian economy, surpassing also the negative quarterly records of the economic-financial crisis from 2008-2009.

After this record decline, Romania's economy grew by + 5.6% in the third quarter compared to the previous quarter. Thus, in annual terms, Romania's GDP accumulated a decrease of 5.7%, both on the gross series and on the seasonally adjusted series, compared to the third quarter of 2019, which at the same time represents a decrease below the EU countries average (-4.3%).

Pressures on the public budget have eased in the first half of 2021 due to the medical situation and the positive developments in the economy. The budget deficit reached 4% of GDP in the first 10 months of the year compared to 7% in the same period of 2020, after increasing to 9.7 percent of GDP by the end of 2020. The real annual GDP growth rate in the second quarter of 13.9% was the consequence of continuing the recovery of the economy as a result of the improvement of the medical situation, but also of a substantial basic effect associated with the strong contraction in the second quarter of 2020 after the COVID-19 pandemic started. These developments have been similar to those at the regional level[7]. Budget revenues increased based on the advance of VAT revenues generated by the recovery of consumption and the reduction of the growth rate of wage expenditures, which ultimately led to the adjustment of the fiscal position by 1 pp compared to the same period of 2020.

The NBR made two increases in the monetary policy interest rate, the first increase being adopted on 5 October 2021 to the level of 1.5%, and the second increase on 9 November 2021 to the level of 1.75%, under cash control conditions on the money market. Also, the interest rate for the deposit facility was increased to 1.00%, and the interest rate for the credit facility was increased to 2.5%, due to the extension of the symmetrical corridor formed by these two interest rates for permanent facilities, from 0.5 pp to 0.75 pp. At the same time, the levels of minimum required reserve ratios for lei and foreign currency liabilities of credit institutions remained unchanged. This increase in the interest rate in less than 2 months will lead to a slowdown in lending. Although inflation has accelerated, the annual rate reaching 8.2% in December 2021, the NBR decided on 10 January 2022 to increase the key interest rate by only 0.25 percentage points, from 1.75% to 2%. In 2021, rising energy and fossil fuel prices led to increased risks in the second half of the year. The annual inflation rate will exceed the upper limit of the target range, especially after the cessation of measures to cap and offset energy prices. Additional effects will be generated by the increase in the price of tobacco products, non-food and imported goods, but also by blockages in the production and supply chains.

The main risks to the macro-stabilization of the economy, and respectively to the financial stability determined by the evolution of capital flows refer to:

- Strengthening the sustainability of the external debt service, both in the short and long term
- Improving the structure of external financing flows, including in order to contribute to the sustainable modification of the growth model of the Romanian economy (the main growth factor is domestic demand, unfortunately mainly private consumption and to a lesser extent investments)
- Absorption of European funds, a source of financing that continues to remain at modest levels (gross capital formation should have increased as a result of the impact resulting from the “residual” absorption of structural and cohesion funds allocated through the Multiannual Financial Framework 2014-2020, but the absorption rate was about 30%).

Financial vulnerabilities are still high in some sectors, such as the sovereign or insurance sectors.

[7] www.bnr.ro/RSF_2021_editia_decembrie (1).pdf.

According to the IMF, the main vulnerabilities that could affect financial stability are targeted at[8]:

- inflationary pressures and the longer-term trend, including in the context of persistent supply chain problems and labor and material shortages;
- overvaluation of assets in some market segments, fueled by monetary policy and large gains;
- high financing needs in emerging and border markets;
- non-uniform recovery among non-financial firms, depending on countries, sectors and size; for example, the risk of solvency continues to be high in the sectors most affected by the pandemic, as well as in small firms. In some economies, lending standards in the banking sector remain restrictive, with effects on lending prospects.

3. Conclusions

In Romania, the annual IPC inflation rate increased significantly in the fourth quarter of 2021, reaching 8.19 percent in December, the highest value in the last ten years. And the world's major economies are facing an unexpected rise in inflation, such as Germany, where inflation has reached a maximum value in the last twenty-nine years, while in the US inflation has reached an unprecedented value in the last thirty-one years. In this quarter, however, the evolution of the indicator was oscillating, the evolution being decreasing only in November, as a result of capping and compensating the prices of electricity and natural gas for the population. In December, the annual inflation rate increased on the background of the increase in the quotations of energy goods on global markets, also reflected in the dynamics of those on the domestic market, given that in the period October-December the wholesale price for natural gas exceeded more than seven times, and in the case of electricity, more than four times, the levels in the same period of the previous year.

Analysts believe that the process of fiscal consolidation can be a brake on economic growth given the high level of the budget deficit. The National Bank of Romania postponed until January 2022 the increase of the monetary policy interest, which reached the level of 2%, but in order to have a visible impact on the economy and implicitly on the inflation rate, at least another increase of this rate should be carried out together with an adequate correlation of the fiscal and monetary policies.

According to the inflation report of February 2022 published by the NBR[9], "an important source of risks remains the conduct of fiscal and revenue policy stemming from the perspective of fiscal consolidation measures. At the current juncture, measures have already been adopted aimed at mitigating both the impact of the abrupt deterioration of the epidemiological situation and that of the increase in utility bills". Between April 1, 2022 and March 31, 2023, the government approved the capping of the final billed electricity prices for vulnerable household customers on two consumption tranches, based on the average monthly consumption achieved in 2021 and the final prices for natural gas. The need for a new extension of the support measures financed from the state budget entered into opposition to the need to continue at an ambitious pace the correction of the budget deficit, with a deadline of 2024. "On the other hand, attracting the widest possible volumes of European funds, especially investment funds from the "Next Generation EU" program, through the favorable impact on the macroeconomic framework, would be likely to facilitate the process of fiscal consolidation, given a higher speed and, respectively, of lower costs associated with it"[10].

The EU's recovery program should be a goldmine for our country, especially as the medium- and long-term economic recovery must be sustained after the strong impact of the pandemic. The COVID-19 crisis hit two decades of outstanding economic performance, as a result of which Romania's GDP per capita rose to over 60% compared to the OECD average.

In December 2021, the European Commission transferred to Romania EUR 1.8 billion in the form of pre-financing representing the equivalent of 13% of the total grants allocated under the Recovery and Resilience Mechanism (MRR).

OECD Economic Survey of Romania[11], published in January 2022, mentions the need to implement structural reforms focused on resuming productivity growth by making investments in infrastructure, to improve competition and the regulatory framework (economic productivity in Romania is about 2/3 of the OECD average), as well as to create jobs and develop skills.

To support medium- and long-term recovery, Romania needs to focus on an efficient implementation of the EU-funded National Recovery and Resilience Plan, by improving administrative capacity and completely reforming the pension system, as population ages, in order to ensure the sustainability of public finance.

[8] COVID-19 Crisis Poses Threat to Financial Stability – IMF Blog.
[9] RaI februarie 2022 (1).pdf.
[10] *Ibidem* 9.
[11] romania-2022-OECD-economic-survey-overview.pdf.

It is also necessary to implement a regulatory framework with simpler procedures for setting up and closing companies, thus enabling efficient companies to thrive, invest and adopt new technologies.

Accelerating the modernization of the tax administration, as well as reforms aimed at eliminating inefficient tax provisions (especially those targeting micro-enterprises and certain sectors such as construction) and raising taxes that create less distortions (such as property taxes) could help increase revenue and the creation of a fairer and more efficient tax system.

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ANALYSIS OF REGIONAL MIGRATION DISPARITIES IN ROMANIA

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Abstract

Migration is a complex phenomenon, highly studied globally. Thus, the analysis of the population mobility process is performed using an interdisciplinary approach, with strong links in sociology, history, economics, geography, demography and even psychology. All disciplines involved in the analysis of the phenomenon target different aspects of population migration, define the decision underlying the migration of individuals and build the image of the impact that the phenomenon has on the actors involved.

Emigration and immigration became important aspects of the Romanian society in the last decade. The present paper focuses on the regional migration phenomenon in Romania, between 1991 and 2019. The objective of the research is to characterize from a quantitative point of view the migration flows in and from Romania. Moreover, ARDL models are used to analyse the impact of the GDP in the migration decision.

This analysis highlighted the fact that people who decide to emigrate are from all age groups and their decision is based on socio-economic considerations, these categories being attracted by well-paid jobs. The link between the number of emigrants and the evolution of GDP in Romania made with the help of a regression equation, which showed that there is a weak link between these variables, confirms once again that the evolution of gross domestic product did not change the decision of emigration to Romania.

Keywords: *migration, emigration, immigration, globalization, regional disparities.*

JEL Classification: F_{22}, K_{37}, O_{15}, R_{22}, F_{60}.

1. Introduction

In Europe, the last ten years have been characterized by significant flows of international migrants. Dealing with the development of the migration phenomenon has proven to be a challenge for many countries. The mobility of people and the workforce has played a particularly important role in moderating the rate of demographic aging and slowing it down, especially in Europe. Economic aspects have attracted labor force from countries with lower levels of economic development to Western European countries, which have received the largest inflows of migrants in recent years.

Aspects of the demographic problem are still relevant today, given that the human factor is the only common element that can be subject to all risks at local, regional or global level, being influenced by political or social conflicts, ethnic or religious inequities, as well as natural disasters or health crises.

Since the second half of the 1990s, discussions have intensified about the effects of international migration on the migration of highly skilled workers. The brain drain from Central and Eastern Europe to Western Europe was marked by the fall of the Berlin Wall and the fall of socialist regimes in 1989. These countries have taken steps to facilitate the entry of highly qualified people, especially IT specialists, to face a global competition for such employees.

The demand for highly skilled workers can be met to a large extent by developing countries, with the direct benefits of "brain migration" still highly valued. However, an increase in the reverse flow of specialists from rich to less developed countries can be predicted as a result of the reduction in the demand for highly qualified personnel due to the increase in economic efficiency in developed countries.

The link between demographic change and migration policies, including the migration of highly qualified people, will be an important issue in the near future. It is expected that some Member States will prefer the migration of specialists and develop regulations and procedures to facilitate it. OECD migration statistics show that in recent years the number of foreign workers has risen in most developed European countries (OECD, (2001). Immigrant workers are, on average, younger than the rest of the labor force and are distributed in a wide range of activities in the economy: agriculture, construction and

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civil engineering, light industry, tourism, the hotel and catering sector, domestic activities or various services, including computer science.

Starting from these premises, a first objective of the paper is to make a descriptive analysis of Romania's migration in the European context based on statistical data from 1991-2019. We also used the Gini-Struck concentration coefficient to analyze the degree of homogeneity and concentration for analyzes performed by age groups, gender, etc. This analysis highlighted the fact that people who decide to emigrate are part of all age groups and their decision is based on socio-economic considerations, these categories being attracted by well-paid jobs.

Identifying a link between the number of emigrants and the evolution of GDP in Romania is another step in this study, which will be done using ARDL models, which will describe whether the decision to emigrate Romanians is influenced by economic considerations.

2. Literature review

The current trends of the migratory phenomenon need, for a good understanding , not only analysis tools from a single scientific branch, but from many more scientific sources, which would define the phenomenon in its complexity. The formation of solid theories in this field has been one of the main problems of the last century even today being a debated topic.

Vasile (2012) shows that in less developed countries, a main concern is not so much the external mobility of workers, but the migration of those with higher education, known as "brain drain". Countries with high migratory flows are trying to find more leverage to maintain and create new jobs of interest to generations of graduates with higher and long-term education, so that they can be given the chance to grow, evolve and develop prosperous in their own country (Vasilescu, 2020).

The comparative disadvantages in terms of the level of development, the remuneration of the labor force and the existence of attractive jobs, as well as the structural deficit between the supply of the education system by fields of training and specializations, but also the demand of the labor market, motivate the predisposition towards international labor mobility (Begu, 2021).

Begu (2019) and others argue that developed countries create opportunities for people with a high professional level in order to attract "brains" that would increase the economic potential of the destination country. The people included in this category will be the first to benefit from the recruitment, proving specific qualities and professional expertise above the average level registered in the destination country.

Boboc et al. (2014) consider that the current conditions should also be taken into account: people' mobility is much more flexible and volatile. For employment this is obtained mainly through fixed-term contracts, for certain occupations. Staying in the host country after the initial employment contract had ended is less likely for people with a strong background than for the ones with a medium level who carry out routine activities.

The main negative effect of migration for the country of origin is the loss of a significant proportion of highly skilled labor. On the one hand, the country of origin has not been able to benefit from its investment in human resources, on the other hand, the emigration of specialists can lead to a reduction in technological development, economic growth, wages and employment in certain economic sectors (Vasile, 2014).

Diaconescu (2019) argues that a decisive factor in the choice of people to migrate is the development of the labor market, which is a point of attraction for those who have a training in a particular field and also a catalyst for economic and social development for developing countries. The researcher draws attention to a form of discrediting migrant citizens, by assigning unattractive, poorly paid jobs among compatriots. However, given the economic aspects underlying the migration decision, they accept the job offers because they come from areas with an economic level well below the standards encountered in the host country. The paper also highlights that well-paid job offers, which require training in the field concerned and which offer a certain status from a social point of view, are addressed especially to the local population and only to a small extent can be addressed by migrants. The latter are subjected to difficult tests of analysis and differentiation, having to prove their skills through language certificates, diplomas and certificates recognized internationally, but also to pass a series of internal exams, within the structure that organizes the competition. From these considerations, it can be concluded that the phenomenon of migration can also have negative consequences due to capitalist governance and technological advancement, if we take into account the aspects described in the work of world systems theory (Enache, 2019).

This paper contributes to the enrichment of the specialized literature with a socio-economic analysis of the migration situation in Romania.

3. Description of the migration phenomenon in Romania after the fall of the communist regime

This research analyzes the migration phenomenon in close connection with the influencing factors in the economic, social and political environment. All these factors generate a wide range of problems globally, in terms of international migration. The effects of these factors generate positive and negative effects for both the host and the destination country. In Romania, the migratory phenomenon presents significant evolution in socio-economic dynamics, and these problems will be tackled in what follows.

During the communist regime in Romania, the migration of the population was kept under strict control, and after the 1990s, this phenomenon was in a continuous expansion, in terms of migratory flows, but also in terms of the destination countries. The universally valid reasons behind the decision to migrate were socio-economic.

In the second half of the 1980s, Romania was one of the major source countries in the Eastern European migration system. The determining factors of this phenomenon were the onset of an extensive economic crisis, associated with a major lack of resources, isolation of the country from Western currents and accentuation of the lack of credibility of the communist regime (Eke and Kuzio, 2000; Gabanyi, 2000; Georgescu, 1995).

The number of Romanian emigrants seeking refugee status in Western countries increased from 2,864 asylum seekers in 1980 to 14,864 in 1989 (UNCHR, 2001).

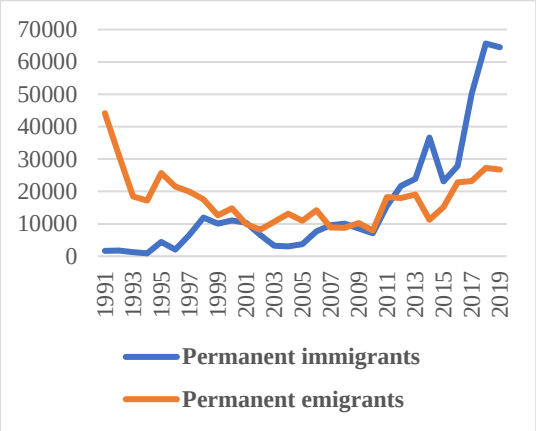
After the fall of the communist regime and the opening of borders to various developed and evolving states, the number of Romanian migrants increased considerably. As such, between 1990 and 1993, out of a population of 22 million, 190,687 Romanian citizens emigrated legally (CNS, 1995), and 338,132 applied for asylum in Western countries (UNCHR, 2001).

Over time, the countries of refuge for Romanian migrants begin to no longer grant political asylum and thus, many migrants participate in illegal migration. During the 1990s, marked by the collapse of the Romanian economy, the number of illegal migrants increased, although their primary purpose was no longer to settle permanently in another country, but to work (Sandu, 2000a, 2000b). For this reason, during the last 15-16 years, massive waves of Romanian workers have gone abroad. In 2006, their number was estimated at 2.5 million (Sandu, 2006).

Over time, the socio-demographic structure of the population engaged in the migration process has also changed. At the beginning, migrants from Romania were typically highly qualified, qualified or urban specialists. Nowadays, most migrants are young, poorly or under-qualified, from rural areas, where about half of the country's population lives.

From the perspective of the descriptive analysis of the migration phenomenon, between 1991 and 2019, Romania registered important international migration flows with oscillating evolutions of both the number of immigrants and the number of emigrants, becoming a significant phenomenon for the Romanian society. (Figure no. 1)

Figure 1: Romania's international migration between 1991 and 2019



Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

At the same time, internal migration was impacted by these different developments, in terms of urban development, followed by legislative changes in the economic field and attracting foreign direct investment. Thus, large cities become recipients of labor in all counties of the country and abroad, by adding immigrants to the labor market.

With a population of about 20 million inhabitants on July 1, 2020, international migration in Romania has a share of about 0.5%, plus the clandestine migratory flows (Sandu, 2006). The geographical position of the country is very attractive for illegal migrants, Romania being a transit country between refugees and their destination countries. Because of this, in connection with the problems related to the fulfillment of the criteria of the Maastricht Treaty, our country joined the European Union much later.

4. Data and Methodology

4.1. Data

For the descriptive analysis, the data source was the National Institute of Statistics in Romania. The following variables were used in the analysis:

- Permanent emigrants by sex, macro-regions, development regions and counties of departure, number of people, 1990-2020, Romanian National Institute of Statistics
- Definitive emigrants by age groups, macro-regions, development regions and counties of departure, number of people, 1990-2020, Romanian National Institute of Statistics
- Permanent immigrants by sex, macro-regions, development regions and counties of arrival, number of people, 1991-2020, Romanian National Institute of Statistics
- Permanent immigrants by age groups, macro-regions, development regions and counties of arrival, number of people, 1991-2020, Romanian National Institute of Statistics

Definitive emigrants by sex, macro-regions, development regions and departure counties represent, according to the Romanian National Institute of Statistics definition, persons (of Romanian citizenship) who emigrate abroad. Emigration is the action by which a person renounces his domicile in Romania and establishes his domicile on the territory of another state.

Definitive immigrants (immigrants with change of residence) by sex, macro-regions, development regions and counties of arrival represent, according to the Romanian National Institute of Statistics definition, persons (of Romanian citizenship) who immigrate to Romania. Immigration is the act by which a person renounces his domicile on the territory of another state and establishes his domicile in Romania.

In order to determine a socio-economic connection of the migration phenomenon in Romania, we presented, in the second part of the quantitative analysis, how the number of Romanian emigrants is influenced by the evolution of GDP (in millions of euros, constant prices since 2010).

4.2. Methodology

In order to study the dynamics of the migration phenomenon, we used the Gini-Struck concentration coefficient to analyze the degree of homogeneity and concentration for the analyzes performed on age groups, gender etc. (Begu, 2009).

$$G = \frac{\sum_i \sum_j |x_i - x_j|}{2 \sum_i \sum_j x_i} \quad (1)$$

Unit root tests are applied for the GDP, Emigrants and Immigrants series in order to establish the stationarity of the data series. The ADF test (Augmented Dickey-Fuller, Dickey & Fuller, 1981) is designed to test if the series have unit-root thus being non-stationary.

ADF test equation: $\Delta_{y_t} = \varphi y_{t-1} + \sum_{j=1}^{p} \delta_j \Delta_{y_{t-j}} + \varepsilon_t$ (2)

where we admit that the variable ε_t is white noise the null hypothesis (existence of the root unit) means $\varphi = 0$, thus the hypotheses of the test are H_0: $\varphi = 0$, H_1: $\varphi < 0$.

The null hypothesis of the KPSS test is that the analyzed time series is stationary, around a constant (β) or a linear deterministic trend ($\beta + y_t$). KPSS writes the time series y_t as a sum between a deterministic trend, a random process (r_t) and error (ε_t) which is supposed to be stationary (Jula, 2019):

KPSS test equation: $y_t = yt + r_t + \varepsilon_t$, (3)

where $r_t = r_{t-1} + e_t$ and e_t is a white noise process.

5. Results and discussions

5.1. Descriptive analysis of the emigration flows from Romania

Following the collection of data from the database of the National Institute of Statistics of Romania, several forms of migration from Romania can be analyzed, on the two major segments, emigrants and immigrants, and each segment will be analyzed in terms of several factors.

The first considered segment of migration in Romania is that of emigrants. They can be permanent emigrants - Romanian citizens who have established their permanent residence abroad or temporary emigrants - Romanian citizens who have moved abroad during the reference year, for a period of at least 12 months.

For the category of permanent emigrants, we analyzed the evolution by age groups, in the period 1990-2019. The analysis is performed on the 6 age groups found in the time series provided by Romanian National Institute of Statistics. To determine if there is a degree of concentration on certain age categories, several moments in time are analyzed, using the Gini-Struck Coefficient. Thus, we chose the years 1990, 1995, 2000, 2005, 2010, 2015 and 2019, all these years representing certain key moments in the country's history.

1. 1990: the first year after the Revolution, when the restrictions of the communist regime no longer apply;
2. 1995: Romania applies to join the European Union;
3. 2000: is the first year of the 21st century, a year with privatizations and major changes in the country's economy;
4. 2005: is the year of pre-accession to the European Union;
5. 2010: a year of austerity, all revenues are diminished following negotiations with the International Monetary Fund;
6. 2015: is a year of economic growth and financial stability on the Romanian market;
7. 2019: most recent year with available data.

Table 1: Definitive emigrants by age groups

Number of people	1990	1995	2000	2005	2010	2015	2019
Under 18	25298	5137	4372	765	1062	2610	5234
18-25 years	13570	4180	1513	1408	1074	2853	4017
26-40 years	25589	10875	5717	6359	3955	6378	9522
41-50 years	9790	2803	1551	1355	1156	2223	5255
51-60 years	11311	1245	657	545	406	714	2004
61 years and over	11371	1435	943	506	253	457	743

Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

Following the data processing with the help of the Gini Struck Coefficient, the following values resulted:

Table 2: Gini-Struck coefficient for permanent emigrants, by age groups

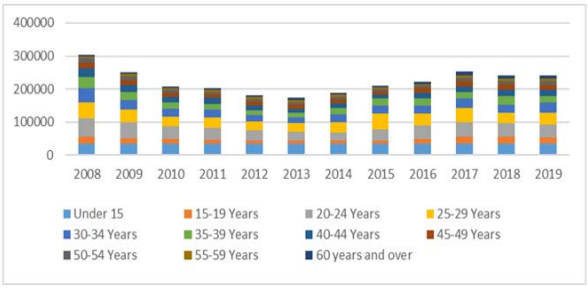
Years	1990	1995	2000	2005	2010	2015	2019
Gini Struck coefficient	0,184	0,341	0,345	0,505	0,417	0,342	0,280

Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

We know from theory that a value of the Gini-Struck Coefficient closer to 1, shows a higher degree of concentration on one condition, in our case on one age group (Begu, 2009). As can be seen in Table 2, permanent migrants are distributed relatively evenly across all six age groups in almost all years analyzed, except in 2005 and 2010, when the concentration level is focused on the 18-25 age segments, 26-40 years and 41-50 years.

Regarding the category of temporary emigrants, the data search is performed over a shorter period of time, due to the lack of data, namely for the period 2008-2019. The analysis is also performed on age groups, this time on several groups, in order to draft a socio-demographic profile of the migrants.

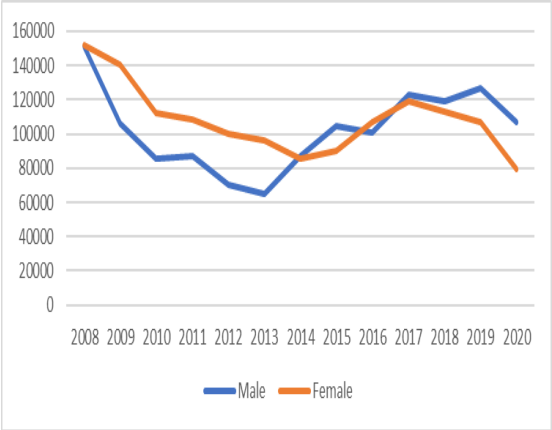
Figure 2: Temporary emigrants by age groups



Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

Also, data processing can be done on the gender of individuals, this being another socio-demographic factor.

Figure 3: Temporary emigrants by age groups



Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

As can be seen from Figure 3, the segment under 15 years and between 15-19 years, presents relatively uniform data over the entire duration of the analysis. This segment is represented by the children of families who decide to move their residence abroad for a period of less than one year. We might consider, regarding the segment under 15 years, in relation to the following three age segments analyzed (20-24 years, 25-29 years and 30-34 years) that they can be young families with one, two or more children minors in care, with low incomes and without high financial possibilities, who decide to go abroad for a short period of time in order to apply for seasonal jobs.

If we look at the segment between 15-19 years old, in relation to the following three age segments (35-39 years old, 40-44 years old and 45-49 years old) we can assume that it may be families with teenage children, looking for places working together. The dropout rate among young people is quite high in Romania and as a rule, these people go abroad with their family to find work. The last three age groups, 50-54 years old, 55-59 years old and 60 years old and over, are the most vulnerable age groups, as these people usually do not have a qualification that allows them to be employed in well paid jobs and can be exploited for undeclared work.

The analysis can continue with the study of Figure 3, which shows that females predominate until 2014, compared to males. Between 2014 and 2016, there are fluctuations in the gender distribution of temporary emigrants, and in 2017 there is a balance of the gender distribution. The results of this analysis are in line with the events produced in Romania, in the analyzed years, considering that between 2008 and 2010 Romania was

affected by the global economic crisis. It is known that in Romania the distribution of incomes is uneven, the lowest incomes per household being registered in rural areas and following the national austerity, these financial imbalances have deepened (Statistical Yearbook of Romania, 2021).

5.2. Descriptive analysis of the immigration flows in Romania

The second part of the migration in Romania is represented by the segment of immigrants, which can be permanent, these being persons who established their domicile in the country during the reference year or temporary- persons with foreign, Romanian or stateless citizenship who have established their habitual residence in Romania during the reference year, for a period of at least 12 months. For both permanent and temporary immigrants, the data will be structured according to their country of origin.

For the category of permanent immigrants, the data analysis is performed for the period 1991-2019, by age groups. The same 6 age groups are proposed, and in order to determine if there is a degree of concentration on them, several moments of time are analyzed, with the help of the Gini-Struck Coefficient. Thus, we chose the years 1991, 1995, 2000, 2005, 2010, 2015 and 2019, all these years representing key moments in the country's history as mentioned above.

Table 3: Definitive immigrants by age groups

Number of people	1991	1995	2000	2005	2010	2015	2019
Under 18	318	541	1743	554	951	1716	9141
18-25 years	183	775	1893	426	975	4335	11368
26-40 years	622	1822	3588	1410	2382	10269	27527
41-50 years	176	633	2017	649	1264	3548	9767
51-60 years	115	343	908	376	878	2198	4734
61 years and over	188	344	875	289	609	1027	1942

Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

Following the data processing with the help of the Gini Struck Coefficient, the following values resulted:

Table 4: Gini-Struck coefficient for permanent immigrants by age groups

Years	1991	1995	2000	2005	2010	2015	2019
Gini Struck coefficient	0,285	0,305	0,220	0,270	0,217	0,357	0,339

Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

The role of the Gini-Struck Coefficient is to determine the degree of concentration on one or more age groups. As can be seen in Table 4, the final immigrants are distributed relatively evenly across all six age groups in all the years analyzed, with values ranging from 0, 21994 and 0.35745, which shows that those who settle in Romania usually come with the family.

Table 5: Definitive immigrants by country of origin

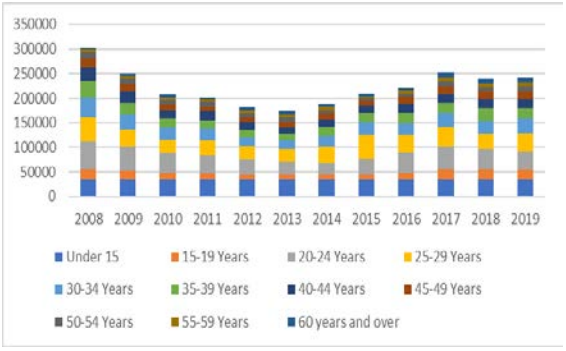
Country of origin	1995	2000	2005	2010	2015	2019
Austria	536	84	76	111	129	184
Canada	74	60	153	230	299	398
France	460	110	117	149	202	300
Germany	739	227	238	438	465	984
Israel	162	57	134	108	142	141
Italy	133	70	216	1274	1315	1123
Republic of Moldova	1019	9146	1917	1973	14340	38205
Spain	28	10	21	77	695	1091
Syria	27	15	13	135	99	79
US	325	161	311	434	477	584
Turkey	52	22	33	398	49	136
Ukraine	24	649	27	39	1221	6196
Hungary	280	173	74	294	227	202
Other countries	599	240	374	1399	3433	14856

Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

If we refer to the country of origin of immigrants who establish their permanent residence in Romania, we can see that most come from the Republic of Moldova, Romania's neighboring country, followed by Germany, Ukraine, Hungary and France. In Transylvania and especially in the western part of the country, there are many communities of people who are part of the aforementioned countries, established for many years.

Regarding the category of temporary immigrants, the data search is performed over a shorter period of time, due to the lack of data, namely for the period 2008-2019. The analysis is also performed on age groups, this time on several groups, in order to perform a psychological analysis that is the basis for the decision to go abroad.

Figure 4: Temporary immigrants by age groups



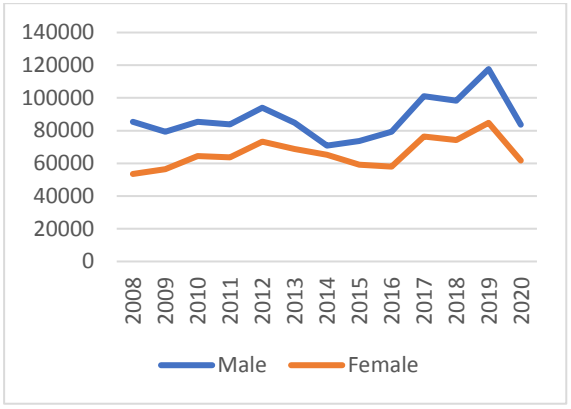
Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

Also, data processing can be done on the gender of individuals, this being another factor that can be analyzed from a psychological point of view.

Both processes denote the nature of the immigration decision and, as can be seen in Figure 4,

all age groups show relatively uniform data over the entire duration of the analysis. Both the age groups of children and young people, as well as those of middle age and second age, are distributed evenly over the entire time period analyzed. Thus, we can assume that people who establish their domicile in Romania, but for a period of less than 1 year, are people who are either seconded to work at the branch of a company in our country and take their family with them, or have relatives and settled in our country and decide to live for a year. Another category could be represented by the ones who come to study in Romania or are absorbed in the labor market, in seasonal jobs, such as in construction, in the field of hospitality, and others.

Figure 5: Temporary immigrants by gender



Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 Edition

The analysis continues with the study of Figure 5, which shows that there the immigrant men outnumber the immigrant women over the entire time period analyzed.

5.3. Analysing the stationarity of the underlying series

Another way of approaching the factors that influence migration is to analyze how the gross domestic product influences both the number of emigrants and the number of immigrants.

Thus, we considered the analysis period between 1995 and 2019 (table 2-Appendix). We considered the gross domestic product as an independent factor and emigration, immigration and the balance of migration as dependent factors.

Based on the above data, we determined the extent to which the number of Romanian emigrants is influenced by the evolution of GDP (in millions of Euro, constant prices 2010).

To specify the model, we tested the stationarity of the GDP-euro 2010 series, Emigrants and Immigrants. The results are described in the following table:

Table 6: Unit root tests for the GDP, Emigrants and Immigrants series

Test			Data series			
			GDP€ 2010	Emigrants	Immigrants	Balance
ADF	Level series	t-statistics	0.2860	-1.8763	0.0715	-1.7931
		critical value	-2.9862	-2.9810	-2.9919	-2.9810
	The first difference series	t-statistics	-3.0032	-5.8628	-1.2280	-5.2859
		critical value	-2.9919	-2.9810	-2.9919	-2.9810
		Conclusion	I(1)	I(1)	I(2)	I(1)
KPSS	Level series	t-statistics	0.7225	0.2495	0.5688	0.6420
	The first difference series	t-statistics	0.1274	0.1111	0.1118	0.1930
	critical value			0.4630		
	Conclusion			I(1)	I(0)	I(2)	I(1)

Caption: ADF - "Augmented Dickey-Fuller test"
KPSS - "Kwiatkowski-Phillips-Schmidt-Shin test"
The critical value is for the 5% threshold.
Source: Calculations in EViews based on the data in Table 2-Appendix.

For the GDP€ 2010 series (gross domestic product in millions of euros, constant 2010 prices), the tests suggest a type I (1) structure - the series is non-stationary in level and stationary in the first difference. For the "Emigrants" series, the ADF test indicates a type I (1) structure, while the KPSS test does not reject the stationarity assumption, I (0), at the significance threshold of 5%. For the "Immigrants" series, the tests suggest a type I (2) structure - the series is non-stationary in the level and in the first difference and is stationary in the second difference. The unit root test that admits the level break rejects the unit root hypothesis, for an interruption in 2016: the value of the ADF test is -4.8778 below the critical threshold -4.4435 (for the significance level of 5%). This information will be used in specifying the models (Jula & Jula, 2019).

5.4. Modeling the link between the number of emigrants and the gross domestic product

Since the unit root tests for the "Emigrants" series are not match (ADF does not reject the unit root hypothesis, and KPSS - does not reject the stationarity hypothesis) we built an ARDL model - Distributed Lag Autoregressive. The ARDL is built in order to test the relationship between GDP and Emigrants. The advantage of this type of model is that it can be applied even when the series do not have the same integration order and, through the Pesaran test, it indicates the type of connection (between the series in level, or through an Error Correction type model).

In the ARDL model we took as an explanatory variable GDP lagged with on year:

$$(\text{Emigrants})t = f(\text{GDP}t\text{-}1, X, e) \qquad (4)$$

where X symbolizes other influencing factors, and e - the error variable. This choice is motivated by the fact that the hypothesis of a contemporary link between GDP€ 2010 and the number of emigrants is rejected by the model with the probability of 69.25%. Also, considering the graphical form of the "Emigrants" series, we introduced a polynomial time function as an exogenous variable. As a method of selecting the

number of lags in the ARDL model, we opted for AIC (the default option in EViews). We also selected at 4 the maximum number of lags for the dependent variable (as well as the value suggested by EViews) and the maximum lag = 5 for the dynamic regressor. The results are presented in the following tables:

Table 7: The ARDL model of the link between the number of emigrants and the gross domestic product

Selected Model: ARDL (4, 5).
Method AIC
Data: 1995 – 2020

Dependent variable: (Emigrants)t	Coefficient	Std. Error	t-Statistics	Prob.*
(Emigrants) t-1	-0.228876	0.143384	-1.596249	0.1491
(Emigrants) t-2	0.025231	0.139143	0.181329	0.8606
(Emigrants) t-3	0.117915	0.141708	0.832094	0.4295
(Emigrants) t-4	-0.311025	0.126626	-2.456245	0.0395
(GDP€2010) t-1	-0.451096	0.127003	-3.551860	0.0075
(GDP€2010) t-2	-0.066987	0.156603	-0.427751	0.6801
(GDP€2010) t-3	-0.143743	0.156415	-0.918985	0.3850
(GDP€2010) t-4	0.133864	0.162812	0.822197	0.4348
(GDP€2010) t-5	0.411148	0.154095	2.668142	0.0284
(GDP€2010) t-6	-0.770538	0.126187	-6.106310	0.0003
t2	111.3451	13.65713	8.152896	0.0000
C	75359.16	10380.98	7.259349	0.0001

Source: Calculations in EViews based on the data in Table 2-Appendix.

The test method using the ARDL model, presents another way of economic analysis between the two factors, emigration and gross domestic product.

The long run equation for this model is:

$$Emigrants_t = X_t + \delta_1 Emigrants_{t-1} + \delta_2 GDP_{t-1} + e_t \quad (5)$$

The cointegration coefficient is negative (-1.3968) and significantly different from zero (associated t-statistic is -9.9737). The value of the F-Bounds statistic is 24.95472, and the Pesaran-Shin-Smith limits are I (0) = 6.027 and I (1) = 6.76, for the 1% threshold. Since the F-statistic value = 24.95472 is higher than the threshold I (1) it results that the probability attached to the hypothesis that states the absence of a cointegration relationship between "Emigrants" and "GDP€ 2010" is less than 1%. We therefore accept the alternative hypothesis: the existence of a long-term relationship.

The relationship is:

$$EC:(Emigrants)_t = \underset{(0.1025)}{-0.6353} \cdot (GDP_{€\,2010})_{t-1} + \underset{(7660.928)}{53952.9818} \quad (6)$$

(under estimators, in parentheses, standard deviation).

This means that, in the long run, real GDP growth attenuates the emigration trend of the population. In the short term, the relationship between emigrants and economic growth is influenced by economic factors. The long-term negative link is in line with economic theory: the trend of emigration is attenuated by economic growth in the country of origin and is accentuated by economic development in the destination country (those countries with a higher level of development than the country of origin are sought).

5.5. Modeling the relationship between the number of immigrants and gross domestic product

For immigrants, we considered the GDP of our country as a factor of influence and the number of immigrants as a dependent variable. For GDP € 2010, the stationarity tests do not reject the unit root hypothesis for the level series and reject the respective hypothesis for the series calculated by simple differentiation - the series is I (1), as described in Table 6. For the "Immigrants" series, standard unit root tests suggest a type I (2) structure, and the unit root test that admits level break (in 2016) rejects the unit root hypothesis. Given these results, we have built an ARDL model of the link between Immigrants and GDP € 2010. We have included in the model two dummy variables, for the years 2015 and 2017. The results are presented in the following table:

Table 8: The ARDL model of the link between the number of immigrants and the gross domestic product

Selected Model: ARDL (2, 0).
Method AIC
Data: 1995 – 2020

Dependent variable: (Immigrants)t	Coefficient	Std. Error	t-Statistics	Prob.*
(Immigrants)t-1	1.291550	0.227191	5.684868	0.0000
(Immigrants)t-2	-0.769621	0.239697	-3.210808	0.0044
(GDP€2010)t	0.142857	0.075374	1.895317	0.0726
D2015	-15879.10	7238.969	-2.193557	0.0403
D2017	19212.53	7254.836	2.648238	0.0154
c	-9791.643	7517.279	-1.302551	0.2075

Source: Calculations in EViews based on the data in Table 2-Appendix .

The coefficient of integration is negative (-0.4781) and significantly different from zero (the associated t-statistic is -3.5572). The value of the F-Bounds statistic is 7.0586, and the Pesaran-Shin-Smith limits are I (0) = 5.395 and I (1) = 6.35, for the 5% threshold. Since the value F-statistic = 7.0586 is higher than the threshold I (1) it results that the probability attached to the hypothesis stating the absence of a cointegration relationship between "Emigrants" and "GDP € 2010" is less than 5%. We therefore accept the alternative hypothesis: the existence of a long-term relationship. The relationship is:

$$Eq:(Immigrants) = \underset{(0.1091)}{0.2988} \cdot (GDP_{€\,2010}) \quad (7)$$

(under the estimator, in brackets, the standard deviation)

This means that, in the long run, real GDP growth has a positive effect on immigration. In the short term, the relationship between immigrants and economic growth is influenced by economic factors.

The positive connection, stable in the long run, is in line with economic theory: the immigration trend is accentuated by economic growth in the destination country.

5.6. Modeling the link between the external migration balance and the gross domestic product

We built an ARDL model to analyze the link between Romania's GDP and the migration balance. The results are as follows:

Table 9: The ARDL type model of the link between the external migration balance and the gross domestic product

Selected Model: ARDL (1, 0).
Method AIC
Data: 1995 – 2020

Dependent variable: $(Balance)_t$ = $(Immigrants)_t$ - $(Emigrants)_t$	Coefficient	Std. Error	t-Statistics	Prob.*
$(Immigrants)_{t-1}$ - $(Emigrants)_{t-1}$	0.463746	0.193152	2.400938	0.0257
$(GDP_{€2010})_t$	0.670100	0.314842	2.128371	0.0453
$(GDP_{€2010})_{t-1}$	-0.494551	0.335047	-1.476063	0.1548
C	-20750.65	11593.25	-1.789891	0.0879

Source: Calculations in EViews based on the data in Table 2-Appendix.

The cointegration coefficient is negative (-0.5362) and significantly different from zero (the associated t-statistic is -2.7763). The value of the F-Bounds statistic is 2.9522, and the Pesaran-Shin-Smith limits are I (0) = 4.09 and I (1) = 4.66, for the 5% threshold. Since the value F-statistic = 2.9522 is lower than the threshold I (0) it results that the probability attached to the hypothesis that states the absence of a level relationship between "Balance = Immigrants - Emigrants" and "GDP€2010" is less than 5%. Consequently, we reject the hypothesis of a cointegration relationship and accept the hypothesis of a level relationship, of the type described in this relationship:

(Immigrants)t - (Emigrants)t = –20750.6453 + 0.4637·(Immigrants)t - (Emigrants)t-1 (8)

+ 0.6701·(GDP€2010)t – 0.4945·(GDP€2010)t

(t-statistic associated with estimators is shown in Table 9). The steady state equation is:

(Immigrants)t - (Emigrants)t = –38695.5341 + 0.3274·0.6701·(GDP€2010)t (9)

This means that, in the long run, macroeconomic dynamics have a positive effect on the flow of external migration: the positive impact on migration outweighs the negative effect on emigration.

6. Conclusions

As a result of the descriptive analyzes carried out previously, we find that in Romania migration is encountered on a large scale, after the fall of the communist regime, this becoming a significant phenomenon. According to the Romanian National Institute of Statistics, after the 1989 revolution and as a result of the opening of the country's borders, Romania registered increased values of international migration. In the first part of the period, migrants had causes related to nationality: the largest share of migration is made up of emigrants, who are largely ethnic Germans, Hungarians or Jews. Later, the restrictions imposed on Romania's borders regarding the introduction of visas and work permits, led to a decrease in the rate of permanent migration, in contrast to the rate of temporary migration which has experienced an unprecedented explosion, which could turn into a worrying phenomenon, with major social, economic and psychological implications.

Analyzing the dynamics of the migration phenomenon in terms of the Gini-Struck coefficient, we can deduce that people who decide to emigrate are from all age groups, whether we are talking about people in the category of children or adolescents, young people or people of second and third age. Based on socio-economic considerations and attracted by well-paid jobs, our country offers abroad both highly trained people, who stand out abroad and bring prestige to Romania's image, but also less qualified staff, who integrate into the labor market from the host country, in areas of activity less sought after by the local population.

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Appendix

Table 1: Internal migration determined by the change of domicile, by means of residence

	Immigrants		Emigrants	
Years	**To the urban area**	**To the rural area**	**From the urban area**	**From the rural area**
1990	691803	94668	170381	616090
1991	185459	77444	79670	183233
1992	186172	107010	111471	181711
1993	144994	95237	96084	144147
1994	149712	117033	117368	149377
1995	148333	141158	135833	153658
1996	152585	140294	148902	143977
1997	144034	158545	156622	145957
1998	132472	143682	150470	125684
1999	131138	144561	157758	117941
2000	105614	138893	140552	103955
2001	148066	136266	157556	126776
2002	154801	166018	179497	141322
2003	167395	164352	190880	140867
2004	174447	195445	214001	155891
2005	136840	135764	157377	115227
2006	176100	157925	194749	139276
2007	175666	198490	213668	160488
2008	185948	203306	232105	157149
2009	166853	163819	193120	137552
2010	236502	222493	273353	185642
2011	164019	160607	194248	130378
2012	181194	191003	225107	147090
2013	182393	168163	211080	139476
2014	189956	181721	222203	149474
2015	183170	177913	211939	149144
2016	191484	197889	229822	159551
2017	198689	181513	220995	159207
2018	203988	182286	223153	163121
2019	211928	191293	231407	171814

Source: The author's calculation, data collected from the Statistical Yearbook of Romania - Time Series (1990-2019), 2021 ed.

Table 2: Romania's gross domestic product, the number of emigrants and the number of immigrants in the period 1995-2020

Years	GDP (million euros 2010)	Emigrants (people)	Immigrants (people)	Balance (people)
1995	83899.5	25675	4458	-21217
1996	87178	21526	2053	-19473
1997	82950.7	19945	6600	-13345
1998	81267	17536	11907	-5629
1999	80960.8	12594	10078	-2516
2000	82953.5	14753	11024	-3729
2001	87282.1	9921	10350	429
2002	92259.8	8154	6582	-1572
2003	94419.8	10673	3267	-7406
2004	104266	13082	2987	-10095
2005	109133.3	10938	3704	-7234
2006	117895.4	14197	7714	-6483
2007	126423.7	8830	9575	745
2008	138190.5	8739	10030	1291
2009	130566	10211	8606	-1605
2010	125472.3	7906	7059	-847
2011	127863.9	18307	15538	-2769
2012	130473.2	18001	21684	3683
2013	135393.3	19056	23897	4841
2014	140279.2	11251	36644	25393
2015	144422.6	15235	23897	8662
2016	151214.8	22807	27863	5056
2017	162282.9	23156	50199	27043
2018	169544.3	27229	65678	38449
2019	176542.2	26755	64479	37724
2020	169728.8	21031	32250	11219

Source: GDP€ 2010: Eurostat, GDP and main components (output, expenditure and income) [table nama_10_gdp - Gross domestic product at market prices, Chain linked volumes (2010), million euro.

Emigrants: National Institute of Statistics, Tempo Online, table POP309A (Definitive emigrants by sex, macro-regions, development regions and counties of departure).

Immigrants: National Institute of Statistics, Tempo Online, table POP310A (Definitive immigrants by sex, macro-regions, development regions and counties of arrival).

Balance: The migratory balance is calculated as the difference between Immigrants and Emigrants, for each year.

CROWDFUNDING - A VIABLE ALTERNATIVE TO FINANCE SMALL AND MEDIUM ENTERPRISES

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Abstract

The resumption of economic activity after the lockdown imposed by the need to stop the Covid-19 pandemic is a major imperative for any of the states in the world that have faced this scourge.

Among the most affected corporate organizations were small and medium-sized enterprises (SMEs), whose small financial resources did not allow them to maintain the level of performance recorded before the pandemic.

In order to recover, especially in the context of the economic crisis that is looming at the beginning of 2022, SMEs need even more additional sources of financing and alternative solutions to bank loans would be welcome.

In this context, the crowdfunding mechanisms proposed in recent years by the business environment in developed countries and recently adopted in the European Union by "Regulation (EU) 2020/1503 on European providers of crowdfunding services" offer solutions that have proved viable, and a draft law is being prepared in Romania to regulate the crowdfunding of Romanian enterprises.

Keywords: *crowdfunding; small and medium-sized enterprises; financial management; fundraising platforms; business angels.*

1. The economic conjuncture in the spring of 2022 and the financing of SMEs

The combined effect of the national and global impact of the pandemic has severely degraded the performance, cash flow and solvency of companies.

From large companies to small companies, the entrepreneurial tissue is beginning to feel the effects of the global recession and the slowdown in the national economy.

Survivors of this wave of closures are not exempt from the current market difficulties, and the prevailing uncertainty is particularly detrimental to investment, with most businesses, especially small and medium-sized enterprises (SMEs) reporting a decline in demand for their products and services.

In the European Union[1] for example, the two consecutive years of lockdown - 2020 and 2021 - have slowed down and even decrease the activity in the main sectors of the real economy. Thus, in 2020 compared to 2019, the production of capital goods decreased by 7.1%, consumer goods by 2.4%, energy production by 1.5%, intermediate goods by 0.5 %, and the production of capital goods decreased by 7.1%. In the following year, 2021, the situation improved slightly, but without recovering from the previous decline: the production of non-durable consumer goods increased by 8.0%, energy production increased by 6.1%, consumer goods by 3.2% and intermediate goods by 2.4%, while the production of capital goods continued to fall by 0.8%.

In the construction sector, the evolution has been similar. In 2021, compared to 2020, civil engineering decreased by 2.1%, while civil engineering increased by 1.7%.

The negative consequences of this evolution were felt in all economic and social fields, along with the negative impact of the pandemic.

Thus, according to European statistics[2] in 2020, 8.6% of the population of the European Union and more than one in five people were at risk of poverty (21,7%) not being able to afford a meal of meat, fish or a vegetarian equivalent every two days.

It should be noted that Romania registered in 2020 the highest rate of material and social deprivation in the entire European Union, respectively 25.3%.[3]

But beyond its immediate effects, the crisis has revealed structural defects in the private sector, primarily the significant gap in competitiveness between high-tech sectors - IT, automotive, aeronautics, etc. - and those that have been late to modernize, as in the case of Romania, agriculture - with

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[1] https://ec.europa.eu/eurostat, accessed on 28.03.2022.

[2] https://ec.europa.eu/eurostat/statistics-explained, accessed on 28.03.2022.

[3] https://ec.europa.eu/eurostat/databrowser, accessed on 28.03.2022.

very serious effects to ensure the supply of the population, but also the increase of the current account deficit, caused by the increase of imports of agricultural products and food, unjustified for a country with such a high agricultural potential.

Funding and financial sustainability are two more barriers. First of all, businesses, especially SMEs, have difficulty accessing loan financing because they cannot meet all the eligibility criteria imposed by banks through their methodology to reduce their risk of default. Also, SMEs are often unable to meet their current obligations to repay and / or pay the costs of credit, in the case of small companies there are frequent delays in payment.

From another point of view, the financing of SMEs is difficult. In this regard, although entrepreneurship and SME innovation are the strengths of private sector dynamism, young companies are struggling to raise start-up capital, and the funding structure and access mechanisms are cumbersome, too complex for start-ups to meet. More flexible and simpler conditions would give small businesses, at least in the transition phase from the project to the operational phase, the opportunity to function properly and survive in a competitive market.

An unexpected positive effect of the health crisis, which was at the root of the current economic crisis, is the involvement of banks in resolving the tensions of corporate treasuries by proposing short and very short-term loans that would improve their liquidity management. In this way, insolvency and even the closure of companies that declare themselves unable to pay can be avoided.

In the current unfavorable situation and probably for a longer period of at least two years, these measures are insufficient; which leads to the need for the intervention of public authorities not only in the field of real and social economy, but also of promotion, in collaboration with the private sector, of some simpler and faster financial services, which urgently respond to the needs of SMEs in financial difficulty or in the initial stage of activity.

2. Techniques and tools for financing the activity of SMEs

Financial techniques have diversified greatly in recent years, especially in developed, but also in developing countries - as our country – which have resorted to some of these and implemented an increasingly diverse range of means of accessing new generation financial sources.

The financing of any enterprise corresponds to the stages of its existence:

- first its creation as a distinct entity in the specific economic landscape;
- then the development of the activity and the gaining of a market segment, which it wants to expand. In order to achieve this goal, the company will have to be able to finance the current activity - at the bottom of the profit and loss account, financing the necessary working capital (NFR), but also to finance the essential investments for the operation of the company, respectively the acquisition of equipment and other heritage items.

In the practice of classical financial management of enterprises, the sources of financing of private entities can be classified into three distinct categories, access, costs - explicit or implicit -, the impact on the competitive market position being decisively influenced by the sources of funds used by the company. These can be classified into three main categories, which have proved to be very heterogeneous and constantly undergoing modernization:

- ***self-financing*** is a mandatory element to support the development of a company, in the absence of which investors of any color lose confidence in the creditworthiness of the enterprise;
- ***the contribution to the own capital from individuals or legal persons*** who are involved in the existence of the respective corporation, even if only as owners, if not as managers, constitutes an essential element both in the creation phase of the enterprise and its subsequent evolution. The size of equity depends on several factors, among which the most important are correlated with the company's position on the market, respectively with its attractiveness, determined by profitability, as well as with the element of innovation proposed by the activity sector.

When looking for investors to participate in the creation of a company, individuals and / or corporations willing to invest in the new entity are targeted. These may be private individuals / legal entities, such as:

- those close to you (family, friends, etc.), grouped in the category known as “love money”;
- crowdequity, a category of participatory financing, in which some intermediaries (so-called platforms) propose to the general public to invest in the company's own funds, thus becoming shareholders;
- venture capital companies interested in the respective company, from various points of view: the type of activity, the potential importance in the respective geographical area, the improvement of the employment in the locality, etc.

Business angels mainly finances innovative projects, whether technological or otherwise, and / or projects with high growth potential. They not only bring money to strengthen the company's equity, but also their experience, skills and network, which they

make available to managers to help them enter their market.

Venture capital funds are mainly involved in the creation of an innovative company with strong growth prospects or in the development of an existing company. In this case, their purpose is to participate in the capital of the (unlisted) company and to give impetus to its growth through a significant contribution to equity which, due to the leverage effect, will allow them to obtain higher returns and thus attract foreign investors.

- the third category of financing of enterprises is indebtedness, and the forms under which it materializes are more and more diversified, from the classic bank credit to the multiple forms of financing obtained by accessing alternative financing platforms.

Crowdfunding also includes the form of crowdlending, which allows companies to borrow from individuals and / or legal entities in the community through a platform.

There are also several operations that facilitate the financial management of a company, among which leasing and factoring are widely used.

Leasing is generally a solution offered by a bank for the long-term lease of goods, with the option to buy at the end of the period, under conditions that vary according to the chosen formula.

Factoring is also a quick way to raise funds, considered as part of the turnover, by transferring the commercial receivables that the company has on customers, and thanks to the online platforms specialized for this purpose the respective liquidities are obtained almost immediately. The most important disadvantage is the cost of factoring, but it can also offer the management of the company's treasury, which would save valuable time for the company.

3. Participatory financing - benefits and risks

At least two parties are involved in a crowdfunding operation:

- investors - natural or legal persons - who invest a sum, generally not very large, in the project presented on the participatory financing platform;
- the promoter of this project, who appeals to the public to collect the funds necessary for the implementation of the project.

Being an investment, crowdfunding involves risks, mainly the failure to carry out the project, so the loss of the amounts invested, but for investors there are a number of options so that the risks are reduced to zero.

Regarding the type of crowdfunding, there are currently three types of fundraising platforms: donation, loan and investment.

Participatory funding in the form of donations or ***Reward Crowdfunding*** can take many forms, depending on the request of the fundraiser:

- donations without consideration or reward, which the public makes to support the project, as can be the launch of a music CD, a book, a concert, the establishment of a kindergarten and much more;
- donations with a symbolic reward, such as a gift CD, a printed T-shirt with the respective band, etc.;
- pre-orders for the respective activity, generally with a price / tariff below the market price, etc.

Participatory financing in the form of loan or crowdlending can take the form of:

- interest-free loans;
- loans with interest, without guarantee or guarantee from the debtor, minibon loans.

This type of crowdfunding generally makes it possible to finance expenses that are not taken into account by banks, such as the need for liquidity, which arises from the bottom can have a profit and loss account, to cover the financial needs of working capital or for intangible investment projects.

Unlike crowdfunding, which mainly involves a donation from individuals or legal entities for a cultural or social project, crowdlending offers the possibility of a financial investment with a specified return and for a specified period of time.

One of the most important advantages of crowdlending is that it does not require collateral, or it is very low, which means that project initiators can access financing much more easily than from commercial banks.

They can also use the loans collected to finance the required working capital (NFR) - respectively to balance the operating activity - without proving a sufficiently high turnover, thus being able to carry out new projects with implementation of innovative solutions, research & development works, etc.

The most important disadvantage of such financing is the higher cost than a classic bank loan, but compared to short and very short term loans, the interest rate differences and other costs – in brief debt service - are not very high, although, obviously, they are a measure of the higher risks faced by investors compared to bank depositors.

In all cases, the initiator of a project must choose a participatory financing platform accredited by the national authorities in the field - in the case of Romania, the Financial Supervisory Authority (FSA) - which will fulfill the role of intermediary for fundraising, and for this purpose being specialized in analyzing the creditworthiness of project initiators, as well as the projects themselves.

Given the great diversity of projects and developers, there is a wide range of crowdfunding

platforms, some dedicated to personal projects, others to professional projects specialized in certain fields of activity, and large platforms that have already consolidated their activity and market segment offer services for the promotion of complex projects.

The platforms that offer intermediation for financing the business aim especially at professional projects in fields such as renewable energy, real estate developments, support for the establishment and / or development of SMEs, elaboration of studies and works in R&D, etc.

Crowdfunding platforms are mainly accessed for fundraising for activities initiated by individuals, for various purposes: financing studies, family events - for example weddings, baptisms, anniversaries -, purchasing durable goods or even real estate, etc.

In the case of ***participatory financing in the form of shares or Crowdequity*** (capital investments), economic agents, natural and/or legal persons, invest in an enterprise by acquiring shares or social parts, thus becoming shareholders. The invested funds allow the creation or development of an enterprise, the remuneration of the shareholders being realized through dividends, which means that it depends on the results obtained by the company in the operating cycle.

Crowdequity is mainly used to create start-ups and businesses and can, like other types of crowdfunding, take many forms:

- the investors participate in the share capital of the corporation, either in the form of shares, or of social parts, depending on the way the company is organized. According to this participation, the investor will be remunerated in the form of dividends or capital gains realized during the sale of securities;
- the investment is materialized by the purchase of bonds issued by the borrowing company, and the remuneration of the investors will consist of earnings resulting from bonds, respectively interest and other gains, in accordance with the issue prospectus;
- the investment is materialized in the form of participation in a concession, the investor's remuneration being the royalty, calculated, according to the contract, as a percentage of the turnover resulting from the activity of the respective project.

Depending on the particularities of each project, its initiators address a crowdfunding platform, which can be a convenient intermediary - both in terms of fundraising and costs - between them and potential investors.

The platforms can be divided into two categories, general or specialized, depending on the methods they apply to raise funds: by donation, loan or capital and the sector of activity of the projects for which they agree to raise funds.

General platforms present an important advantage for project initiators because they can address potential investors who are not, at least initially, interested in the field of activity of the project in question.

On the other hand, both the general and the specialized participatory financing platform require that the projects they promote meet certain eligibility criteria, which include risk and profitability forecasts, implementation and operation deadlines at the projected parameters, etc., such as also the size of the investor community - number, value of participation with funds - but also their rewards / remuneration, if requested.

In the financial markets, especially in the developed countries, a lot of crowdfunding platforms have appeared, the profile publications presenting the most important ones, which exercise their intermediation in a certain geographical area or even globally. For example, Investopedia, the well-known financial site in New York, published at the end of 2021 a list of crowdfunding platforms for small businesses, highlighting the top six best performing US platforms, including the fees and other costs they perceive to the initiators of projects: Indiegogo, SeedInvest Technology, Mightycause, StartEngine, GoFundMe, Patreon, who, although general, have specialized in certain fields.

Although much more shy, crowdfunding has appeared and spread in Romania. Platforms have been created and managed to raise funds from individuals or legal entities. Even though some have been closed (crestemidei.ro, multifinantare.ro - the first crowdfunding platform in Romania, We-are-here.ro), at the beginning of 2022, these were some of the best known[4]:

- PotSiEu.ro, for projects with social impact, initiated by NGOs, associations and foundations;
- Startarium.ro is dedicated exclusively to entrepreneurial initiatives;
- Bursabinelui.ro is a platform developed by BCR and dedicated to NGOs;
- The participatory financing platform developed by Babeş-Bolyai University - Cluj-Napoca, for the ALUMNI graduates association, as well as other activities within the university;
- Sprijina.ro, a general platform that collects funds for personal projects, but also for projects, usually for small businesses, sports, education, animals, environment and travel, etc.
- seedblink.com, an investing platform specialized in sourcing, vetting, financing, and scaling European tech start-ups

[4] https://laurentiumihai.ro/crowdfunding-din-romania/, accessed on 20.03.2022.

4. Participatory financing - regulation and institutional framework

Participatory financing includes several activities: the provision of investment services; public offering of financial securities; banking transactions between investors - platform - project initiators; making payments; consulting; market research etc. Most of these activities are regulated in the Member States of the European Union by national and / or European legislation, and the monitoring of its observance is the responsibility of the authorities of the respective states.

Consequently, the regulatory framework for crowdfunding operations was specific to each state, which made the regulations heterogeneous, preventing the development of a common European crowdfunding market. With the free movement of capital, in the European Union was enacted the Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European providers of crowdfunding, applicable in all Member States from 10 November 2021, for the proper functioning and access of platforms, as well as the protection of investors, but also the stimulation of business development,.

This Regulation lays down uniform requirements for the provision of crowdfunding services as follows:

- organization and operation of crowdfunding service providers;
- authorizing and monitoring the respective providers of crowdfunding services, mainly following the operation of crowdfunding platforms;
- imposing the principle of transparency, the rules on advertising communications, the information addressed to the users of the platforms, as well as the marketing requirements;
- the supervisory institutional framework in the European Union: the European Supervisory Authorities and the European Banking Authority (EBA), established by Regulation (EU) no. 1093/2010 of the European Parliament and of the Council and the European Securities and Markets Authority (ESMA), established by Regulation (EU) no. Regulation (EC) no. 1095/2010 of the European Parliament and of the Council. The Regulation specifies the powers of these authorities with regard to notification obligations, information protection, etc.;
- the regulation also provides for the administrative sanctions that the competent authorities may apply in the event of a breach of European regulations, including the national ones that have taken them over.

Along with Regulation (EU) 2020/1503, directives and regulations on the financing of the European financial market have remained in force, such as Directive 2020/1504 amending Directive 2014/65 / EU on markets in financial instruments ("MiFID II"); Regulation (EU) 2017/1129 on the prospectus of public offerings of securities or of the admission of securities to trading on a regulated market; Directive 2014/65 / EU on markets in financial instruments; Directive 2011/61 / EU on the management of alternative investment funds; Directive (EU) 2015/2366 on payment services in the internal market, etc.

The provisions of these European regulations and directives are or will be taken over in the national legislation of the Member States. Thus, in Romania, the institution designated for the supervision of participatory financing is the Financial Supervision Authority (ASF). The establishment of a crowdfunding platform requires the authorization of the FSA, which will enter the entity in a special register, specifying its structure and the crowdfunding services it can provide.

5. Conclusions

Participatory financing or crowdfunding is a technique of obtaining the funds needed to carry out an activity from a multitude of people - natural or legal, without traditional intermediaries, using an Internet promotion platform. Crowdfunding is a very powerful tool to create a company or stimulate its development, involving the general public - either individuals, associations or companies, or local public authorities, etc. - in supporting the financing of projects that they consider interesting or important or profitable, etc.

Although the technique of crowdfunding is not new - the first forms can be found even in the 19th century, the classic example is the public funding of the Statue of Liberty platform in the United States - it has become widely used mainly due to the enormous possibilities offered by the Internet, becoming a simple and affordable fundraising tool.

Thanks to the Internet, crowdfunding has become a simple and affordable fundraising tool. The initiator of the project uses a crowdfunding platform as a site through which he makes his project known and asks for funds from the public, at first investors are friends, family members, acquaintances and their area expands as the project becomes more and more better known.

In recent years, especially after the financial crisis in the US mortgage markets since 2007, credit institutions have applied more restrictive methodologies to lending to firms, especially smaller ones, which obviously have a higher credit risk. As a result, many alternatives to bank credit have been developed: crowdfunding, lease back or even automatic factoring, so that SMEs are encouraged to study the financing offers that currently exist on the market before starting their activity.

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PLACEMENT OF THE PROFESSIONAL JUDGMENT IN THE CURRENT REMOTE WORKING ENVIRONMENT

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Mihaela SUDACEVSCHI[**]

Abstract

Current global pandemic changes imposed a new decisional process that drags the reshaping of the professional judgment in the current environment. This reshape is an effect of the pandemic and it is highly correlated to the adaptability of the companies to the new technological path.

The continuity of the activity at an organizational level has as base the rethinking of the structure of the professional judgment within remote work conditions.

This paper aims to highlight the change of the professional judgment in the new format by explaining the influence and generating factors and, more accurate, the benefits and the drawbacks of the remote work.

Keywords: *professional judgment, pandemic, remote work, global changes, decisions.*

1. Introduction

Professional judgment has been in our field of research for over 10 years. This indissoluble concept regarding the activity at the organizational level has undergone changes on perception and on the entire process of formation and substantiation of this type of judgment.

Below we will present results of our past research in the professional judgment definition area.

Based on the research conducted so far, we have outlined several definitions of the professional judgment starting from the basic notions and then continuing at a particular level.

All the definitions regarding the professional judgment used in the qualitative and quantitative research we have conducted so far represent accepted general notions that have proven authenticity and carry the label that they are valid.

These definitions are:

- „the construction „professional judgment" indicates a cognitive demarche based on factors that support the creation of a correct decisional structure"[1];
- „the professional judgment is a set of logical judgments linked together in order to obtain concluded results for the activity carried taking into consideration certain circumstances, knowledge, evidences, methods, criteria and proper regulation;
- the professional judgment is the mechanism that forms an opinion and decision making taking into consideration the interaction between the accumulated experience in the domain, the assimilated knowledge;
- the professional judgment is a process that intervenes when the domain's legislation does not cover all the situations encountered in the activity carried and as a cognitive process that takes into consideration ethical codes, knowledge, circumstances but also by the employee's behavioral structures."[2]

In conducting qualitative and quantitative research on aspects of working in remote conditions we found the following results:

- remote work had already been implemented for some time in large companies and in companies that did not require a specific work infrastructure and it ensured higher productivity under these conditions;
- remote work has been seen by employees as beneficial especially during the pandemic period, giving an idea of security and protection;
- there has been cooperation between both state institutions and the private sector on the development and speed of the logistics needed to carry out the activity;
- remote work can be seen as a proof of adaptation to the global environment- economical, financial, and even social;
- remote work led to the extension or modifications in the employees' work tasks to keep the

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[1] Ștefan-Duicu Viorica, M., & Ștefan-Duicu, A. (2014), *Professional judgment of the financial analyst in the context of normative and positive theories of accounting directed by the economic resilience*, From Person to Society, 1003.

[2] Ștefan-Duicu, V.M., & Ștefan-Duicu, A. (2018), *Professional Exo-Judgment Perception–A Quantitative Research Based on an Innovative Conceptual Structure*, Global Economic Observer, 6(2), pp. 17-25.

job if working remotely was not possible.

2. Placement of the professional judgment in the actual remote working conditions

Currently, a fact that interests us in this situation is the current pandemic status.

According to the definitions offered by the dictionary, pandemic means:

„an outbreak of a disease that occurs over a wide geographic area (such as multiple countries or continents) and typically affects a significant proportion of the population: a pandemic outbreak of a disease a global pandemic or an outbreak or product of sudden rapid spread, growth, or development."[3]

The coronavirus that causes COVID-19 is a contemporary example of a pandemic, representing a worldwide spread of a new disease.

At an official level, The World Health Organization (WHO) is the institution responsible for declaring and announcing a globally extended pandemic. This organization monitors the outbreaks of a disease and evaluates situations created with the help of health experts and specialists in various fields.[4]

All countries have been affected by the pandemic through different implications such as:

- the health system has been overwhelmed by the medical crisis and also by the insufficient and unprepared staff in this specific situation;
- the fact that the virus is highly contagious and develops multiple variants quickly has blocked economic activity and activities in optimal conditions;
- the education system was also affected by the pandemic, fact that required the adaptation to the new environment via implementing online learning tools and policies.

„Public authorities must ensure, at the same time, a real competition on the markets and the suppliance of public services, such as education, health etc., for a proper functioning of the economy".[5]

It was necessary to reengineer all work processes for each sector of activity. Digitalization and the use of technology are key elements of business continuity in all domains.

The pandemic status has imposed changes at all levels in companies and has led to work processes being conducted under conditions that comply with the recommendations of the relevant authorities, at the level of the health system and in other areas.

There has been the need to modify the tasks and workload, to increase awareness of the pandemic situation. The professional judgment of the employees has shown greater attention to detail and has required continuous collaboration between colleagues and beyond. The transition period between working under normal conditions and the type of work mentioned above has consisted in the employee adaptation to all aspects regarding the global changes that have been predetermined. This adaptation followed both the integration of the personal and family plan in the work in remote conditions and the implementation of modern technologies that would allow the company's activity to take place in any location and context.

As a first reaction, many companies have restricted their activity but later they have returned to the market with solutions that ensured the continuity of its activity and keep employees in their jobs. Managers' professional judgment took unpredictable trajectories in the early days when uncertainty was high in the global economic and financial landscape. The pandemic was the main cause that both imposed and extended home-based remote work and extended the periods to indefinitely. The fact that companies have found a solution for working at home versus working in the office has led to support for the health system in the first place.

„Remote work, also called distance working, telework, teleworking, working from home (WFH), mobile work, remote job, and work from anywhere (WFA)[6] is an employment arrangement in which employees do not commute to a central place of work, such as an office building, warehouse, or retail store. It is facilitated by technology such as collaborative software, local area networks, virtual private networks, conference calling, videotelephony, internet access, cloud computing, voice over IP (VoIP), mobile telecommunications technology. It can be efficient and useful for companies since it allows workers to communicate over long distances, saving significant amounts of travel time and cost. Common software used for remote work are Zoom, Cisco Webex, Microsoft Teams, Google Meet, Slack, and WhatsApp."[7]

[3] Dictionary by Merriam Webster, an An Encyclopædia Britannica Company, available at: https://www.merriam-webster.com/dictionary/pandemic#examples.

[4] Healthdirect Australia - the national virtual public health information service, available at: https://www.healthdirect.gov.au/what-is-a-pandemic.

[5] Stoica, E.C., & Sudacevschi, M. (2019), *Economic policies instruments used by developed and emerging states in the conjuncture of our days*, Challenges of the Knowledge Society, p. 1109.

[6] What is telework?, United States Office of Personnel Management, available at: https://en.wikipedia.org/wiki/United_States_Office_of_Personnel_Management

[7] Wikipedia - the free encyclopedia, available at: https://en.wikipedia.org/wiki/Remote_work

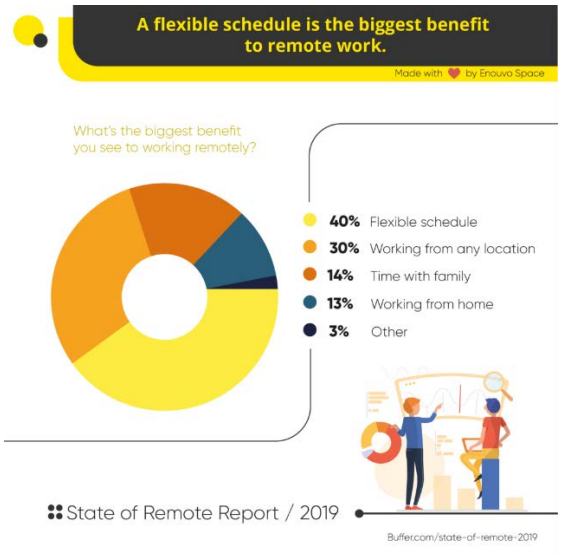
2.1. Potential benefits and drawbacks of the remote working

This type of work has led to distinct types of potential benefits and drawbacks.

From the category of **potential benefits**, we name:

- the reduction of costs for companies to conduct their activity in the previous conditions because teleworking does not require an actual space to be provided to the employee or to control the work climate, electricity costs, building maintenance, etc.
- it has been pointed out that the environmental aspect is an important one because remote working has led to a reduction in traffic and to lower emissions of pollutants and general pollution;
- the improvement of workers` quality of life by reducing the time spent in traffic and organizing the remaining activities;
- a highlighted advantage of remote work is that it creates a climate that encourages family life by ensuring a significant physical presence of people at home;
- schedule flexibility allows the employee to plan and decide when to complete the tasks;
- remote work is already considered an employee privilege in some companies.

Figure 1. Potential benefits of the remote working



Source: Report by Buffer State of Remote Work[8]

The **general drawbacks** of remote work are:

- establishing logistics that cover 100% of the means of conducting the work in favorable conditions
- the lack of face-to-face interaction can lead to miscommunication and feedback often provided by personalized communication through gestures, voice, tone, facial expressions, and body posture; [9]
- the existence of employee's work-life balance concerns, the increase of efficiency related to the new working conditions, the need to adapt to new technologies and tools, maintaining work control and also the existence of home office constraints;
- distractions in remote work environment such as members of the family or neighbors;
- the occurrence of tensions between those who work from home and those who still work from the offices;
- the constant need of training for employees both in technology and how to work in new conditions and logistics;
- the exposure of companies to IT breaches and data theft;
- the pressure of working from home to show worth for the employees;
- continuous use of laptops, phones and tablets can lead to burnout and health issues among employees;
- during the adaptation process „people cannot solve problems perfectly, costless and instantaneously."[10]
- employee's behaviors and attitudes change in remote working conditions because a different degree of autonomy is taken into consideration and the employee's experiences a greater focus on personal growth opportunities.

This fact goes both ways - it can increase the employee's work productivity or distract them from the main responsibilities they have because of the independence, freedom provided or the flexibility of schedule. „However, studies also show that autonomy must be balanced with high levels of discipline if a healthy work/leisure balance is to be maintained."[11]

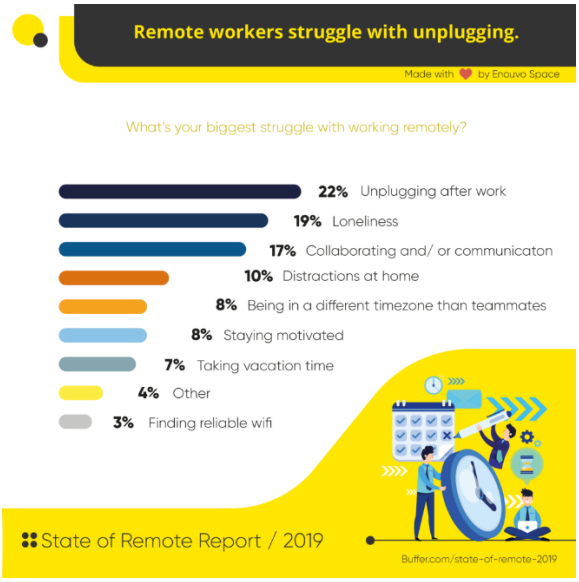
[8] Report by Buffer State of Remote Work – „How remote workers from around the world feel about remote work, the benefits and struggles that come along with it, and what it's like to be a remote worker in 2019", available at: https://buffer.com/state-of-remote-work/2019.

[9] *Daft, Richard L.; Lengel, Robert H. (1986), Organizational information requirements, media richness and structural design*, Management Science. *32 (5), pp. 554–571*. doi:10.1287/mnsc.32.5.554. JSTOR 2631846.

[10] M. Z. (2009), *Information economics, instrument of analysis in new microeconomics*, Lex ET Scientia International Journal (LESIJ), 16(2), pp. 362.

[11] Cook, Dave (March 12, 2020), *The freedom trap: digital nomads and the use of disciplining practices to manage work/leisure boundaries*, Information Technology & Tourism. 22 (3), pp. 355–390. doi:10.1007/s40558-020-00172-4.

Figure 2. General drawbacks of the remote working



Source: Report by Buffer State of Remote Work[12]

2.2. The professional judgment during the remote working

The part that interests us the most and that we want to emphasize in this paper is that professional judgment also undergoes different changes.

If so far we were used to a fast-decision-making process at the workplace, now we had to adapt this process through the tools made available by the employer. It has been observed that the speed of decision making has decreased because the employees are withheld in group meetings, leading to longer times to be needed in this process.

This is a consequence of adaptation to the new technological path, and beyond.

The professional judgment has been affected by the lack of traditional face-2-face communication and has been, at least at the beginning of the pandemic, hampered by the adaptation time and flexibility of each employee in manifesting communication and decision making in the new work conditions.[13]

Each employee and each manager had to get used to the new working climate and adapt to the new processes. Because the main goal is to ensure the continuity of the company's business at a general level and to maintain the workplace in normal parameters or with increased efficiency at an individual level all efforts have been directed towards this aspect.

Discussions no longer took place face-to-face at the office, meetings migrated online and therefore each employee had to push their limits and develop online communication skills.

The clarity of the professional judgment consisted in a comprehensive approach on all the factors influencing the company's activity and the adaptation to the new conditions imposed by the remote work.

Managers, seen as „supporters of innovation find the principles and the conventions of any kind, in a way not only to adapt better to the reality, but also to anticipate developments."[14]

There has been a need for a separation between work and personal life and a need to establish a schedule to accomplish tasks in optimal conditions. Managers and stakeholders initially suspected that employees were not using the time allocated to their work in the best of their ability, but over time this suspicion disappeared as verifications occurred in the performance of tasks, activity reports or other types of reporting imposed into each company.

The remote work process has been developed against the current pandemic, but it will continue in companies even after the danger of contagion has disappeared.

3. Conclusions

Companies have adapted its activities and remote working schedule and have achieved various advantages and will continue to maintain certain remote working periods in accordance with internal policies.

[12] Report by Buffer State of Remote Work – „How remote workers from around the world feel about remote work, the benefits and struggles that come along with it, and what it's like to be a remote worker in 2019", available at: https://buffer.com/state-of-remote-work/2019.

[13] *Akkirman, A.; Harris, D.L. (June 2005), Organizational communication satisfaction in the virtual workplace, Journal of Management Development. 24 (5), pp. 397-409.* doi:10.1108/02621710510598427.

[14] Cristea, V.G. (2015), *The necessity to introduce the accounting rules and fair value in the conceptual framework*, Procedia economics and finance, 26, p. 515.

Figure 3. Remote working in images

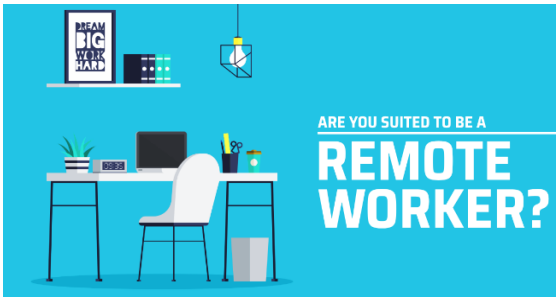
Source: photos published on unsplash.com[15]

Professional judgment is based on a well-defined framework. During the transition to remote work the fact that every member of the company, whether employee or manager, had established job tasks and draft documents needed to conduct the work, led to an intrinsic decision-making process.

Initially, the difficulty arose from the concerns of transposing all the means of working from the office at home. All these elements shaped the professional judgement both through behavioral factors that influenced remote work and the employee themselves, as well as environmental factors. These environmental factors have transformed the professional judgement in remote work environment from an uncommon issue into a paradigm of the present time.

The professional judgment has seen variations in the way of being applied in areas where it initially seemed harder to work from home. Managers often decided to expand or change employees' duties and tasks in these situations.

Figure 4. Are you suited to be a remote worker?



Source: Picture used on Research by TalentLMS[16]

In fact, looking at the whole situation, there has been a beneficial extension of professional training through the emergence of new remote working environment and processes.

Remote work will become a viable choice for companies from now on, as all the logistical and technical bases are already in place, given the historical precedent that has been set.

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[15] Tribute to photographers: Helena Lopes (photo 1.), Clark Tibbs (photo 2.), Manny Pantoja (photo 3.), Nelly Antoniadou (photo 4.); Andreas Klassen (photo 5.), Charles Deluvio (photo 6.), Chris Montgomery (photo 7).

[16] Picture from Research by TalentLMS, available at: https://www.talentlms.com/blog/remote-work-statistics-survey-2019/.

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RESEARCH-DEVELOPMENT AND INNOVATION IN ROMANIA BETWEEN REALITY AND IMPROVEMENT SOLUTIONS

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Mădălina TOCAN[**]

Oana CHINDRIȘ-VĂSIOIU[***]

Abstract

Research and innovation contribute to economic growth and, thus, to better living and working conditions in the European Union. For this reason, research and innovation are an important part of policies by which the European Commission seeks to stimulate employment, growth and investment.

Research and innovation provide us with the knowledge and solutions we need for urgent problems, such as epidemics or socio-economic crises, but also for long-term societal challenges, such as transport, climate change or energy.

For this reason, this paper attempts to present the current state of research and development in Romania and also to analyze the level of correlation between the activity of research and development and economic performance of Romania.

Key words: *research, development, innovation, economic growth, competitiveness.*

JEL classification: *E02, O32*

1. Introduction

The aim of this paper is to highlight the role of the research-development-innovation sector (hereinafter referred to as RDI) in Romania and to analyse the links between expenditures for this sector, RDI employees and the evolution of gross domestic product (hereinafter referred to as GDP). In this approach, we started from the idea that economic and social development does not come by itself, but is based on the fruit of the researchers' creative work. That is why scientific research is a very important element for the industrial development, evolution of transport, construction, agriculture and all the domains of activity within a society.

The specialized literature highlights the crucial role that science and technology play in solving the economic, social and environmental problems that determine the unsustainability of the current development model. Reducing the gaps between countries, eradicating poverty and a fair future for all people on the planet impose a new approach that integrates existing scientific knowledge with new ones, the scientists responsibility being to make the general public aware of its contribution to sustainable economic growth, mitigation negative climate change, accelerating the depletion of resources, understanding demographic trends and sustainable development strategies[1].

The specialized literature mentions innovation as a way to achieve sustainable results, with the condition of an adequate process management of the evaluation and orientation of public and private actors towards technological innovation. Sustainable growth requires a new governance model focused on long-term goals and strategies which mediate conflicts between concerns about short-term profit growth and ensuring a balanced and healthy growth in the long term. Given that the innovation system has a visible international dimension, the absorption and use of new technologies existing worldwide and the management of specific "niche" technologies in the medium term could converge towards a long-term structural change, beneficial for sustainable growth. Arie Rip (2002) conceptualized the interaction between technology and society in terms of "co-evolution of societal and technological systems". The innovation system can speed up or slow down the achievement of sustainable development depending on the solidity of the interconnections and the existence of feedbacks between the technical-scientific and the social aspects[2].

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[1] https://www.researchgate.net/profile/IoanFrancValeriu/publication/316038351_Sistemul_national_al_CDI_si_contributiile_sale_la_asigurarea_dezvoltarii_durabile/.

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2. Area of scientific research

Scientific research represents the search, production, promotion and application of the scientific research and scientific knowledge's, in order to solve theoretical and/ or practical problems. The principles of scientific knowledge are: logical consistency, objectivity, repeatability and social responsibility. Knowledge is usually expressed in sentences that are given a value of truth. Accidentally discovered or as a result of a search activity, the knowledge must then be organized in a structured system of scientific knowledge.

The scientific research distinguishes between the fundamental research, applied research and research for development, innovation and technology transfer. The fundamental scientific research (theoretical or experimental, exploratory or strategic / oriented) means the search, production and dissemination of basic scientific knowledge. Knowledge which refers to rules and principles are the defining results of the fundamental research. As a general rule, they are expressed / submitted for academic debate in publications. Fundamental research can be exploratory (especially associated with theoretical problems) or strategic (especially associated with distal practical problems). Fundamental research also formulates and verifies hypotheses, models and theories on phenomena and processes of a theoretical or practical nature. Applied scientific research represents the incorporation of fundamental scientific knowledge and that empirically obtained into a finished product, process or service that can, in principle, have market value. In this case, the knowledge refers to the application to specific contexts of the knowledge resulting from the fundamental research. The results of applied scientific research are also disseminated through publications. Applied research can be translational (utilize the results of fundamental research to solve practical problems) or practical (seek solutions to well-defined practical problems).

If the knowledge is sufficiently proceduralized to express itself in completed products, technologies and services, we are talking about research and development, whose result is expressed in publications and / or patents and prototypes. The transformation of scientific knowledge from publications, patents and prototypes into products, economically and socio-culturally assimilated technologies and services represents innovation through knowledge transfer and dissemination, process in which scientific research and researchers are only a component alongside the socio-economic environment (*e.g.*: industry, users, policy makers, etc.). Thus, development and innovation represents the process of bringing from the stage of product, technology or service obtained by applied research, directly or through technology transfer, to the level of entry into production to become a product, technology or service, respectively, a service with a market value.

Innovation is a fundamental mechanism of competitiveness and excellence. Innovations, as part of high-performance research, are understood in three directions: theoretical, methodological and practical. Innovation means the generation of new scientific constructs, methodologies, new creations and / or products / services / technologies, recognized and assimilated in the national and international scientific and socio-economic community, which set standards and / or change practices in the field.

Research- development and innovation play a key role in generating smart and sustainable growth and creating jobs. By producing new knowledge, research is essential for the development of new and innovative products, processes and services that increase productivity, industrial competitiveness and, ultimately, prosperity. The importance of productivity in stimulating sustainable growth and consolidating Europe's economic recovery has been widely recognized[3]. The increasing of the labor productivity depends on the ability of the economy to invest more in the available capital for each worker, namely to increase capital intensity, and to increase efficiency by combining factors of production, namely multifactorial productivity[4]. For countries with a high level of GDP per capita, RDI, skills and technological development have a fundamental importance for multifactorial productivity. For the emerging countries, it is also essential to start reducing the productivity gap. Along with better regulatory and institutional frameworks and efficient market functioning, RDI systems are a key to increasing the efficiency of a country's combined use of labor and capital. RDI systems are complex ecosystems that require several elements in order to function optimally. These elements include a solid public science base that produces high quality results, an intense participation of enterprises in innovation activities, fluid and abundant knowledge flows between RDI actors and good framework conditions for the development of innovation.

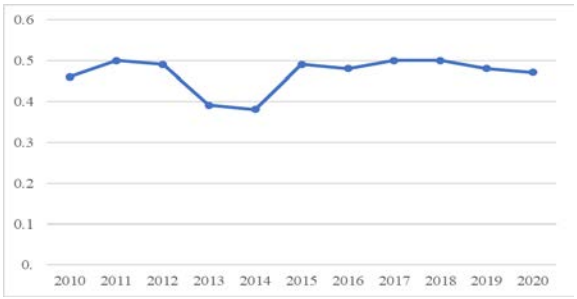
3. RDI sector in Romania

The most important premise of the RDI sector development, the engine of innovation in any economy, is the investments targeted to various relevant activities. According to the OECD, the expenditures on

[3] OECD, The future of productivity, 2015.
[4] Forumul Economic Mondial, Raportul privind competitivitatea globală 2016-2017, 2017.

RDI activities represent an indicator of a country's efforts to boost innovation[5]. These activities mainly cover three areas: fundamental research, applied research and experimental development. The indicator used to measure the intensity of specific activities is the total expenditure on research and development as a percentage of GDP. It represent a percentage of the expenditures made by all performance sectors of a country for research and development, relative to gross domestic product (GDP), and provide the level of financial resources allocated to research and development in a country's economy[6]. The indicator has the advantage of allowing comparisons between states, which is particularly important in the context of highlighting the role that RDI plays in the economic growth of nations. In this section, we will focus on the analysis of the Romanian RDI expenditures as a percentage of GDP in the last decade, adding some comments regarding the place occupied by Romania in the ranking of the European Union countries.

Figure 1 – RDI expenditures as a % GDP in Romania



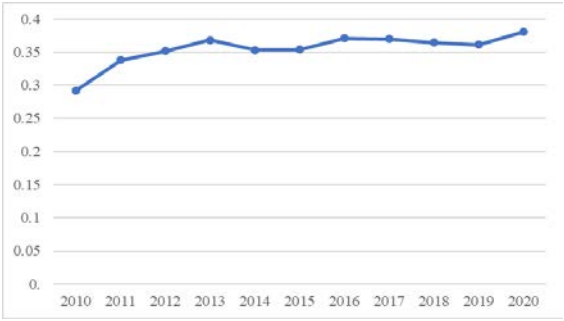
Source: authors' processing according to Eurostat data, https://ec.europa.eu/eurostat/data/database

Last year, Romania recorded the lowest share of RDI expenditures as a percentage in GDP in the last six years, according to Eurostat data. Our country ranks last in the EU with a percentage of only 0.47%. In order to have a better picture, it is worth mentioning that the value of RDI expenditures in 2020 was below the post-accession level of 0.55%, recorded in 2008 and from the Eurostat data series, the highest level for our country was recorded in 1995 (0.75% of GDP) [7].

A particularly relevant indicator of the research-development-innovation sector is represented by the number of employees assigned to these types of activities, starting from the premise that researchers represent the backbone of this sector. Researchers are those professionals involved in designing and creating new knowledge, products, processes, methods and systems, being directly involved in management processes[8].

There are important studies that have tested a positive correlation between the number of researchers in the RDI area and the growth rate of innovative results, but also a reverse determination, in the sense that investment in innovation leads, in addition to increasing productivity, to a significant increases in employment[9]. According to the European Commission, the share of researchers in the total number of employees is an indicator of the economy structure, as well as its degree of development, being strongly correlated with the production of innovative results at the national level. Thus, the countries with high shares of RDI expenditures in GDP also tend to be leaders in innovation[10].

Figure 2 – RDI employees in total active population Romania



Source: authors' processing according to Eurostat data, https://ec.europa.eu/eurostat/data/database

Over the last decade, the RDI workforce has had a slightly upward trend of only 0.07% (from 0.29% in 2010 to 0.38% in 2020). It is important to point out that Romania also ranks last in the European Union in terms of full-time research personnel. We specify that it were analyzed the persons employed full time in the RDI sector.

4. The analysis of the relationship between RDI and Romania's economic growth

Starting from the models of endogenous economic growth, in this last part of the paper, we intend to analyse the correlation between the evolution of Romania's GDP, expenditures and the number of

[5] OECD, Science and Technology, OECD Factbook 2016.
[6] www.insse.ro.
[7] https://ec.europa.eu/eurostat/data/database.
[8] Griffith, R., Redding, S., & Van Reenen, J., *Mapping the two faces of R&D: Productivity growth in a panel of OECD industries*, Review of economics and statistics, 86(4), 883-895, 2004, p.22.
[9] Pianta, M., New technology and Jobs. In J. Michie, and J.G. Smith, G*lobalization, Growth and Governance:Creating an Innovative Economy*, Oxford University Press, United States, 1998.
[10] European Commission, Science, Research and Innovation performance of the EU, 2016.

employees from the RDI sector. Romer mathematically formalized the idea that knowledge leads to continuous economic growth, which marked a new theoretical approach to the analysis of economic growth factors, the so-called endogenous growth[11]. In Romer's model, the growth is based on the results of research and development, embodied in technological change, which companies use to maximize profits. In this regard, a Romer point out that technology is different from all other goods, as it is uncompetitive and is a partially an exclusive good. Endogenous growth models, based on research and development, in a way follow Schumpeter's idea of the importance of creating organized knowledge in generating economic growth[12]. The basis of these approaches is based on the idea of creative destruction[13]. What motivates individuals to engage in research and development is their perception that such activity will provide additional profit[14].

The neoclassical growth theory is based primarily on Robert Solow's model, developed in the mid-1950s[15]. Solow concluded that about 50% of historical growth in the industrialized countries could not be attributed to the increasing use of physical capital and labour, but to the third factor, the so-called residual[16]. The residue includes all intangible growth factors, such as the development of existing means of production and the creation of new means of production, changes in employee education and expertise, research and development, changes in organization and production methods.

Defining contextual indicators and models applied

According to previous studies, research and development expenditures and the number of employees in the RDI sector are the tools used to measure the intensity of innovation. In this context, these parameters will be used to test the hypothetical model.

To analyse the impact of RDI sector on Romania's GDP, research was conducted using the Eurostat data and a statistical method (multiple regression).

The purpose of multiple regression is to highlight the relationship between a dependent variable (endogenous) and a set of independent variables (exogenous, predictors). The function between *Y* (the dependent variable) and *X* (the *p*-dimensional covariate) relies on a finite number of parameters to be estimated. The most popular parametric regression model is the linear regression model

$$Y = \alpha + \sum_{j=1}^{p} \beta_j X_j + \varepsilon,$$

where $\beta_j \in R$, $j = 1, ..., p$ are the parameters to be estimated and ε is a random error term.

To interpret correctly the parameters, we use logs for variables, i.e. log-log multiple regression model. Both the dependent variable and independent variables are log-transformed variables. The interpretation is given as an expected percentage change in *Y* when *X* increases by some percentage.

For the analysis of data to be further developed, we get the following general linear model:

$$Log\ GDP_t = \alpha + \beta_1 LogExp_t + \beta_2 LogEmployee_t + \varepsilon,$$

where *t* is time in years.

The specific, RDI indicators we analysed are the predictors, i.e.:

- Exp_t: is the RDI expenditure in Romania.
- $Employees_t$: is the number of employees in RDI in Romania,

and GDP_t, is the gross domestic product (GDP) in Romania, is the dependent variable.

After plotting the correlation matrix we can see whether multi-collinearity occurs between the variables. The analysis of the sample correlation presented below clearly illustrates there is no multi-collinearity. So, between the RDI expenditure in Romania and the number of employees in RDI departments in Romania the correlation coefficient is $r_{Exp;Empl}$ = -0,19, so the model is correctly fitted and, respectively, the strong relationship between GDP and the two of indicators ($r_{GDP;Exp}$ = 0,9832 and respectively, $r_{GDP;Empl}$= 0,9832) allows the estimation of a significant linear model.

Estimation of Regression Equation

Based on statistical data for 2000-2020 log-log regression equations showing the relationship between GDP and each predictor were developed, illustrating strong correlations, along with the analysis and the regression model.

[11] Romer, P., *Growth based on increasing returns due to specialization*. American Economic Review, 77, 1987.
[12] Schumpeter, J., *Capitalism, socialism, and democracy*. New York, NY: Harper, 1932.
[13] Ayres, R., & Warr, B., *The economic growth engine – how energy and work drive material prosperity*. Cheltenham: Edward Elgar Publishing, 2009.
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[15] Solow, R., *A contribution to the theory of economic growth.* Quarterly Journal of Economics, 70, 65–94.10.2307/1884513, 1956.
[16] Solow, R., *Technical change and aggregate production function*. Review of Economics and Statistics, 39, 312–320.10.2307/1926047, 1957.

Table 1 presents regression results. Based on regression results, the explanatory power of the model is highly significant $\boldsymbol{R^2 = 0.98}$ and there is no multi-collinearity.

Regression Statistics	
Multiple R	0,992006
R Square	0,984076
Adjusted R Square	0,982307
Standard Error	0,031274
Observations	21

Table 1 – Regression Results

	Coefficients	Standard Error	t Stat	P value	Lower 95%	Upper 95%
Intercept	1,159575	1,213769	0,95535	0,3520561	-1,39046	3,70961
Log Cheltuieli C-D	0,855726	0,026882	31,83262	2,81E-17	0,799249	0,912203
Log Forta de munca C-D	0,351578	0,264075	1,331354	0,1996893	-0,20322	0,90638

$$LogGDP_t = 1.145162 + 0.855726 * LogExp_t + 0.351578 * Employee + \varepsilon$$

Figure 3 presents the regression of the logarithm of the RDI Employees on the log of GDP.

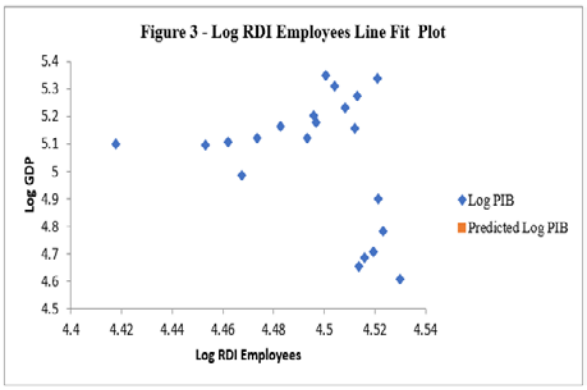
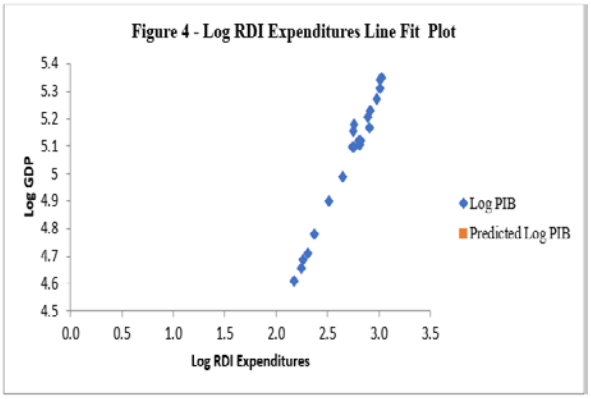


Figure 4 presents the regression of the log of the RDI Expenditures on the log of GDP.



5. Conclusions

Starting from the endogenous growth models, the aim of the paper was to examine the effects of RDI expenditures and the number of employees in the RDI sector on Romania's economic growth.

The working hypothesis was whether the investment in research and development in the period 2000-2020 in Romania had a positive effect on economic growth. To this end, we constructed a multiple regression model, in which the dependent variable was the economic growth rate, and the independent variables were research and development expenditures as a and the number of employees in the RDI sector.

The result of the regression model shows that there is a positive and significant relationship between the RDI expenditures, number of employees and growth rate of GDP. For this reason, it should be taking into consideration the fact that emerging economies, such as Romania, in order to obtain economic growth, should increase their research and development activities. The experience of developed countries has shown that countries that are leaders in innovation and research and development have higher economic growth than other non-leading economies.

The re-launch of research and innovation depends decisively on the public investments in research and development, a chapter in which Romania ranks last in the European Union. Romania reaffirms strategic option to increase public RDI spending to reach 1% of GDP by 2027. Public investment in RDI will support private sector innovation drive through a wide range of private-public partnerships, attracting and training talent, cross-sectorial mobility , developing the technology transfer capacity of public research organizations and engaging enterprises in addressing societal challenges.

Increasing the competitiveness of the Romanian economy through innovation can also be achieved by

supporting the performance of economic agents and increasing their competitiveness based on innovation. This involves developing the ability of companies to absorb state-of-the-art technology, to adapt these technologies to the needs of the markets they serve, and to develop, in turn, technologies or services that allow them to progress in value chains.

As future research we intend to perform a more complex correlation analysis, using a large number of variables that characterize the RDI system in Romania, with a view to identify the most important factors which influence the economic growth.

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- https://ec.europa.eu/eurostat/data/database;
- https://www.insse.ro;
- https://www.researchgate.net.

AGENT-BASED SYSTEM TO SUPPORT COLLABORATION AMONG AUTONOMOUS MICROGRIDS

Adina-Georgeta CREȚAN*

Abstract

Maintaining the sustainability of organizations on the market and their performance in a competitive market is very difficult to accomplish. In this dynamic environment, organizations decide to cooperate, becoming partners in a virtual enterprise. To work efficiently, the partners must collaborate and coordinate their negotiation activities to find the optimal solution unanimously accepted.

This paper proposes an agent-based system to support collaborative activities among autonomous microgrids grouped in a virtual enterprise to better meet customers' energy requirements. To maintain the autonomy of each microgrid within the virtual enterprise, it is proposed a decentralised and flexible negotiation solution that combines diverse technologies, such as multi-agent systems in dealing with negotiation interactions issues, and middleware-level coordination facilities for all aspects related to coordination of multiple parallel negotiations. Currently, interoperability among the involved autonomous microgrids in a negotiation is often not reached or maintained due to failure in adapting to new requirements, parties, or conditions. The use of an adaptive agent-based system as proposed will result in a seamless, sustainable interoperability which favours its maintenance across time. The proposed negotiation solution enhances the ability to reach and interoperate with more parties that leads to more business opportunities and to stronger and healthier interactions.

Keywords: *Smart Microgrid, Intelligent Agents, SME, Virtual Enterprise, Negotiation.*

1. Introduction

To be able to perform, enterprises need to exchange information, whether this exchange is internal (among departments of the enterprise), external (between the enterprise or part of it and an external party), or both. Enterprise Interoperability (EI) is thus defined as the ability of an enterprise to seamlessly exchange information in all the above cases, ensuring the understanding of the exchanged information in the same way by all the involved parties[1]. Large enterprises accomplish this by setting market standards and leading their supply chain to comply with these standards. Small and Medium Enterprises (SMEs) are more sensible to the oscillations of the environment that involves them, which leads them to the need to constantly change to interoperate with their surrounding ecosystem. Sustainable EI (SEI) is thus defined as the ability of maintaining and enduring interoperability along the enterprise systems and applications' life cycle. Achieving a SEI in this context requires a continuous maintenance and iterative effort to adapt to new conditions and partners, and a constant check of the status and maintaining existing interoperability[2].

The electric power system must continually adapt to the new requirements of environmental compliance and energy conservation. In addition, the recent natural disasters and other destructive events that caused significant power outages have shown that a more robust and reliable power grid is needed.

According to Wang[3], a smart grid is an intelligent and flexible power network that manages and coordinates a Distributed Energy Resource (DER) system, having a key role in supplying energy on demand and monitoring power outages. Moreover, in the context of reducing energy losses during transmission and distribution, particular attention has been paid to microgrids (MGs).

Modern smart microgrids represent a major technology breakthrough due to a decentralized and decarbonized energy infrastructure made up of interconnected DER ensuring stability and resiliency energy systems. However, in dynamic energy networks, the pressure to reach sustainability goals requires to find viable solutions for improving microgrids' performance. One of the solutions consists in achieving the microgrids' cooperation and ensuring the interoperability among their distributed systems to work more seamlessly together.

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Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and the negotiations among independent microgrids that participate in a Network Enterprises.

The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos[4] defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks".

In this paper the negotiation we want to model involves several participants negotiating for a negotiation object described by several interdependent attributes and each agent manages its own information regarding the strategy used, to achieve the proposed objective. Thus, to conduct one or more negotiations, in an effective manner, considering all dimensions of negotiations, coordination mechanisms with well-defined functionalities are needed.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous microgrids. Typically, these are competing companies. However, to better meet customer energy demands, they must enter in an alliance and must cooperate to achieve common tasks. The manager of a microgrid wants to have a complete decision-making power over the administration of his contracts, resources, budget, and clients. At the same time, the manager attempts to cooperate with other microgrids to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that the manager is in charge and can select the information exchanged.

Section 2 presents the theoretical background. In Section 3 we are describing the collaborative platform for coordinating concurrent negotiation activities[5]. In Section 4 we define the Coordination Components that manage different negotiations that may take place simultaneously. In Sections 5 we present the collaborative approach and the proposed solution, and, finally, Section 6 concludes this paper.

2. Theoretical Background

2.1. Generic coordination of negotiations

Many research papers highlight the importance of microgrids as a valued energy solution where distributed (renewable) sources respond to local demand (Carrasco et al., 2006). However, due to the different capacity and weather-based characteristic of various distributed sources, microgrids may not provide the best solution to cover the load with stable output. For instance, the power output of solar panels and wind turbines may drop down a large amount in a short time, requiring other sources (*e.g.*, batteries) to cover the drop to sustain power delivery. To solve this issue several solutions regarding a flexible and optimal collaboration approach among microgrids have been proposed. In this context, the authors in (Arefifar et al., 2012) advocate a clustering approach of the distribution system into a set of virtual microgrids with optimized self-adequacy. Reference (Saleh et al., 2015) emphasizes the advantages of multiple microgrids clustering in improving their stability, supply availability and resilience during blackouts.

Whereas these papers mainly focus on a central coordinator of different interactions related to energy trading among interconnected microgrids (*i.e.*, market agents), or between the main grid and microgrids, this work attempts to provide a decentralized solution with minimum information exchange based on a collaborative framework that fully maintains the autonomy of microgrids grouped in an alliance. For this purpose, a lot of coordination, and a flexible and optimal communication among distributed microgrids partners are required to be reach by the alliance cloud infrastructure.

Therefore, the proposed generic collaborative framework refers to define and coordinate the negotiation interactions at communication middleware level, allowing to be integrated in any Multi-agent system (MAS) or directly as a support in a human interaction negotiation system.

The architecture of a framework is structured on several layers (see Fig.1). The Agent Oriented Platform (AOP) bottom layer offers basic services such as: communication between agents or negotiation lifecycle management. Above the PDO layer are:

(i) General Negotiation Protocol (GNP);
(ii) taxonomy of negotiating rules;
(iii) language for defining negotiating rules;
(iv) language for expressing negotiating offers.

[4] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations*, Kluwer Academic Publisher Boston.

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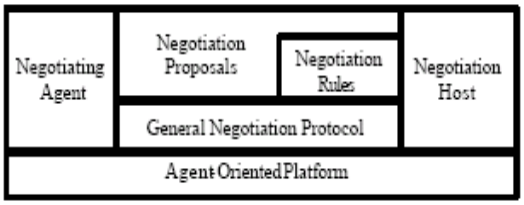
Fig. 1. The architecture of a negotiation framework



The general negotiation protocol is composed of coordination rules that indicate when an agent can send a message and what message it can send.

In this type of negotiation process, agents can have two roles which, according to our approach, are the following: participating agent (negotiating agent) and mediating agent (negotiation host). To negotiate, participants send their offers to a common space (local negotiation), which is controlled by a mediator. This negotiation space is a blackboard on which each agent - participant or mediator - can write. However, only the mediator has full visibility into the information. Its role is to create and enforce the rules of coordination that may impose constraints on the execution of the negotiation protocol, on the validation of offers, on the completion of the negotiation and, of course, on the communication between the participants. So, the negotiation process is modeled as a centralized market in which the mediating agent has the role of coordinating all ongoing negotiations. Depending on the types of rules, the role of the mediating agent is broken down into several sub-roles attached to a taxonomy of declarative rules that can be used to capture a wide variety of negotiation mechanisms. These sub-roles and the types of rules attached are as follows:

- Gatekeeper: establishes the rules for the admission of participants in the negotiation;
- Proposal validator: manages the validity rules that stipulate that each offer must be in accordance with a negotiation format and sets the constraints on the attributes of the negotiated objects and their values;
- Enforcer protocol: establishes several types of rules for fulfilling the negotiation protocol: signaling rules - specifies when a participant can send an offer; improvement rules - specifies which new offers can be sent; withdrawal rules - specifies when the offers can be withdrawn and what is the policy on the expiration period of the offers;
- Agreement maker: establishes several types of rules, especially for updating the status of participants and the information to which each participant has access. These rules are: update rules - specify how the negotiation parameters change under the influence of certain events; visibility rules - specify which participants can access a certain offer; display rules - specifies whether certain information (a new offer or a new agreement) is visible to a participant and how this information will be shared between participants;
- Information updater: establishes the rules for accepting an agreement; this set of rules determines which agreements should be concluded given a set of offers of which at least two are compatible;
- Negotiation terminator: sets the rules for the life cycle of the negotiation process, indicating when the negotiation should stop.

The mediating agent, with his role and sub-roles, behaves like a system of cooperative agents that communicates with the help of a blackboard. From the participants' point of view, these agents are seen as a single mediating agent coordinating the negotiation. This centralization of the coordination process leads to the non-existence of a distribution of control over the interactions between the participating agents and the mediating agent. Each agent participating in a negotiation sends offers to the mediating agent and it is the one who, using the set of coordination rules as filters, decides if the offer is valid and who can access this offer. Thus, in the proposed system, the coordination process not only manages the dependencies between the initial and final state of negotiation, but also the dependencies between the intermediate states of negotiation. In other words, the mediating agent is able to check the constraints for each offer sent. These constraints aim to synchronize communication in negotiations. Although all the submitted offers are available at the level of the mediating agent, he cannot fix the dependencies on the values of these offers without having any information about the purpose and strategies of the different participating agents. In conclusion, the system allows modeling and coordination of n-type negotiations to n participants as a lot of one-to-one type negotiations, but always having the mediating agent as one of the participants. This approach has advantages in terms of optimizing the coordination of interactions but limits the autonomy and power of the participating agents through the various rules imposed and managed by the mediating agent.

2.2. Interaction Oriented Programming

In order to implement a multi-agent system, with autonomous agents that can interact with each other, not only the application-specific aspects must be coordinated, but also the aspects related to the agents' behavior and the possible interactions between them. The IOP (Interaction Oriented Programming) approach achieves this type of coordination based on the communication protocol or on the organizational characteristics of the system. These means are rigid and can sometimes limit the autonomy of the agent. In order

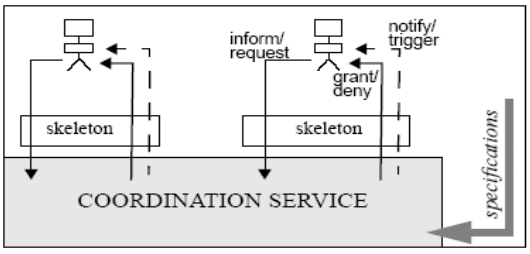
for the agents to maintain their autonomy, Singh proposed separating the coordination of a multi-agent system into a separate service[6]. Singh's approach to coordinating agent autonomy is structured on two levels. First, at the programming level, where agents may be implemented differently and their internal details may be unavailable. And, secondly, at the level of the agent's behavior, where the agents act autonomously and can perform certain specific actions.

Coordination refers to the actions that the agent performs externally and which are considered as potentially significant for the coordination service. These actions are called events and can be of four types:

- flexible: events that show that the agent is willing to delay the action or withdraw it;
- inevitable: events that show that the agent is only willing to delay the action;
- immediate: events that show that the agent does not want to delay or withdraw the action;
- triggerable: events that show that the agent can execute the action but only at the request of the system.

An agent's events are then organized into a framework (skeleton) to provide a simple model of agent-level coordination. Each event was associated with a "guard" that expresses the conditions in the system for which the exemption must be executed. The expressed conditions fix the constraints on the eventual execution of the event and of other events on which it depends in order to be executed. Figure 2 shows how the coordination service interacts with the agencies. Agents inform the coordination service about immediate events and request permission for unavoidable and flexible events. The coordination service grants or does not grant permissions on flexible events, delays unavoidable events or triggers triggerable events depending on the "guards" associated with them.

Fig. 2. I.O.P. - Interaction between the coordination service and agents



For effective coordination between events performed by multiple agents, the approach proposed by Singh requires that the following characteristics be met:

g) the dependencies between actions (events) are known from the beginning of the system implementation;

h) the agents communicate with each other, exchanging relevant information on the execution of their actions.

So, the approach proposes a generic coordination service that is implemented in a distributed way between the component agents of the system, as well as the execution of a single workflow that describes the actions necessary to fulfill a single task. Each agent can be seen as an entity that encompasses part of the coordination service and makes decisions about the execution of events based on local information.

In conclusion, we chose to present this system in the end because Singh demonstrates a clear separation between agent-modeled decision-making processes and coordination processes modeled by an outside service. This feature is similar to one of our goals. In Singh's approach, the coordination service is interested in synchronizing interactions between agents without taking into account any information about the content of messages or the purpose of the conversation between agents. Assuming the particular case where conversations between agents refer to negotiation, the only dependencies that the service can manage are the dependencies between the execution of different actions (*i.e.*, sending offers) that make up a negotiation to ensure a coherent flow of conversation.

Depending on the different dimensions of the negotiation process, we can see that the type of strategic coordination is directly influenced by several factors such as: participants and their role, time, object of negotiation and negotiation protocol. Also, given that this type of coordination is implemented in the decision-making process, strategic coordination is therefore strongly influenced by the negotiation strategy. Strategic coordination fixes the dependencies between the initial and final states of negotiation, between the objects of negotiation or between the attributes that describe these objects. Regarding the generic coordination, it does not take into account, at the level of the negotiation process, only the events related to the management of the interactions between activities, actions or messages. Neither the objects of the negotiations nor the participants in the negotiations are taken into account. So, in general, generic coordination is not influenced by any of the dimensions of the negotiation process.

In the different coordination systems presented, we can observe that no coordination is proposed between the intermediate phases of negotiation in order

[6] Singh., M. P., *Interaction-Oriented Programming: Concepts, Theories, and Results on Commitment Protocols*, in AI 2006: Advances in Artificial Intelligence, LNAI 4304, pp. 5-6, 2006.

to dynamically correct the proposals made during the negotiations. This limitation may result from the fact that, in a generic coordination, the necessary data are unavailable. In the case of a strategic coordination, although the necessary data are available, the coordination through a decision process is not the optimal solution for the implementation of the management of the types of dependencies. In other words, strategic approaches that try to take into account dynamic data are hit by the fact that every change that occurs on the data, involves a restart of the decision process, because the decision process is based on history. Certain features of the presented systems meet our objectives, but our problem is much more complex due to the fact that we want to coordinate actions (negotiations) that are performed by competing agents to perform not only a certain task, but several different tasks. An additional aspect is given by the fact that the dependencies to be managed refer to the values of the attributes of the proposals changed during the negotiations. Thus, in addition to coordinating the initial and final states of the negotiations, we will also coordinate the intermediate states, verifying and modifying the content of the messages exchanged during the negotiations.

3. Collaborative Platform

Our approach in terms of coordination of negotiations is structured on two models:

- strategic coordination managed at the agent level;
- generic coordination managed at the middleware level.

This approach (multi-agent and middleware) allows the development of a multi-agent system based on a distributed and competing architecture. Aspects related to the synchronization of the negotiation process are left to the middleware.

In the context of this approach, we break down the negotiation process into three distinct processes:

i) coordination process;
ii) decision process;
iii) communication process.

This structuring of the negotiation process is justified by its complexity, involving multiple dimensions and different mechanisms.

The implementation of a negotiation presupposes the existence of a well-structured coordination mechanism or process. In this sense, we call the *coordination process*, the process that has a global vision on the negotiation, to manage the parallelism and dependence between the actions executed in a complex negotiation. Thus, we will approach the negotiation as a process that preserves the autonomy of the participants - each of them manages their own negotiations and their own information (description of tasks, contracts, partners, etc.). In addition, two important aspects of the negotiation process need to be highlighted:

i) for a single task, one participant is involved in several bilateral negotiations - one for each participant interested in contracting the task;

ii) at the same time, the same participant is engaged in other bilateral negotiations on other different tasks. So, the coordination process is the process that manages, for each participant, three important aspects:

1) coordinating the different proposals received in a bilateral negotiation (one to one) for modeling a multi-phase negotiation on a multi-attribute negotiation object;

2) coordinating several bilateral negotiations to model a multi-participant negotiation;

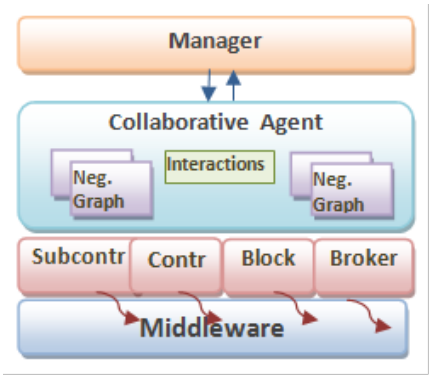
3) coordination of several negotiations in which the participant is engaged.

The aim of this paper is to propose basic mechanisms for coordinating negotiations. These represent mechanisms for interfacing between the generic communication process and the decision process in order to implement negotiation schemes that manage the simultaneous evolution of several negotiations. These coordination mechanisms must maintain the coherence of the agent's decisions in terms of actions that can be executed (initiating or finalizing a negotiation) and proposals that can be sent. This coherence must also be guaranteed both locally (for a single negotiation) and globally (for all negotiations in which a participant is involved).

The main objective of this software infrastructure is to support collaborating activities in virtual enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

Figure 3 shows the architecture of the collaborative system:



This infrastructure is structured in four main layers: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its microgrid manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[7]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place simultaneously.

The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[8]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure (Zhang and Lesser, 2002). A Collaborative Agent aims at managing the negotiations in which its own microgrid is involved (e.g., as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[9].

In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints (Barbuceanu and Wai-Kau, 2003). The manager may participate in the definition and evolution of negotiation frameworks and objects (Keeny and Raiffa, 1976). Decisions are taken by the manager, assisted by his Collaborative Agent (Bui and Kowalczyk, 2003). For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents (Faratin, 2000).

4. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose the negotiation components[10]: *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning.

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[11].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of coordination components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus, we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual enterprise. To achieve a generic coordination framework, nonselective and flexible, we found

[7] Bamford J.D., Gomes-Casseres B., and Robinson M.S., *Mastering Alliance Strategy: A Comprehensive Guide to Design*, Management and Organization, San Francisco: Jossey-Bass, 2003.
[8] Smith R., and Davis R., *Framework for cooperation in distributed problem solving*, IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.
[9] Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991.
[10] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes*. In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011.
[11] Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000.

necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. In the next sub-sections we will describe the *Subcontracting* and *Contracting* components.

4.1. Subcontracting Component

The *Subcontracting* component is the main component of a negotiation. The automatic negotiation process is initiated by creating an instance of this component starting from the initial negotiation object. Further, this component must build the negotiation graph by following the negotiation requirements (*i.e.*, assessment and creation of proposals and coordination rules). The component meets these requirements by manipulating the Xplore primitives [14].

Besides these functionalities, the *Subcontracting* component has to interpret and check the negotiation constraints, which are set up in the following two data structures: *Negotiation Object* and *Negotiation Framework*.

The information provided by the structure of the Negotiation Object on the possible values of the attributes to be negotiated allow easily the *Subcontracting* component to check whether the proposals received concern the attributes negotiated in the current negotiation and if they are associated to the values of the intervals specified.

For example, assuming that the Negotiation Object requires that the price should be (*cost <= 10k)*, the *Subcontracting* component can stop the continuation of the negotiation in the phases associated to the white nodes where the proposals are outside the interval.

Also, by using the *partner* coordination attribute, the *Subcontracting* component can make known to the other components the participants imposed by the Negotiation Object or whether other components instantiate this attribute. In this regard, the *Subcontracting* component can easily check if the associated value confirms the constraints imposed by the Manager.

At middleware level, the *Subcontracting* component has also the function of administrating the transactional aspect of the negotiation. This component is seen like a *coordinator* and has the role to conclude an agreement among the component instances participating in the same negotiation.

Another *Subcontracting* component functionality is to interpret and execute the tactics specified in the Negotiation Framework structure by connecting a combination of different instances of the other components.

Thus, the *Subcontracting* component as well as the *Contracting* component described below are those connecting the aspects specified at the Negotiation Agent level and their implementation at the coordination components level.

4.2. Contracting Component

The *Contracting* component manages the negotiation from the organization side deciding to accept a task proposed in the collaborative networked environment, with some functionalities similar to those of the *Subcontracting* component.

The differences come from the fact that this component does not have a complete picture on the negotiation and that, at the beginning of the negotiation, it has no information about what is negotiated or about the constraints of its Manager.

Therefore, looking to the differences, we can say at first that the image of the *Contracting* component on the negotiation graph is limited to the data referring only to its direct negotiation with the *Subcontracting* component or with another component negotiating for the organization having initiated the negotiation.

Secondly, unlike the *Subcontracting* component, which, from the beginning, has constraints specified by the Manager within the data structures of the *Negotiation Object* and the *Negotiation Framework*, the *Contracting* component has a close interaction with its own Manager on the new aspects required in the negotiation.

Thus, depending on attributes required by the negotiation initiator the *Contracting* component can progressively build the data structures describing the Manager's preferences on the negotiation object and on the negotiation process.

5. Collaborative Approach

In the proposed scenario, a conflict occurs in a network of enterprises, threatening to jeopardize the interoperability of the entire system. The first step consists in identifying the Enterprise Interoperability issue. The following steps refer to analyse the problem, evaluate possible solutions and select the optimal solution. The proposed solution for conflict resolution is reaching a mutual agreement through negotiation. The benefit of this approach is the possibility to reach a much more stable solution, unanimously accepted, in a shorter period of time.

The design and coordination of the negotiation process must take into consideration:

- Timing (the time for the negotiation process will be pre-set);
- The set of participants to the negotiation process (which can be involved simultaneous in one or more bilateral negotiations);
- The set of simultaneous negotiations on the

same negotiation object, which must follow a set of coordination policies/ rules;

- The set of coordination policies established by a certain participant and focused on a series of bilateral negotiations[12];
- Strategy/decision algorithm responsible for proposals creation;
- The common ontology, consisting of a set of definitions of the attributes used in negotiation.

The negotiation process begins when one of the enterprises initiate a negotiation proposal towards another enterprise, on a chosen negotiation object. We name this enterprise the Initiating Enterprise (E1). This enterprise also selects the negotiation partners and sets the negotiation conditions (for example sets the timing for the negotiation) (Schumacher, 2001). The negotiation partners are represented by all enterprises on which the proposed change has an impact. We assume this information is available to E1 (if not, the first step would consist in a simple negotiation in which all enterprises are invited to participate at the negotiation of the identified solution. The enterprises which are impacted will accept the negotiation) (Kraus, 2001).

After the selection of invited enterprises (E2 … En), E1 starts bilateral negotiations with each guest enterprise by sending of a first proposal. For all these bilateral negotiations, E1 sets a series of coordination policies/rules (setting the conditions for the mechanism of creation and acceptance of proposals) and a negotiation object/framework (NO/NF), setting the limits of solutions acceptable for E1. Similarly, invited enterprises set their own series of coordination policies and a negotiation object/framework for the ongoing negotiation.

After the first offer sent by E1, each invited enterprise has the possibility to accept, reject or send a counter offer. On each offer sent, participating enterprises, from E1 to E2 ... En follow the same algorithm.

The algorithm is shown below: Pseudocode representation of the negotiation process

Inputs: Enterprises *E1…En; NO(Negotiation Object); NF(Negotiation Framework)*

Outputs: The possible state of a negotiation: *success*, *failure*

```
BEGIN
on receive start from E1{
        send initial offer to partner;
}
on receive offer from partner{
        evaluate offer;
        if(conditions set by the NO/NF are not met){
                offer is rejected;
                if(time allows it){
                        send new offer to partner;
                }else{
                        failure;
                }end if;
        }else{
                send offer to another partner;
        }end if;
        if(receive an accepted offer){
                if(offer is accepted in all bilateral
negotiations){
                        success;
                }else{
                        if(time allows it){
                                send new offer to
partner;
                        }else{
                                failure;
                        }end if;
                }end if;
        if(receive a rejected offer){
                if(offer is active in other bilateral
negotiations){
                        failure in all negotiations;
                }end if;
        }end if;
}
    END
```

[12] Ossowski S., *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, no. 1202, LNAI, Springer Verlag, 1999.

6. Conclusions

This paper proposes a collaborative system for sustainable interoperability by modeling and managing of parallel and concurrent negotiations, which aims to open the market to broader discovery of opportunities and partnerships, to allow formalization and negotiation knowledge to be passed to future negotiations and to properly document negotiation decisions and responsibilities.

We have addressed the issue of collaborative interactions among distributed autonomous microgrids grouped in a virtual enterprise to improve their power supply availability with minimal work and, thus, to better satisfy the customer power needs during the peak demand periods.

The proposed architectural design of the negotiation system of each microgrid is in line with our distributed approach of splitting the negotiation process into three separated processes (i.e., decision-making process, coordination process and communication process). Therefore, communication process is ensured by the middleware layer, which provides generic synchronization mechanisms of communication among several agents based on Xplore protocol.

The coordination process is fully distributed on several coordination modules corresponding to specialized negotiation components, which can be used in real case negotiations.

The decision-making process is ensured by the Negotiation Agent that supports human user in dealing with all the aspects related to the negotiation strategy in terms of evaluating and generating offers, and the protocol for sending offers to the other agents. This feature allows the separation of decision-making process from agents that reinforces the generic applicability of our negotiation framework.

The sequence of this research will comprise the completion of this negotiation framework with the contract management process and a possible renegotiation mechanism.

With respect to the framework middleware, future research shall include handling issues regarding the security and resilience of the stored negotiation data in the cloud and managing privacy aspects as the negotiating parties should be able to seamlessly interoperate but still to maintain their data free from prying eyes; also, several issues need to be solved from non-disclosure of participating parties to secure access to the negotiation process.

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THE INFLUENCE OF SOCIAL EFFECTS ON STOCKS OF DIRECT INVESTMENT IN EASTERN EUROPEAN COUNTRIES

Adelina Andreea SIRITEANU*

Abstract

Currently, the countries of Eastern Europe and the European Union are focused on economic development. And this is governed by respect for environmental rules and human rights. For this reason, the UN has set 17 sustainable development goals, which is in fact a universal program used on a global scale. These SDGs manage 3 types of effects, namely economic, environmental and social. In recent years, developing countries have attracted a fairly high level of direct investment that has contributed to economic growth. In general, direct investment is positively correlated with the level of growth or the cost of labor. Thus, the influence of economic effects in attracting direct investments is usually pursued. In this paper we want to see how the social effects of sustainable development influence the size of direct investment stocks in Eastern European countries. We will analyze the countries of Eastern Europe and which are members of the European Union in the period 1995-2020 and we will use the Eviews program. Thus, following the running of the multiple regression equation, we found that in attracting direct investments in Eastern Europe in the period 1995-2020, the social effects have a positive influence, over 40% of the total stocks.

Keywords: *stock of direct investments; sustainable development; social effect; economical growth; Est Europe.*

JEL Classification: *G28, O11, Q01*

1. Introduction

Currently, an economically developed country is based on an abundance of capital (Horobeț and Popovici, 2017). Thus, we can say that underdeveloped countries are experiencing a limitation of public sources of investment. These limitations can be attributed to different national interests, such as controlling the budget deficit, paying pensions or salaries. And due to a weak investment activity, the economy has to lose. On the other hand, if public resources are limited, then public policies should encourage private funding. Direct investment is a healthy resource on which the economy can rely on both stability and imbalance.

Since the 1990s, direct investment has become a major source of capital inflows into both developed and emerging economies. This type of investment is mainly made by multinational companies entering a local market and creating new production facilities in the host countries (Qiu L.D., Wang S., 2011).

The long-term success of investors also implies the economic progress of the companies in which they invest and, automatically, the employees will also know a social progress. This idea of progressivity is intertwined with the goals of sustainable development, which are based on social progress, environmental balance and economic growth. Thus, in this context we want to focus on the social effects of sustainable development and observe their influences on direct investment stocks.

Although the beginning of 2020 did not seem to bring anything different from the reality we were used to living in, in March we began to come into contact with a new life marked by the decision of the world's states to declare a health crisis, pandemic and lockdown. Thus, we will include in the analysis the period 1995-2020 in order to have an extended area of time and in which to include this recent crisis.

2. Direct investment

The Organization for Economic Co-operation and Development (OECD) defined FDI in 2008 as "a reflection of the objective of obtaining a long-term interest in an entity resident in an economy (referred to as a "direct investment enterprise") by an entity resident in another economy (referred to as a "direct investor"), this interest implying a long-term relationship between the direct investor and the direct investment firm, as well as a significant degree of influence of the investor on the management of the receiving enterprise "(https : //www.oecd.org/ investment/fdibenchmarkdefinition.htm).

Foreign direct investment hosting a long-term investment relationship that takes place between 2 entities, respectively a resident and the other non-

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resident (https://www.bnr.ro/Cercetarea-statistica-pentru-determinarea-investi%c8%9biilor-). foreign-direct- (ISD) -18375.aspx). This relationship usually involves significant managerial influence by investors in the companies in which they have invested.

In general, direct investments are correlated with economic growth, given the fact that the volume of investments and their efficiency increase. Direct investment is also believed to contribute to economic growth through technologies that are dispersed from the developed economies of developing countries (Borensztein et al., 1998).

In Table 1 we have presented a description of the descriptive statistics of direct investments in Eastern European countries in the period 1995-2020.

Table 1: Descriptive statistics for direct investment

	Direct investment in the reporting economy (stocks) - annual data, % of GDP
Mean	74.73821
Median	57.80000
Maximum	327.3000
Minimum	12.20000
Std. Dev.	58.08744
Skewness	2.125208
Kurtosis	7.127930
Jarque-Bera	179.9174
Probability	0.000000
Sum	9192.800
Sum Sq. Dev.	411646.4
Observations	123

Source: Author

On average, all the analyzed countries in Eastern Europe recorded a level of direct investment stocks of 74.74% of the total GDP in the period 1995-2020. Most DI stocks as% of GDP have values between 12.20-327.20% in the analyzed period.

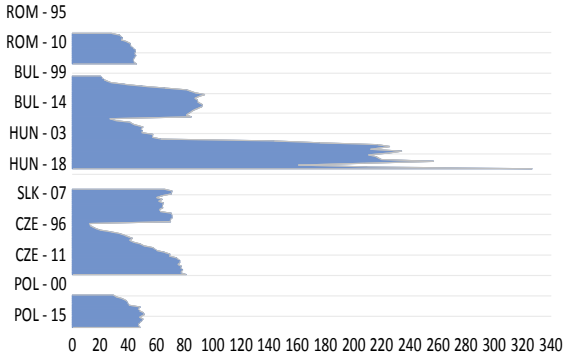
The skewness has the value of 2.13> 0, therefore we have an asymmetry to the right.

Kurtosis has a value of 7.13> 3, so it is called leptocurtic.

Coefficient of variation (std, dev / mean * 100 = 58.09 / 74.74 * 100 = 77.72%)> 50%, therefore we have a heterogeneous distribution.

In graph 1 we presented the direct investments from 1995-2020 in the analyzed countries.

Chart 1: Evolution of direct investment DI



Source: Author

It is noted that Hungary has the highest level of direct investment stocks in the period under review. At the opposite pole is Romania, with the lowest level of direct investment stocks from 1995-2020. However, there is an upward trend in direct investment stocks in Romania.

3. Indicators of social influence, a pylon of sustainable development

The concept of sustainable development has its origins in the Brundtland Report of 1986. Sustainable development is based on 3 fundamental pillars, namely the environment, the economy and society. This first vision dates back to 1979 and belongs to economist Rene Passet. The concept has also been defined on the basis of the phrase "ecology, economy and equity" (Passet R., 1979).

In this paper we will focus only on the social side of sustainable development. Thus, we will analyze the influences of the social effects of sustainable development on the level of direct investment stocks.

In Chart 2 we made a presentation of the indicators used to define the social effects of sustainable development.

Chart 2: Indicators used to define the social effects of sustainable development

Source: Author

Among the 17 goals included in the 2030 Agenda by the UN is the eradication of poverty. Thus, we introduced the indicator People at risk of poverty or social exclusion. People exposed to poverty have an equivalent disposable income below the at-risk-of-poverty threshold, which is set at 60% of the median equivalent disposable income (after social transfers).

Another goal refers to health and well-being. Thus, life expectancy at birth is an indicator that measures the number of years a newborn is expected to live. Thus, this indicator measures the health of the population. However, it is not an indicator capable of answering the question of whether the extra years of life gained through increased longevity are spent in good or poor health. Thus, the indicator of healthy life years has developed. This indicator focuses on the quality of life of a person who spends his life in a healthy state. It does not focus on the amount of life.

Another goal of the UN is decent work and growth. Thus, we introduced the official development assistance indicator. It takes the form of grants or loans from the official sector to promote economic development and well-being in the beneficiary countries. Thus, through these payments an international transfer of financial resources / goods / services valued at the cost of the donor is registered.

Through the goal of decent work and growth, full employment is desired. Thus, people aged 55-64 have a fairly high risk of not being employed in the event of dismissal. For this reason, we have introduced the indicator of the employment rate of older workers, with the specification of this age category.

4. Data and methodology

In Table 1 we will make a presentation of the notations made to determine the influence of social effects on direct investment in Romania, Bulgaria, Hungary, Slovakia, the Czech Republic and Poland in the period 1995-2020.

Table 1: Notations

Variable	Type of variable	Explication
Y	Dependentă	Direct investment in the reporting economy (stocks) - annual data, % of GDP
X_1	Independentă	Healthy life years at birth by sex (total)
X_2	Independentă	Life expectancy at birth by sex (total)
X_3	Independentă	Official development assistance as share of gross nation income
X_4	Independentă	Employment rate of older workers, age group 55-64
X_5	Independentă	People at risk of poverty or social exclusion

Source: Author

Data on official development assistance as a share of gross national income were obtained from the OECD website. The other data related to the other 4 variables were obtained from the Eurostat website.

We will first check if the analyzed variables are stationary. And if they are not stationary we will apply the Unit ROOT test with a difference.

Next, we run the regression equation. All these operations will be performed using the Eviews 12 software.

The equation used to determine the social effects of direct investment is:

$$Y=\beta_0+\beta_1*X_1+\beta_2*X_2+\beta_3*X_3+\beta_4*X_4+\beta_5*X_5+\varepsilon$$

where,

B0 = constant

B1 = parameter of the independent variable X_1, Healthy life years at birth by sex (total);

B2 = the parameter of the 2nd independent variable X_2, Life expectancy at birth by sex (total);

B3 = the parameter of the 3rd independent variable X_3, Official development assistance as share of gross national income;

B4 = the parameter of the 4th independent variables X_4, Official development assistance as share of gross national income;

B5 = the parameter of the 5th independent variables X_5, People at risk of poverty or social exclusion;

ε = error term of the equation.

5. Results

In Table 2 we will apply 2 unit root tests to see which of the 6 variables are stationary.

Table 2: Unit root tests for social effect

Levin, Lin and Chu	Level		1st difference	
	Statis.	Prob.	Statis.	Prob.
Y	-2.56738	0.0051	-	-
X_1	-0.45398	0.3249	-6.42987	0.0000
X_2	1.50384	0.9337	-5.68546	0.0000
X_3	1.02292	0.8468	-6.37779	0.0000
X_4	1.53208	0.9372	-6.85644	0.0000
X_5	-0.99595	-0.1599	-7.29972	0.0000
ADF test				
Y	8.95612	0.7067	62.8102	0.0000
X_1	4.64840	0.9687	44.5339	0.0000
X_2	2.46757	0.9983	41.2620	0.0000
X_3	2.00314	0.9994	57.6300	0.0000
X_4	1.17771	1.0000	47.0859	0.0000
X_5	9.29197	0.6778	54.6419	0.0000

Source: Author

It can be seen that in the case of the first test, the first variable, the stocks of direct investments as% of GDP, are stationary with a probability of 5% level. The other 4 variables are stationary by applying the test with a difference of 5% significance threshold.

In the case of the second test performed, we notice that all variables are stationary at the first difference.

Once the variables are stationary, we can run the regression equation to determine the influence of the social effects on direct investment stocks in the period 1995-2020.

Within the table 3 we made a presentation of the regression equation using the least squares method.

Table 3: The results of the equation for social effect

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	17.04286	3.094265	5.507887	0.0000
X_1	-0.721045	0.287432	-2.508579	0.0133
X_2	0.896295	0.267654	3.348706	0.0010
X_3	612.2165	102.1025	5.996099	0.0000
X_4	-1.101827	0.432672	-2.546562	0.0120
X_5	1.185305	0.316033	3.750577	0.0003
R-squared	0.440984	Prob (F-statistic)		0.000000
Adjusted R-square	0.421019	Mean dependent var		54.33767
S.E. of regresssion	41.63674	S.D. dependent var		54.71980
F-statistic	22.08800			

Source: Author

We used a total of 146 observations for 25 periods. It is observed that all variables are accepted at a significance level of 5%.

Prob F statis. is less than 0.05 so the model is valid. Thus, the variables can together influence 42.10% (Adjusted E-square) of direct investments.

The regression equation can be written as follows, according to Table 3:

$Y=17.04286+(-0.721045)*X_1+0.896295*X_2+612.2165*X_3+(-1.101827)*X_4+1.185305*X_5$

It is observed that variables X_2 and X_4 have a negative influence on direct investments. And the variables X_2, X_3 and X_5 have a positive influence on direct investments in the period 1995-2020.

We checked with the White test whether the errors were not correlated with each other. The test results showed a sig = 0.0000 less than 5%, so I reject the null hypothesis and accept the second hypothesis, namely that there is heterodasticity.

We checked the cross-sectional dependence on residues, as there is a fairly large difference between the included periods (24) and the cross-section periods (6). Thus, in the table no. 4 we presented the results of the cross-section dependency test in residues.

Tabel 4: The test results of cross-section dependence in residuals

Test	Statistic	d.f.	Prob.
Breusch-Pagan LM	71.64367	15	0.0000
Pesaran scaled LM	10.34167		0.0000
Bias-corrected scaled LM	10.21667		0.0000
Pesaran CD	0.762566		0.4457

Source: Author

The first 3 tests reject the null hypothesis, which states that there is no cross-section dependence in residues. Only the 4th test has a probability higher than 0.05% and it would accept the null hypothesis. Analyzing the 4 tests, we can reject zero hypotheses, as there is a probability higher than 0.05% in the case of 3 tests. Therefore there is a cross-section correlation between residues.

In table 5 we made a presentation of the correlations that are established between the variables for social effects.

Tabel 5: The correlations that are established between the variables

Variable	Y	X_1	X_2	X_3	X_4	X_5
Y	1.000000	0.590327	0.583820	0.619405	0.558636	0.495161
X_1	0.590327	1.000000	0.785087	0.861631	0.772996	0.859089
X_2	0.583820	0.785087	1.000000	0.819203	0.977761	0.588286
X_3	0.619405	0.861631	0.819203	1.000000	0.833190	0.568781
X_4	0.558636	0.772996	0.977761	0.833190	1.000000	0.549308
X_5	0.495161	0.859089	0.588286	0.568781	0.549308	1.000000

Source: Author

Analyzing these values we can see if there are statistical links between statistical variables, if:

- r <0 then there is a negative connection;
- r is included between (0; 0.4) then there is a positive connection, of low intensity;
- r is included between (0.4; 0.7) then there is a positive connection, of medium intensity;
- r is included between (0.7; 1) then there is a positive connection, of strong intensity.

Thus:

Y and X_1: r = 0.590327> 0, so there is a direct, average correlation;

Y and X_2: r = 0.583820> 0, so there is a direct, average correlation;

Y and X_3: r = 0.619405> 0, so there is a direct, average correlation;

Y and X_4: r = 0.558636> 0, so there is a direct, average correlation;

Y and X_5: r = 0.495161> 0, so there is a direct, average correlation;

X_1 and X_2: r = 0.785087> 0, so there is a direct, strong correlation;

X_1 and X_3: r = 0.861631> 0, so there is a direct, strong correlation;

X_1 and X_4: r = 0.772996> 0, so there is a direct, strong correlation;

X_1 and X_5: r = 0.859089> 0, so there is a direct, strong correlation;

X_2 and $X3_2$: r = 0.819203> 0, so there is a direct, strong correlation;

X_2 and X_4: r = 0.977761> 0, so there is a direct, strong correlation;

X_2 and X_5: r = 0.588286> 0, so there is a direct, average correlation;

X_3 and X_4: r = 0.833190> 0, so there is a direct, strong correlation;

X_3 and X_5: r = 0.568781> 0, so there is a direct, average correlation;

X_4 and X_5: r = 0.549308> 0, so there is a direct, average correlation.

It is observed that direct investments are positively correlated and with an average intensity with all the independent variables introduced in this equation.

It can also be seen that the strongest correlation exists between the independent variables X_2 and X_4 (Life expectancy at birth by sex (total) and Employment rate of older workers, age group 55-64).

The results of this study show that the social effects have a positive, average influence on the stock of direct investments in the 6 countries of Eastern Europe. Thus, social indicators have a positive influence on direct investment, explaining 44.10% of the evolution.

6. Conclusions

In conclusion, following the study, we found that the UN aims to create a developed society both economically and socially by fulfilling its objectives. Thus, the development of a company is achieved through capital.

The long-term success of investors also implies the economic progress of the companies in which they invest and, automatically, the employees will also know a social progress. This idea of progressivity is intertwined with the goals of sustainable development, which are based on social progress, environmental balance and economic growth. Thus, in this context we want to focus on the social effects of sustainable development and observe their influences on direct investment stocks.

The results of this study show that the social effects have a positive, average influence on the stock of direct investments in the 6 countries of Eastern Europe. Thus, social indicators have a positive influence on direct investment, explaining 44.10% of the evolution.

These results may help to reinforce the idea that direct investment creates great benefits in both economically and socially developing countries. Thus, the study can also be used for future studies in which to expand the sample. A comparison can also be made between the influence of social and economic effects on the stock of direct investment.

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UNDERSTANDING AND USING EMOTIONS IN MARKETING

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Abstract

Emotion always had a special power, influencing the decisions of individuals and causing them to act in one way or another. In classical economic theory, consumers play the role of rational individuals making decisions based only on relevant information using conscious thinking. Unfortunately, conscious thinking requires a significant amount of energy from the individual, which has led to the evolution of the human body by limiting this type of thinking, to increase efficiency. Thus, the human brain has come to process unconsciously almost all communication signals in the environment (visual, auditory, tactile, etc.), through implicit processes controlled by the limbic system ("the emotional brain"). As a result, many consumer decisions are made unconsciously and are based on emotions.

It is also well known that consumers' purchasing decisions are driven by two types of needs: functional needs, satisfied through product functions, and emotional needs associated with the psychological aspects of product possession. Emotion is one of the most important motivators for purchasing, representing an important strategic element in the organization's marketing activity, giving meaning and depth to the experience with a brand or a product.

In the age of strategic-relationship marketing, emotion plays a key role. In this context, the following paper reveals important aspects regarding the necessity of understanding how emotions influence consumer behavior together with ways in which emotions can be used in the company's marketing activity.

Keywords: *emotional marketing, consumer behavior, relational marketing, strategic marketing, promotion.*

1. Introduction

Today's consumers are more educated and better equipped to research and find information about things that interest them. On the other hand, they are bombarded from all sides with advertisements, so in this very crowded space, companies have to stand out. And this can be done by accessing a very important component of consumer behavior - emotion.

It is well known that consumer purchasing decisions are driven by two types of needs: functional needs, satisfied through product functions, and emotional needs associated with the psychological aspects of product ownership[1]. Emotion is one of the most important motivators for performing an action[2]. Emotion is the necessary ingredient for almost all decisions[3], an aspect identified after performing neurological studies on individuals whose connection between the areas of the brain dedicated to "thought" and those dedicated to "emotion" have been damaged.

We rely on emotions, not information, to make brand decisions. „When we are confronted with sensory information, the emotional part of our brain can process information in a fifth of the time required by the cognitive part"[4]. In addition, the same areas of the brain dedicated to decision making are also involved in inhibiting behavior[5]. Also, neuromarketing studies performed using magnetic resonance imaging (MRI) reflect the fact that in the process of brand evaluation, consumers use their emotions (personal feelings and experiences) rather than information (brand attributes, product features, etc.)[6]. All this emphasizes the importance of knowing and using emotions in the company's marketing activity, a necessity that led to the shaping of emotional marketing. Emotional marketing aims not only to provoke certain moods in consumers, but also to associate a state of mind with a

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brand that will ultimately lead to loyalty to it. The use of emotions in the marketing activity gives meaning and depth to the experience with a brand or a product, an objective that is mainly targeted in the current marketing activity[7].

In this context, the following paper aimed to reveal, through a secondary data exploratory research, the important aspects regarding the necessity of understanding how emotions influence consumer behavior, and to identify the ways in which emotions can be used in the company's marketing activity.

2. What is emotional marketing

The principles underlying emotional marketing aim to "develop and maintain a socio-emotional relationship with consumers"[8] on the market of interest. In a society where consumers are looking for meaning and experience, the purpose of emotional marketing is to create images and transfer them into consumer consciousness[9]. In other words, emotional marketing targets all marketing activities that are based on stimulating emotions designed to influence consumer decisions[10].

Emotional marketing is a form of marketing communication that involves the deliberate use of persuasive messages designed to stimulate human emotion in order to create a deep connection with the audience meant to ultimately lead to the achievement of marketing objectives, the most important of which is to achieve a long-term relationship with consumers.

In classical economic theory, consumers play the role of rational individuals making decisions based on relevant information using conscious thinking. Unfortunately, conscious thinking is an explicit process that requires a significant amount of energy from the individual, which, through the process of evolution has been limited in order to increase efficiency. This translates into the fact that the human brain processes unconsciously almost all communication signals (visual, auditory, tactile, etc.) from the environment, through implicit processes controlled by the limbic system ("emotional brain"). As a result, many consumer decisions are made unconsciously and based on emotions[11].

The emergence and development of the emotional marketing concept in the context of marketing science is justified by the following main characteristics of consumer needs[12]:

- Consumers want to express themselves and their relationships with others through the objects they possess. Thus, in contemporary society, the expression of one's personality is achieved by satisfying desires based on the existing emotional relationship between the consumer and the company or its product brands. Self-expression is the highest form of personal need that possess emotional characteristics;
- Consumers place more value on those transactions and traded objects that help them express their feelings.

In the context of using emotional marketing, two basic characteristics of emotion are of interest[13]:

- *Valence*, namely whether the emotion is negative or positive;
- *Arousal* - the level of energy produced by emotion.

The variation in valence and arousal produced by an emotion causes individuals to decide whether they should continue or stop, take action, or think carefully. Positive emotions cause us to continue a certain behavior, while negative emotions cause us to consider changing a behavior. On the other hand, emotions with a high level of arousal cause us to act (a high probability of impulse shopping), while emotions with a low level of arousal push us to reflect (a relaxed or bored consumer is more likely to spend time searching, paying more attention to label information). Also, certain negative emotions, such as anger and anxiety, involve a high level of psychological and physiological arousal (revealed by the increase in heart rate, increased activity in the prefrontal area of the brain), while other negative emotions, such as sadness or depression,

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involve a low level of arousal. According to studies, the level of arousal caused by an emotion, whether negative or positive, has different effects on the extent to which we can convince individuals[14]. Thus, emotions with a high level of arousal may lead consumers to prefer action-oriented events, while emotions with a low level of arousal may lead them to prefer passive events.

There are two types of emotions that can influence our decisions[15]: immediate emotions and anticipated emotions. Immediate emotions are those that we experience directly when we make a decision. Immediate emotions are much more intense and can have a major impact on our decisions. Anticipated emotions, on the other hand, are not directly experienced, being expectations of how we will feel after making a decision. The latter are the emotions most often exploited in emotional marketing. For example, BMW allows customers to track car production at every stage, building anticipation before the arrival of the purchased car[16].

The human emotion targeted in emotional marketing can be fear, anger, joy or any other emotion strong enough to lead to a decision or to push to action. The human emotion, especially the negative one, persists and haunts, the tendency of people is to try to free themselves and act according to them.

According to a 2016 Nielsen study, ads with an above-average emotional response from consumers resulted in a 23% increase in sales, as opposed to ads with an emotional response placed at the average level[17]. Also, according to studies conducted in B2B field by Les Binet and Peter Field for B2B Institute, strategies that appeal to emotions are seven times more effective in generating long-term sales, profit and revenue compared to rational messages[18]. These results reflect the importance of emotions in the company's marketing activity.

3. Why is emotional marketing effective?

When properly designed, emotional marketing strategies help differentiate companies in the competitive environment in which they operate because:

- Emotional marketing has a big impact on the audience. Thus, an ad that describes the benefits of a product will have a much lower impact on the audience compared to a funny ad that brings smiles and good mood, or one that impresses to tears.
- Emotional marketing influences the purchasing decision making process. Studies show that people are more likely to rely on emotions, not information, to make purchasing decisions[19]. The emotional response to marketing influences consumers' purchasing intentions and decisions to a much greater extent than the content of an ad or promotional material[20]. According to a study published in the Harvard Business Review[21], customers become more important in terms of purchases, frequency of product use, etc., with each step of the process of "emotional connection" with the brand, a process whose stages start from "being disconnected" to "be fully connected" with the brand.
- People remember much better the companies that apply emotional marketing, considering the fact that emotion and memory are connected to each other. The probability that people will have a lasting memory of emotionally charged events is much higher. Thus, the principle we need to remember for our marketing activity is that intense memories come from strong emotional experiences. Consequently, when the company's activity has an emotional impact on the public, its brand and content will remain in the hearts and minds of consumers for a longer period of time. Also, the emotional experience is able to create memories that can have delayed effects, which can unfold at the time of consumption[22].
- The emotional marketing content is much more shareable. It is human nature to share stories that

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are emotional in some way.

- Emotional marketing contributes to consumer loyalty and creating brand supporters. Studies have shown that positive emotions towards a brand have a much greater influence on consumer loyalty than their confidence or other judgements based on brand attributes would have. Emotions are the main reason consumers prefer branded products[23]. Creating an emotionally charged brand means making it tangible, affordable, and credible for customers so that they unconsciously develop an emotional connection with it[24]. Consumers that have an emotional connection to a brand are far more valuable than consumers who are simply satisfied. Emotionally connected consumers spend twice as much and even more buying from their favorite retailers and will stay true to a brand for an average of 5.1 years, compared to 3.4 years for satisfied consumers[25].

4. The use of emotions in marketing

In neuroscience, specialists distinguish between emotions and feelings[26]. Feelings are consciously experienced and processed by the individual. Feelings are the result of emotions processing, being superior affective states, characterized by a longer duration and a moderate intensity. Emotions, on the other hand, are formulated by the limbic system, a fairly old area of the human brain. Emotions are not subject to awareness, they are spontaneous emotional states, of short duration, with variable intensity. Through emotions such as fear or joy, the limbic system triggers a series of reactions of which we become aware only physiologically (palpitations, nervousness, sweating, etc.). This is, after all, the objective of emotional marketing - to get an emotional reaction from the potential customer before making a conscious decision.

Studies conducted in the field of measuring consumers' emotions classify emotions into two categories - positive emotions (contentment, happiness, love, and pride) and negative emotions (sadness, fear, anger, and shame)[27].

As mentioned earlier, emotional marketing most often uses a single emotion to connect with the audience. And most of the time, the strongest emotion, whether positive or negative, offers the greatest chance of success.

Fear. Of all human emotions, fear probably affects us the most. Consumer fears are either physical fears (related to threats that may affect the human body) or social fears (related to threats that may affect social desirability). Fear causes the consumer to prevent, solve or jump to the aid of others[28]. Evoking fear through a marketing message is useful provided that it aligns with the existing fears of the target audience. Fear of accidents, fear of aging are the threats we face and which can be exploited extremely easily. The proliferation of gluten-free products is an example of how health related fear has been exploited far beyond the number of consumers who are really affected[29]. Fear can also be created where it did not previously exist. Some time ago the fear of aging did not exist for the men's segment, but now there are anti-aging products specially created for men. And danger is not the only element that can be exploited in this context. Fear of missing out ("FOMO") is a fear that can be exploited in social networks. The fear of missing out can be exploited by timing moments to the deadline of an exceptional offer. Fear also urges us to cling to something comfortable and this ultimately leads to increased brand loyalty. The use of fear in emotional marketing allows the association of the brand with the only good thing in a dark world. However, the use of fear must be done in moderation. For campaigns in which fear is exploited, it is necessary to identify how the brand (the source) influences the conveyed message and how the message exploiting this emotion, especially if used in the long term, influences the brand[30].

Anger. The exploitation of anger in marketing is making people realize that something needs to be done or changed in order for justice to prevail or for a problem to be solved. Anger also causes us to be stubborn, and stubbornness leads to viral content and

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[23] Murray, P.N., 2013, *How Emotions Influence What We Buy*, Psychology Today, February 26, https://www.psychologytoday.com/intl/blog/inside-the-consumer-mind/201302/how-emotions-influence-what-we-buy.

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[29] Wong, W., 2019, *The Science Of Emotion: 4 Keys To Effective Social Media Marketing*, SEOPressor, https://seopressor.com/blog/science-of-emotion-effective-social-media-marketing/.

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loyal followers, considering that strong emotions such as anger cause people to share. Thus, the "Together for Magic Home" campaign called on people to take a stand in solidarity with the parents of children battling cancer, knowing the situation in Romanian hospitals where the parents of children suffering from cancer are forced to live in a chair next to their bed. The outcome of this campaign was overwhelming. By the end of November 2017, half a million euros had been raised and 60% of initial donors had maintained their monthly subscription, making MagicHOME the recurring campaign with the highest retention rate after more than 6 months. The money raised from SMS donations alone has reached over 1 million euros[31]. Another example of effective emotional marketing is the #unfollowhate campaign launched in 2021 by ING Bank, meant to encourage Romanians to not be influenced by negative comments, in response to the online harassment phenomenon[32].

Happiness. Considering that everyone is looking for happiness, a positive emotion, we can make use of the "marketing of joy" thus contributing to the association of the brand with positivity. Happiness also causes consumers to share[33] everything that makes them smile, and this action ultimately leads to increased brand awareness, taking into account the fact that today thanks to social media, good news are circulating much faster[34]. Advertisements designed to promote Nutella, for example, successfully exploit the feeling of happiness and good mood. Since December 2020, Nutella has been promoted in the "It's Good To Be Together With Nutella" campaign[35], in which Nutella's contribution to family happiness is quite obvious. And who doesn't want at least a piece of happiness like the one offered in Nutella videos!?

Sadness makes us empathize and relate so that it is not surprising that animal welfare associations present touching pictures of animals when requesting a donation. In this case, the feeling of sadness makes us act and help, at least by directing the 3.5% of the income tax. On the other hand, sadness intrigues us. Thus, the use of "sad news" in the online environment causes the consumer to access the links. In other words, using words with negative connotations contributes to a higher accessing rate[36].

Belonging. There are few those who want to be alone. The desire for intimacy, strong bonds and security that come with joining a group is in our human nature. Maslow acknowledged that the sense of belonging is one of the most basic needs that motivates consumer behavior. That's the reason why we're seeing more and more brands creating online and offline communities where their loyal consumers share common interests. Neumarkt, for example, created the "men as they should be"[37] club in 2021 aiming to make consumers feel part of a community.

Greed. Delighting consumers is one of the main goals of marketers, and this is usually the case when people feel that they have received much more than what they paid for. In this case, it's all about greed. Offers such as those with a 75% discount and free shipping accompanied by a sense of urgency ("limited offer", "offer valid only 6 days"!) rely on consumer greed.

But these are just basic emotions. Emotions actually fall into a much wider spectrum. A slight change in the spectrum can lead to a certain kind of happiness, a certain kind of sadness, a certain kind of anger ... similar to the different shades of a color (see Robert Plutchik's "wheel of emotions").

On the other hand, negative emotions can have a rather intense delayed effect while positive emotions are much more appreciated by consumers when the message is communicated[38]. Also, using negative emotions in marketing is ideal in the case we want to get people to avoid certain behaviors or events, and less when we want to build brand loyalty, in which case the strategy should target positive emotions[39].

As we do with any marketing objective, we should also clearly define the targeted feeling in the emotional marketing activity, this objective further influencing all the details of the marketing activity carried out in this regard. Depending on the type of product, field, and audience, emotional marketing may

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[31] Bunea, I., 2019, *STUDIU DE CAZ. Povestea Magic Home, Grand Effie 2018: MagicHome, campania virală a anului, care a strâns donații de peste jumătate de milion de euro în mai puțin de o lună*, Paginademedia.ro, https://www.paginademedia.ro/2019/05/studiu-de-caz-magichome-grand-effie/.

[32] ING Romania, 29 December 2021, *Unfollow hate* [Video], YouTube, https://www.youtube.com/watch?v=kAqo-4Txn1g.

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not target just a general feeling, such as "happiness". The targeted feeling can be extremely subtle, such as the feeling of "security", "trust" or simply getting people to like the brand. In addition, emotional marketing should aim to create a long-term relationship with consumers, a friendly relationship rather than one that has the characteristics of a marriage[40].

5. Emotional marketing tools

Similar to any type of marketing strategy, there is also a set of systematic actions in the case of emotional marketing that can lead to achieving marketing objectives:

In-depth knowledge of the audience. When it comes to emotional connection, the only way to reach consumers' hearts is to rely on a more personal understanding of them, where we know the deepest fears, the strongest desires, the personal struggles and the motivations of the targeted audience. Many companies face difficulties in determining how their product can make consumers happy. Identifying and measuring consumers' emotional motives is a rather complicated task, given that consumers may not be aware of them. Emotional motives may differ from those stated by consumers[41]. However, any company can start a structured process of determining the emotional motivators of its customers based on which a series of experiments can be performed in order to capitalize on them, evolving later from this point. Also, companies can go so far as to conduct in-depth research and metadata analysis or contract the specialized services offered in this field.

Establishing the emotion that is to be the subject of emotional marketing. It is advisable to select an emotion or two around which the future marketing activity will be built. In-depth knowledge of the audience should be used in interdependence with information about the type of product, the company's position on the targeted market and the cognitive and behavioral level with the greatest utility for the brand. Also, a particularly important aspect to consider in this context refers to the fact that not only the content of applied marketing will determine emotions, but also how it interacts with the emotions that the public already has. For instance, the anxiety and fear that consumers have gone through during this pandemic should in no way be reflected in the marketing activity, a situation that could be counterproductive[42].

Creating a story. Once we know the audience in depth, we can next create stories that consumers can relate to. People are delighted to listen to stories they can empathize with, learn from, or be inspired by. Such a story can also lead consumers to share it with their peers. In addition, emotionally charged stories increase dopamine levels in the brain, which stimulates memory. However, we must be careful that the message we use has an impact, but without selling the brand openly.

Creative design. The emotional impact that colors have on people is already well known[43], so that these can be used to enhance the emotional appeal of promoted content, taking into account, of course, the cultural diversity that imposes different interpretations of colors.

For example, studies conducted in this field have shown that individuals react more favorably and have a higher rate of purchases in commercial spaces where the color blue is used and that warm-colored backgrounds draw more attention and determine consumers to visit the store. Also, children associate positive feelings with light colors and negative feelings with dark colors[44].

But it's not just colors that have an impact on consumers. Music, in turn, can cause a strong emotional reaction that can influence consumers' perceptions of a particular brand. Smell and hearing are other stimuli that can trigger emotions. Odors have a great ability to imprint memories[45]. Various flavors and certain melodic lines have long been used in stores. Real estate agents use coffee or cake flavor to stimulate „home" related emotions. Also, the constant development of AR and VR applications gives the opportunity of using digital media to engage customers in an even more intense way, allowing them to experience brands and products in a much more emotionally intense manner[46].

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[40] Fernandes, T., Proenca, J., 2013, *Reassessing Relationships in Consumer Markets: Emotion, Cognition, and Consumer Relationship Intention*, Journal of Relationship Marketing, vol. 12, Issue 1, pp. 41-58, https://www.tandfonline.com/doi/abs/10.1080/15332667.2013.763719.

[41] Goward, C., 2021, *Increase customer engagement by creating emotional marketing experiences*, Widerfunnel (blog), June 17, https://www.widerfunnel.com/blog/emotional-relevance-marketing/.

[42] Fleming, J., 2020, *The five most important emotions in B2B marketing today*, Marketing Blog LinkedIn, August 17,https://business.linkedin.com/en-uk/marketing-solutions/blog/posts/B2B-Marketing/2020/The-five-most-important-emotions-in-B2B-marketing-today.

[43] Cherry, K., 2020, *Color Psychology: Does It Affect How You Feel? How Colors Impact Moods, Feelings, and Behaviors*, Verywell Mind, May 28 2020, https://www.verywellmind.com/color-psychology-2795824.

[44] Lin, I.Y., 2004, *Evaluating a servicescape: the effect of cognition and emotion*, Hospitality Management, no. 24, pp. 163-178, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.606.2671&rep=rep1&type=pdf.

[45] Consoli, D., 2010, *A New Concept of Marketing: The Emotional Marketing*, BRAND. Broad Research in Accounting, Negotiation, and Distribution, vol. 1. Issue 1, ISSN 2067-8177, https://www.edusoft.ro/brain/index.php/brand/article/view/76.

[46] Heintz, E., 2020, *Positive energy! How emotional marketing wins the hearts of customers*, DMEXCO - Digital Marketing Exposition & Conference, July 15, https://dmexco.com/stories/positive-energy-how-emotional-marketing-wins-the-hearts-of-customers/.

Authenticity. The use of emotional marketing involves authenticity and sincerity, aspects to which the public is particularly sensitive. In this regard, the company must clearly establish its core values and then align these values with its emotional marketing activity. It is also necessary to take into account the fact that the emotional impact is not only obtained through the words and images used, but also through behavior. Thus, the company must have a behavior that is consistent with the promoted image. In addition, the company must initiate activities in which the community has the opportunity to get involved. This leads to the creation of an emotional connection based on feelings of affinity and trust.

Creating a social movement or a community. Feelings of camaraderie and acceptance can lead to a sense of attachment to a brand. Also, the sense of community inspires members to agree with each other. In other words, if members of a community prefer certain brands, the other members are likely to prefer those brands as well. This also reduces the likelihood that members of a community will change the brand they use.

Organizing campaigns that aim for dreams, goals, or aspirations that the audience longs to fulfill. Consumers may want, for example, financial security or simply a highway run with a powerful car. In this regard, the company must determine, first of all, how its product can contribute to achieving consumers' dreams, goals and aspirations, and then build a story that turns the dream into reality.

Basically, the principle stated by Tom Fishburne that "the best marketing doesn't feel like marketing" must be taken into account in emotional marketing. A good emotional marketing strategy contains rational arguments that at the same time generate emotions. In marketing, the subtle feeling that a brand understands you is often the strongest of all[47].

6. Measuring the effectiveness of emotional marketing activity

The success of the emotional marketing activity is measured based on the same indicators used to measure the success of any marketing effort. In addition, in the emotional marketing activity, the emotional response pursued through this kind of activity is also of interest. Beyond the clicks, subscriptions or purchases made, consumers' reaction to the activity carried out is also important. In this case, *surveys* can be an important method for determining this reaction. Also, the possibility of obtaining consumers' *feedback* can be an aspect to consider in the process of designing the activity carried out. *Focus groups* also give the opportunity to get important details about consumers' reaction. *Observation* of actual consumer behavior is also quite relevant. Physiological reactions, facial expressions or heart rate, reflect the emotions of individuals quite well. Moreover, *neuromarketing* allows the measurement of the brain activity of consumers in order to determine the effects of emotional marketing. At the same time, *experiments* can be performed to reflect the effectiveness of different combinations of elements in order to achieve the desired emotional effect[48].

In addition, it is useful to determine how the emotions exploited in the emotional marketing activity are translated into the actions of the targeted consumers. As mentioned earlier, happiness is expected to translate into sharing (number of shares), sadness into generosity, fear into loyalty (number of subscriptions, followers), and anger into virality. Thus, depending on the emotion exploited in the marketing activity, we can expect an increase in the expected actions.

7. Conclusions

Relationships have become increasingly important in the process of making purchasing decisions, which leads to an increased attachment to brands that reflect and are in agreement with consumers' personal values.

In addition, it should not be overlooked that a company's products and services are designed to satisfy the desires and needs of consumers, and these desires always have an emotional component. Under these conditions, emotion has become an important strategic element in an organization's marketing activity, giving meaning and depth to the experience with a brand or a product. Companies must take an active role in shaping the emotions associated with them, otherwise other feelings will certainly fill this fruitless void, feelings that will not necessarily be to the benefit of the company.

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THE IMPACT OF THE PANDEMIC ON SME EMPLOYEES IN EU MEMBER STATES

Erika-Maria DOACĂ*

Abstract

Small and medium-sized enterprises play a very important role in the country's economy, as they contribute significantly to growth and job creation. However, small and medium-sized businesses around the world have been severely affected by the COVID-19 pandemic. The main objective of this paper is to investigate how the pandemic affected the performance of small and medium enterprises and how effective the measures taken by the state in combating the effects on this sector were. We also aim to highlight the measures taken to save employees from unemployment. Through its content, the paper indicates that the vast majority of employees were severely affected by the pandemic, with HoReCa employees being the ones who suffered the most. The data used in this research are from 2020, and the dependent variable is the number of employees in small and medium-sized enterprises, and the independent variables are the unemployment rate, the inflation rate, the annual growth rate of real GDP and the incidence rate of households. COVID per 100,000 inhabitants. Among the most important measures taken by the authorities to reduce the effects of the pandemic on SMEs and employees are the state granting 75% unemployment benefits, the use of new sources of funding (grants, state-funded programs, etc.).

Keywords: *COVID-19, employees, unemployment, measures taken.*

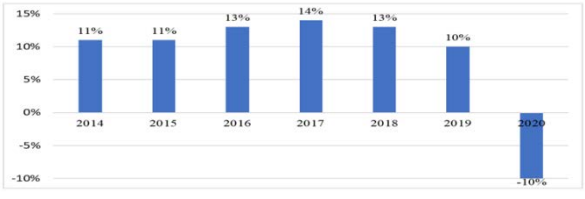
1. Introduction

Small and medium-sized enterprises are the backbone of the economy. They represent 99% of companies in the European Union, employing over 100 million people. SMEs also contribute innovative solutions to climate change, with those emerging in the economy being key to the transition to a sustainable and digital economy. Small and medium-sized enterprises are of vital importance in terms of Europe's competitiveness and prosperity. In addition to the significant social impact, the COVID-19 pandemic has also caused a major shock to the European Union's economies, as the spread of the virus has led to disruptions in supply chains, volatility in financial markets and declining consumer demand for certain key sectors. which tourism and travel.

The COVID-19 pandemic has affected all countries in the world, affecting economic activity both globally and nationally. As a result of the "lock-downs" imposed in each country, economic activity decreased significantly. Thus, these decreases also had effects on the employment rate, and therefore on the unemployment rate. The crisis caused by the COVID-19 pandemic has negatively affected employees in all fields, especially those in the hospitality and tourism industry. As a result of the state of emergency, SMEs in Europe have felt the losses caused by the restrictions imposed. The problem facing the SME sector is that the COVID-19 pandemic has gone from a health crisis to an economic crisis. That's why business owners have tried to survive the two crises by using the resources at their disposal.

According to a study conducted by Oracle, the COVID-19 pandemic affected employees around the world, causing them to feel lonely and out of control[1]. Also, globally, over 62% of workers consider 2021 to be the most stressful year at work. In the last year, 80% of employees worldwide said they were affected by the pandemic, 29% said they were experiencing financial difficulties, 28% said they had suffered a mental deterioration, 25% did not feel motivated to continue their careers and 23 They felt separated from their own lives. In 2020, the number of employees in SMEs decreased by 10%, due to the restrictions imposed by the pandemic. In figure 1 we presented the evolution of the number of employees in the EU member states, in the period 2014-2020.

Figure 1. Evolution of the number of employees, at EU level, in the period 2014-2020



Source: European Commission, 2020. An SME strategy for a sustainable and digital Europe. Brussels: EC,

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[1] https://www.oracle.com/ro/news/announcement/people-believe-robots-can-support-their-career-2021-10-26/.

2. Analysis of the specialized literature

Some authors analyze the impact of the COVID-19 pandemic on the labor market in EU member states[2]. It also looked at measures taken by each EU member state to combat the social effects of the pandemic crisis, as well as how the EU's efforts to implement the objectives of the European Pillar of Social Rights and more specifically: Labor and Employment, Skills and Innovation, Welfare Status and Social Protection, all of which were discussed at the Porto Social Summit on 7 May 2021. The author also analyzed the evolution of labor supply and demand, taking Considering three macroeconomic indicators: employment rate, unemployment rate and index of actual hours worked, data from Eurostat. The author's conclusions are based on capitalizing on the challenges of the pandemic crisis and transforming them into new opportunities for development, innovation and job creation. Also, an important aspect to consider in the future is the digitalization of the business and the implementation of a sustainable economy, based on green energy.

The effects of the pandemic are being felt significantly on the economies of the countries of the European Union[3]. Many companies were forced to close their jobs temporarily or permanently, so the employees were laid off. According to the study conducted by the National Council for Small and Medium Enterprises in Romania, among the most important effects that entrepreneurs face are: massive reduction in sales, temporary or permanent closure of companies, delays in payment of suppliers, restriction of activity, etc. Thus, it was concluded that the most affected areas are HoReCa, air transport, tourism, culture, etc.

A number of authors have analyzed the link between the epidemiological evolution of COVID-19 and its effects on the macroeconomic environment[4]. Thus, they analyzed the link between the COVID-19 positivity rate and the unemployment rate. The authors found that there is a direct link between the number of cases of COVID-19, the unemployment rate and global economic activity. A number of authors analyzed the impact of the COVID-19 pandemic on SME employees and used hierarchical linear models to observe the link between unemployment, psychological distress among young people (20-35 years), and risk factors[5].

Thus, in the literature, unemployment is independently associated with greater psychological distress and confidence and optimism have declined significantly during the pandemic, due to financial stress and loneliness. One of the authors findings is that policy makers need to develop and expand initiatives in various areas to help reduce the mental health consequences of rising unemployment. Interventions in the labor market must also be promoted so that young people can be helped to find a job and integrate into employment. The results of the study show that the effect of unemployment on citizens can be reduced by a greater sense of self-control, confidence and optimism.

Another author analyzed unemployment from two points of view: as a mechanism of propagation and as socioeconomic costs[6]. It has been found that in order to stop the social and economic impact of unemployment, fiscal policy can be designed as preparation and prevention. The conventional view of unemployment is that it is either a failure of the market or a feature of the market. The first aspect comes from the imperfections of the market (salary rigidity, etc.). Globalization, automation and job loss are perceived as unavoidable.

Unemployment also causes very high direct and indirect costs for both the economy and individuals.

Other authors[7] have examined the role of entrepreneurship in the process of reducing unemployment, concluding that certain existing barriers such as access to finance and the inadequate structure of the labor market contribute to impeding the development of the SME sector. Some authors consider that a period of unemployment causes a permanent loss of earnings, throughout life, because the unemployed are sicker and spend more on health expenses (depression, anxiety, etc.)8. All these major health effects create a circle that prevents the unemployed from re-entering the labor market. In the years following the Great Recession, firms refused to hire the unemployed and included clauses such as "the unemployed should not apply." However, it should be noted that this way of rejecting the unemployed has been challenged and rejected over the years. Some

[2] Dumitrescu, A. L., (2021), *The impact of the COVID-19 pandemic on the labor markets of the Member States of the European Union*, Journal of Global Economics. 2021, vol. 13 Issue 1.

[3] Pripoaie, R., (2021), *The effects of the COVID-19 pandemic on unemployment and inflation*, Economic Development and Research Conference 2021, Chisinau, Moldova.

[4] Goes, M., Gallo, E., (2020), *Infection Is the Cycle: Unemployment, Output and Economic Policies in the COVID-19 Pandemic*, Review of Political Economy.

[5] Achdut, N., Refaeli, T., (2020), *Unemployment and Psychological Distress among Young People during the COVID-19 Pandemic: Psychological Resources and Risk Factor*, International Journal of Environmental Research and Public Health.

[6] Tcherneva, P., R., (2017), *Unemployment: The silent epidemic*, Working Paper no. 895.

[7] Botric, V., (2012), *Regional Differences in Self-Employment: Evidence from Croatia*, Economic Research-Ekonomska Istraživanja.

[8] Abraham, K., Haltiwanger, J., Sandusky, K., Spletzer. J., 2016, *The Consequences of Long Term Unemployment: Evidence from Matched EmployerEmployee Data*, NBER Working Paper no. 22665. Cambridge, MA: National Bureau of Economic Research.

authors found that employment history and duration of unemployment have a very significant negative impact on the likelihood of subsequent employment.

Also, during the pandemic, in developed countries, the demand for unemployment benefits rose sharply as a result of the overwhelming number of people who lost their jobs. There were differences in the demographic group, educational level and income of each household.

3. Data and methodology

The main purpose of this paper is to investigate whether the COVID-19 pandemic has affected the performance of small and medium enterprises and whether employees in this sector have experienced losses. In order to achieve a more realistic and complex picture of the SME sector, the analysis includes all EU Member States, the analysis period being 2020. The dependent variable of this study is the number of employees in SMEs and as independent variables I have included the unemployment rate, the inflation rate, the real GDP growth rate, the incidence rate of COVID cases, according to the data presented in Table 1. I must also specify that I chose these data due to their availability for the 27 countries members of the European Union.

Table 1: Description of variables

Variable name	*Variable symbol*	*Description*	*Unit*	*Data source*
Dependent variable				
Number of employees in SMEs	Number of employees	Number of employees in SMEs	%	Eurostat
Independent variable				
Unemployment rate	Rate unemp	Unemployment rate	%	World Bank
Inflation rate	Infl	Inflation rate (average annual rate)	%	World Bank
The economic activity	Gdp_Growth	Annual real GDP growth rate	%	World Bank
Covid incidence rate cumulated per 100,000 inhabitants	Covid incidence rate	Incidence rate of covid cases cumulated per 100,000 inhabitants	%	European Centre for Disease Prevention and Control

Source: own data processing according to the specialized literature

The dependent variable used in this study is the number of employees in small and medium-sized enterprises, an indicator that is expressed as an annual percentage change. We chose this indicator because it is a way to measure the performance of SMEs. We also considered the impact of the pandemic on employees in small and medium-sized enterprises, where a large number of them faced unemployment during the pandemic.

The unemployment rate is defined as the job-seeking population that is looking for a job but cannot find a job during a certain period. The definitions of labor and unemployment differ depending on the country and the country's economy.

The inflation rate is defined as the general increase in prices (expressed as a percentage) over a certain period of time.

The rate of economic growth is expressed by the indicator of the annual growth rate of real GDP, which expresses the value of goods and services produced in a country during a year, but in which prices are expressed in the prices of a reference year.

The incidence rate of COVID-19 cases is an indicator that expresses the evolution of the pandemic at the national level, a very important indicator for the economy because most of the measures have been adopted as a result of its sharp increase.

4. Results and discussions

Next, I analyzed the data that I will use in descriptive statistics, correlation analysis, and regression analysis. The calculations were performed using the EViews econometric software. Table 2 presents descriptive statistics of the variables included in the study and this table shows that the highest standard deviation is recorded by the variable incidence rate of COVID cases per 100,000 inhabitants, which demonstrates the impact of this pandemic on individuals.

Table 2. Descriptive statistics of the variables included in the study

Variable	*Min.*	*Max.*	*Mean*	*Median*	*Std. Dev.*	*Skewness*	*Kurtosis*	*Obs.*
Number of employees in SMEs	-0.482515	6.513346	1.769006	1.644056	1.436332	1.383069	5.759113	27
Unemployment rate	2.01000	17.31000	6.039259	5.360000	3.316261	1.976258	7.001548	27
Inflation rate	0.250371	3.827854	1.704965	1.630523	1.001963	0.314736	2.120876	27
The economic activity	0.410278	5.539566	2.995129	2.682760	1.400894	0.167694	1.979775	27
Covid incidence rate cumulated per 100,000 inhabitants	100.2000	1376.100	544.2259	501.4000	322.6119	0.793557	3.036697	27

Source: own calculations based on EViews econometric software

In Table 3 we present the results of the correlation analysis and we can see that the unemployment rate is positively related to the impact of the pandemic on employees, having a significant effect on them and the performance of the SME sector, with a statistically significant value less than 0.01.

Table 3. Correlation matrix

	Number of employees	Unemp	Infl	GDP_Growth	Covid incidence rate
Number of employees	1.0000				
Unemp	0.450341***	1.0000			
Infl	-0.374142	-0.584508	1.0000		
GDP_Growth	0.109713	-0.368791	0.310404	1.0000	
Covid incidente rate	-0.107213	-0.255683	0.198813	0.165806	1.0000

*, **, *** indicates that the coefficients are significant at 90%, 95% and 99%

Source: own calculations based on EViews econometric software

The table below shows the results of the regression analysis and by performing it we determined which of the variables included in the study are the main determinants of the decrease in the performance of SMEs, respectively the number of employees. According to the data presented, it is observed that the unemployment rate and GDP Growth are statistically significant. Based on the statistical results and the statistically significant coefficients, we can conclude that the unemployment rate and the economic activity are the main factors that affect the employees during the pandemic period.

Table 4. Regression results – model 1

Variable	Coefficient	Std. Error	t-Statistic	Prob.
Constant	0.88063	1.288342	0.068354	0.9461
Rate unemp.	0.194173***	0.097791	1.985588	0.0597
Infl.	-0.311791	0.313167	-0.995605	0.3303
GDP_Growth	0.352299***	0.195755	1.799690	0.0856
Covid incidence rate	-2.81E-05	0.000812	-0.034617	0.9727
R-squared	0.321645	Mean dependent var		1.769006
Adj. R-squared	0.198308	S.D. dependent var		1.436332
S.E. of regression	1.286052	Durbin-Watson stat		1.698786
Sum squared resid	36.38648			
F-statistic	2.607852			
Prob (F-statistic)	0.063518			

*, **, *** indicates that the coefficients are significant at 1%, 5% and 10%

Source: own calculations based on EViews econometric software

The results show that an increase in the unemployment rate can lead to a decrease in the performance of the SME sector, having a significant influence on employees as well. According to the R-squared value, we find that 32.16% of the variation in the number of employees in SMEs is explained by the model. Thus, we can conclude that the independent variables included in the study have an impact on employees and the SME sector, especially during the pandemic period, as shown by the results: R-squared (32.16%) and Adj. R-squared (19.83%).

For the impact of the COVID-19 incidence rate the sign is the anticipated one but the small sample size increased the volatility of the estimator with effect on the significance level. For the robustness of the analysis, we estimated separate models in which the number of employees was regressed depending on the incidence of the COVID rate, the incidence of the COVID rate and the increase in GDP, respectively the incidence of the COVID rate and the unemployment rate. Also, due to the small number of available observations, the results obtained are not econometric significant, but the meaning of the influence of the variable. The incidence of the COVID rate remains the same as in the global model[9].

Despite the fact that it is not a new problem in the empirical field, the analysis performed is subject to some shortcomings. Thus, the short period of data analysis is caused by the unavailability of data on COVID cases, given that the first cases of COVID-19 appeared in the European Union in March 2020. Thus, our analysis refers to a single year (2020).

5. Conclusions

Small and medium-sized enterprises in the European Union have been severely affected by the COVID-19 pandemic. Thus, the blockade created and the quarantine of the population led to their food and the increase in the number of unemployed. Small and medium-sized enterprises make an overwhelming contribution to economic development, being the main employees in the economy. Thus, SMEs provide over 65.8% of existing jobs, which demonstrates the importance of access to finance for this sector vital to the functioning of an economy. By 2020, 90% of SMEs say they are economically affected by the consequences of the pandemic, with the most affected sectors being services, construction and industry[10]. The economic impact caused by the pandemic crisis varies from one sector to another, and from one company to another, because it depends on a number of factors. Among the biggest factors are the ability to adapt to changes in the economy, the existence of stocks, etc.

In the early stages of the COVID-19 pandemic crisis, European governments provided support to SMEs by introducing short-term financial assistance measures to reduce the effects these companies faced. Among the most important measures adopted by the state, in order to save this sector are the postponement of the payment of taxes, the application of short-term unemployment schemes. The pandemic crisis has also paid special attention to employees in terms of their

[9] Jula, D., Jula, N. (2022), *Econometrics*, 5th ed., Mustang Publishing House, Bucharest, pp. 85-87.

[10] https://economie.hotnews.ro/stiri-finante_banci-24049654-impactul-pandemiei-asupra-imm-urilor-romanesti-masuri-luat-alte-alte-state-care-putea-putira-autoritatile-romane-planuri-afaceri- simplified-fast-procedures-for-granting-guarantees-innovation-stimulation.htm.

training. In conclusion, despite the vital role that SMEs play in the economy, this sector has been very vulnerable to the pandemic crisis. Thus, investing in SMEs and their digital transformation provides an opportunity for Europe's economy to recover in a way that has lasting and effective effects.

As a result of the statistical results obtained, we can conclude that the increase in the unemployment rate and the growth rate of real GDP are the main determinants of the decrease in the number of employees in small and medium enterprises, both during the pandemic and before the pandemic. The conditions imposed by the pandemic (traffic restrictions, remote work, access by a limited number of people) have caused a difficult situation for SMEs around the world, as many companies have had to cease operations either temporarily or permanently, which led the state to take a number of measures in each country to support employees. Therefore, given the fact that the impact of the pandemic crisis was strongly felt, both in Romania and in all EU member states, I must point out that the results of the study are as expected.

Due to the small sample size, the risk of estimators not being significant slightly exceeds the standard 5% threshold (the probability of F-statistic is 0.06), which subsequently requires further analysis, as the data is published.

Thus, as the literature shows, access to finance is of vital importance in the development of the SME sector, especially today, when companies face a low degree of absorption of skilled labor and face major problems in terms of It is. regarding competitiveness.

As a future direction of research, we intend to analyze empirically how the pandemic has affected each type of enterprise and to carry out the analysis for the year 2021. I also consider that it would be interesting to include in the research the potential candidate countries for the European Union.

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COMPARATIVE ANALYSE OF VAT SYSTEMS IN THE NEW EU MEMBER STATES

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Abstract

The common system of value added tax plays an important role in the European single market, with VAT being a major source of revenue for Member States as well as for the EU budget. EU VAT legislation is constantly changing until a single EU VAT area is created. One of the most important objectives of the European Commission is to harmonise VAT rules in order to significantly reduce the €50 billion lost each year to VAT fraud in the EU, with the highest levels in the new Member States. Directive 2006/112/EC aims to apply common rules for Member States in the intra-Community area, while leaving each Member State free to decide, within certain limits, on the level of rates and ceilings, deductibility, time limits for declaration and payment, refunds, etc. The aim of the paper is to analyse the similarities and differences concerning VAT in the new Member States of the European Union. To this end, standard and reduced VAT rates, exemption thresholds for small businesses, the share of VAT in GDP and the VAT Gap in these countries are highlighted. The results of the study are a starting point for identifying the most appropriate solutions to improve VAT collection in Romania and the other EU-13 Member States.

Keywords: *value added tax, standard VAT rates, reduced VAT rates, VAT share in GDP, VAT Gap.*

1. Introduction

Whether we are talking about products or services, VAT is borne by the final consumer. In the current context, as we emerge from the crisis caused by the Covid-19 pandemic and enter the crisis generated by the Russia-Ukraine war, Romania and the EU Member States are directly affected, with the economic effects becoming not only visible but also worrying. At least in Romania, the uncontrolled rise in prices is further burdening the population with low and even average incomes. In addition to this fact, which has a direct impact on consumption, there is also the tendency of the population to keep their savings, this time also at the level of the high-income population. The tendency to leave Romania, to spend money earned in Romania in other countries, and therefore to pay VAT in other countries, is an imminent danger which, in our opinion, requires special attention. In order to increase VAT revenue to the state budget, domestic consumption must be encouraged, because an increase in the VAT rate is pointless in the context of Romania's derisory VAT collection.

These days, the EU VAT system must aim, in addition to eliminating tax competition, to combine efforts to tackle the post-Covid economic crisis. This is why, at this point, challenges such as digitisation and modernisation of VAT with the aim of implementing a definitive tax system are taking a back seat. Exceptional provisions are needed, similar to those adopted for example by EU Decision 2020/4915 exempting EU Member States from VAT on imports of products needed to fight the pandemic, such as certain medicines, protective equipment and Covid-19 medical devices.

The analysis carried out in this paper focuses on the new EU Member States as, in our view, their economies appear to be more exposed in the current context than the economies of the other EU Member States. These are the countries that became EU members in 2004 (Cyprus, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Slovenia, Slovakia), in 2007 (Bulgaria, Romania) and in 2013 (Croatia).

The aim of this paper is to highlight the similarities and differences between the EU-13 countries in terms of the level of VAT rates applied, the exemption thresholds for small businesses, the VAT revenue as a proportion of gross domestic product and the amount of VAT Gap. The study is based on current intra-EU legislation, the Eurostat database and recent European Commission VAT analyses.

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2. VAT rates in the new EU Member States

Directive 2006/112/EC on the common system of value added tax requires Member States to apply a standard VAT rate of at least 15%, but allows their governments to set the number and level of reduced VAT rates within certain limits.

There are notable differences in the VAT rates applied between EU member countries. Thus, as Figure 1 shows, of the new EU countries, Malta has the lowest standard VAT rate of only 18% (only 1 pp. below the EU-27 minimum rate in Luxembourg). Romania and Cyprus follow with standard VAT rates of 19%, Bulgaria, Estonia and Slovakia with 20%, the Czech Republic, Lithuania and Latvia with 21%, Slovenia with 22%, Poland with 23%, Croatia with 25% and Hungary with 27%, which has the highest VAT rate in the EU.

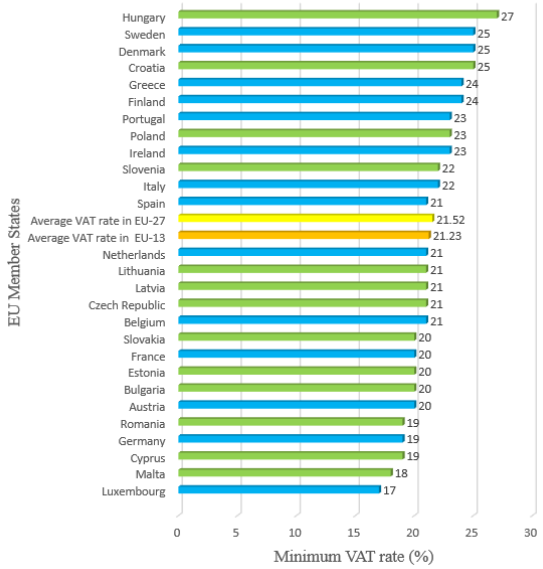
The average standard VAT rate at EU-27 level is 21.52% and the average standard VAT rate at EU-13 level is 21.23%. Although the difference between the two average rates seems very small, we note that only 4 EU-13 countries (Slovenia, Poland, Croatia and Hungary) have rates above the average level and the remaining 9 EU-13 countries have rates below the average VAT rate. We can conclude that in general the new Member States have a lower standard VAT rate than the countries that became EU members before 2004.

The VAT Directive establishes the right of Member States to have, in addition to the standard VAT rate, a maximum of two reduced rates for goods and services listed in Annex III to the VAT Directive. These reduced rates must be a minimum of 5%.

According to Figure 2, all new EU Member States have reduced VAT rates, with Bulgaria, Estonia and Slovakia having only one reduced rate and the others two reduced rates. The highest reduced rate is in Hungary (18%), and 8 countries have reduced rates of at least 5%: Cyprus, Croatia, Latvia, Lithuania, Malta, Poland, Romania and Hungary. The only EU country with no reduced VAT rate is Denmark, which is not on the list of new Member States.[1]

Unlike the new Member States, the founding Member States also have very low VAT rates and 'parking rates'. Rates of less than 5% or even zero apply to cultural services, delivery of newspapers, books, food, pharmaceuticals, etc. These include France with a super low rate of 2.1%, Luxembourg with 3%, Spain and Italy with 4% and Ireland with 4.8%. Parking rates are lower than the standard rate but equal to or higher than 12%, which apply to supplies of goods and services not listed in Annex III to the VAT Directive. Five Member States benefit from these rates: Luxembourg, Austria, Belgium, Ireland and Portugal.

Figure no.1 - EU member states' VAT rates, average VAT rate in EU-27, average VAT rate in EU-13 (%)

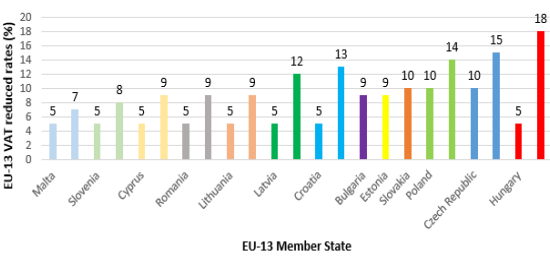


Source: *https://ec.europa.eu/taxation_customs/tedb/taxSearch.html* (consulted on March 10, 2022)

In conclusion, there are significant differences in the level of standard and reduced rates applied in Member States, justified by the specific social and environmental objectives of each national economic system. A uniform common VAT system cannot exist when standard and reduced VAT rates differ or when only some Member States (those that joined the EU before 1992) have the possibility to apply very reduced rates or "parking rates".

Although reduced VAT rates may appear to help achieve social or environmental objectives, they are often ineffective because they do not reach the target groups and because they contribute to reduced tax revenues, increased administrative costs (due to controls and inspections) and compliance costs, and tax evasion.

Figure no.2 - EU-13 VAT reduced rates (%)



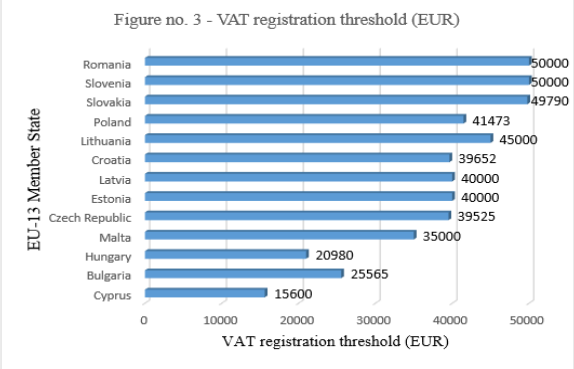
Source: *https://ec.europa.eu/taxation_customs/tedb/taxSearch.html* (consulted on March 10, 2022)

[1] https://europa.eu/youreurope/business/taxation/vat/vat-rules-rates/index_ro.htm.

However, the Covid-19 pandemic has shown that Member States need a certain degree of flexibility to deal with urgent or unforeseen situations. EU rules on VAT derogations have allowed governments to find solutions to the problems caused by the pandemic.

3. VAT exemptions and derogations in the new Member States

The common VAT system is becoming increasingly complicated to implement, not only because of the different VAT rates, but also because of the VAT exemptions.



Source: *https://europa.eu/youreurope/business/taxation/vat/vat-exemptions/index_ro.htm*

Thus, some Member States grant VAT exemptions for certain goods and services, such as education, healthcare, social care, sport, cultural or financial services. If taxable persons only carry out VAT-exempt activities without the right to deduct VAT on their purchases, they will not be registered as VAT payers and will not pay VAT to the budget of the state concerned.

Also, almost all EU countries have VAT exemption thresholds for small businesses (Figure 3). Small businesses can opt for the normal taxation scheme even if their annual income is below this threshold.

Romania[2], Slovenia and Slovakia have relatively equal VAT exemption thresholds for small businesses (€50,000), the highest exemption thresholds in the EU-13, and Cyprus has the lowest exemption threshold at €15,600 (Figure 3).

Compared to the EU-13 Member States, there are some peculiarities in the remaining Member States: Spain and the Netherlands do not provide for exemptions for small businesses, but there are also countries where the thresholds are higher than in the EU-13, such as France (€85,800), Ireland (€75,000) and Italy (€65,000). France and Ireland also have different exemption thresholds for supplies of goods or services.

4. The VAT Gap in the new Member States

Differences between standard and reduced VAT rates in the Member States and the increasing number of businesses with cross-border activities contribute to a shift of consumption to Member States with reduced VAT rates, to distortions in the collection of VAT revenue and to increased compliance costs for tax administrations.

It is well known that VAT plays an important role in strengthening the EU budget (almost 21% of total EU tax revenue) but also the budget of each Member State. For this reason, reducing the VAT Gap is an important objective on the European Commission's list. The causes of this gap are: legislative shortcomings, lack of digitalisation of tax administrations, tax evasion, ineffective control, etc.

The VAT Gap in absolute terms is the difference between the expected VAT revenue (or 'VAT Total Tax Liability' - VTTL) *i.e.* the VAT estimated that should be collected according to VAT legislation and the amount actually collected. The VAT Gap is due to tax evasion, but also to insolvency or bankruptcy of businesses, legal tax optimisation or administrative errors.

We note from Figure 4 that Poland, which has a standard VAT rate of 23%, collects the highest VAT revenue in 2019, amounting to over 42 billion EUR. In fact, in Poland VAT revenue accounts for about 40% of the Polish budget revenue. Poland is followed at a considerable distance by the Czech Republic, with a VAT collected of almost 17 billion EUR, Hungary and Romania with VAT receipts of around 14 billion EUR, with all other EU-13 countries below 10 billion EUR.

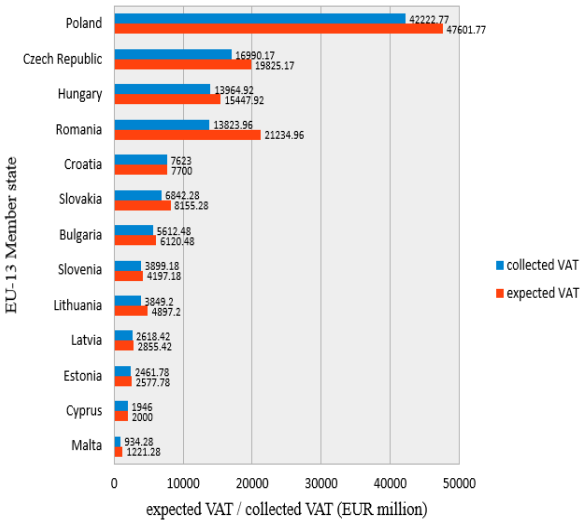
The order of countries according to the VAT Gap in absolute terms is different. In first place is Romania, with a VAT collection gap of 7.4 billion EUR, followed by Poland with 5.4 billion EUR and the Czech Republic with 2.8 billion EUR. Hungary has a VAT Gap in absolute terms 5 times smaller than Romania, although the VAT collected by the two countries are roughly equal.

Malta, the EU-13 country with the lowest standard VAT rate (18%) and the lowest real VAT revenue (below 1 billion EUR) has a VAT collection gap of 287 million EUR, the fifth lowest in the EU-13.

The smallest VAT GAP in absolute terms is recorded in Cyprus (54 million EUR), whose VAT collected is less than 2 billion EUR, ranking second after Malta in the EU-13 countries with the lowest VAT revenue.

[2] 300000 RON at the exchange rate of 4.9488 RON/EUR on 10.03.2022.

Figure no. 4 – VAT GAP in EU-13 (EUR million)



Source: *https://ec.europa.eu/taxation_customs/business/vat/vat-gap_ro* (consulted on March 10, 2022)

The VAT Gap can also be calculated as a percentage, by relating the absolute value of the VAT Gap to the VTTL.

Analysing the VAT Gap in percentage terms (Figure 5), we see that Romania stands out in 2019, with a VAT Gap of 34.9%, the highest value ever recorded by our country and also the highest value in the EU-13 and EU-27.

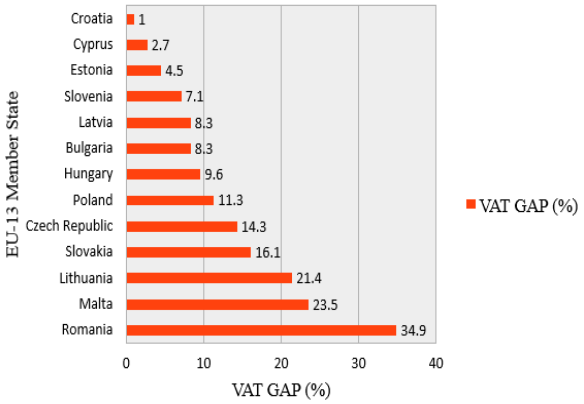
At the opposite pole, Croatia, Cyprus and Estonia had the lowest Gap values, respectively 1%, 2.7% and 4.5%, followed by Slovenia with 7.1%, Latvia and Bulgaria with 8.3%.

From Figure 6 we see that the VAT Gap decreased in 2019 compared to 2018 in seven EU-13 Member States: Croatia, Cyprus, Lithuania, Bulgaria, Slovakia, Latvia and Poland.

The most spectacular decrease in the VAT Gap was recorded in Croatia, which recorded a value of 1% in 2019, compared to 7.4% in 2018 and 11% in 2015. In addition, VAT revenues increased significantly in 2019, despite the extension of the application of the reduced VAT rate to certain agricultural products, food and pharmaceuticals.

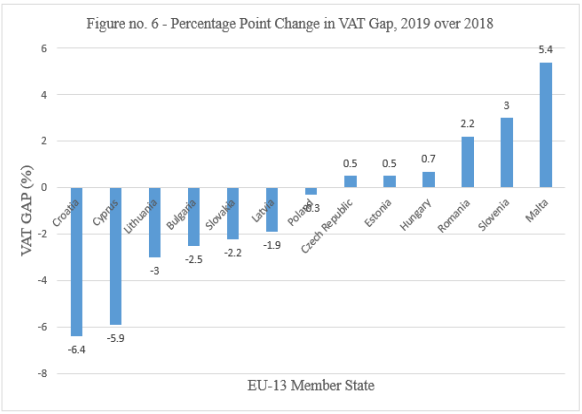
Also in Cyprus the VAT Gap decreased significantly in 2019 compared to 2018 and 2017 and reached 2.7%, the value it had been in 2006.

Figure no. 5 - VAT GAP in EU-13 (%), 2019



Source: *https://ec.europa.eu/taxation_customs/business/vat/vat-gap_ro* (consulted on March 10, 2022)

Figure no. 6 - Percentage Point Change in VAT Gap, 2019 over 2018



Source: *https://ec.europa.eu/taxation_customs/business/vat/vat-gap_ro* (consulted on March 10, 2022)

By contrast, in Lithuania and Bulgaria the VAT GAP decreased in every year from 2015 to 2019. Bulgaria has seen one of the most remarkable decreases in the VAT Gap over this period, of 11.3 pp., as a result of the implementation since 2015 of a programme to reduce grey economy and tax compliance costs.

In 2019, the VAT Gap in Slovakia decreased by 2.2 pp. compared to 2018 and by 9 pp. compared to 2015, despite the fact that as of 2019, accommodation services are no longer taxed at the standard rate of 20%, but at a reduced rate of 10%.

Even though in 2019 compared to 2018 the reduction of the VAT Gap in Latvia was only 1.9 pp., in the period 2015-2019 the reduction was one of the highest in EU-13 (12.2 pp.)

Poland recorded the most significant decrease in the VAT Gap between 2015 and 2019 (13.4 pp.) not only in the EU-13, but in the EU-27. The biggest reduction occurred in 2016 as a result of the implementation of SAF-T[3]. It remains to be seen whether the implementation of SAF-T will have the

[3] The Standard Audit File for Tax (SAF-T) reflects the international standard for the electronic exchange of accounting data between companies and tax authorities or external auditors, developed by the OECD in 2005.

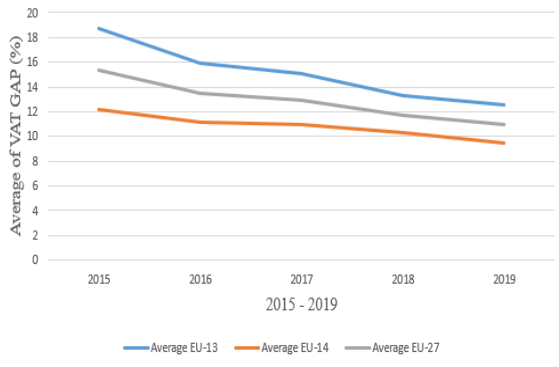
same effect in Romania[4]. For 2019, however, our country has seen an increase in the VAT Gap of 2.2 pp. compared to 2018.

A significant increase in the VAT collection gap (3 pp.) is also found in Slovenia, but the situation is not as serious as in Romania because in Slovenia the VAT Gap in 2019 is 7.1% compared to 34.9% in Romania.

The biggest increase in the VAT Gap in 2019 compared to 2018 is in Malta (5.4 pp.), which thus reaches a VAT Gap level close to that of 2015.

According to Graph 7, in the period 2015-2019, before the Covid-19 pandemic, there was a decrease in the VAT collection gap both at the level of the new Member States (EU-13) and at the level of the whole European Union.

Figure no. 7 - Evolution of VAT GAP in EU-27, 2015 - 2019



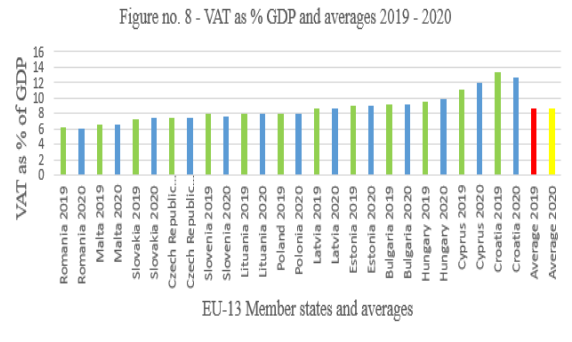
Source: *https://ec.europa.eu/taxation_customs/business/vat/vat-gap_ro* (consulted on March 10, 2022)

It is also noted that the VAT Gap in percentage terms is significantly higher in the EU-13 compared to the rest of the Member States, characterised by prosperous economies and higher living standards.

5. Evolution of the share of VAT revenue in GDP in the new Member States

The evolution of the share of VAT in GDP in the EU-13 over the period 2019-2020 is shown in Figure 8. The share of VAT in GDP calculated as EU-13 average increases by 0.005 pp. from 8.6283% in 2019 to 8.6333% in 2020.

Figure no. 8 - VAT as % GDP and averages 2019 - 2020



Source: *https://ec.europa.eu/taxation_customs/tedb/taxSearch.html* (consulted on March 10, 2022)

Croatia has the highest VAT revenue to GDP, i.e. 13.35% in 2019 and 12.59% in 2020, due to the high standard VAT rate (25%) and the VAT Gap of only 1%. It is followed by Cyprus with 11.03% in 2019 and 11.99% in 2020, which, despite having a low standard VAT rate (19%), has a VAT Gap of only 2.7%. The 3rd place is occupied by Hungary, with a VAT share in GDP increasing from 9.52% in 2019 to 9.83% in 2020. The explanation is given by the very high standard rate (27%) combined with a VAT Gap below the EU-13 and EU-27 average.

Romania and Malta, the EU-13 countries with the highest VAT Gaps (34.9% and 23.5%) and the lowest VAT rates in EU-13 (19% and 18%) are at the bottom of the EU-13 in terms of VAT to GDP ratio, with values of 6.13% and 6.52% in 2020 , down from 2019.

The share of VAT revenue in GDP remained stable in 2019 compared to 2018, with VAT being the largest source of consumption taxes in the EU-13.

6. Conclusions

VAT revenue is one of the most important sources of public revenue for Member States and a significant own resource for the EU budget, which is why a major objective of the European Commission, but also of national tax authorities, is to reduce the VAT Gap, especially in the context of the economic slowdown caused by the COVID-19 pandemic and the Russia-Ukraine war.

The VAT Gap is a measure of the ineffectiveness of the application of VAT compliance rules in EU countries and may be the result of miscalculations, tax fraud or bankruptcies. This affects the EU budget, reducing the funds available for development, conservation and environmental protection, digitisation, research, etc. Competitiveness between Member States, generated by different VAT rates, lack

[4] In Romania large taxpayers were the first required to submit the SAF-T file in February 2022, followed by medium-sized taxpayers in 2023 and small taxpayers in 2025.

of coherence, compliance and tax efficiency remain unresolved issues.

Each country adopts its own measures, in line with the already existing context. Economics is, above all, a feeling. Therefore, to better understand the phenomena in a country, you have to live in that country. In our opinion, encouraging consumption can move things in a favourable direction because it is the final consumer of goods or services who bears the tax. As far as companies are concerned, as they are the ones who collect and pay the tax, the producer-consumer chain must be shortened, as an incentive to consumption by maintaining or even reducing the price level, at least for basic products.

In 2022, some EU-13 governments have taken measures to help people cope with substantial price rises. For example, the Lithuanian government has decided to apply a 0% VAT rate (instead of 9%) for heating from 1 January to 30 April 2022. The Latvian government reduced the VAT rate for petroleum products from 21% (standard rate) to 12% from 1 April to 31 December 2022. From 30 April 2022 Estonia changes the reduced VAT rate on fuel from 9% to 5%.

The Romanian government is considering capping certain prices, given the massive increase in prices in recent times. However, a cap on food prices, for example, could bankrupt many food companies (such as poultry farms) whose costs have risen sharply due to rising electricity and gas prices, and the VAT reduction as a support measure in this case seems insignificant.

The fact that Romania has the biggest VAT Gap in the EU is not surprising. Entrepreneurs in our country are forced to 'borrow' from the state in order to carry on their business. The decline in purchasing power and the current geopolitical context are contributing to the deepening crisis we are facing.

One of the measures to reduce the VAT Gap is the E-invoice programme. This measure will also burden economic agents by obliging them to invest in equipment, specialised training, perhaps hiring specialised staff or contracting out the service. Slovakia has started implementing E-invoicing. In Poland it will become mandatory from January 2023, until then it is optional. France has already requested a derogation on mandatory implementation until 1 January 2024. From 1 July 2022 Romania will practice mandatory e-invoicing for high tax risk products (vegetables, fruit, alcoholic beverages, clothing, shoes, sand, gravel, new housing). The aim is to combat fraud and tax evasion by giving tax administrations the possibility to track VAT collection in real time. Businesses are being forced into digital transformation to comply, for many of them this is a new burden.

During the Covid-19 pandemic, support measures were put in place in Romania for entrepreneurs, who could benefit from payment instalments for outstanding obligations (including VAT). However, businesses with debts older than March 2019 could not benefit from the measures provided for in GO no. 11/2021[5].

We believe that less restrictive measures are needed to help any entrepreneur willing to continue a business, to give him the possibility to pay VAT arrears older than one year in instalments, without foreclosures and account freezes, which ultimately lead to the blocking of the activity. If businesses close down one after the other, the state will have nowhere to collect VAT. Moreover, following the enforcement procedure, goods are sold at derisory prices, after deducting three steps from the starting price at auction[6], plus enforcement costs, and the foreclosing party remains in debt, most of the time.

Perhaps it is time to focus more on cause than effect. In vain we try to manage, to fine, as if we are in the position of patching a bag that always snaps in other places. We all know that we can only temporarily get rid of the effect if we don't treat the cause, and the cause lies in the poverty of Romania's population. Where there is suspicion of tax evasion, there is a reason beyond the desire of a limited segment of people to get rich. We cannot categorize a country according to a few models that do not represent them. The many, the ones who are the true captains of a ship on an eternally troubled sea are the small businessmen who have the courage to go ahead, under any conditions and at any risk. Because this is what they have learned to do, they have made and are making numerous efforts and for this they must be respected, supported and guided[7]. It is certainly very important for the state to collect VAT, but it is essential to promote trust, transparency and a culture of tax compliance in all possible ways.

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TRENDS OF THE BUDGET DEFICIT IN THE EUROZONE AND THE EUROPEAN UNION IN THE CURRENT CLIMATE

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Emilia STOICA[**]

Abstract

The theme of this paper is dedicated to the concerning situation of budget deficits in Europe. Over the past two years, the severe economic downturn caused by the COVID-19 pandemic has led to a sharp rise in deficits and public debt in all Member States.

Thus, the worrying evolution of the budget deficits registered at the level of the European Union, will have adverse effects on the financial and macroeconomic stability, by increasing the general level of risk of all the activity sectors.

Estimates of global economic growth hope for a significant recovery in economic activity, with developments largely driven by the epidemiological situation and conflicts within Europe.

For all Member States, the deficit exceeded the Treaty benchmark in 2020, as a result of a severe EU-wide economic recession. Real GDP contracted in 2020 in all EU Member States except Ireland. For the EU as a whole, the contraction in economic activity was 6.1% (6.6% for the euro area).

Deficit increases have been driven by the budgetary cost of measures taken by EU Member States to combat the COVID-19 pandemic. In this context, Member States have been encouraged to adopt a favorable budgetary stance to combat the pandemic, while protecting the sustainability of public finances in the medium term.

Key words: *budget deficit, interest, budget revenues, debt sustainability, growth.*

1. Introduction

The structural or permanent budget deficits that are facing most countries in the world, especially the European Union, are exacerbated by the pandemic situation facing Europe. Governments believe that the best option to cover the budget deficit can be achieved mainly by resorting to borrowing from abroad, which is preferable to raising the real interest rate. The generation of deficits will lead to an increase in public debt.

When large budget deficits are the main cause of large external (current account) deficits, fiscal / budgetary adjustment is inevitable to balance the external balance, to avoid a balance of payments crisis. In order to cushion the pandemic shock, which also induced the temporary partial closure of the savings (lockdown), the fiscal rules in the EU were suspended in 2021, with an extension in 2022.

In order to finance the public debt service, indebted developing countries have no choice but to adopt a budgetary policy of austerity, with public spending being kept to a minimum. This means, however, the lowest possible funds allocated to key areas for national economic and social life: health, education, public investment in road infrastructure, railways, aeronautics, communications, etc. generating jobs, neglecting research and development, etc.

Economic forecasts predict that the EU economy will grow by 4.4% in 2022. This represents a significant improvement in the growth outlook compared to the economic forecasts for the winter of 2021. Growth rates will continue to fluctuate across the EU, but the economies of all states Member States should return to pre-crisis levels by the end of 2022.

The economies of the EU and the euro area are expected to recover sharply as restrictions are lifted, but there is a very high degree of uncertainty over these projections.

Member States need to implement fiscal-budgetary policies aimed to achieving prudent medium-term budgetary positions and ensuring debt sustainability, while consolidating investment. The recovery and resilience mechanism will have a substantial and lasting positive impact on GDP growth in the coming years, which should also contribute to strengthening debt sustainability.

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2. Overview of the evolution of the budget deficit in the EURO area and the European Union

The budget deficit of the euro area registered a much higher increase than in 2019, reaching 821 billion euros. Growth is unprecedented and not even the economic crisis of 2008-2009 has had such rapid and far-reaching budgetary effects.

At the level of the European Union, the deficit is even higher, registering values of 922 billion euros.

The effects of the increase in budget deficits are also reflected in public debt: in the euro area, it increased by 1 billion euros compared to the previous year, and in the European Union by 1.2 trillion euros, the percentage of public debt reached 90% of GDP, compared to 77%, as it was in 2019. However, Estonia, Bulgaria and Luxembourg managed to keep public debt below 25% of GDP.

The only area of normality is the level of budget revenues, which have been kept at a constant share in the gross domestic product, in the last four years, of about 46%.

The pandemic has wiped out all budgetary consolidation efforts by Member States, and the analysis indicates that.

At Member State level, the budget deficit remained below 3% of GDP in only two countries, Denmark and Sweden, a level considered optimal in the European Treaties. The biggest deficits were recorded last year by Spain, 11%, Greece, 10%, Malta and Italy, 9.6% of GDP. At the same time, note that 17 of the 27 European states have gone from budget surplus to deficit.

Germany has had the largest deterioration in the budget balance from one year to the next, from the 2019 surplus to the 2020 deficit is a difference of 196 billion euros. It was also said that Germany had a difficult year, 2020, with a budget deficit and an increase in public debt. Thus, after three years, in the period 2017-2019, Germany registered only a budget surplus, in 2020 the deficit was 4.3% of GDP. Public debt also rose by 10 percentage points, from 59% to 68% of GDP. In 2021, the budget deficit widened from 3.1% to 9.1% of GDP, and government debt rose from 97.5% to 115% of GDP.

One criterion taken into account to judge the performance of an economy is that of budget revenues, calculated as a percentage of GDP. The European average has not changed compared to previous years, remaining at 46%. The countries with the most efficient revenues are Denmark, France and Finland, in a slightly different order compared to the period before the pandemic, and those with the lowest performance are Ireland, Romania and Lithuania.

From this point of view, Ireland is the special case of the European Union, and Romania, with 32%, is practically the least performing economy of the European Union in terms of budget revenues in GDP. But this has been happening for years, so the pandemic period only confirms a state of affairs and does not bring any major changes.

Now, the imbalances created in 2020 can be seen very clearly in the statistical figures. Europe is starting again with the consolidation of the budget and the reduction of sovereign debt. More than a decade after the 2008 economic crisis, European countries are facing the same macroeconomic problems. Deficit and debt reductions will be made with great difficulty. Under these conditions, the current crisis will require remarkable efforts to ensure the sustainability of accumulated debt, both in the public and private sectors.

The European Commission proposes a correction of the budget deficit registered by Romania in accordance with the fiscal-budgetary strategy adopted by the Ministry of Public Finance, respectively the classification below the target of 3% at the end of 2022.

Romania ranks 6th in the EU in terms of the share of the budget deficit in GDP, equal to France, according to Eurostat data for 2020. Romania's budget deficit, calculated based on the ESA methodology, rose to 9.2% in 2020, from 4,4% in 2019.

In 2020, in Romania, due to the significant challenges imposed by the context of the COVID-19 pandemic and the urgency of implementing measures that required budgetary efforts to combat the social and economic effects caused by the COVID-19 crisis, amid an economic decline in GDP 3.9%, government funding needs (determined by the level of the consolidated general budget deficit and the volume of government debt refinancing) have increased compared to estimates at the beginning of the year, mainly due to the widening of the budget deficit, from 3.6% of GDP, the initial target, approved by the State Budget Law no.5 / 2020, to 9.64% of GDP, according to the execution on December 31, 2020.

Large budget deficits were recorded in Spain (11%), Malta (10.1%) and Greece (9.7%), as well as Italy (9.5%) and Belgium (9.4%).

All states, except Denmark (with a budget balance of -1.1% of GDP), had a deficit share above the 3% of GDP limit imposed by the Maastricht Treaty. Sweden was just slightly above this limit, with a deficit of 3.1%. In 2020, the budget deficit widened sharply, both at EU level and in the euro area. In the European Union, the deficit rose from 0.5% to 6.9%, and in the euro area, the deficit was 7.2%, compared to 0.6% in 2019.

The EU Council recommends Romania to take measures to get out of the excessive deficit procedure,

the adjustment trajectory imposed for 2020 was 3.6%; 3.4% for 2021 and 2.8% for 2022. Romania has registered with a deficit well above the level of 3%, respectively 9.4% (9.2% ESA).

Thus, our country does not meet one of the two criteria defined in the Protocol of the Treaty on the Functioning of the European Union. Regarding the second criterion, the level of public debt, it was below the limit of 60% of GDP stipulated in the Treaty, but for 2022 the trend is an increasing one.

Member States need to implement fiscal-budgetary policies aimed at achieving prudent medium-term budgetary positions and ensuring debt sustainability, while consolidating investment.

3. Public debt in EU Member States

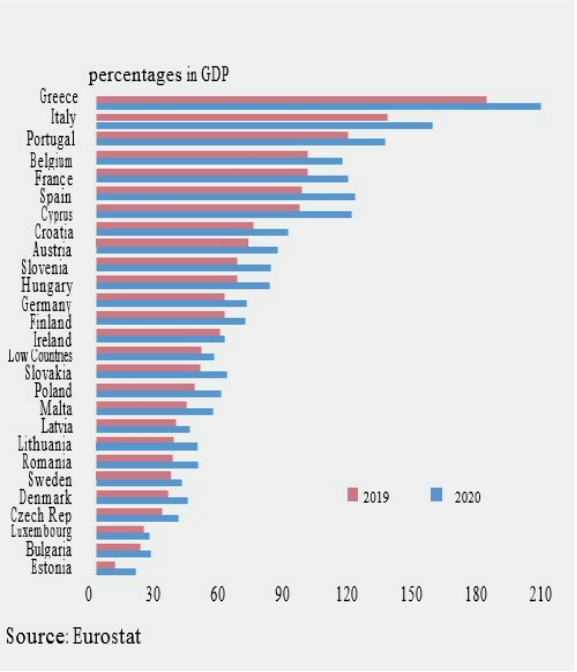
The future will bring special pressures to ensure debt sustainability in most countries around the globe. Low interest rates have consolidated the accumulation of debt, with global debt levels currently standing at historical levels, especially in the case of external debt. The IMF points out that among the determinants of the financial crisis, the one that predominated in early 2020 in the case of emerging countries was the high share of foreign currency debt.

Through the obligations to repay the borrowed capital and to pay the costs of the public debt, it affects the financial balance of the public administration and implicitly the activity of the public sector. However, if the burden of public debt on national public finances is high, the impact may be major, especially if the national economy is not strong and the international economic situation is not a promising one.

There are many developing countries in this situation, whose public debt, mainly external, has become very important in the context of the fragile domestic economy, and the international financial institutions require the repayment of public debt and the payment of its cost as a priority obligation to continue to provide financial assistance.

Debt sustainability must be ensured by the fact that additional indebtedness has its counterpart in assets or structural changes in the economy, which will allow debt to be paid in the future.

Graph 1. Public debt of the European States



14 EU Member States reported debt of over 60% of GDP. Greece (205.6%), followed by Italy (155.8%), Portugal (133.6%), Spain (120.0%), Cyprus (118.2%), France (115.7%) and Belgium (114.1%) even reported percentages of over 100%. Romania ranks seventh in the top countries with the lowest ratio of public debt to GDP.

In Belgium, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Hungary, Austria, Portugal, Slovenia, Slovakia and Finland, government debt exceeded the 60% of GDP target by the end of 2020. for 2020 indicates that Belgium, Greece, Croatia, Italy, Cyprus, Hungary, Austria, Portugal and Slovenia have not met the debt reduction benchmark - or, in the case of Spain and France, the transitional debt rule. In 2020, Germany, Slovakia and Finland did not meet the 60% of GDP reference value set out in the Treaty, while in 2019 they had a debt ratio of less than 60% of GDP.

Table no. 1. Public Debt

Percentage from GDP

Country	2017	2018	2019	2020	2021	Estimate 2022
Belgium	102,0	99,8	98,1	114,1	115,3	115,5
Bulgaria	25,3	22,3	20,2	25,0	24,5	24,0
Cech Republic	34,2	32,1	30,3	38,1	44,3	47,1
Denmark	35,9	34,0	33,3	42,2	40,2	38,8
Germany	65,1	61,8	59,7	69,8	73,1	72,2
Estonia	9,1	8,2	8,4	18,2	21,3	24,0
Greece	179,2	186,2	180,5	205,6	208,8	201,5
Spain	98,6	97,4	95,5	120,0	119,6	116,9
France	98,3	98,0	97,6	115,7	117,4	116,4
Croatia	77,6	74,3	72,8	88,7	85,6	82,9
Italy	134,1	134,4	134,6	155,8	159,8	156,6
Cyprus	93,5	99,2	94,0	118,2	112,2	106,6
Latvia	39,0	37,1	37,0	43,5	47,3	46,4
Lithuania	39,1	33,7	35,9	47,3	51,9	54,1
Luxemburg	22,3	21,0	22,0	24,9	27,0	26,8
Hungary	72,2	69,1	65,5	80,4	78,6	77,1
Malta	48,5	44,8	42,0	54,3	64,7	65,5
Holland	56,9	52,4	48,7	54,5	58,0	56,8
Austria	78,5	74,0	70,5	83,9	87,2	85,0
Poland	50,6	48,8	45,6	57,5	57,1	55,1
Portugal	126,1	121,5	116,8	133,6	127,2	122,3
Romania	35,1	34,7	35,3	47,4	48,9	50,8
Slovenia	74,1	70,3	65,6	80,8	79,0	76,7
Slovakia	51,5	49,6	48,2	60,6	59,5	59,0
Finland	61,2	59,7	59,5	69,2	71,0	70,1
Sweden	40,7	38,9	35,0	39,9	40,8	39,4

Source: European Commission

The economic disparities between northern and southern Europe could be exacerbated if the European Union does not reform its budget deficit rules.

Southern countries, such as France, Italy and Spain, are calling for reforms that will allow more public investment to boost growth and take into account the high level of debt. On the other hand, Austria, Germany and the Netherlands believe that any reform should ensure strong fiscal discipline.

4. Conclusions

Tax rules at EU level should take into account two aspects: firstly, the different tax situation on public finances and, secondly, the need to support sustainable economic growth.

Budgetary policy must continue to support economic activity in 2022 as well. Member States should avoid premature withdrawal of support and make full use of funding from the Recovery and Resilience Mechanism. Implementing investments and reforms under the Recovery and Resilience Mechanism will help support economic recovery, boost growth and employment potential, reduce imbalances and improve public finances.

A factor with a very significant contribution to the stimulation of activity is a stable rate of increase in consumer prices, and public authorities wishing to implement a policy of economic recovery in the current situation, characterized by a relative slowdown in development, must take into account the control of inflation, including the proper management of the main factors that determine this inflation.

Overcoming the effects of the financial crisis, many economies are now close to full employment, with rising wages being a predictable factor, which could lead to a widening of the deficit and an increase in public debt to finance it. The pressure of increasing public debt can affect the financial stability of the state, thus necessitating the use of restrictive budgetary and monetary regimes.

A very high level of public debt in itself creates a vulnerability, which can threaten the public budget even if the budget deficit is small (for example, a primary surplus that is lower than the public debt service). This vulnerability is all the more clear the more unfavorable the external financial conditions become, when the cost of financing increases greatly.

In 2022, national fiscal-budgetary policies should become more and more differentiated, while all Member States should maintain investments to support recovery. When conditions allow, Member States should implement policies to ensure the sustainability of public finances in the medium term.

The measures taken globally to support the economy are significant. The International Monetary Fund estimated in June 2020 global measures worth US $ 10.7 trillion (about 13 percent of global GDP).

At European Union level, the Recovery Plan for Europe is worth more than € 1.8 trillion. The program covers the period 2021-2027 and provides for measures to both support the economic recovery and to support the European Union's focus on a sustainable growth model, in particular environmental protection and digital integration projects.

Romania aims to continue the gradual fiscal consolidation, which will allow the deficit target set by European regulations to be reached by the end of the forecast horizon, respectively 2024, achieved in a balance between the need for fiscal adjustment and the need to support economic recovery. health care, infrastructure, climate change, digitization which remain a priority in the current difficult circumstances.

Romania is facing an important opportunity, as it benefits from allocations of EUR 30.3 billion under cohesion policy related to the EU's multiannual financial framework for the period 2021-2027, adding EUR 29.2 billion (14 , EUR 3 billion in grants and EUR 14.9 billion in loans) through the Recovery and Resilience Mechanism (MRR) facility for the period 2021-2026.

The European financial package can lead to the attenuation of the contractionary impact of the macroeconomic correction, to the implementation of structural reforms, resulting in increasing the robustness of the Romanian economy, attracting European resources being a *sine-qua-non* condition of

a sustainable fiscal-budgetary and economic policy.
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THE FINANCING OF LOWER SECONDARY EDUCATION UNITS. CONSTRAINTS AND OPPORTUNITIES

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Abstract

In Romania, the state pre-university education system is mainly supported by ensuring funding from public funds by the central and local authorities, represented by the Ministry of Education, respectively the local councils through the administrative-territorial units within whose jurisdiction the schools are located. The financing of these school units is based on the determination of the standard cost per student, which is the main indicator in substantiating the budget allocations, being a complex of factors related to the region, the area, the environment from which the beneficiaries of the education services come, the language of instruction and the level of education. The main objective for which the schools are financed is to provide quality education services, so that the instructive-educational process to be carried out in optimal conditions. But, as in any field, effectively supporting the education system can be a real challenge.

The present work has as objective the analysis of the way in which a lower secondary education unit in the rural area was financed, how the budget was substantiated through the possible funding sources and how the stringent needs of the instructive-educational process were covered through the existing resources. The topic under discussion will also present the constraints caused by poor funding, but also the opportunities arising from effective funding.

Keywords: *Financing, lower secondary education unit, standard cost per student, expenses, instructive-educational process.*

1. Introduction

The lower secondary education units are state pre-university education units classified in the sphere of public institutions financed from public funds, as provided by Law no. 500/2002. Moreover, the schools are organized and ensure their functioning on the basis of regulations and principles that are well defined on the basis of the National Education Law no. 1/2011, with subsequent amendments. Within this legal framework, schools benefit from all the necessary resources to develop, provide and promote the values necessary for the growth of educational services at national level, through the instructive-educational process, functioning independently of any interference that could lead to the violation of the norms of moral conduct and social cohabitation and that would endanger health, the physical or mental integrity of students or staff. The lower secondary education unit, hereinafter referred to as the secondary school, operates under legal conditions based on the accreditation obtained from the Ministry of Education, through the Romanian Agency for Quality Assurance in School Education.

At the level of each lower secondary school that has legal personality, the management, financial-accounting and personnel departments are organized and function. Management is provided by the Board of Directors, and executive management through the Director, who also holds the role of tertiary authorising officer.

Also, the school benefits from its own budget, distributed according to the legislative provisions by normative acts, draws up the monthly, quarterly and annual financial statements, having, within certain limits, institutional and decisional autonomy.

In view of these legal provisions, known information in general at the level of the educational system in Romania, this paper aims to show whether, in real, state pre-university education units can indeed provide education services under conditions Optimal and appropriate standards for all categories of students from different demographic and social environments.

2. Methodology and database

In the following will be presented data that have been obtained and processed in the form of a case study on a lower secondary education unit (secondary school) in rural areas, which will analyze whether the basic needs of the instructive-educational process are covered by the resources allocated from funding.

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Funding has a key role to play because it produces resources, and these, in turn, cover the needs of the education system. The information presented below is based on the current legislation in Romania regarding the status of schools, the financing modalities and the analysis regarding the efficiency of the standard cost per pupil in their financing.

3. Results and comments

3.1. Financing of lower secondary education units

The basic financing of the lower secondary education units is based within the limits of the standard cost per student, an indicator that is established annually according to the methodological norms elaborated by the Ministry of Education, through different normative acts.

The basic funding of the pre-university education, implicitly of the lower secondary education referred to in this communication, is guided by the principle **"the financial resource follows the student"**[1], which implies that the budget allocation related to a student / preschooler is transferred to the school that provides the educational services.

It can be seen how the standard cost per student represents an important pawn for the financing of the educational institutions in Romania because it is the starting point in substantiating the annual expenditure budget necessary to ensure the optimal and qualitative functioning of the instructive-educational process. This standard cost is established according to the region, the area, the environment from which the student comes, the language of instruction, the field and the level of education.

If in terms of human resource expenditures, the standard cost per pupil/preschooler is at unitary level for all regions of the country, the only differentiation is that related to the environment, urban or rural, for the other categories of basic expenses the situation changes, in the sense that the territory is divided into 6 areas, and the amount of the standard cost differs depending on the thresholds of pupils and the area where the school is located. In this way, significant discrepancies appear because some geographical areas of the country are more devastated than others, but the needs of the instructive-educational process are generally the same.

Moreover, during 2017-2021, in Romania the amount of the standard cost per student was determined by normative acts that updated annually the Government Decision no. 72/2013.

In the case of the lower secondary education units, in this case a secondary school in zone 4 of the country's temperature, according to the classification, classified in the category of 301-800 students enrolled, taught in Romanian language, the rural area, the evolution of the standard cost per pupil that was the basis for financing the unit, was presented according to the data presented in the following table:

Table 1 – The amount of standard cost per student in the period 2017-2021

Normative act	Year	Cuantumul costului standard per elev		
		Expenditure on salaries, bonuses and allowances (RON)	Expenditure on Goods and services, vocational training and periodic evaluation of students (RON)	Relationship between staff costs and other basic categories of expenditure
Government Decision no.32/2017 (Annexes 1 and 3)	2017	4031	361	11,16
Government Decision no.30/2018 (Annexes 1 and 3)	2018	5075	389	13,04
Government Decision no.169/2019 (Annexes 1 and 2)	2019	6192	405	15,29
Government Decision no.107/2020 (Annexes 1 and 2)	2020	7028	424	16,58
Government Decision no.353/2021 (Annexes 1 and 2)	2021	7028	576	12,20

Data processed by authors from the annexes of the mentioned normative acts

The needs of the education system in lower secondary education are constantly increasing from year to year and are influenced by various economic, social or civic factors, among which we could find the density of students and the severity of the disadvantages in the area where the school unit is located. All these aspects have direct involvement in determining the standard cost per student.

As the data were presented in Table 1, the standard cost per pupil/preschooler recorded a gradual increase from year to year, in terms of the basis for substantiating the budget for salary, bonuses and allowances, known as personnel expenses, the only exception being in 2021 when the amount of the standard cost at the same level as in the previous year. On the other hand, regarding the other categories of expenses, such as those with Goods and Services, professional training and periodic evaluation of students, the upward trend from year to year can be observed, taking into account the increases in the costs of current maintenance. In fact, the ratio between such categories of expenses, according to Table 1, registers year-on-year increases, in 2018 +16.85% compared to 2017, in 2019 +17.25% compared to 2018, in 2020 +8.44% compared to 2019, the exception is 2021, when there is a decrease of -26.42% compared to 2020.

As a result of this, the budget of the educational establishment, in this case the presence of the lower secondary education units, recorded annual progressive

[1] Financing of pre-university education units - position document, Cezar Mihai Hâj, Bucharest, 2017.

increases, necessary to cover the educational requirements.

The basic financing of the lower secondary education units is generally carried out through two sources of funding, the state budget and the local budget. The Ministry of Education through the County School Inspectorate and the territorial administrative units, substantiates the construction of the budgets of the educational institutions and allocates the necessary funds to cover the stringent needs of the educational system, but based on the number of students enrolled and the standard cost per student.

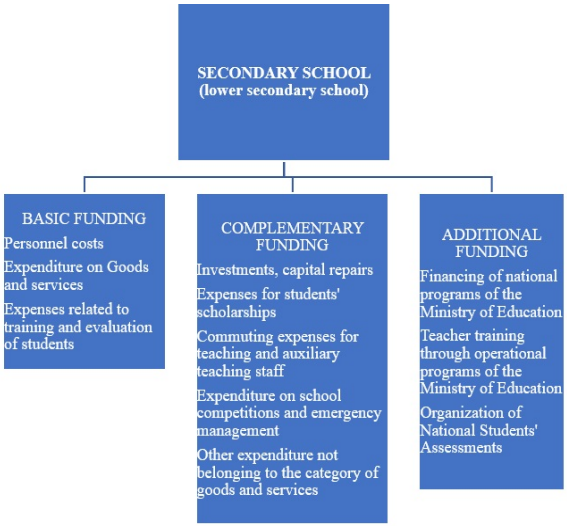
The financing of the lower secondary education units may also be possible through other 2 types of funding, namely complementary funding and additional funding.

Through complementary funding, the administrative-territorial unit contributes to the development of the educational unit in the community by improving the material base as a result of investments in buildings, in digitalization, by stimulating students as a result of granting school scholarships or prizes following school competitions.

Instead, through additional funding, the school can benefit from certain development programs of the Ministry of Education through which the human resource, teachers, can benefit from a high level of qualification to European standards.

What comprises each type of funding of a lower secondary school, secondary school, how the allocated funds can be used and for what purpose, is shown in the following Figure:

Figure 1 – Types of funding for a lower secondary school

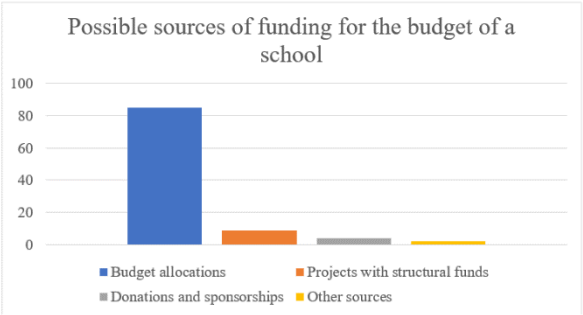


Data processed by authors according to Law no.1/2011 with subsequent amendments and completions

Instead, through additional funding, the school can benefit from certain development programs of the Ministry of Education through which the human resource, teachers, can benefit from a high level of qualification to European standards.

The budget of the lower secondary education unit is built on the basis of legal regulations and may include budget allocations from the state budget and the local budget, structural funds or grants, donations, sponsorships or other possible sources, as shown in the following figure:

Figure 2 – The possible construction of the budget of a lower secondary education unit



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Further, a comparative analysis is presented on types and sources of funding and for the types of expenditure essential for the activity of a lower secondary education, rural school, with a number of 493 students enrolled for The last 5 years, during 2017-2021. It is considered how the educational-educational process, as the main component of the educational

system, has been effectively supported and if the unit can provide quality education services.

In the above-mentioned period, 2017-2021, the funding of the Gymnasium School was ensured by the three types of funding and budget allocations were allocated, according to Table 2.

Table 2 - Financing of Gymnasium School in 2017-2021

Anul	Total funding, of which:	Basic funding			Complementary funding		Additional funding	
		Total (RON)	State budget (%)	Local budget (%)	Total (RON)	Local budget (%)	Total (RON)	Stat budg (%)
2017	1.810.000	1.784.000	0	98,56	26.000	1,43	0	
2018	2.031.152	1.940.863	87,43	8,12	84.500	4,16	5.789	0,
2019	2.503.618	2.437.048	90,73	6,61	61.000	2,44	6.070	0,
2020	2.492.319	2.375.651	89,10	6,22	108.000	4,33	8.668	0,
2021	2.462.415	2.389.591	88,35	8,69	69.000	2,80	3.824	0,

Data processed by authors from the financial statements of the educational unit

As can be seen from the data presented in the previous table, the educational unit benefited from the three types of funding, but the distributed budget recorded fluctuations due to the oscillation of the number of students enrolled at the beginning of each school year. As regards expenditure financed by the state budget, those relating to staff rights, there is a significant increase in 2018 and 2019, but in the 2020s and 2021 are on a downward slope. The basic funding insured on the financial route of the local budget has been maintained at an optimal level, even a significant increase in 2021.

The complementary financing provided through the public funds from the local budget presented an irregular route, with oscillations of growth and decrease, being influenced, most likely, by the way in which, in the respective years, the administrative-territorial unit could cover the needs of the instructive-educational process from its own revenues. This is largely due to gaps in the legislation because the powers of the administrative-territorial units in terms of the education system are not concretely foreseen. The year 2020 was an exception in this regard, being the period when there was a pandemic with the SARS-Cov-2 virus, and in that existing context it was invested in the digitalization of the educational system. The educational process has adapted to the new requirements in order to be able to continue to provide education services at an optimal level, which has attracted new opportunities.

It can also be noticed that through additional funding, the allocated funds were quite low, which results that they were allocated only to cover the expenses incurred with the organization of the national assessment of students at the end of the gymnasium cycle.

This situation may be a constraint on the quality of the instructive-educational process because, by the lack of national programs of the Ministry of Education aimed at the professional development of human resources in the educational unit, certain impediments can occur at some point that may make it difficult to align with the standards European Quality of Education. At the same time, it can be a challenge for the educational unit in rural areas to maintain at a level in which to ensure quality education needing to meet the needs of the community.

3.2. Comparative analysis on the dynamics of expenditure at the level of a lower secondary education unit

In addition to the budget allocations granted by the types of funding, the situation with processed data from the lower secondary education unit, the rural gymnasium school, in which the dynamics of expenditure, budget execution, the budget execution, and the influence of the budget, , by which these public funds were used, in the period 2017-2021, according to the following table:

Table 3 - Expenditure dynamics and budget execution of the Gymnasium School during 2017-2021

Year	Type of expenses	Funding (RON)	Budget execution (RON)	Budget execution rate (%)	Influence compared to previous year (%)
2017	Staff expenditure	1.592.000,00	1.591.421,00	99,96%	-
	Expenditure on goods and services	193.000,00	187.240,76	97,02%	-
	Students' scholarships	5.000,00	5.000,00	100,00%	-
	Expenditure with auxiliary teaching staff and teaching staff	20.000,00	19.560,00	97,80%	-
	Expenditure on investment	0,00	0,00	0,00%	-
	Expenditure on the organization of national assessment	0,00	0,00	0,00%	-
2018	Staff expenditure	1.775.863,00	1.775.863,00	100,00%	+11,59%
	Expenditure on goods and services	222.500,00	220.800,69	99,24%	+17,92%
	Students' scholarships	5.000,00	5.000,00	100,00%	0,00%
	Expenditure with auxiliary teaching staff and teaching staff	22.000,00	20.560,00	93,45%	+5%
	Expenditure on investment	0,00	0,00	0,00%	N/A
	Expenditure on the organization of national assessment	5.789,00	5.789,00	100,00%	N/A
2019	Staff expenditure	2.271.548,00	2.271.548,00	100,00%	+27,91%
	Expenditure on goods and services	201.500,00	199.980,80	99,25%	-9,43%
	Students' scholarships	5.000,00	5.000,00	100,00%	0,00%
	Expenditure with auxiliary teaching staff and teaching staff	20.000,00	18.155,00	90,78%	-11,70%
	Expenditure on investment	0,00	0,00	0,00	N/A
	Expenditure on the organization of national assessment	6.070,00	6.070,00	100,00%	0,00%
2020	Staff expenditure	2.220.651,00	2.220.651,00	100,00%	-2,24%
	Expenditure on goods and services	244.000,00	197.605,28	80,98%	-1,19%
	Students' scholarships	5.000,00	5.000,00	100,00%	0,00%
	Expenditure with auxiliary teaching staff and teaching staff	14.000,00	12.151,00	86,79%	-33,07%
	Expenditure on investment	34.290,00	34.284,00	99,98%	N/A
	Expenditure on the organization of national assessment	8.668,00	8.668,00	100,00%	+42,80
2021	Staff expenditure	2.175.591,00	2.175.591,00	100,00%	-2,03%
	Expenditure on goods and services	226.000,00	218.781,42	96,81%	+10,72%
	Students' scholarships	37.000,00	37.000,00	100,00%	+74,00%
	Expenditure with auxiliary teaching staff and teaching staff	20.000,00	16.310,00	81,55%	+34,23%
	Expenditure on investment	0,00	0,00	0,00	N/A
	Expenditure on the organization of national assessment	3.824,00	3.824,00	100,00%	-55,88%

Data processed by authors from the financial statements of the educational unit

From this comparative analysis, regarding the financing of the school and the dynamics of the expenses, we can observe certain essential aspects with a direct impact on the instructive-educational process.

Personnel costs, related to the human component as a resource of the educational system, recorded an ascending trend, up to 27.91%, during 2017-2019, but a regression followed by 2020, reaching a decrease of -2.03%. The main cause of this is the demographic factors, ie the number of registered students that oscillate from year to year, which has repercussions on the budgetary substantiation of the gymnasium school. The educational unit covers these possible shortcomings through budgetary rectifications and will not enter into a financial deadlock, but on this point of view, this situation may be considered as a constraint on the activity of this institution in the Community.

Expenditure on goods and services, which assumes everything of the smooth functioning of the lower secondary education unit, have an irregular route, recording an increase of up to 17.92%, following a decrease from -1.19% to -9 , 43%, subsequently recording an increase of up to 10.72%. All of these resulting calculations are obtained by reporting a year to the previous one. The basic funding provided by the standard cost per student for the country's 4th school unit, the rural area, was generally on the same line. The reason why these fluctuations occurred is caused by the fact that the administrative-territorial unit has ensured the funds in the local budget for complementary funding to the extent availability and possibilities of each financial year. With regard to current expenditures, the educational unit has made efforts to fall into budget allocations, a certain balance has been maintained. It is well known that in the period 2020-2021, the pandemic generated by the SARS-COV-2 virus has created greater expenses related to ensuring and maintaining the integrity and health of students, teachers and all those who participate in the educational process .

An objective was the provision of auxiliary teaching and didactic staff, in this way professionally prepared teachers were motivated to continue their activity in this educational unit. Any fluctuations in this expenditure category do not have a significant impact because it depends on the number of nursing teachers at the beginning of each school year. In addition, in the 2020s and 2021, they were months in which, due to the pandemic generated by the SARS-COV-2 virus, didactic activity took place in the online environment.

Another important objective was related to the granting of school scholarships, to stimulate students to perform and achieve better learning outcomes, in this case observing an increase of 74% in 2021 compared to previous years. Funding was also ensured by funds by the Ministry of Education, but on the local budget route. These measures are an opportunity for school unity because, through the financial incentives for students, an increase in educational performance may result.

An important aspect in institutional development is the investments in the material basis of the educational unit. Being located in a rural area, the need for modernization and digitization in order to maintain and perform at a high level is a stringent one. Analyzing the period 2017-2021, it can be seen that only in 2020, funds have been allocated for this category of expenditure. It has been invested in digitization by purchasing tablets for students and laptops for teachers in order to continue the activity of the instructive-educational process in the online system, sometimes in the hybrid system. From this point of view, on the one hand, it is an opportunity to digitize the educational system, aligning with the requirements of the current community, but, on the other hand, is also a constraint, as it can have a negative impact on the image of the education unit by Lack of investments and other components of the material base.

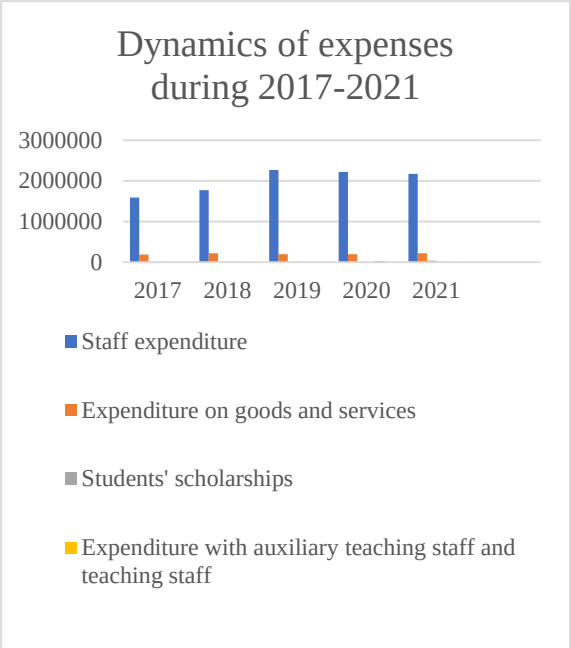

Figure 3 - Dynamics of expenditure at school level in 2017-2021

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The imbalance between needs and resources can be evident in the case of investment expenses. It is necessary to implement measures by which the educational unit can be financially supported by central or local authorities in order to develop the material base by investing the buildings in which the insprising-educational process is carried out by upgrading all classrooms by equipping the computer laboratories And sciences with better equipments that meet current requirements, all of which lead to the opening of new opportunities for the rural education system.

Also, another imbalance between needs and resources is recorded in the case of expenditure for the continuous training of teaching staff. The human

resource is particularly important when the school unit provides education services to children in that community. This is worth increased attention because there have been deficiencies in this direction, through the lack of funds allocated through the national training programs of the Ministry of Education or other budget allocations from the local budget. This is a constraint on the financing of the educational unit and can have a negative impact on the instructive-educational process at a time.

Between Needs, Resources and Financing There is an interdependence relationship, in the sense that existing needs can be covered by resources, and resources can be effective and can only be provided if there is solid funding, as can be seen from Figure 4, presented below:

Figure 4 - Relationship between Needs, Resources and Financing

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In order to no longer there are imbalances generated by differences between needs and resources, the lower secondary education unit must adopt a strategy to attract funds for the extinguishing deficiencies and coverage the educational system by supplementing the budget by different methods.

A well-founded strategy may include promoting public-private partnership in the community in which the educational unit is located. In the range of administrative-territorial unity, various economic agents that can be involved in supporting the school and extra-curricular activities of the instructive-educational process or can therefore finance the expenses necessary for the development of the material base of the educational unit.

Another component of the strategy may be that the educational unit attract European structural funds or grants. The attraction of structural funds has become a tool for institutional and material development of public institutions since 2007. In the case of a unit of education, the implementation of projects through which European structural funds are drawn can bring major benefits to the quality of the education system by standardization by rehabilitation Buildings, by setting up special places for taking after-school teaching or school sports competitions by replacing IT equipment and peripherals with a high degree of wear with some of the last generation and, last but not least, through training programs of auxiliary teaching and didactic staff.

These objectives can be achieved only with a thorough planning and staff trained in the field. In this respect, support from local authorities is essential, there are cases where it is necessary to access these Structural Funds, a private contribution, called co-financing, provided by the administrative-territorial unit in the local budget or ensured following a partnership with an economic agent.

4. Conclusions and recommendations

The funding of lower secondary education units in state pre-university education is mainly based on the standard cost per student. At this time, the calculation of the standard cost per student is not based on a foundation appropriate to his or her purpose. In reality, the standard cost is determined from the general financial allocation and not from the actual financing needs. Over 80% of the budget execution on the types of expenses included in the basic financing is represented by the personnel expenses, which leads to the decrease of the amounts provided for the financing of the other expenses related to the optimal development of the instructive-educational process.

The current budgetary allocations of lower secondary education units, especially in rural areas, can be classified as the result of underfunding. This creates situations where the allocation is insufficient or does not exist for many categories of basic expenditure. In such circumstances, the secondary school is obliged to organize its activities in such a way that the available budget is proportioned for each quarter to cover the most stringent needs.

The educational system in Romania is extremely diverse regarding from the perspective of the organization, the characteristics related to the number of students, the language in which they are taught, the levels of education, the situation of the administrative-territorial unit, with high or lower own incomes and other factors. In this case, it complicates the standardization of financial allocations that must take into account a very large number of factors that have a significant influence on the real costs of operating in optimal conditions of an educational establishment.

It is important that, at some point, the sources of funding are as diversified as possible, by receiving

donations or sponsorships, collaborating with other entities, such as non-governmental organizations or non-profit organizations, and thus, the educational institutions become entrepreneurial schools.

The adoption of strategies regarding a public-private partnership and the attraction of structural funds, can be called the financial "engineers" who could cover the deficiencies generated by the financing through the standard cost per student and on the basis of which further research in this field can be developed. Lower secondary schools can obtain their own income from donations, sponsorships or other legally established sources. In addition, under legal conditions, any natural or legal person can contribute to the financing of the educational system in Romania.

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- Government Decision no. 107/2020 amending the Government Decision no. 72/2013 regarding the approval of the Methodological Norms for the determination of standard cost per student / preschool;
- Government Decision no. 353/2021 for the amendment of the Government Decision no. 72/2013 regarding the approval of the Methodological Norms for the determination of standard cost per student / preschool;
- Financing of pre-university education units - position document, author Cezar Mihai Hâj, Bucharest, 2017.

GENDER BASED VIOLENCE STILL UNDER FIRE. THE ISTANBUL CONVENTION AND THE ROMANIAN WAY

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Abstract

Romania ratified the Istanbul Convention on 23 May 2016, and this can be considered a very important moment in the history of fighting gender-based violence. The Istanbul Convention is considered to be the most far-reaching international treaty addressing violence against women and domestic violence by offering a detailed and comprehensive set of provisions together with important and overarching preventive and protective measures in fighting these phenomena. Nevertheless, there are voices openly criticizing the Convention and advocate for different countries to withdraw from the international agreement. Given the abovementioned context, in my article I will first try to make an analysis of the arguments that made the Convention into the gold standard in protecting women and girls' rights. Secondly, I will briefly present how and why this "gold standard" has been contested. Last but not least, using the document analysis method, I will attempt a critical review of the way in which Romania responded to the Istanbul Convention requirements, underlining the most important conceptual and legal developments/adjustments that have been done.

Keywords: *Romania, Istanbul Convention, gender-based violence, gold standard, opponents.*

1. Introduction

Gender-based violence (GBV) is stated to be a global issue and an extensive human rights abuse that we cannot afford to overlook. Gender-based violence that disproportionately affects women is considered to be alarmingly high, even if we still do not have a complete image of the phenomenon's real amplitude due the fact that this kind of abuse is still considerably and systematically under-reported to the authorities. For instance, the FRA study – which is reflecting the EU state of affair - illustrates that only 14 % of women reported their most serious incident of intimate partner violence to the police, and 13 % reported their most serious incident of non-partner violence to the police[1]. Addressing gender-based violence in developing countries, Palermo, Bleck and Peterman are reporting that forty percent of women experiencing GBV previously disclosed to someone; however, only 7% reported to a formal source (regional variation, 2% in India and East Asia to 14% in Latin America and the Caribbean)[2].

Also, FRA – The European Union Agency for Fundamental Rights in the study *Violence against women: an EU-wide survey* (2014), has reported the following:

- one in 10 women has experienced some form of sexual violence since the age of 15;
- one in 20 has been raped;
- just over one in five women has experienced physical and/or sexual violence from either a current or previous partner, and
- just over one in 10 women indicates that they have experienced some form of sexual violence by an adult before they were 15 years old.3

UNwomen[4] also reports that:

- **Globally, an estimated 736 million women have been subjected to intimate partner violence, non-partner sexual violence, or both at least once in their life (30 per cent of women aged 15 and older).** This figure does not include sexual harassment. The rates of depression, anxiety disorders, unplanned pregnancies, sexually transmitted infections, and HIV are higher in women who have experienced violence compared to women who have not, as well as

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[1] FRA – European Union Agency for Fundamental Rights, 2014, Violence against women: a EU-wide survey), p. 3, available at: https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf.

[2] Palermo T, Bleck J, Peterman A. Tip of the iceberg: reporting and gender-based violence in developing countries. Am J Epidemiol. 2014 Mar 1;179(5):602-12. doi: 10.1093/aje/kwt295. Epub 2013 Dec 12. PMID: 24335278; PMCID: PMC3927971.

[3] FRA – European Union Agency for Fundamental Rights, 2014, Violence against women: a EU-wide survey), p. 3, available at: https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf.

[4] UNWomen, Facts and figures: Ending violence against women, accessed in 27.03.2022 at https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures.

many other health problems that can last even after the violence has ended;

- **Most violence against women is perpetrated by current or former husbands or intimate partners.** More than 640 million women aged 15 and older have been subjected to intimate partner violence (26 per cent of women aged 15 and older);

- **In 2018, an estimated one in seven women had experienced physical and/or sexual violence from an intimate partner or husband in the past 12 months (13 per cent of women aged 15 to 49).** These numbers do not reflect the impact of the COVID-19 pandemic, which has increased risk factors for violence against women;

- **One hundred thirty-seven women are killed by a member of their family every day.** It is estimated that of the 87,000 women who were intentionally killed in 2017 globally, more than half (50,000) were killed by intimate partners or family members. More than one third (30,000) of the women intentionally killed in 2017 were killed by their current or former intimate partner;

- Calls to helplines have increased five-fold in some countries, as rates of reported intimate partner violence increased due to the COVID-19 pandemic. Restricted movement, social isolation, and economic insecurity are increasing women's vulnerability to violence.

Underlining that human life, pain and suffering do not have a price, and perhaps also as a strategy to get the issue on the formal agenda of mostly male politicians holding power in the EU member states, the European Institutes for Gender Equality (EIGE) **has estimated that the cost of gender-based violence across the union is €366 billion a year. Violence against women makes up 79 % of this cost, amounting to €289 billion[5]. EIGE has calculated that** the biggest cost coming from physical and emotional impact (56 %), followed by criminal justice services (21 %) and lost economic output (14 %). Other costs can include civil justice services (for divorces and child custody proceedings for example), housing aid and child protection.[6] That is why Carlien Scheele, EIGE's Director said that "EU countries need to invest more in activities that prevent violence against women and protect victims - this is both a moral imperative, as well as savy economics"[7]. The need for effective and efficient intervention in fighting GBV is also stated by the Istanbul Convention, which is considered to be perhaps the most important international documents relating to fighting gender-based violence. In January 2022 the Convention has been ratified by 21 EU members states (Austria, Belgium, Croatia, Cyprus, Denmark, Finland, Estonia, France, Germany, Ireland, Greece, Luxemburg, Italy, Malta, Portugal, Poland, Netherlands, Romania, Slovenia, Sweden and Spain) and signed by all. Turkey was the first but also the only one to withdraw from the Convention, even though was also the first who ratified it.

2. The Istanbul Convention. Why is it so important?

The Council of Europe Convention on preventing and combating violence against women, known also as the Istanbul Convention after the city in which it opened for signature on 11 May 2011, was negotiated by its 47 member states and adopted on 7 April 2011 by its Committee of Ministers. It came into force in 2014, and its importance is also related to the fact that it is the first legally binding international instrument on preventing and combating violence against women and girls at the international level. Until the Istanbul Convention, which is also considered to be very important due the fact that offers a common framework and common tools in addressing GBV, we faced a variety of ways of defining and addressing the phenomenon which differed a lot from country to country. The Convention substantively **addressed the need to offer clear definitions and conceptualizations** in the field, clear common definitions and concepts that would enable researchers to do comparative studies, and, even more important, to use the data collected in order to facilitate policy transfer. That is why defining and conceptualizing violence against women is from my point of view, one of the important added value of the Convention. In this respect, the art. 3 is defining four very important concepts:

1. **"violence against women"** is understood as a violation of human rights and a form of discrimination against women, encompassing all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or

[5] EIGE, 2021, The costs of gender-based violence in the European Union, accessed on 27.04.2022, at https://eige.europa.eu/publications/costs-gender-based-violence-european-union.
[6] EIGE, 2021, The costs of gender-based violence in the European Union, accessed on 27.04.2022, at https://eige.europa.eu/publications/costs-gender-based-violence-european-union.
[7] EIGE, 2021, The costs of gender-based violence in the European Union, accessed on 27.04.2022, at https://eige.europa.eu/publications/costs-gender-based-violence-european-union.

arbitrary deprivation of liberty, whether occurring in public or in private life;

2. "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;

3. "gender" shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men;

4. "gender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately.

Those definitions are stated in order to reflect the premises and the values on which the text is based, some of which are strongly stating, that the roots of the problem are to be looked for in the patriarchal construction of the societies most of us live in. That is the reason why *gender* reflected especially as a power relation between women and men (a contested term as we shall see) became very important in the Convention text, but also in developing integrated policies for ending violence that affects women and girls. In this respect, the Preamble of the Convention underline "that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women". Furthermore, the convention is "recognizing the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". That was why domestic violence was also considered not enough to cover the complexity of the reality addressed. That was why also **violence against women** and **gender-based violence against women** were added in the convention text**.**

Another extremely important **added value of the Istanbul Convention I consider to be the deconstruction of the patriarchal (mis)interpretation of the public-private division.** The public-private division is directly connected both with the gender roles, but also with what we can call the area of legitimate state intervention, and in consequence with the status of citizen. Feminist scholars have substantively challenged the patriarchal public-private divide, one of the epic illustrations of this contestation process being the expression "The personal is political!". For instance, Ruth Lister recalls two of the connotations of this division: the state-market separation and the patriarchal separation between the domestic sphere and the public one. Lister recalls also the original liberal meaning of the public-private division - which refers to the need to create a sphere of personal autonomy, an area of personal inviolability, body security, freedom of thought, conscience and religion - and it's distortion by the introduction of the patriarchal domestic area in the equation.[8] In Gender, the Public and the Private, Susan Moller Okin begins her plea precisely form the original liberal meaning of the distinction referring to private as the space in which intrusion or interference with freedom requires further justification, while public refers to the more generally and just accessible spheres - the society/state jurisdiction[9].

But what happens when we add gender to the public-private divide in a patriarchal world? One of the paradoxes of doing that is the reversal of the value added to the two spheres. Thus, if initially in the liberal sense the private sphere was the one valued in its sense of enhancing individual autonomy, now the public sphere is the one that acquires a socially valued meaning.

The existence of the gendered hierarchy between the two spheres has also led to the limitation of women's private sphere by virtue of their so-called inability to be autonomous. The paradox is also manifested in the identification of the family with the private sphere and, in one way or another, the translation of autonomy - which is a fundamental individual attribute - over a form of social organization – the family. This translation becomes even more natural in a patriarchal world in the context in which the supreme authority in the family is held by the father/man, the head of the family or the household.

Assuming the above criticism the Convention text state "that violence against women and domestic violence can no longer be considered a private matter, but that states have an obligation, through comprehensive and integrated policies, to prevent violence, protect victims and punish the perpetrators.**"** That is why the **governments of the states that signed and ratified the Convention are obliged to take action in order to stop GBV**. They are obliged "to change their laws, introduce practical measures and allocate resources to adopt a zero-tolerance approach to violence against women and domestic violence."[10]

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[8] Ruth Lister, *Citizenship: Feminist Prespective*, New York: Palgrave, 2003, 2nd ed., p. 119.

[9] Susan Moller Okin, Gender, the Public, and the Private, în Anne Phillips, ed. *Feminism and Politics*, Oxford: Oxford University Press, 1998, p. 119.

[10] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers, accessed in 27.04.2022 at https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80.

Last but not least, by **underlying the importance of gender-based stereotypes and prejudice in powering the tolerance towards violence against women,** the Istanbul Convention is addressing the phenomenon in a very complex and in-depth way, pushing steps forward towards the discourse and actions regarding GBV. That is why prevention becomes one of the four pillars (prevention, protection, prosecution and integrated policies) of the Convention. Is not less important that prevention is strongly related in the text with patriarchal norms and power relations between women and men: Chapter III – Prevention, Article 12 of the Convention states that "Parties shall take the necessary measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."[11]. So we are facing a consistent update of approaching GBV, one which integrates a particularly useful set of tools for addressing violence such as: power, consensus, choice, autonomy, exploitation, dominant culture, hate, culture of violence, toxic masculinity etc.

The text and spirit of the Istanbul Convention underlines once again the fact that protection and prosecution are not enough in fighting GBV and that this happens because we still witness stereotypical representations of women and men and their relations, but also stereotypical representation of violence itself. Unfortunately, for instance in the case of Romania there are many studies that underline the fact that neither school nor media brings useful approaches in this respect and that in fact we are dealing with traditional gendered socialization that perpetuates violence[12] (Rughiniș, Grunberg, Popescu 2015; Grunberg 2004; Grunberg, Ștefănescu 2002). The media does not help either in this respect by presenting unreliable information, with unreliable victims and aggressors - men have more authority, have decision-making positions in the media and identify with the aggressors. The excusing of aggressors and perpetuation of stereotypes about victims (blaming and victimization), the focus on women's behaviors - provocative - and not men's, the symbolic dissociation of sexual violence from the social mainstream; the omission or misinterpretation by positioning attackers as 'others', 'others' and victims as well, the association with mental illness, drug addiction remain unfortunately mainstream in the so-called understanding of violence against women. Last but not least, the emphasis on law-and-order can hide gender inequalities: the law is not neutral, it is often built on patriarchal, racist, homophobic foundations (Kitzinger, 2004). The lack of analysis of society as a whole, of intersectional approaches, can put us in a situation in which efforts to protect and prosecute to be only partially effective (Kitzinger, 2004). In this context, the Convention calls for a joint effort to develop a series of integrated policies – educational policies inclusively - aimed at addressing the harmful beliefs, stereotypes and prejudice that perpetuate violence against women and girls.

That was why Amnesty International called the Istanbul Convention "**the gold standard that can save the lives of millions of women and girls" also adding to the above-mentioned arguments the fact that the convention is "**a widely accepted human rights instrument".

3. A contested gold standard?

It is now notorious the fact and Turkey, which was the first state ratified the convention on 14 March 2012, is also the first and only country in the Council of Europe to have withdrawn from the international human rights convention, but also from an international human rights convention in general. The Amnesty International called shameful Turkey's withdrawal from the Istanbul Convention and underlined that this today will put millions of women and girls at greater risk of violence. How Turkey justified the decision? Zehra Zumrut Selcuk, Minister of Family, Labor and Social Services, said that Turkey, by virtue of its own laws and constitutional provisions, has the power to protect women's rights without the need for the Istanbul Convention – a pseudo -argument dismounted by other experts in the field. For instance, Alina Isac Alak, a Romanian islam researcher said, in a commentary for the paper Adevărul, that the withdrawal can be read as a sign of weakness of Erdoğan's regime and in line with the AKP ideology, which from a gender perspective is a conservative and nationalist party that has constantly promoted a neo-traditionalist ideology in the style of the Muslim Brotherhood. This ideology is based on the

[11] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers, accessed in 27.04.2022 at https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80.

[12] UNICEF and ISE. 2004, Perspective asupra dimensiunii de gen în educație (Perspectives about a gender sensitive approach in education), Bucharest, available at http://www.unicef.org/romania/ro/STUDIU_de_GEN.pdf.; Cosima Rughiniș, Laura Grünberg, Raluca Popescu, 2015, *Alice în țara manualelor (Alice in the country of textbooks),* The Faculty of Sociology and Social Work, Bucharest University, accessible at http://doctorat-sociologie.ro/wpd/wp-content/uploads/2017/09/Alice-in-Tara-Manualelor.pdf; Claudia-Neptina Manea, *Gender Stereotypes. A Comparative Analysis: Preschool Children from Romania and France*, Procedia - Social and Behavioral Sciences, vol. 78, 2013, pp. 16-20, ISSN 1877-0428.

preservation of traditional gender roles with minor, culturally opportunistic adjustments."[13]

But not only Turkey has contested the Convention, Poland also announced the intention to withdraw. Slovenia had also some street demonstrations against it. What happened there? Agnieszka Graff and Elzbieta Korolczuk explain the Polish anti-Instanbul Convention in the wider framework of the Polish "anti-genderism" which they connect with the strong right-wing, catholic, conservative movement in the country that officially inaugurated, on 29 December 2013 (by the Pastoral Letter of the Bishops'Conference) a campaign against "gender equality education and legislation, sexual and reproductive rights, as well as the very use of the term "gender" in policy documents and public discourse." Polish anti-gender campaigners claim that their aim is to protect the Polish family (especially children) against feminists and the "homosexual lobby"; to defend authentic Polish cultural values (which are equated with Catholic values) against the foreign influence of the corrupt West and liberal European Union, which has supposedly replaced the USSR as Poland's "colonizer". Targets include sex education, ratification of the Istanbul Convention and gender equality policies more broadly. Conference read in Poland's parishes."[14] In this context the Polish minister of justice Jarosław Gowin publicly opposed ratification of the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), calling it a "carrier of gender ideology" (Graff 2014; Grzebalska 2015). As Graff and Korolczuk says "the rationale offered by Gowin was that the Convention is an ideological Trojan Horse: Its hidden agenda, he claimed, was undermining the traditional family. The fact that the text of the Convention includes the word "gender" was viewed as proof of its portrayed as traitors, mere puppets in the hands of an international or even global conspiracy against the existing traditional gender order."[15] This perspective on "gender" word is also officially stated in the Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) [16] in which the Polish Government makes the following remark: "The use of the term "gender" in the Convention poses many problems of interpretation. The term is not a legal term and is not rooted in universally binding international mechanisms. Furthermore, because of its ambiguity, it has a forcible character which, in the context of the rights and obligations guaranteed, creates doubts about the correct understanding and application of the legislation."[17] Also in the same document is stated that "There is a risk that measures to combat "gender-based violence" may include, among other things, attempts to reduce the importance of basic social institutions, in particular the family, as the family and the roles of its members associated with it may be wrongly perceived as a source of women's oppression and a space for men's domination."[18] With this comment and invoking the Polish Constitution and it's values[19] Poland designed its anti-Istanbul Convention/anti-gender profile.

But interesting is also the fact that the above-mentioned Polish traditional, cultural, deeply socially rooted values that were invoked seems not to be that Polish, but in fact are invoked as being much more spread and accepted. That was why for instance on 2 September 2020, the same Polish Justice Minister Zbigniew Ziobro has invited Slovenia in an official letter to join Poland in withdrawing from the Istanbul Convention. We have reasons to believe that Ziobro in fact wanted to speculate the effervescence of an anti-gender movement that took shape also in Slovenia. Roman Kuhar makes an analysis of the anti-gender movement in Slovenia saying that the discourse concentrated on the controversies around public schools education and children being exposed to "gender theory". In this context there were voices that urged the Slovenian government not to ratify the Istanbul Convention due the "extreme ideas of gender theory" that should not be integrated into national

[13] Alina Isac Alak, 22 March 2021, *Turcia, violenţa îndreptată asupra femeilor şi succesul nefast al neotradiţionalismului Islamic (Turkey, violence against women and the disastrous success of Islamic neo-traditionalism)*, accessed in 03.05.2022, at adev.ro/qqd20n.

[14] Agnieszka Graff and Elzbieta Korolczuk, "Worse than communism and Nazism put together": War on gender in Poland in Kuhar R., Paternotte D. (eds) (2017). *Anti-Gender Campaigns in Europe Mobilizing against Equality*. Maryland: Lowman &Littlefield, p. 132.

[15] *Idem*, pp. 134-135.

[16] Received by GREVIO on 8 September 2021 GREVIO/Inf(2021)10 Published on 16 September 2021, accessed in 03.05.2022 at https://rm.coe.int/grevio-inf-2021-10-eng-final-comments-gov-poland/1680a3d208.

[17] See p. 5.

[18] Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report), 2021, p. 3.

[19] - the obligation of impartiality of public authorities in the field of religion, convictions and philosophical beliefs (Article 25, paragraph 2, of the Constitution of the Republic of Poland), − the fulfilment of the fundamental obligation of public authorities to respect and protect human dignity and to guarantee the freedoms and rights derived from it (art. 30 of the Constitution of the Republic of Poland), − the protection of marriage as a union of a man and a woman, the family, motherhood and parenthood (art. 18 of the Constitution of the Republic of Poland), − respect for the right of parents to bring up their children in accordance with their beliefs (art. 48, para. 1 of the Constitution of the Republic of Poland), − respect for the right of parents to provide their children with moral and religious education and training in accordance with their convictions (art. 53, para. 3, of the Constitution of the Republic of Poland).

legislation and school curricula.[20] The Slovenian officials refused the Polish invitation to join what is in fact a global-conservative club. The Modern Centre Party (SMC), of which Justice Minister Lilijana Kozlovič is a member, said that Slovenia's withdrawal from the Istanbul Convention would be unacceptable, and Janja Sluga member of the same party underlined that "Slovenia as a state should not be even considering that", and that Poland's initiative jeopardizes Slovenia's constitutional and legal system and that the withdrawal would push Slovenia back to the dark times when women and children's abuse was a norm.[21]

Bulgaria also does not ratified the Convention due it's so called incompatibility with the Bulgarian constitution, the controversies being also around the gender meaning. The Constitutional Court said that the word "gender" can only indicate biological sex, and that ratification of the Istanbul Convention which defines gender as a social construct would be anti-constitutional. Emberi Méltóság Központ in Hungary also criticized the Convention as being part of the "gender ideology" and in Croatia the implementation of the Convention has been delayed due the conservative protests organized all over the country.

Romania also had a number of public voices that opposed to the Istanbul Convention. It is now not a surprise that the voices were form the orthodox side of the story, for instance priest Necula, a prominent public figure in Romania, signed in March 2018, together with other 8 high-education professors an open letter denouncing the gender theories adopted by Romania trough the Istanbul Convention. Also, in 2018 a group of NGOs sent the Ministry of Education an address in which concerns regarding the Istanbul Convention were expressed. In the address was mentioned and criticized the definition of gender as a social construct, the fundamental right of parents to choose the values they pass to their children that was threatened by the Convention provisions, but also the fact that the GREVIO monitoring mechanism violates the national sovereignty of Romania.[22] The Education Ministry requested clarification form NAEO (National Agency for Equal Opportunities) which clearly in the response stated that the "whole process of ratifying the Convention has complied with all the steps provided by law and the rules of a real democracy in terms of the legislative process in our country" and that "the ratification of the Istanbul Convention is a certainty of continued governmental efforts to prevent and combat the phenomenon of violence against women and domestic violence and that Romania is reaffirming its support for the Convention also in the spirit of solidarity other countries that ratified the convention, but also as a sign of its unquestionably support for the elimination of all discrimination against women and men on the grounds of sex"[23]. In this respect, addressing the most important topics of the anti-gender rhetoric in Romania Oana Băluță identifies the following issues: 1. Gender equality *per se*, understood as "making the girls boys, and the boys girls", or conservative rhetoric pro traditional gender roles; 2) Feminist movement; 3) LGBTQ rights – see the 2018 Romanian referendum for the traditional family; 4) Istanbul Convention, 5) Sexual and reproductive rights; 6) Formal gender education, including gender studies; 7) Non-formal gender education.[24]

But even though Romanian did not escape this anti-gender rhetoric, the Istanbul Convention was not until now in the front line of the attacks. In Romania the anti-gender rhetoric worked as an ideological glue for a variety of conservative groups (around 30 Romanian NGOs) - the Coalition for Family - that initiated in 2018 a National Referendum for changing the Constitution of the country. On the same track of hostility, in November 2019, a Senator – member of a young right-wing party (Popular Movement in Romania) known as the Parliamentary Prayer Group, which includes prominent supporters of the Coalition for Family, proposed a law that should forbid any kind of sex/gender proselytism in education, because gender theory is not scientifically proven and gender sensitive education artificially creates different kinds of minorities. As a follow-up, the Romanian Parliament passed in June 2020 an amendment to the education law, banning all educational institutions from "activities propagating theories and opinions on gender identity according to which gender is a separate concept from biological sex"[25]. At the end of 2020, the Constitutional Court, in perfect opposition with the

[20] Roman Kuhar, Changing gender several times a day: The anti-gender movement in Slovenia, in Kuhar R., Paternotte D. (eds) (2017). *Anti-Gender Campaigns in Europe Mobilizing against Equality*. Maryland: Lowman &Littlefield, p. 160.

[21] Poland Invites Slovenia to Withdraw from Convention Aimed at Preventing Violence Against Women, By STA, 02 Sep 2020, accessed in 03.05.2022 at https://www.total-slovenia-news.com/politics/6881-poland-invites-slovenia-to-withdraw-from-convention-aimed-at-preventing-violence-against-women.

[22] National Agency for Equal Opportunities, Response to The Education Ministry referring some concepts and provisions of the Istanbul Convention, no. 3975/SG/MC/22.11.2018.

[23] *Ibidem*.

[24] Băluță, Oana, *Egalitatea de gen. Politici publice sau un câmp de luptă discursiv și politico-religios?* Transilvania, no. 11-12 (2020): 18-33. https://doi.org/10.51391/trva.2020.12.03.

[25] See Cătălin Avramescu, lecturer at Bucharest University and his interview (18 Jun. 2020) about gender studies as pesudo-science:https://www.libertatea.ro/stiri/catalin-avramescu-studiile-de-gen-sunt-pseudostiinta-3039462 (accessed on March, 5th, 2021); Adina Papahagi, lecturer at Babeș Bolyai University, facebook post about gender studies as being ideology and propaganda, https://www.facebook.com/papahagi/posts/595211791109749/?_rdc=1&_rdr (accessed onMarch, 3rd, 2021) or his article about gender studies

Bulgarian one, declared the law unconstitutional in response to a claim of the Romanian president.

4. Consolidating legal framework in Romania: follow up after the Istanbul Convention ratification

Romania ratified the Istanbul Convention on 23 May 2016. The coordinating body is the NAEO (National Agency for Equal Opportunities Between Women and Men). The agency is responsible for the elaboration, coordination and implementation of strategies and policies in these two areas of competence and as a state authority, coordinates the implementation of two programmatic documents in the two areas of competence: the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

The NAEO's competencies are based on the 202/2002 Law and treatment between women and men, republished, with subsequent amendments and completions and its functions and from the provisions of the Law no. 217/2003 on preventing and combating domestic violence, republished.

As such, NAEO is the responsible body for the coordination and monitoring of the implementation of the National Strategies for promoting equal opportunities for women and men and combating domestic violence and the operational plans, but also for developing, coordinating and implementing the national strategy on preventing and combating sexual violence (see "Synergie" 2020-2030).

In order to give meaning to various requirements of the Istanbul Convention Romania, especially via NAEO, made since 2016 a series of amendments to various laws, but in particular the Law no. 217/2003 for the prevention and combating of domestic violence (the Domestic Violence Law) and Law no. 202/2002 on equal opportunities and treatment for women and men (the Gender Equality Law).

New concepts and definitions have been added to Domestic Violence Law by the amendments maid in 2018 in order to provide a comprehensive understanding of domestic violence. The conceptualization was done in full compliance with art. 3 (Definitions) of the convention[26], but also recognized two additional forms of domestic violence - social and spiritual violence.

The law domestic violence law was also amended in in July 2020 when cyber violence was recognized and added as a form of domestic violence. Art. 4 para. 1 letter (h) defines cyber violence as: "online harassment, online messages that instigate hate on the basis of gender, online stalking, online threats, non-consensual publishing of information and intimate graphic content, illegal access to interception of communications and private data and any other form of misuse of Information and Communication Technology by means of computers, smartphones or other similar devices that use telecommunications or can connect to the Internet and may transmit and use social platforms or email platforms, with the intent to cause embarrassment, humiliate, scare, threaten, or silence the victim". Like that all forms of domestic violence are now covered by the Romanian legal framework: verbal, physical, psychological, sexual, economic, social, spiritual and cyber violence.

Also, there were amendments provided a more detailed definition of family members (art. 5), one that overpassed the traditional perspective on what family is and can be. In this respect, children from previous relationships and the children witnesses to domestic violence were explicitly acknowledged as victims. But, in line with the need for a common understanding of GBV it is important to underline that some other changes and updates are to be done by Romania in order to have a coherent legal framework in addressing this kind of abuses. For instance, even though the Domestic Violence Law was amended in accordance with the Istanbul Convention provisions, the Criminal Code still contains a restrictive definition of "family members" (art. 177) and only covers current - but not former – family relations (spouses and partners) and also limits the recognition of the aggression to the condition of family members that share the same residence.

Another very important step made by Romania in order to define and recognize violence against women as an issue of gender and power relations was the introduction in the Law no. 178/2018 (which completes the Law no. 202/2022 regarding the equal opportunities and treatment between women and men) of the concept of "gender-based violence" as follows: "gender-based violence is the act of violence directed against a woman or, as the case may be, a man and motivated by gender.

as being non-science, intelectual imposture and leftist indoctrination published in June, 17th 2020 at https://inliniedreapta.net/monitorul-neoficial/adrian-papahagi-studiile-de-gen-nu-sunt-stiinta-ci-impostura-intelectuala-indoctrinare-stangista/(accesed on March 1st 2021); Daniel Funeriu's (former minister of Național Education) facebook post about academic freedom and political corectness cited in the article published by Newsweek in June, 19th 2019 at https://newsweek.ro/educatie/teorii-opinii-gen-aparare (accessed on February, 27th 2021); Alexandru Lăzescus article about gender studies as pseudo-science and neo-marxist ideology published in June, 2nd 2020 at https://inliniedreapta.net/monitorul-neoficial/alexandru-lazescu-studiile-de-gen-sunt-pseudo-stiinte-ce-ar-trebui-studiate-ca-parte-a-curentelor-neo-marxiste/ (accessed on March, 13th 2021).

[26] "Domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

Gender-based violence against women or violence against women represents any form of violence that affects women disproportionately. Gender-based violence includes, but is not limited to, domestic violence, sexual violence, genital mutilation of women, forced marriage, forced abortion and forced sterilization, sexual harassment, trafficking in human beings and forced prostitution".

Multiple discrimination is also addressed by the Romanian legislation in art. 2 para. 6 of the Antidiscrimination Law – which states that the discrimination on multiple criteria shall be considered an aggravating circumstance (art. 2, para. 6) - and art. 4(h) of the Gender Equality Law. Although the concept of multiple discrimination is reflected in the legislation, it is important to underline here that it is also a reported lack of acknowledgment and understanding of the concept of multiple and intersectional discrimination within the courts and legal institutions, but also within the population in general.[27]

Sexual harassment is criminalized in Romania since 200, but the definition offered by Criminal Code, which entered into force in 2014 refers to it as acts of repeatedly demanding sexual favors in the context of an employment which intimidate the victim or place her in a humiliating situation (art. 223). This approach is not in line with the Istanbul Convention due the fact that limits the harassment once to requesting sexual favors and second to the repetitiveness of the abuse. The Istanbul Convention refers to any unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (art. 40). Also, the Romanian Criminal Code limits sexual harassment to the workplace or similar relationship which is not in line with the Convention text which does not have such reference.

In respect with the protection pillar of the convention it is also important to mention the introduction in the Domestic Violence Law of **the Provisional Protection Order** (PPO), as a measure of immediate protection. The PPO allows and requires law enforcement bodies (especially the police) to quickly intervene in order to protect victims of domestic violence also by the immediate removal of the aggressors form the home. The PPO was accompanied by measures to monitor compliance and prevent infringement of court-ordered protection orders and to assess risk in cases of domestic violence according to art. 51 of the Convention, supportive legal framework consolidated by the changes done in 2018. The PPO proved to be a very useful tool in fighting GBV due the fact that the overwhelming majority of the PPO were later confirmed by the prosecutors.

Year	PPO	Confirmed by a prosecutor	Unconfirmed	Transformed in PO (Protection Orders)	PPO violated
2020	8393	7296	1097	3887	479
2021 (first 6 months)	4561	4040	521	2065	264

Source: National Agency for Equal Opportunities Between Women and Men

It is also important to underline the fact that, in Romania, there is no specific offence or other legislation expressly criminalizing **female genital mutilation, forced abortion or forced sterilization** and **forced/early (**illegal child**) marriage**. Further efforts should be done by Romania in this respect and in order to have a substantive implementation of the IC. The Convention addresses those forms as violence in the art. 37, 38 and 39 and underlines that they are a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men.

5. Conclusions

To sum up, gender-based violence is still under fire of the detractors that are not sporadic and isolated, but global and organized. This can be seen by the same ideological framework that was invoked in different contexts, a conservative/religious framework that goes against the women empowerment, against women's rights as human rights. The contesters of the Istanbul Convention are in fact part of a wider anti-gender global movement that are in the back of the global gender backlash, a phenomenon well documented in the last years[28]. As Kuhar and Paternotte notes "in fact, Slovenian activists were inspired by Italian activists, and Italian activists were themselves inspired by a French group, the Veilleurs (Vigilist), which they

[27] See here the research results presented in the Intersectionality – Training Manual, 2022 accessible hereTraining-Manual-Final-Intersect-Voices.pdf.

[28] Petö A. (2018). *Attack on Freedom of Education in Hungary. The case of gender studies, LSE Blogs*. Accesed at: https://blogs.lse.ac.uk/gender/2018/09/24/attack-on-freedom-of-education-in-hungary-the-case-of-gender-studies/, August 30th, 2020; Băluță, I. (2020) *Studiile de gen: un turnesol al democrației românești (Gender Studies: a Litmus for the Romanian Democracy)*, Transilvania, no. 11-12 (2020), pp. 34-41. https://doi.org/10.51391/trva.2020.12.04, accessed in August, 23rd, 2021; Băluță, O. (2020), *Egalitatea de gen. Politici publice sau un câmp de luptă discursiv și politico-religios? (Gender Equality. Public Policies or Political and Religious Discoursive Battlefield?)*, Transilvania, no. 11-12, pp. 18-33. https://doi.org/10.51391/trva.2020.12.03, accessed in August, 23rd, 2021; Case, M.A. (2019), *Trans Formations in the Vatican's War on 'Gender Ideology'*, Signs: Journal of Women in Culture and Society 44, issue 3;Corredor E S. (2019), *Unpacking 'Gender Ideology' and the Global Right's Antigender Countermovement*, Signs: Journal of Women in Culture and Society 44, issue 3; Kováts,E., Poim M. (2015). *Gender as symbolic glue: The position and role of conservative and far right parties in the anti-gender mobilization in Europe*. Foundation for European Progressive Studies & Friedrich-Ebert-Stiftung.

imported to their own country and hybridized. Born in 2013 in Paris, this group initially gathered a few (mostly Catholic) youngsters who wanted to oppose the same-sex marriage bill and promote "human ecology"[29]. But even though for scholars is obvious that we are dealing with a strong ideological opposition to gender equality, for the rest of the citizens we are dealing with a dangerous play. We are dealing with a war which is delegitimizing the actions/policies aimed at ending GBV and is re-legitimizing the submission of women, the patriarchal norms that are reinforcing the power relations and inequalities between women and men. In this ambiguous global and regional context, one in which some of its neighbors had had strong voices opposing the Council of Europe Convention, Romania is showing signs of keeping its commitment to the values and principles stated by this important international document. The milestones I consider worth mentioning in this respect are related to the Constitutional Court response to the sex/gender debate, the NAEO response to the detractors which addressed the Education Ministry, but also the steps are being done in order to do an ambitious and comprehensive reform of gender-based violence legal framework.

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FROM REGIONAL TO GLOBAL – THE RUSSIAN FEDERATION STRATEGIES AND PERSPECTIVES

Cătălina-Laura PAȘCU[*]

Abstract

The 21st century has surprised, after 2001, metamorphoses of the Russian Federation, both internally but especially at the external level, from a strategic regional identity towards a desired global identity. Identity and identification of power for the Russian Federation became a target centered on the recovery of the state's major power and to restore the greatness of power. In the global context of geopolitical transformations, we can identify a new regional approach versus globalization – as a response reaction, in which new centers of power, and the powers print its presence in a world that tends toward structural changes of multipolar system. Thus, a strategic identity in the multipolar context is what wants and the Russian Federation.

The present article, it is focused to debate the new dimensions of international theory and practice and aims to analyze a few aspects of defining social – political and cultural identity, which allow us to point out the extent to which, both geopolitical and geostrategic policies, identify and mobilize the meanings of evolution on post-Soviet Russia. In a context on the multidimensional system of international relations, the proposed research was aiming at the theoretical and methodological issues focused on an interdisciplinary approach, specific geopolitical analysis, combining the meanings of identity perspective historical, political, social, economic and cultural.

Keywords: *International relations, globalization, regional security, geopolitics, identity.*

1. Introduction

The beginning of the evolution of the modern international state system was also the beginning of the geopolitical projections because geopolitics represents by translation a national, regional, or global space, governed by a state or a system of states, which is in a relationship dependent on the valences of power and identity and offers us the opportunity to observe and reflect on the manifestation and evolution of power relations in a certain historical period.

At the end of the last millennium, post-Soviet Russia lost its status as a great power, the adventure of the greatness of the "Russian Idea" and messianic traditions declined in the "Great Russian Question", which subsequently manifested itself in the numerous attempts at identity-national retrieval.[1]

The structural transformations involved for the Russia of the XXth century, quantitative losses through territory, resources, population, qualitative and identity losses through the normative crisis and the renunciation of the imperial identity of power in the context of new criteria for reporting in the system of international relations.[2]

The positioning between a strong European identity and the vastness of the Asiatic continent has created a force of geopolitical and geostrategic tension for the Russian Federation, which has continuously supported its identity matrix as well as its political discourse as an ideological support of various regional and global projects and strategies[3].

Thus, the present article aims to analyze its aspects of identity, socio-political and cultural definition, which would allow us to identify to what extent its geopolitical and geostrategic conception supports and mobilizes the meanings of the Russian space of current international evolution.

We will note that post-Soviet Russia represents an important space-time framework, from the point of view of the evolution of ideology and the exercise of power, so that a geopolitical analysis regarding the internal functional structure of this important state, as well as the foreign policy regarded as geopolitics, its relations with the former union states, with the United States, the European Union but also the reference to the system of international relations, makes that, indeed, the study of the pragmatic actions of the Russian Federation, to be particularly relevant for understanding the Eurasian geopolitical projections, as

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[1] Trenin, Dmitri, *The End of Eurasia: Russia on the border between geopolitics and globalization*, Carnegie Moscow Center, Washington DC, 2001.

[2] Tsygankov, Andrei P., *Russia and the West: From Alexander to Putin*, Cambridge University Press, Cambridge, 2012.

[3] Brzezinski, Zbignew, *The Great ChessBoard*, Univers Enciclopedic Publishing House, Bucharest, 2000.

an identity vision in the multidimensional context of the current globalization.

2. Geopolitics – a model of knowledge of international processes

In order to understand and know the processes and phenomena that take place in the system of international relations, implicitly of the different current geopolitical situations, we must correctly understand what geopolitics is, regarded as an instrument of study and analysis, in the context of the new world order and of the processes of globalization, which necessarily support the redefinition of international relations approaches.

Today, geopolitics is perceived as an academic discipline and a field of political-strategic action at the state level, with an "integrative, visionary and planning character"[4].

As a field of academic research, geopolitics has a multidisciplinary and interdisciplinary character, and thus becomes a field of study of the combinations between geographical and political factors by determining the positioning of a state towards its neighbors, and in the regional or international context, towards the other actors of the system.

The need for methods and techniques of geopolitical analysis is dictated by the radical transformations that have happened and are happening in the world, both regionally and globally. The research of international relations with the help of geopolitics has led to the change of the image and representation of the system of international relations.

Geopolitics and geostrategy have a different object of study and must have their own methods, but they investigate the same reality, the one that makes possible the mixing of the methods used, depending on the concrete situation. Through geopolitical methods, the interests of the actors in a region can be deciphered, and through geostrategic methods we find out how and by what means these interests will materialize[5].

The knowledge of the geopolitical space of action must be aimed at a set of characteristics: economic, political, military, ideological, because the geopolitical value of a space is given by its dominant characteristic. The indicators of the geopolitical space are the power potential of each actor, the interest and perception of the geopolitical field, they are associated with the analysis of political, social, demographic, religious, ethnic values[6].

From my point of view, without a deep knowledge of the political realities, geographically related to the global economic and social landmarks, the geopolitical analysis of the international political phenomena, with the support of maximizing the representation of the internal state policy, even viewed through the prism of a spatial unfolding and not only temporal, can only be the object of a "geopolitics without substance".

3. Redefinition of power – global strategy and domination

The phenomenon of power, in terms of its role in the functioning of the international system, reveals a special, constant interest and creates debates and controversies among specialists in the field of political science, international relations, materialized in various theoretical approaches, according to its importance and an analysis of power and its distribution in the international system is required, especially at a time when power is undergoing important transformations after the breakup of the Soviet Union, by relating it to the global dimension.

For the Russian Federation, the option of realistic transition, the pragmatic realism of the early twenty-first century was the right response in difficult times, even if the subsequent motivation of unilateral geopolitical actions and projects no longer had real coverage in accepting hegemony but manifested itself fervently at the level of regional political discourse and practice.

The Russian Federation has challenged the American model because it imposes its *pattern* of solving the legitimacy dilemma caused by the anarchic nature of the international system, as well as the American responsibilities for the national interest and for the international liberal order that involves the use of military, economic and financial power, which the United States has[7].

Thus, the Russian Federation supports the need for "American unilateralism" to be replaced by an "ideological multilateralism", pragmatic, which supports international institutions and respects international law[8]. Contemporary Russia must rethink its role in the international system, through the perspective of recalibration as smart power capable of

[4] Parker, Geoffrey, *Geopolitics. Past, Present and Future*, Pinter, London, 1998, p. 11.
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[7] Collins, Alan, *Contemporary Security Studies*, Oxford University Press, New York 2010, p. 12.
[8] *Idem*, pp. 14-15.

meeting the challenges of the twenty-first century and through actions that do not cause damage either to themselves or to the other actors with whom it collaborates, a difficult mission in the offensive conditions of the Kremlin's current power policy.

In the international arena, there are continuous debates on the global character of the world and on the new global geopolitical architecture. Political processes and the effects on international life led to a new vision of a balance of power in the world, of the roles imprinted on the main actors who must manage the opportunities of the new world order[9].

Current international relations are characterized not only by a sharp dynamic, but also by complexity and multidimensionality. From a bipolar system existing during the Cold War, today we have a system with several poles of power of a different nature: economic, ideological, political.

The actions of states are determined by the existing relations between them, relationships that are determined by the characteristics of these states, from the exercise of influence to cooperation or to dependence and domination. Thus, we note that as factors of the international state of the states, the economic potential, the technological development, the legitimacy of the political regime are increasingly affirmed, besides the size of the territory and the number of the population, resources, the military potential, and the geopolitical position[10].

The changes in the status of power at the beginning of the twenty-first century changed not only the importance of military power, but also the resources allocated to it. Economic resources can produce military power, as well as a specific soft power behavior, an example of success such as the United States or the European Union[11].

For the Russian Federation, the option of realistic transition, the pragmatic realism of the early twenty-first century was the right answer for that historical moment, even if the subsequent motivation of unilateral geopolitical actions and projects no longer had real coverage but manifested itself fervently at the level of regional political discourse and practice.

4. The Russian Federation – from regional to global

After the dissolution of the Soviet Union, in December 1991, fourteen independent states emerged, resulting from the former Union Republics and the Russian Federation, part of these independent republics formed the Commonwealth of Independent States (CIS). Since post-Soviet Russia, by population, territory, industrial capacity, economic power, and armed power was superior to the other former union republics, it became the rightful successor in the foreign affairs of the former USSR and took its place in international organizations.

The formation of the Russian Federation was achieved with a territorial decrease that led to a geostrategic rebound. According to statistical data, a geographical contraction of about 17 million km² was achieved, and "today Russia holds about 50% of the Soviet population, 60% of the industrial capacity and 70% of the surface", mentions Dmitri Trenin[12].

Although it retained the atomic arsenal and continued the position of the Soviet Union as a world nuclear power, comparable to that of the USA, Russia's role on the international stage was greatly diminished compared to that of the former USSR. The Russian Federation did not have the same economic, military, and political power as the USSR. In Trenin's view, it remained, however, "a basic piece in international relations through its territorial and human weight, through its nuclear weapons, through its economic potential, through its leading role for the Slavic world"[13].

But is Russia a great power? When, in the early 1990s, in the environment of the system of international relations, the Russian Federation was not considered a power as great as the former USSR, Russia's response was that "it is impossible... Russia must be a great power." This phrase is considered an axiom in the politics of Russian identity and power, visible throughout history and to which Vladimir Putin in his speeches often makes references such as *derjava* or "great power" revived[14].

Russia's preoccupation with having the status of a great power has been permanent and dates back historically, since the time of Tsar Ivan III and especially Peter the Great, who has permanently linked the security policy to the recognition of the status of great power by the other important states of Europe in different periods of history. This concern was of great importance to Russia because it places it at the center of Russian identity politics, and in this way, Russian nationalism has historically coalesced around this issue.

Currently, the Russian Federation is not a great world power, if we consider that the way of governing, the type of regime and its efficiency are key factors for

[9] Krahmann, Elke, *Conceptualizing Security Governance*, in Cooperation and Conflict, vol. 38, no. 1, p. 7.
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[13] *Idem*, p. 31.
[14] De Tigny, Anne, *Moscow and the world. The ambition of Grandeur: an illusion?*, Minerva, Bucharest, 2008, p. 16.

the great powers, but it can be considered a great power in the sense of Max Weber, according to which prestige is obviously linked to military and economic factors, power and spheres of influence[15].

The Russian Federation relies in thought on the concepts of state and sovereignty, while the great European powers rely more on the concepts of civil society and integration, it also seeks to be recognized as a great power from a traditional point of view, but it visibly stands out that it is "another player"[16]. With a Eurasian geohistorical, the current Russia tends to conceive and achieve an effective national security policy, its objectives being: ensuring the security of the state, maintaining strategic nuclear parity with the United States, the need to act as a dominant power in the "near abroad" and facing the continuous global economic crises.

Russia cannot be compared to the United States, France, or The United Kingdom, where liberal values have deep traditions. For Russia, the state, with its institutions and structures, has always played an important role, exclusively in the life of the country and its people. For the Russians, a strong state is not an anomaly, something they must contend with, but, on the contrary, a source and guarantee of order, an initiator, and the main force of movement in any change[17].

The Russian Federation has made regional efforts to restore its international prestige. First of all, maintaining the leading role among the ex-Soviet countries is a matter of prestige for Russia, as the successor of the USSR and also, a way to ensure stability in the "near foreign" in which it has national security and economic interests, exercises a classic *Realpolitik* policy, but "pragmatic" in order to diminish Western and NATO influence in the ex-Soviet territories[18].

Also, the Russian Federation has reaffirmed itself as an important global actor, both at European and world level, deftly using for its own benefit the political-military and economic external conjunctures. The international opportunity that opened up as a consequence of the terrorist attacks in the United States on September 11 and the Iraq war, led to different manifestations of force at the regional level and its own sphere of interest, Transnistria, Ossetia, Abkhazia, such as the intervention in Georgia in 2008, annexation of Crimea in 2014 and now Ukraine in 2022.

The Russian Federation wants *to become a great power again* in a multipolar world due to the geopolitical, geoeconomics and geostrategic situation in Eurasia as well as the fact that it is a nuclear power and also possesses a classically functional arsenal. Russia is an influential power in terms of its political importance, through its involvement in world affairs, a permanent member of the UN Security Council. It can also be said that Russia remains a great power from a traditional point of view, having its own national specificity, with its own economic development and its own conception of democracy.

5. Conclusions

Global transformations have led to a relativization of identities, both individual and collective, whether they are national, political, ethnic or religious identities, and at the same time generated adverse reactions to these identities or attempts to rebuild new identities.

Geopolitics, through its methods of analysis, can give answers to the systemic questions "why" a state enters into rivalry relations, in a geographical space, with other states or "why" shows a relative interest in states or regions in supporting the equation of power or affirmation on the stage of international relations.

The presented work aimed to qualitatively analyze the security and cooperation strategies in the Eurasian space starting from the concept and foreign policy of the Russian Federation, as an expression of the regional and global vision by objectifying the translation from the status of a regional power to a status of a global power, practically recovering the "greatness of power" of imperial substance.

In the global context of geopolitical transformations, of the gap between regional and global as a reaction-counter-reaction approach, new powers and centers of power imprint their presence in a world that tends towards structural changes of a multipolar type. A "strategic identity" in a multipolar context is what the Russian Federation also wants, promoting cooperation in different disciplines, in order to give it and sustain an identity of great power, both in the Eurasian space and globally.

From my point of view, I believe that the multidimensional transformations at the political-social and identity-cultural, ethnic and religious level have implicitly induced structural changes from a geopolitical point of view, which we could interpret as geosystemic, by redefining the factors contributing to the generation of power and influence policies, in order to maintain some advantageously positioned geographical supports and imperatively necessary for the construction and recognition of the power status in

[15] Poede, George, *Dominance and power in Max Weber's thinking*, Tipo Moldova, Iași, 2010, pp. 94-95.
[16] Hednskog, Jakob, Konnander, Wilhelm, (ed.), *Russia as a Great Power: Dimensions of security under Putin*, Routledge, New York, 2005, p. 19.
[17] Tsygankov, Andrei P., *op. cit.*, pp. 56-61.
[18] Secrieru, Stanislav, *Russia after empire: Between regional power and global custodian*, European Institute, Iași, 2008, pp. 156-157.

the new world order, as is the case with the Russian Federation.

All the data presented above reveals that the Russian Federation does not yet have all the items of a great power in the conventional sense, but all the actions of this state consistently support its objectives to maintain its regional influence in the former Soviet states, to limit the "losses" in the Eurasian space and to promote the conditions that allow the redefinition of the current Russia, so that, in the long run, it regains, through geopolitical, geostrategic and geoeconomics dimensions, its role as a great power in a multipolar world.

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ACTORS AND FACTORS INVOLVED IN PUBLIC POLICIES

Florina POPA*

Abstract

A number of actors and factors, whose action can be decisive for decision-making in the political process, are involved in the public policies making. Different authors have identified a number of factors, grouped in relation to some elements that may favor, streamline or, in some cases, have adverse effects on policy implementation.

The actors involved in decision-making in public policies can exercise their influence, through their interests, but also the resources they have at their disposal. Over the course of the paper, the authors' opinions on the presence of several groups of actors were taken into account, the need to study them being given just by their influence within politics.

The present study aims getting over the grouping of different categories of actors and factors, identified by foreign and domestic specialized literature, taking into account issues related to their role and impact, ways of intervention, relevant elements for their influence within the process.

The conclusions summarize the essential ideas retained in the material, trying to capture the relevance of the research results of this topic.

The novelty elements brought in the paper consist just in bringing together, in a synthetic manner, the aspects noted during the research and highlighting the contribution of each category of factors and actors in the implementation of public policies.

The methodology used was the information from the foreign and domestic specialized literature, getting over the text and assimilation of the essential ideas on this subject, their processing from the perspective of the author's own interpretation.

Keywords: *public policies, influence factors, actors, public policy implementation.*

JEL Classification: *D78*

1. Introduction

We can ask ourselves why it is important to study the role of the factors that intervene in public policy and the influence of the actors that contribute to the elaboration of public policies? There are aspects to which the course of the paper tries to respond, bringing arguments, by grouping certain factors according to the degree of influence and presenting some types of actors involved in formulating public policies.

Studying them can bring additional contributions in a field of interest, showing the importance of some elements that intervene in the public policy and can influence it.

Public policy actions are aimed at increasing the competitiveness and ensuring the well-being of society, maintaining public security and ensuring the quality of the environment, these being outlined as final long-term goals. The ability of public policies to find the necessary means to effectively answer society's needs reflects their quality and is conditioned by the existence of a strategic vision that would allow to be addressed the diversity of pursued objectives[1].

The challenges produced by various factors in the economic (economic crises), competitive (internal and external market), environment, budgetary constraints, require actions to increase the efficiency of public policies[2].

At the social level, it is important that public policies are accessible, perceptible and legitimate[3].

The development and implementation of public policies for economic development involves actions to support the development of certain sectors, by focusing on performance and eliminating or correcting the observed elements of dysfunction[4].

The aspects that distinguish public policies are[5]:

- the sphere of implementation;
- political and economic factors, conjuncture;
- the degree of complexity of the tools and techniques used.

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[1] Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *Manual de bune practici internaționale cu privire la metode de participare și influențare a politicilor publice*, Perioada de elaborare: Ianuarie 2019 – Aprilie 2019, p.12, https://www.paemalba.ro/wp-content/uploads/2019/05/Manual-de-bune-practici-.pdf.

[2] *Ibidem.*

[3] *Ibidem.*

[4] Cosmin Stoica, Cristian Moisoiu, *Importanţa Politicilor Publice în Dezvoltarea Social-Economică a României*, 2007, p. 519, https://www.utgjiu.ro/revista/ec/pdf/2007-01/97_Cosmin%20Stoica.pdf.

[5] *Ibidem.*

The intervention of the state in the economy, through public policies developed at the level of central and local public administration is closely related to a series of aspects: historical, political and economic conjuncture, internally and externally, currents of thought from a certain period, the country`s level development, skills and capacity of action of political leaders[6].

A number of opinions of public policy specialists have highlighted changes related to the forms of state intervention in society, in order to solve the various problems they have to deal with. These involve taking into account aspects such as[7]:

- the form of government that determines the type of public administration (Ariño, 2003, p. 301);
- the need to change the orientation in governance, from projects and programs, to intervention through public policies (Aguilar, 2013, p. 30);
- in studying public issues it is important to consider not only the relations between state institutions, but also the aspects related to the interaction of the state with other actors (market, non-governmental entities and citizens) (Fontaine, 2015, p. 63);
- the tools, mechanisms and intervention techniques used in the actions taken determine the way in which governments carry out their governmental activity.

The paper aims to present some categories of factors and actors involved in the development of public policies as reflected in the foreign and domestic specialized literature, taking into account issues related to their role and impact, ways of intervention, relevant elements for their influence within the process.

The conclusions summarize the essential ideas retained in the material, trying to capture the relevance of the research results of this topic.

2. Influencing factors in the achievement of public policies

The implementation of a public policy is characterized by the degree of relationship between the government and the area to which that policy is addressed ("target space")[8].

In the elaboration and implementation of public policies, a series of elements considered *factors of influence* intervene, the action of which can be decisive. In this regard, there have identified a variety of situations that may have an impact on the development of relevant public policies, depending on how they are grouped.[9]

1) Factors that *can favorably influence the implementation of public policy* grouped on several aspects of the intervention[10]:

- *Factors* in relation to the *objectives* of the parties involved in the implementation of the policy (those who implement it and those for whom it is aimed), respectively, the extent to which the implementation of policy contributes to meeting the requirements of the parties;
- *Factors* concerning the *volume of information* that the involved parties held. In this sense, the knowledge by the managers responsible in the process of the implementation, of information about the field to which the policy is addressed, can favour the application of the public policy (for example, the granting of subsidies).
- *Another class* is the *distribution of power* between the actors who implement public policy and the members of the field concerned. For example, in the case of grants, the decision-making power belongs entirely to those who implement the policy, if the members concerned request such support.

2) Viennet and Pont (2017)[11] identify some possible situations that may influence, differently, the operationalization of the policy[12]:

- *Policy designing*, respectively, adopting or rejecting it, depending on the potential to contribute to solving the signalized problems[13].
- *Stakeholders and the interests* they have in public policy play a central role in policy

[6] *Ibidem.*

[7] María Helena Franco Vargas; Daniela Roldán Restrepo quote Ariño, 2003, p. 301; Aguilar, 2013, p. 30; Fontaine, 2015, p. 63, in the paper *The instruments of public policy. A transdisciplinary look (Los instrumentos de política pública. Una mirada transdisciplinar) (Instruments de politique publique. Une vision transdisciplinaire),* Cuadernos de Administración/Journal of Management, vol. 35, no. 63, 2019, pp. 101-113; Print ISSN: 0120-4645 / E-ISSN: 2256-5078/, p. 102.

[8] Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *Manual de bune practici internaționale cu privire la metode de participare și influențare a politicilor publice*, elaboration period: January 2019 – April 2019, p. 26.

[9] *Idem*, pp. 26-27.

[10] *Ibidem*.

[11] Viennet Roman; Pont Beatriz, *Education policy implementation: A literature review and proposed framework*, OECD Education Working Paper, no. 162, OECD Publishing, Paris. http://dx.doi.org/10. 1787/fc467a64-en, 2017, pp. 28-37.

[12] Debela Tezera, in the paper *Factors for the Successful Implementation of Policies*, Merit Research Journal of Education and Review (ISSN: 2350-2282) vol. 7(8) pp. 92-95, August, 2019, http://meritresearchjournals.org/er/index.htm, p. 093, quotes Pont (2017; pp. 28-34).

[13] Viennet Roman; Pont Beatriz, *op. cit.*, p. 28.

implementation, due to their ability to influence policy and interact with other factors[14].

- *Institutional environment* "comprises the formal and informal social constraints that regulate the implementation process"[15] in a certain field.

The implementation strategy concerns the elaboration and implementation of policy[16]. Frank F. et al. 2007, P: 92 consider that efficient implementation of the policy can be achieved, in the extent that a number of elements are taken into account, such as[17]:

- clear formulation of the objectives pursued;
- feasible structuring of the implementation;
- the positive contribution of the interest groups;
- avoiding some adverse effects on the economic and social environment, as a result of the changes caused by the implementation of the policy.

3) Factors identified by *fields in which they operate*, which exert their influence in fulfilment of public policies, as follows[18]:

- *Knowledge and innovation can influence politics, through* the dissemination of information and possibilities to recognize opportunities;
- *Social, political and economic* context exerts its influence, through:

-Political and development opportunities, openness towards influences coming from outside;

-Resources available to political decision makers;

-Actors who can be involved in policy making and can influence policies.

- The legal framework intervenes through:

-Laws that address a specific field of activity (for example, the management of health risks, generated by chemicals);

-Laws related to institutional processes, the budget available to the government, procedures;

- Influences from the institutional system:

-Structure and potential of the institutional system (central government agencies, local government, NGOs, private sector, etc.).

-*Impact of the external environment in the form of* international agreements and treaties, media and other external events.

4) *Unfavorable factors* in the implementation of a public policy, as a result of which, it does not achieve the purpose for which it was developed (Maarse, 1983; Bressers, 1983)[19]:

- resistance, locally, to the decisions and guidelines received from the central level;
- economic and financial situation;
- lack of clarity in formulating the aims of the respective policy;
- unfavorable market conditions in the short term;
- lack or poor coordination between different public policies;
- insufficient motivation of the municipalities which are responsible for the implementation of public policies;
- insufficient number of civil servants;
- late appearance of application rules;
- erroneous perception of the operationalization of the subsidies, by the applicants.

3. Actors involved in public policy making

The political process involves the involvement of groups of actors, the way of action, as well as their inter-relationship in order to achieve the objectives, elements determined by rules that govern the functioning of society (institutional, political environment)[20].

Actors from public or private sector involved in public policy making have the capacity to intervene with solutions to address the problems facing society. It is important to implement them and assess their impact on society, social groups, etc., for which they were intended.

The study of the actors aims to signal the individual or group interests and the reason for which

[14] *Idem*, p. 30.
[15] *Idem*, p. 34.
[16] *Idem*, p. 37.
[17] Debela Tezera, *op. cit.*, p. 93, quotes Frank F. et al., 2007, p. 93.
[18] Persistant Organic Polluants Toolkit, *Factors Influencing the Policy Process*, http://www.popstoolkit.com/riskmanagement/module/step4/policyprocess/influences.aspx.
[19] Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România)**,** *Manual de bune practici internaționale cu privire la metode de participare și influențare a politicilor publice***,** elaboration period: January 2019 – April 2019, p. 23, quotes Maarse, 1983; Bressers, 1983.
[20] Mihaela Păceșilă, *Actors Involved in the Public Policies Cycle – Public Policy Stakeholders/Actorii implicați în ciclul politicilor publice - stakeholderi ai politicilor publice, Theoretical and Empirical Researches in Urban Management Journal (Cercetări practice și teoretice în Managementul Urban),* vol. 3, no. 8 (August 2008), pp. 84-93, p. 85.

their involvement in the formulation of the decisions is taken into account.

Actors can influence and guide the actions of the organization, so that, by studying them, the interests of important actors and the resources they have when they are involved in a political decision making and its implementation can be better understood[21].

The author Mihaela Păceşilă (2008)[22] considers that the actors participating in the public policy process can be appointed *stakeholders* due to the interest given for the formulation and implementation of public policies. The statement is reinforced by the author, with some elements that outline the concept of stakeholders of public policies, derived from foreign and domestic literature.

The stakeholder is "that individual or group that may influence a particular policy or that is affected by this"[23]. Actors/stakeholders can be consulted to provide practical solutions to solve problems of interest to society and those involved in policy making have the legitimate authority to impose normative directions of action[24]. Their social status can be an important element taken into account in supporting some policies to achieve the goals[25].

Participants, actors, in the political process, can be defined:

"Any natural or legal persons, groups, organizations or institutions, that have an interest, are influenced/affected or may influence/affect the public policies making process "[26].

"The notion of *actor* includes *both the entities within the state (ministries, commissions, decentralized agencies etc.) and those within society (unions, NGOs, pressure groups etc.), which are directly or marginally involved in the process of public policies*"[27].

In the political process it may be involved a single actor (a representative of the Government or the institution) or a group of actors who may have a dominant influence, the roles they play being different, depending on how they relate to the political process and the interests they have[28]. Thus, *public policy subsystems* are formed - structures that contain "regulations", "power relations" and "information", interests and objectives that the actors have in a certain public issue[29].

The institutional environment and the norms regulate the political process, establish the form in which the actors relate to each other, but also, the results obtained, in their actions aimed at achieving the objectives[30].

In solving their own interests, the actions of the actors are guided by regulations given by the institutions, which are defined as "the structures and organization of the state, society and the international system"[31].

The particularities of institutional organization can be[32]:

- *formal* with reference to the membership of members, to the respective institution, the operating techniques;
- *informal* aims at elements that define the institutions.

In the process of elaborating public policies, the actors involved pursue their own interests and the results obtained are regulated by rules that govern this process[33].

The specialty literature includes several types of grouping of actors depending on the role they play in developing public policies, the way they conduct their actions, the interests pursued, as shown in the following examples:

- A well-known form of grouping of actors includes[34]:

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[21] MAI ANFP, *Politici publice*, Uniunea Europeană - Fondul Social European; Guvernul României-Ministerul Administrației și Internelor; Inovație în administrație Programul Operațional „Dezvoltarea Capacității Administrative", *Creşterea capacităţii funcţionarilor publici din Ministerul Apărării Naţionale şi Agenţiei Naţionale a Funcţionarilor Publici de a gestiona procesele de management strategic instituţional şi de proiect, în contextul dezvoltării şi întăririi rolului funcţiei publice*, cod SMIS nr. 22857 Administrație și Apărare – Parteneriat pentru Performanță, p. 23, http://www.anfp.gov.ro/R/Doc/2015/Proiecte/Incheiate/MAPN/3.%20Materiale% 20de%20formare%20Politici%20pub lice.pdf.

[22] Mihaela Păceşilă, *op. cit.*, p. 88.

[23] Mihaela Păceşilă, *op. cit.*, p. 89, quotes "Întărirea capacității UCRAP și a rețelei naționale de modernizatori", suport de curs realizat în cadrul proiectului de întărire instituțională RO03/IB/OT/01.

[24] Melissa Mackay, Louise Shaxton, *Understanding and Applying Basic Public Policy Concepts*, 2011, p. 1, https://www.politicipublice.ro/uploads/understanding_public_policy.pdf; https://hdl.handle.net/10214/23740.

[25] Mihaela Păceşilă, *op. cit.*, pp. 89 and 93.

[26] MAI ANFP, *op. cit.*, p. 18.

[27] Mihaela Păceşilă, *op. cit.*, p. 85.

[28] Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 14.

[29] Mihaela Păceşilă, *op. cit.*, p. 85.

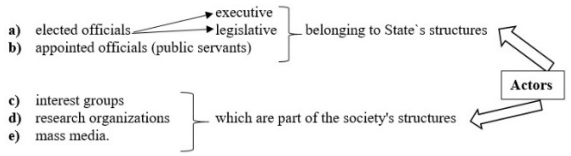
[30] *Ibidem*.

[31] *Ibidem*.

[32] *Ibidem*.

[33] MAI ANFP, *op. cit.*, p. 19.

[34] Mihaela Păceşilă, *op. cit.*, p. 85, quotes M. Howlett, M. Ramesh, *Studiul politicilor publice. Cicluri şi subsisteme ale politicilor*, Epigraf Publishing House, Chişinau, 2004.



These categories form "members of a specific subsystem of public policy"[35], within which, individuals have different interests, according to their position, respectively:

a) Elected officials

Elected officials (politicians), involved in the elaboration of public policies, divided into executive and legislative inter-relations and carry out various actions, in common consent, with advisers from the upper levels of the administration[36].

The executive - the government - an important actor in public policies with the authority conferred by the Constitution, in the management of state activities, the elaboration and implementation of policies, respectively[37]:

- It plays a key role within the public policy-making process, it has the final decision and the financing potential, attributes motivated from the perspective of several elements[38]:

-It has resources and means, by which, it can control and influence the other actors involved;

-Can establish directions for action in solving some problems of public interest.

- The interest given to public policies considers the intervention in the economic and social activity, by orienting the actions in the desired direction. Government guidelines, through public policies, may consist in attempts to change the economic, social or cultural environment through concrete actions[39].
- Has control over social behavior and has the power of coercion, having a network of actors on which to it is based in achieving political goals[40].

The resources and potential it has and which strengthens its position, give it the possibility to intervene by actions, such as[41]:

- exercises control over the fiscal resources, information and in the adoption of laws;
- has a bureaucratic apparatus;
- can exercise authority or influence over the pressure groups, trade unions or other actors;
- priority access to the mass media.

Legislative - operates several activities[42]:

- monitors the activity of the executive and can exert its influence on policies;
- signals public issues that will be on the government's agenda;
- has a role in approving the budget, a tool that allows it to effectively exercise the control over the executive.

The border between the executive and the legislative is highlighted both at the level of the central administration and in the local administration[43]. The ultimate goal of the legislative is to achieve the interests of citizens, by adopting some normative acts that meet their needs.

b) Appointed officials - public servants

Through public policies, their position relates to important principles, in the exercise of their tasks: taking responsibility for problems of public interest and their resolution, ensuring transparency, orientation to the needs of citizens. The role they play in political action relates to the potential it has in various activities[44]:

- take over from the executive, functions of decision-making and implementation;
- are concerned with gathering, processing information from interest groups;
- can exercise their influence in the decisions of elaborating the political agenda;
- have the obligation to support the executive in fulfilling the objectives;
- have knowledge in the technical field;
- can carry out political advisory activities;
- can be service providers;
- are citizens – oriented;
- are responsible in decision-making towards public matters;
- focused on solutions adequate to citizens′ problems.

In many cases, their experience is important for the executive and the legislative, in the implementation of various public policy options.

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[35] Mihaela Păceşilă, *op.cit.*, p. 86.
[36] Fundația PAEM ALBA; ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 24; Melissa Mackay, Louise Shaxton, *op. cit.*, p. 1.
[37] Fundația PAEM ALBA; ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 25.
[38] Mihaela Păceşilă, *op. cit.*, p. 91.
[39] *Ibidem*.
[40] Melissa Mackay, Louise Shaxton, *op. cit.*, 2011, p. 2.
[41] MAI ANFP, *op. cit.*, p. 19, 20; Mihaela Păceşilă, *op. cit.*, 2008, p. 86.
[42] MAI ANFP, *op. cit.*, p. 20; Mihaela Păceşilă, *op. cit.*, p. 91.
[43] MAI ANFP, *op. cit.*, p. 20; Mihaela Păceşilă, *op. cit.*, p. 87.
[44] Fundația PAEM ALBA; ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 25; Mihaela Păceşilă, *op. cit.*, p. 92; Melissa Mackay, Louise Shaxton, *op. cit.*, p. 2.

c) Interest groups

The degree of intervention and influence of these groups in the public policy process is generated by the economic and political interests that determine them[45]. The resources held by this category of actors provide them with the possibility to intervene in decision-making, development and implementation of public policies[46]:

- *informational* - have knowledge related to issues in their field of interest, to which other actors do not have access;
- *political, organizational* - can have a significant influence in making administrative decisions, depending on the number of members that form the respective group;
- *financial* are an important element of differentiation of the influence that pressure groups can exert in the process of elaborating public policy; can contribute in funding the election campaigns**.**

The interest groups aim to achieve the interests of the members within the group and the way they can exercise their influence it depends on the number of members belonging to the group. A large number of like-minded interest members allow them to exert a greater influence than in the situation in which they would act individually[47].

d) University research organizations

They carry out their activity either within universities or they can be set up as independent organizations that carry out multidisciplinary research in order to exert their influence in the formulation of public policies; are research organizations called “think tanks”. "A ”think tank” can be defined as an independent organization engaged in multidisciplinary research in order to influence public policies."[48] Through their studies, they get their contribution with practical ideas in the resolution of some public problems, which distinguishes them from research organizations within universities[49].

e) Mass media

The role of the press in public policy is viewed differently, with some views considering it important and others limited. The press plays has a central role in the relationship between the state and society; follows up on concrete events, disseminates information, highlights certain issues and brings into attention of citizens, the mismanagement of solving some economic and social problems or possible situations in which certain pressure groups gain advantages; thus, it can influence the decisions in the achievement of public policies[50].

In the context of public policies, the involvement of the press in political activities varies from the passive role, as a reporter, by exposing the problems arising, to the active one, as an analyst who contributes with solutions and analysis, to solving some public problems[51].

The media influences and shapes public opinion, by collecting and rendering the information, in society[52].

In the analysis of the possible effects that different interest groups can have, in certain issues related to public policies can be used "stakeholder matrix or matrix of actors interested in ", a tool developed by Lindenberg and Crosby, 1981[53], in which a number of informative elements about the group are taken into account[54]: the interests of the group, the possibility to mobilize resources to exercise its influence. Representation in the table below (Table 1):

Table 1. Stakeholder matrix or matrix of actors interested in

(Lindenberg și Crosby, 1981, quoted by Păceșilă, 2008, p. 89)

The group	**The group's interest in a certain policy**	**Available resources**
The name of the group	The degree of expression of interest can be measured from very high to very low.	A set of resources that interest groups have.

[45] Mihaela Păceșilă, *op. cit.*, p. 92.

[46] Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 25; MAI ANFP, *op. cit.*, p. 21; Mihaela Păceșilă, *op. cit.*, pp. 87 and 88.

[47] Melissa Mackay, Louise Shaxton, *op. cit.*, p. 2; Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 25; MAI ANFP, *op. cit.*, p. 21.

[48] Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 26.

[49] Mihaela Păceșilă, *op. cit.*, p. 92; Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 26; MAI ANFP, *op. cit.*, p.21.

[50] Mihaela Păceșilă, *op. cit.*, pp. 88, 92 and 93.

[51] Mihaela Păceșilă, *op. cit.*, p. 88; Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 26.

[52] Melissa Mackay, Louise Shaxton, *op. cit.*, p. 2; Mihaela Păceșilă, *op. cit.*, p. 92; Fundația PAEM ALBA, ACE-ES București (Asociația Consultanților și Experților în Economie Socială România), *op. cit.*, p. 26; MAI ANFP, *op. cit.*, p. 22.

[53] Mihaela Păceșilă, *op. cit.*, p. 89, quotes Lindenberg și Crosby, 1981, in *Manual pentru elaborarea propunerii de politici publice*, Unitatea de Politici Publice, Secretariatul General al Guvernului, May 2004, p. 37; MAI ANFP, *op. cit.*, p. 23, quotes Lindenberg, Marc and Crosby, Benjamin, *Managing Development: The Political Dimension*, Kumarian Press (West Hartford, Conn.), 1981.

[54] Mihaela Păceșilă, *op. cit.*, p. 90.

The group	The ability to mobilize resources	The group's position on the matter under discussion
The name of the group	The way in which the respective group can mobilize resources	The group's position on the respective matter may be positive or negative.

Source: Mihaela Păceşilă Actors Involved in the Public Policies Cycle – Public Policy Stakeholders/Actorii implicaţi în ciclul politicilor publice - stakeholderi ai politicilor publice Theoretical and Empirical Researches in Urban Management Journal. Cercetări practice şi teoretice în Managementul Urban, Vol. 3, No. 8 (August 2008), pp. 84-93, 2008, p. 90; MAI ANFP, Politici publice, Uniunea Europeană - Fondul Social European; Guvernul României-Ministerul Administraţiei şi Internelor; Inovaţie în administraţie Programul Operaţional "Dezvoltarea Capacităţii Administrative", „Creşterea capacităţii funcţionarilor publici din Ministerul Apărării Naţionale şi Agenţiei Naţionale a Funcţionarilor Publici de a gestiona procesele de management strategic instituţional şi de proiect, în contextul dezvoltării şi întăririi rolului funcţiei publice" cod SMIS nr. 22857 Administraţie şi Apărare – Parteneriat pentru Performanţă, p. 23 quotes Lindenberg, Marc şi Crosby, Benjamin, „Managing Development: The Political Dimension", Kumarian Press (West Hartford, Conn.), 1981.

The relevance of a stakeholder intervention relates to the influence exerted in the implementation of a policy, which can be[55]:

- *Negative*, leads to weakening of the power of decision makers through the pressures exerted by stakeholders who have economic power. For example: the opposition of industrial producers to reforms favorable for exports.
- *Positive*, stakeholders can strengthen the implementation of a policy, such as facilitating entry into a new market, by contribution with resources;
- *Influence*, through the power they hold, stakeholders can influence the implementation of a policy. For example, consumers can influence the policy decisions concerning service delivery.

The actors mentioned above can be considered *public policy stakeholders*, through their interests and influence in the formulation and implementation of public policies, in order to achieve the objectives[56].

4. Conclusions

Public policies are a mean of intervention of the state in the economy, developed at the central and local level and they are closely related to a series of aspects: historical, political and economic conjuncture, internally and externally, currents of thought from a certain period, the country`s level development, skills and capacity of political leaders' action.

In a market economy, in order to increase the competitiveness, the state intervenes through a series of actions, such as: eliminating the negative effects of market failures and streamlining the results; capitalization of social and cultural heritage; increasing well-being[57].

The perspectives pursued in the elaboration of the public policies have in view the settlement of some general matters or by fields[58]. In the actions unfolded by government, the public policy is a means by which the decision-makers use a range of arguments in decision-making[59].

A number of factors and actors intervene in the development of public policies; their action can be determinant for decision-making in the political process. Different authors have identified a number of factors, grouped in relation to some elements that may favour, streamline or, in some cases, may have unfavourable effects on policy implementation.

A number of actors from different fields of action contribute to the formulation of public policies, such as: actors - individuals or legal entities, interest groups, organizations or institutions, government agencies, public policy advisers, NGOs or communities and individuals. Through the roles and interests (direct or indirect) that they have, they can influence the development of public policies or, in turn, are influenced in the process of developing them[60].

The author Mihaela Păceşilă[61] considers that the actors participating in the public policy process can be called stakeholders due to the interest given for the formulation and implementation of public policies.

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[55] Mihaela Păceşilă, *op. cit.*, p. 90, quotes "Întărirea capacităţii UCRAP şi a reţelei naţionale de modernizatori", suport de curs realizat în cadrul proiectului de înfrăţire instituţională RO03/1B/OT/01; *Idem*, p. 91; MAI ANFP, *op. cit.*, p. 22.
[56] Mihaela Păceşilă, *op. cit.*, pp. 89 and 93.
[57] Stoica, Moisoiu, *Importanţa Politicilor Publice în Dezvoltarea Social-Economică a României*, 2007, p. 519.
[58] MAI ANFP, *op. cit.*, p. 7.
[59] ESSAYRX (February 06. 2020), *Different Types of Public Policy*, https://essayrx.com/article/different-types-of-public-policy.
[60] Fundaţia PAEM ALBA; ACE-ES Bucureşti (Asociaţia Consultanţilor şi Experţilor în Economie Socială România), *op. cit.*, p. 24; MAI ANFP, *op. cit.*, pp. 18 and 19.
[61] Mihaela Păceşilă, *op. cit.*, p. 88.

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PANDEMIC AND ENERGY CRISIS – INFLUENCES ON THE LABOR MARKET. RUSSIAN INVASION IN UKRAINE AND ITS CONSEQUENCES

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Liviu RADU[**]

Abstract

This article aims to present a brief analysis of the 2022 moment in the light of the evolution occurred on the labor market under double crisis conditions (pandemic and energy crisis), on the one hand, and of the way of adapting labor resources to the new conditions, on the other hand.

The European and Member States welfare depends on the way people adapt themselves or are helped to adapt to the economic and social environment imposed by the new living conditions that have occurred worldwide in recent years. Given this socio-economic situation, we intend to sum-up the way in which labor work has been affected and changed and whether it has succeeded in adapting to the new challenges.

During the elaboration of this study, the political, strategic and economic perspective was radically changed. On 21 February 2022, after a period of extreme tensions, Russian President Vladimir Putin decided to recognize administrative regions Donețk and Luhansk of Ukraine as independent entities and to send troops of Russian Federation to these areas. In the morning of 24 February 2022, Russian Federation began the illegal invasion of Ukraine, an independent state, member of the UN.

Keywords: *labor market, pandemic crisis, political and military crisis, social and economic security, energy crisis.*

1. Introduction

Current crisis which initially took the form of a sanitary crisis and later of an economical, technical and social crisis has caused so much transformations that the world would need years before being able to measure the scale of the disaster. Covid 2019 pandemic which started at the end of 2019 continues to produce new victims due to changes in the structure of the original virus. The crisis has produced long-term "scars" on economies and societies as a whole.

As we mentioned in previous paper works, the economic sectors affected by the effects of the pandemic and the losses of small and medium-sized enterprise drew back the growth, already modest, recorded in latest years, before the pandemic.

For example, only SMEs have been 50% more affected than large companies. In fact, the loss of jobs due to the pandemic has ruined five years of progress, according to a 2020 UN report, and the return to pre-crisis levels will be very slow. Until at least 2023, employment growth will be insufficient to offset the losses suffered. In the same context, Guy Ryder, Director-General of the International Labor Organization, noted: "the world will be completely different". On this path that we have set out, the labor market will surely recover in the coming years, but there will be huge inequalities between the states of the world. There can be noted a sharp recovery in developed countries with high income and jobs destinated to highly qualified specialists.

Risk of unemployment in economic sectors and impact on output as a result of COVID-19 crisis, at global and EU-27 level

Economic sector	**Potential impact on output**	**Potential risk of job loss in the EU (%)**
Hospitality industry	high	74
Culture and entertainment	medium- high	50
Trade	high	44
Constructions	medium	30-40
Manufacturing industry	high	20
Utilities	low	10-20
Transport, storage	medium- high	19-20
Finance and insurance	medium	18-20
Administration and public order	low	10-17
Local administration	high	10-17
Education	low	10-15
Real estate	high	10-15
Health and social work	low	10-13
Professional services	low	under 10
Computer science, telecommunications	low	under 10
Agriculture, forestry, fishing	low	under 10

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Economic sector	**Number of workers before the crisis** (thousands)	Share in the global number of workers (%)	**Jobs in the E.U.** (millions)
Hospitality industry	143661	4.3	8.4
Culture and entertainment	179857	5.4	1.7
Trade	481951	14.5	14.6
Constructions	257041	7.7	5.9
Manufacturing industry	463091	13.9	7.9
Utilities	26589	0.8	0.4
Transport, storage	204217	6.1	2.3
Finance and insurance	52237	1.6	1.2
Administration and public order	144241	4.3	1.7
Local administration	-	-	2.5
Education	176560	5.3	3
Real estate	-	-	0.3
Health and social work	136244	4.1	3.5
Professional services	-	-	1.6
Computer science, telecommunications	-	-	0.6
Agriculture, forestry, fishing	880373	26.5	0.4

Source: The Romanian Academy – Department of Economic, Legal and Sociological Sciences, Institute of Economic Forecasting, Evaluări ale impactului macroeconomic al COVID -19, Coord. Acad. Lucian Liviu Albu, p.18

At the same time, developing countries will be severely disadvantaged. In other words, "the rich get richer" because they will quickly adapt to the new working conditions that require advanced technology. On the opposite side, "the poor get poorer" by immeasurably affecting human resources, especially women, young people and employees in the informal sector.

2. The effects of the pandemic crisis during 2020-2022

During the 2 years of pandemic, European companies recorded a series of losses with medium- and long-term effects. The most affected were small and medium-sized enterprises operating in the accommodation, food, wholesale or retail trade, construction and much of the manufacturing industry. The losses recorded by companies have major impact on investment, productivity and the ability to set up new jobs. At the EU level, the SME instrument was set up under Horizon 2020 research framework programme[1] to support innovation in SMEs. With an overall budget of €3 billion for the period 2014-2020, the instrument provides grants to high-potential companies. The support is granted in three phases. Therefore, a capital of up to €50,000 is available for supporting feasibility studies, in Phase 1. In Phase 2, a capital of €2.5 million is available for conducting research and development and market-testing. In the last phase, assistance may also be provided through coaching, mentoring or other business acceleration services. The European Commission published a special report meant to help European business to avoid bankruptcy in the wake of the pandemic on 3 November 2021. The report shows that there are a number of common features of the affected businesses, such as a lack of liquidity that has quickly turned into insolvency. Thus, with the support of the national authorities, financial and fiscal measures were taken immediately to help the employees in the affected areas, in the first place.

Despite all these quickly adopted measures, EU surveys show that a quarter of informal businesses face imminent bankruptcy. If we extrapolate this percentage to the world economy, it turns out that about 2 billion informal workers have lost all forms of income. At the same time, these people can no longer receive the minimum income insured by social assistance. Along with informal workers, there is also a very large category of unskilled or lower-skilled workers who have fully felt the effects of layoffs during this period. Obviously, there are also overworked sectors in which there has been an acute shortage of staff, such as the medical field, where even resident students were called to work, due to the lack of medical staff Along with doctors, those in transport or personal care workers, *i.e.* those most exposed to the virus infection, were also required.

In terms of education and training, the pandemic has meant a slowdown and in some places a stagnation in the pace of development. It is already mentioned that we will face generations of illiterate children and later of young people. These are children who learned more or less from home, in the first grades. Their proper training was largely the responsibility of their parents.

[1] The European Court of Auditors, Special Report 02, 2020, SME Instrument.

3. Discrepancies in the human resources market

Since the beginning of the pandemic, more than 80 countries[2] have initiated hundreds of social protection measures in 2020 in response to the impending crisis. The large majority of these are measures related to the adjustment of social spendings, followed by measures to allocate additional funds or the introduction of new aid programs.

By means of Law Decree no. 18 of 17 March 2020, Italy approved "social depreciation" measures to compensate income reduced as a result of social isolation and thus the restriction of economic activity, such as: granting a non-taxable allowance of €600 / month for freelancers, holders of collaboration contracts and workers[3];

Germany launched the largest package of economic recovery measures, aimed mainly at supporting enterprises. However, the program also includes measures for households and specific categories of employees such as: the creation of a separate € 50 billion aid fund for smaller companies and self-employed workers. This fund is intended, for example, for artists, taxi drivers, bookstores, etc.; small companies and sole proprietors, with up to five employees, receive € 9,000 for three months to cover current expenses or to pay debts; companies with 6-15 employees will receive €15,000 for three months.

In Belgium, as of March 2020, self-employed workers who can demonstrate that their activity was affected by COVID19 pandemic, can benefit from the following facilities: if they find that their income is lower than estimated for tax purposes, they can claim a reduction of the taxes to be paid; they can benefit from payment deferral or exemption of social security contributions (for social security contributions in the first two quarters of 2020, a one-year deferral is granted, with no interest on arrears or exemption from paying social security contributions); if they have to stop working for more than a week, they are eligible for financial support of EUR 1,266.37 / month if they do not have dependent family members and EUR 1,582.46 / month if they have dependent family member.

The largest real economy aid program in history has been approved in the United States. Its scope is to strengthen the economy, inject liquidity and stabilize financial markets[4].

The program includes aid distributed directly to households, loans to SMEs and large companies, as well as more financial resources in health. The program, amounting to more than $2,000 billion provides, among other, support for family income by granting $1,200 for an adult, namely $2,400 for a couple and additional child care. The aid will be capped starting with annual income exceeding $75,000 per person. Furthermore, unemployment benefits are increased by $600 per week, for 4 months, in addition to the amount set by each US State. Unemployment benefits vary from state to state, the average being of $385 per week.

In France, 100% of the technical unemployment benefits are paid by the state. In support of companies but also of the self-employed, payments for social security contributions and taxes were deferred from payment;

In Spain, a guaranteed minimum income is introduced to compensate for lost income, for Spanish citizens and for foreigners legally residing in Spain.

In addition, packages of fiscal measures have been adopted to support economic agents. Specifically, the social protection measures are aimed at: payments for sick persons; payments for parental assistance during school closure; salary benefits or extension of unemployment insurance. Furthermore, a large number of transfers and advance payments for the financing of companies have been made; encouraging public investment; providing sectoral support or guarantees especially for SMEs. Among fiscal measures, we mention: the deferral and reduction of taxes and duties for companies and households; VAT reduction, etc.

The International Labor Organization (ILO) grouped the measures to fight the effects of the pandemic on four pillars of action:

- Using social dialogue to find solutions;
- Stimulating the economy and jobs;
- Supporting enterprises, employment and incomes;
- Protecting workers in the workplace.

In this background, ILO maintains a system of international labor standards aimed at promoting opportunities for all to obtain decent work. Given that, for many workers, the shift to telework was abrupt and highlighted the importance of a safe, healthy and even pleasant teleworking environment, a number of issues related to occupational health and ergonomics have been rethought. In this respect, within ILO, the General

[2] The Romanian Academy – Department of Economic, Legal and Sociological Sciences, Institute of Economic Forecasting, Evaluări ale impactului macroeconomic al COVID -19, Coord. Acad. Lucian Liviu Albu.

[3] The Romanian Academy – Department of Economic, Legal and Sociological Sciences - "Costin C.Kirițescu" National Institute for Economic Research, *Vulnerabilități ale pieței muncii și ocupării în contextul pandemiei covid-19. Posibile soluții*, Dr. Luminița Chivu, Dr. George Georgescu (coord.).

[4] https://www.ecb.europa.eu/pub/annual/html/ar2020~4960fb81ae.ro.html.

Survey on Employment and Decent Work[5] in a changing landscape acted by measures to protect labor resources against the new dangers to which they are subject. Specifically, by means of discussions and agreements, the authorities of some countries have considered infection with the new virus as a work-related injury, in order to ensure easier and faster access to associated benefits. In other states, it has been explicitly considered that infection can be considered an occupational disease, especially among highly exposed workers. Information and communication technology have a special impact on work organization as well as on working hours, by participating in the development of telework. Therefore, the boundaries between working time and rest periods are blurring.

The ILO's policy framework for responding to the COVID-19 crisis uses an integrated approach incorporated in the international labor standards and social dialogue, in order to mitigate the socio-economic implications of the pandemic and help countries recover from it. This framework presents a set of interventions to be tailored to country-specific needs, based on four pillars[6].

Regulations are required in the national legislation of the countries on the needs of workers in relation to their physical and mental health and the particularly fragile balance between professional and private life. Within the same framework, it is required to count working hours as accurately as possible, in cases of the employees who have been forced to work from home, in order to ensure compliance with the limits of working hours and rest periods.

All of these measures are in line with recent ILO concerns, derived from labor resource analyses that address issues related to employment, social protection, wage protection, SMEs promotion, cooperation at workplace and even combating discrimination in the current situation.

However, pandemic has opened a real "Pandora's box" in the relationship between employees and employers. According to the American historian Benjamin Hunnicott of the University of Iowa, at the beginning of the last century, it was thought that progress would bring less work and higher wages. The famous economist John Maynard Keynes stands in the support of this argument[7] by predicting that people would work only 15 hours a week, by 2030.Work will be a path to achieve an end, not the end itself. However, after the great economic crisis of 1929-1933, time stopped for employees and we remained with the same 40-hour-a-week schedule, although both technology and labor productivity increased greatly.

The number of American employees leaving their jobs continues to grow, making it increasingly difficult for companies to fill a record number of vacancies, according to MarketWatch. Nearly 4 million Americans have resigned since 2021, twice the level of the same month in 2020. As for private sector employees, the percentage of resignations increased by 2.8%. The main argument[8] supporting such data is that people are looking for better jobs with better salaries. In this respect, many companies have increased their salaries or offered benefits to attract workers. For example, a recent study performed by Bank of America notes that people who have decided to change jobs have earned 13% more due to their new positions. At the same time, more and more people have re-evaluated their careers and decided that they are no longer attracted to their current position and want to try something different. The phenomenon has given employees more freedom as the economy gets rid of the effects of the pandemic. Moreover, Americans could benefit from generous unemployment benefits during Coronavirus crisis. Since most of the restrictions on individuals and businesses have already been given up to, demand in the United States has risen dramatically, and businesses are eager to hire more and more people to cope the current situation. Therefore, employees were given more leeway in the competition to attract labor force, allowing people to be more demanding about the jobs they choose, according to economists. Other analysts believe the government's benefits have allowed Americans to stay out of the labor market or even to resign. Biden administration launched tax incentive in March, offering $1,400 to nearly all citizens. In addition, the new law added a $300 compensation to state benefits for the unemployed. Federal benefits expire at some point, and then resigners will want to get hired. Normally, people who give up work cannot qualify for unemployment benefits, but there are exceptions in many states for reasons related to children's health and care. This situation has spread rapidly in Europe as well. Thus, in Western Europe, the strength of social systems has made people less likely to leave their jobs. Thus, in Western Europe, the strength of social systems has made people less likely to leave their jobs. OECD studies show that around 14 million people within Member States left labor market between 2020 and 2021. In addition, about 3 million of young people are

[5] International Labour Organization Standardele OIM și COVID-19, dispoziții generale ale standardelor internaționale de muncă relevante evoluției pandemiei COVID-19 of 29 May 2020, version 2.1.

[6] https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/briefingnote/wcms_761916.pdf.

[7] *Marea resetare a muncii, cum arată revoluția demisiilor în România față de fenomenul American*, Andrei Luca Popescu, May 2022.

[8] Eduard Ivanovici, 13.06.202, Ziarul financiar, *Numărul de demisii din SUA ajunge la un nivel record: În aprilie, aproape 4 milioane de americani și-au părăsit de bună voie jobul*, Finance Newspaper - The number of resignations in the US hit record highs: In April, almost 4 million Americans left their jobs voluntarily.

neither in employment nor working in the EU. A survey conducted in August 2021 found that a third of German companies reported large shortages of skilled workers in many sectors. Detlef Scheele, head of the German Federal Employment Agency declared for "Suddeutsche Zeitung" that Germany would have to import 400,000 skilled workers to balance out manpower shortages in many sectors, from healthcare to industry sector. The temporary closure of borders, but also the relative increase of salaries in Central and Eastern Europe explains why countries as Germany or Denmark face accentuated human resource shortage in slaughter-houses or hospitality industry.

The study conducted in 2018 by the Bureau of Labor Statistics estimated that, on average, men change jobs every 3 or 4 years and women every 4 years. This number varies greatly with age. While young people are willing to change jobs more often, at about 2.8 years old, those approaching the age of 50 are much more stable, with a trend of resignation after 10 years. The reasons why people want to resign are various, starting from the need for more attractive salaries and the desire to develop, to form a professional career and ending with feelings of failure, limitation and injustice. Prior to the pandemic crisis, Amazon Company, declared that it rewarded its employees who retired from the company and wanted to start their own delivery business, going further, they were even willing to grant three severance pays to those who quitted job. These practices were aimed at keeping in the company only those employees who really wanted to work there. All this happened before the pandemic broke out. Now, the situation is completely different, companies are trying to get their employees back to work and therefore, they make great efforts by offering attractive salaries, bonuses and the opportunity to work from home 2 or 3 days a week.

4. Russia-Ukraine Conflict – Economic and Political Consequences

Russia-Ukraine conflict triggered financial market tensions and drastically raised uncertainty over global economic recovery. In February 2022, the world changed and the same happened to economic. social and political risks.

The conflict threatens to further affect the energy and commodity markets. The Russian Federation is the world's third largest producer of oil, the second largest producer of natural gas and one of the top 5 producers of steel, nickel and aluminum. It is also the largest exporter of wheat (almost 20% of global trade in this product). At the same time, Ukraine is a major producer of agricultural products.

On 24 February 2022 – the day when the invasion started, the financial markets around the world declined sharply and the prices of oil, natural gas, metals and food increased. Following the escalation of the crisis, the price of Brent oil surged to $100 a barrel for the first time since 2014, while Europe's TTF gas prices surged at a record €192 (4 March 2022). Although high commodity prices have been some of the risks already identified as potentially disruptive to the global economy recovery, the escalation of the military conflict increases the possibility that commodity prices would fluctuate to record levels for a long time. Furthermore, the current conflict on the background of a global economy affected by the pandemic crisis, sharpens the threat of a high and long-term inflation, thus increasing the risks of stagflation and social unrest, both in developed and emerging countries.

The crisis triggered by the conflict between Russia and Ukraine severely affects the automotive industry, already strained due to various shortages and high prices of commodity and raw materials: metals, semiconductors, cobalt, lithium, magnesium etc. Ukrainian car factories deliver to major Western European carmakers: some of them have announced a shutdown of factories in Europe, while other factories around the world are already planning to shut down due to a shortage of chips. Air and sea freight companies will also be affected by higher fuel prices, airlines being most at risk. Firstly, fuel accounts for about a third of their total costs. Secondly, European countries, the United States and Canada have banned Russian airlines from entering their territories, and Russia has banned European and Canadian aircraft from its airspace. This means higher costs, as airlines will have to choose longer routes. Finally, these companies cannot increase their costs very much, as they continue to face lower revenues due to the impact of the pandemic[9]. Freight rail transport will also be affected: European companies are banned from doing business with Russian railways, which is likely to disrupt freight activity between Asia and Europe, which transits to Russia. Moreover, it is expected that petrochemical raw materials become more expensive and rising natural gas prices have impact on fertilizer markets, and therefore on the entire agri-food industry.

[9] https://adevarul.ro/economie/business-international/impactul-economic-razboiului-rusia-recesiune-puternica-europa-expusa-risc-scumpiri-majore-lumea-1_62285fbb5163ec4271f735d3/index.html.

5. The Main International Sanctions Generated by the Invasion of the Russian Federation in Ukraine

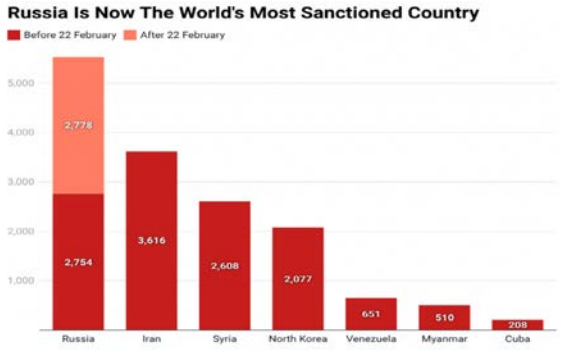
Russia's economy will be in dire straits in 2022, by falling into a deep recession. Updated GDP forecast[10] Following Russia's recognition of non-government-controlled areas in the Donetsk and Luhansk regions of Ukraine and the onset of Russian military aggression against Ukraine, the EU has reacted promptly through a wide range of restrictive measures[11].

Restrictive measures taken by the European Union in response to Russia's invasion in Ukraine

Chronological evolution	Measures taken by the European Union
23 February 2022	The EU imposed the first package of measures, among which: • specific restrictive measures • restrictions on economic relations with areas not controlled by the government in Donetsk and Luhansk Oblasts • financial restrictions
25 February 2022	The EU imposed the second package of measures, among which: • individual sanctions against Vladimir Putin, Serghei Lavrov and members of the Russian State Duma, among others • economic measures
28 February 2022 2 March 2022	The EU imposed the third package of measures, among which: • providing equipment and materials for the Ukrainian military forces by the EU's Instrument contributing to Stability and Peace • a ban on the overflight of EU airspace and on access to EU airports by Russian carriers • a ban on transactions with the Russian Central Bank • a ban on SWIFT access for seven Russian banks • the suspension of the broadcasting activities in the EU of the outlets Sputnik and Russia Today • individual and economic sanctions against Belarus
9 March 2022	The EU imposed new measures, among which: • a ban on SWIFT access for three Belarusian banks • prohibits transactions with the Central Bank of Belarus • limits the financial inflows from Belarus to the EU • prohibits the provision of euro-denominated banknotes to Belarus • restrictions on export of maritime navigation goods and radio communication technology to Russia • sanctions imposed to another 160 persons

Source: https://www.consilium.europa.eu/ro/policies/sanctions/restrictive-measures-ukraine-crisis/

2,754 economic and political sanctions were already in force against Russia. After the invasion of Ukraine on 24 February 2022, other 2,778 sanctions were imposed, leading to a total of 5,532 – by exceeding the 3,616 sanctions imposed to Iran. According to the ranking, the two states are followed by Syria, North Korea, Venezuela, Myanmar and Cuba[12].



Source: castellum.ia

US was the main source of sanctions, with a rate of 21%, followed by the combined total of 18% of the United Kingdom and the EU. The states that have imposed most sanctions on Russia. Countries around the world have stepped up sanctions against Russia in an attempt to step up pressure on Moscow to stop the attack on Ukraine. Other sanctions are expected as Moscow continues its aggression against Ukraine. The list of sanctions imposed by Western powers includes the blocking of loans in foreign markets, the removal of Russian banks from SWIFT, the blocking of assets and the seizure of Russian oligarchs' and top officials' property from abroad or export restrictions[13]. The economic impact of the war: Russia – strong recession.

[10] https://www.coface.com/News-Publications/News/Outlook-2022-peering-through-the-jungle-of-economic-news.
[11] https://www.consilium.europa.eu/ro/policies/sanctions/restrictive-measures-ukraine-crisis/.
[12] https://www.libertatea.ro/stiri/raport-rusia-este-statul-cu-cele-mai-multe-sanctiuni-impuse-impotriva-ei-4020546.
[13] https://www.libertatea.ro/stiri/raport-rusia-este-statul-cu-cele-mai-multe-sanctiuni-impuse-impotriva-ei-4020546.

Europe – exposed to risk. Major price increase worldwide[14].

Russia-Ukraine conflict sparks financial market tensions, raising uncertainty over global economic recovery.

There are a series of economic implications[15] of Russia's invasion in Ukraine which are considered major, according to a S&P report:

- Risk repricing that drives up borrowing costs or limits funding access for weaker borrowers;
- A drag on economic expansion, particularly in emerging markets, which are already feeling inflationary pressures and U.S. monetary policy tapering;
- Sustained inflationary pressures across economies via higher energy, food, and metals prices;
- The possibility of a migrant crisis in Eastern Europe, as Ukrainians attempt to leave the theater of war;
- Profit erosion for sectors that are energy intensive or rely on consumer discretionary spending.

Disruption to production and exports—particularly if Black Sea ports are shut down – could exacerbate food price inflation globally, adding to the energy price shock that is already weighing on disposable incomes[16].

Wages in Russia are falling because of the war. What will the Russian people do in the event of an economic collapse?[17]

Western countries have turned the economy into a weapon in response to the Russian invasion in Ukraine. More than 300 companies are closing or suspending operations in Russia, with hundreds of thousands of employees directly affected. Under these circumstances, the following questions arise: Will the Russian people resist? For how long? What will Russians do? Russia became the most sanctioned country in the world, surpassing Iran, after the invasion in Ukraine which started two weeks ago. More than 5,500 sanctions against Russian individuals and entities are in force on 9 March 2022. "The question is whether these economic and social effects can be converted into opposition political attitudes towards Putin. The sanctions affect those who, before the application thereof, benefited from the positive effects of clan capitalism of Russia. For many Russians, ideological fuel is at least as important as material fuel"[18].

As a result of the sanctions, Russia's currency collapsed and the population rushed to withdraw both rubles and foreign currency from banks. In order to save currency and fight inflation, Russia's Central Bank has raised key interest rates to 20%, a record high. A dollar was bought in March 2022 even for 136 rubles. When Putin first became president of Russia in 2000, a dollar was bought for 30 rubles, and when the Covid pandemic broke out in 2020, a dollar was worth 60 rubles. At the same time, 71.5 million Russians were employed in Russia, in January 2022, the number falling from 72.50 million in December 2021. The minimum wage in Russia was of 13,890 rubles, about 177 US dollars, at the beginning of 2022.

Many Russian supermarket chains[19] agreed to limit price increases to a maximum of 5% for dairy and bakery products, sugar and some vegetables, according to TASS Russian News Agency, which cites federal antitrust authorities. But it will be difficult for Russia to go through the sanctions imposed by the West.

In addition to the fact that disconnecting from SWIFT will temporarily block transactions, the freezing of Russia's central bank assets will mean that the institution can no longer intervene in the foreign exchange market to defend the ruble. About 400 billion euros of the 600 billion euros of Russia's reserve are frozen[20].

In addition, the citizens of Moscow took bank ATMs and branches by storm in search of cash, both in rubles and dollars, because they fear a collapse of the national currency and the inability to use international payment systems, according to the American press. Such a withdrawal of money from the Russian banking system will put even more pressure on the depreciation of the ruble. Moreover, first round of sanctions announced by US President Joe Biden is also very painful for Russia. US President announced the limitation of Russia's possibility of doing business in dollars, euros, pounds and yens in order to be part of the global economy and the sanctioning of Russian banks that together hold about $ 1 trillion in assets.

6. Conclusions

Humanity is currently immersed in a process of irreparable change in which professionals in digital marketing, on line training, data analysis or experts in

[14] https://adevarul.ro/economie/business-international/impactul-economic-razboiului-rusia-recesiune-puternica-europa-expusa-risc-scumpiri-majore-lumea-1_62285fbb5163ec4271f735d3/index.html.

[15] https://economie.hotnews.ro/stiri-finante_banci-25392586-8-implicatii-economice-efectelor-razboiului-ucraina-raport-agentie-rating-rusia-intrat-gunoi-china-nu-inlocuiasca-deplin-europa-piata-cheie-rusiei.htm.

[16] *Ibidem*.

[17] https://romania.europalibera.org/a/populatia-rusa-sanctiuni-economice-combustibil-ideologic/31744822.html.

[18] Cosmin Popa, scientific researcher at "Nicolae Iorga" Institute of History.

[19] https://www.mediafax.ro/externe/razboiul-din-ucraina-este-o-catastrofa-economica-avertizeaza-banca-mondiala-20587422.

[20] https://economedia.ro/cum-va-fi-afectat-sistemul-bancar-romania-de-sanctiunile-impuse-bancilor-din-rusia-ce-masuri-ia-banca-nationala-in-plin-razboi.html#.Yi7q3LbP2Uk.

cybersecurity and various sectors of health can find a wide range of possibilities. Therefore, it's time for many economies to reinvent themselves. Unfortunately, according to the DESI index, our country is the third least digitized EU member state, the difference from the last place occupied by Bulgaria, being made by connectivity (internet access).

As of 2020, immediately after the spread of the pandemic in Europe, the European Commission anticipated the earthquake caused by the installation of the virus and created the European instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE). This is a support system for part-time work regimes meant to help protect the jobs and employees affected by the pandemic. SURE, with a total value of 90 billion euros, has been distributed to countries severely affected by the pandemic. In this situation, the countries affected by the large number of cases of illness, Italy and Spain benefited from aid amounting to 27.4 billion euros, respectively 21.3 billion. Romania received 4.1 billion euros.

Despite all the aid received, many European countries, including Romania, are facing worrying and contradictory phenomena such as the feeling of isolation or failure for those who have worked from home, and on the other hand the desire to change the current workplace and even to quit. As Michael Miebach, CEO of Mastercard noted, according to Bloomberg, workers who are looking for job changes to better their prospects is a phenomenon exacerbated by the pandemic that will remain for some time. In the same context, a study conducted by Microsoft during this period of the pandemic shows that 41% of employees worldwide are seriously considering leaving their current jobs. In Europe alone, it is estimated that 46% of employees plan to resign in the next 6-12 months, according to a study conducted by the German company Personio. In fact, more than 50% of those surveyed by the German company said they intended to resign before the pandemic broke out, which only accelerated people's desire to explore new options.

Notwithstanding, Ursula von der Leyen, the President of the European Commission believes that sooner or later scientists will find a vaccine to eradicate coronavirus. But the changes produced during this period will leave definitive marks at least on the level of human consciousness.

In this context, the period 2020-2022 will certainly produce consequences that are impossible to assess at this time. Russia has reached a relatively strong financial stage before the conflict: a low level of external public debt, a recurring current account surplus, as well as substantial foreign exchange reserves (about $640 billion). However, the freezing imposed by the Western depositing countries on the latter prevents Russian Central Bank from deploying and mitigates the effectiveness of Russia's response. Russia's economy could benefit from higher commodity prices, especially for its energy export. However, EU countries have announced plans to limit imports from Russia. In what concerns the industrial sector, the restricted access to the equipment of semiconductors, computers, telecommunications, automation and information security produced in the West will be detrimental, given the importance of these inputs in the Russian mining and manufacturing sectors. The European economies are most at risk. Due to dependence on Russian oil and natural gas, Europe seems to be the region most exposed to the consequences of this conflict. Replacing the entire supply of Europe with Russian natural gas is impossible in the short and medium term, and current price levels will have a significant effect on inflation. At the time of writing this material, with a barrel of Brent oil traded at over $125 and natural gas prices on the futures market above €150 /Mwh, an additional inflation of at least 1.5 percentage points in 2022 is expected to erode household consumption and, along with the expected decline in business investment and exports, will determine a decline in GDP by about one percentage point. While Germany, Italy and some Central and Eastern European countries are more dependent on Russian natural gas, trade interdependence in Eurozone countries implies a general slowdown.

Furthermore, specialists[21] consider that a complete reduction in Russian gas flows to Europe would raise the cost by 4 percentage points in 2022, bringing annual GDP growth close to zero and possibly in negative territory - depending on demand management. No region will be exempt from imported inflation and disruptions in world trade. In the rest of the world, the economic consequences will be felt mainly by the increase of commodity prices, which will fuel existing inflationary pressures. As always, as commodity prices rise, net energy and food importers will be particularly affected, with the specter of major supply disruptions if the conflict escalates. The decrease of the demand in Europe will also prevent global trade. The impact will be felt almost immediately in Asia-Pacific by the increase of import prices, especially in energy prices, with many economies in the region being net energy importers, in front with China, Japan, India, South Korea, Taiwan and Thailand. As North American trade and financial ties with Russia and Ukraine are quite limited, the impact of the conflict will be felt mainly through the

[21] https://adevarul.ro/economie/business-international/impactul-economic-razboiului-rusia-recesiune-puternica-europa-expusa-risc-scumpiri-majore-lumea-1_62285fbb5163ec4271f735d3/index.html.

price channel and the slowdown in the growth of the European economy. Despite the prospect of slower economic growth and higher inflation, recent geopolitical events are not expected to affect monetary policy in North America, at this stage.

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MEDIUM AND LONG TERM ENERGY STRATEGY - A KEY ELEMENT FOR ECONOMIC AND SOCIAL DEVELOPMENT

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Abstract

The macroeconomic evolution since the beginning of 2022, worldwide, but also at regional and national level, marks major imbalances, caused by several factors, among which the vulnerability of the energy system as a whole is a major one.

Demand and supply in all forms of energy, both in terms of production and distribution, have unsustainable gaps, which implies the need the need for public authorities to intervene through the design and implementation of appropriate strategies to address the challenges of the transition in energy resources and, at the same time, to remove the effects of the crisis of the energy system, a crisis that is felt in the vast majority of the states of the world.

Keywords: *energy supply and demand, macroeconomic challenges, global geopolitical environment, types of energy products, energy transition.*

1. European and global macroeconomic situation at the beginning of 2022. Vulnerabilities in the energy sector

By the end of 2021, the world's economies showed signs of ending the difficulties created by the lockdown imposed by the need to curb the Covid-19 pandemic, and output and investment returning to levels seen in 2019.

However, the economic and social outlook for the entire globe presents multiple risks: a continuation of the pandemic through various variants, such as Omicron, but also consistent inflationary expectations in most countries, particularly in Europe; major difficulties in supplying the population with food, as well as with raw materials for all productive activity, which, together with the continued degradation of natural environmental conditions will lead to a slowdown in macroeconomic development and a worsening of the social-cultural climate in most European countries.

On the other hand, the resumption of economic growth, together with disruptions in the supply of goods and services in various areas: energy, supply of raw materials, supply of the population, investments with any time horizon, etc., as well as geopolitical tensions, will have a major impact on the financial balance of global markets.

It will be seen that the impact of the war in Ukraine is just as damaging and far-reaching as the Covid-19 pandemic, affecting both the global supply of goods and services and the demand for them, and hence the standard of living of the population.

The demand shock is caused by consumer and/or investor behaviour in the face of large macroeconomic fluctuations. Thus, household consumption is strongly affected by the income reduction caused by the pandemic containment measures, as well as by people's behaviour in the face of expectations of economic and social fluctuations caused by the current geopolitical conflict, in the sense that they will prefer to keep their savings in view of the macroeconomic financial downturn.

On the supply side, supply is being disrupted primarily by rising energy costs - for example, the price of a barrel of Brent oil, which is the international benchmark, has risen significantly, to almost US$140, according to information on the bursa.ro website on 8 March 2022 - to levels well above those of 2014, the year of the Crimea crisis.

Supply channels are disorganised for other reasons too. A number of key metals in industry - for example titanium, vanadium, etc. - come mostly from Russia, and as a result of the sanctions that Western countries have imposed on it, businesses in these countries have to find other sources to get them, which is very difficult in such a short time.

An even more dangerous consequence of the current geopolitical conflicts is that food supply routes are being seriously affected by the disruption of international trade, as exports from major agricultural producing countries - Russia, Ukraine - to countries on

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several continents are interrupted, threatening the very lives of the entire population.

One of the economic sectors that is very strongly affected by the energy crisis is transport - road, rail, sea and air - especially in Europe, as many operators are supplied from Russia - the sanctions that block it greatly reduce the quantities of fuel that can be accessed. In addition, the very activity itself, and therefore the customers of the operators, decreases as a result of the economic bans. All these negative effects have a substantial impact on transport costs, whose high increase amplifies the negative shock on the whole economic sector.

Theoretically, to balance the economy, public authorities have to choose between letting inflation happen and curbing unemployment, but during the health crisis, government interventions were needed to protect people who were losing their jobs or cutting short their working hours. In order to stimulate a return to the previous pace of development, the lockdown must be lifted, resulting in increased demand, which explains the rise in prices, a factor in addition to higher energy prices.

Several major factors contribute to maintaining an unstable economic environment with high downside risks. Geopolitical tensions are exacerbating raw material and food supply bottlenecks, falling production levels in all countries - developed and developing, including China and European countries - and the cautious behaviour of Middle Eastern oil exporting countries not to increase extraction volumes in order to lower the price per barrel and destabilise Russia.

In order to influence the evolution of inflation, it is necessary to act on the main factors that determine it, the price of energy products being one of them.

Regardless of the type of energy - electricity, heat, water, etc. - or energy products: oil, gas, coal, etc., the average price can be monitored by two types of intervention: consumption and source.

Energy consumption is driven from two directions: on the one hand by the population and economic activities - production, transport, services, etc. - and on the other by environmental policies around the globe, with almost every country striving to reduce pollution in order to achieve climate neutrality.

Consumer behaviour cannot be changed quickly enough to significantly reduce demand. People can only reduce their consumption by investing in better insulation of their homes, use of energy-efficient vehicles, etc., which means significant costs that can only be covered over time. Moreover, at least in developing countries, where the aim is to raise living standards, this can only be achieved by increasing energy consumption.

In terms of business activity, energy consumption can only be improved both in terms of quantity and carbon dioxide emissions through modern efficiency techniques - clean resource exploration and exploitation, high-tech processing, safe and clean transport infrastructure, highly efficient technology use.

2. Current energy demand and supply. Forms of energy produced and distributed

The global economic environment is currently facing multiple challenges, which are producing and will imply for a long period of time profound structural and qualitative changes in economic and social life, as well as in the entire geopolitical order that will characterise the 21st century.

As regards the economy, it is experiencing major disruptions in world trade in a wide variety of goods and services, perhaps the most important being energy products, the crisis of which is the cause of rising inflation in almost all countries of the world, especially in Europe, but which is also the main cause of production imbalances in many sectors of activity.

Fossil resources are found where nature has placed them around the globe and are unevenly distributed. According to TotalEnergies' 'Panorama des énergies 2021' Report, ten countries hold more than 86% of the world's oil reserves and ten countries hold almost 80% of its methane gas reserves, while coal is found in large quantities in many parts of the world, which explains why it is difficult to give up its use, especially in the current energy crisis.

	Oil (billion barrels)		Gas (trillion cubic meters)		Coal (billion tons)	
North America	238	13%	16	7%	257	24%
South and Central America	293	16%	8	4%	14	1%
Europe	15	1%	5	2%	135	13%
Africa	126	7%	19	8%	15	1%
Middle East	834	46%	81	36%	1	0%
Eurasia	146	8%	77	34%	191	18%
Asia Pacific	151	8%	22	10%	457	43%
World	1803	100%	228	100%	1070	100%

Source: 2021_Rapport_TotalEnergies_Panorama_Energies

The issues raised by energy differ in several ways. First, there are the types of energy, which can be categorised according to different criteria that present both opportunities and risks for each category.

Thus, energy sources are distinguished according to their origin, in:

- fossil energies: coal and hydrocarbons, respectively oil and gas;
- nuclear energy;
- renewable energies: solar, wind, hydro,

biomass and geothermal.

The forms of energy also differ if one takes into account:

- the possibility of storing them. Some energy products are easy to store, *e.g.* solid fossil fuels such as coal, others are almost impossible to store, *e.g.* electricity, the most widely used energy product produced by processing primary resources. Renewable energies, such as solar radiation, wind, streams, etc. cannot be stored.
- The availability of a form of energy varies according to its origin and characteristics. For example, electricity produced in power stations of any kind is always available, while wind energy is only available if there is wind, solar energy only during the day, etc.;
- the cost of energy differs according to how abundant and/or easily available it is (by extraction, such as fossil fuels, by technological processing, such as nuclear energy, and by specific installations in the case of renewable energy);
- the impact on the environment presents significant variations and risks depending on the type of energy. Fossil fuels, which are currently the most widely used energy sources - more than 80% of world consumption - also generate greenhouse gas emissions through their use, especially coal-fired power plants, which pollute the atmosphere much more than other forms of energy.

This prompted global environmental experts to propose at the 2015 Paris Summit (COP21) an Agreement, ratified by representatives of the 197 UN member states participating in the United Nations Framework Convention on Climate Change, committing to take action against climate change. On this occasion, the European Union presented its long-term emissions reduction strategy and its updated climate plans before the end of 2020, reducing CO2 emissions by at least 55% below 1990 levels by 2030. Progress has been recorded at COP26, the Glasgow Summit in November 2021, but it was noted that more work is still needed to reach the 1.5 degree Celsius global temperature reduction target. Some European countries, such as Germany, whose strong economy is a major consumer of electricity, have even put this commitment into practice by shutting down coal-fired power plants.

However, at the beginning of 2022, the geopolitical landscape in the world, but especially in Europe, has changed with the Russia-Ukraine war and the tensions created by the sanctions imposed on Russia by the United States and the European Union.

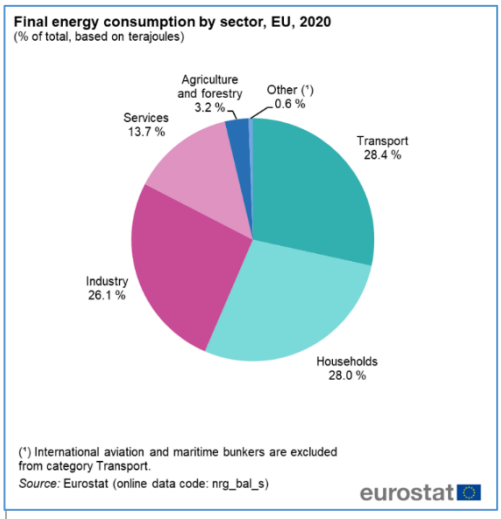
In addition, extraction techniques present some risks, for example in the case of shale oil and gas, the balance of geological strata and the water table can be disturbed.

3. The macroeconomic challenges of the energy transition

The two major issues that are considered crucial for future global development are energy self-sufficiency and meeting energy demand.

The current energy crisis has highlighted even more strongly than in the past the need for any country to be relatively independent in terms of energy and food resources. Of the major developed countries, only the United States can enjoy such autonomy, with oil and shale gas complementing its energy resources. European countries depend to a greater or lesser extent on imports, especially as oil reserves in the North Sea are showing signs of a sharp decline. As for renewable energies, although long-term strategies mention increasing their use, they pose thorny problems because they are inconsistent and require costly investment which, if they do not pay for themselves relatively quickly, risk being technologically outdated.

As for energy demand, it has been growing steadily and at an ever-increasing rate as a result of the considerable increase in the world's population, and also because of the sharp industrial development brought about by technical and technological progress and, by extension, people's standard of living.



Final consumption in the European Union - 27 countries (from 2020)

- Thousand tons of oil equivalent by sectors -

	2011	2020	2020/2011 (%)	Share in total (%)	
				2011	2020
Total final energy consumption, of which:	933989.94	885764.45	94.84	100	100
- industrial sector	244695.81	231211.89	94.49	26.20	26.10
- transport sector	278927.98	251969.94	90.34	29.86	28.45
- trade and public services	128249.54	121376.49	94.64	13.73	13.70
- households	251827.99	248243.38	98.58	26.96	28.03

Source: Eurostat, Final energy consumption by sector [TEN00124__custom_2488803]

Globally, energy consumption has decreased over the last ten years, but there have been important shifts in the energy needs of different sectors. For example, industrial activity has seen a slight decrease in energy demand, mainly due to new, more efficient technologies, and the IT and telecommunications sectors have become more energy efficient through interconnection, although they themselves have become major consumers of electricity.

The transport sector has also reduced its energy demand, although activity has increased considerably in recent years. It has also been observed that the level of greenhouse gas emissions from transport is on a downward trend, mainly due to the strong growth of the electric car fleet, but this is still in its infancy.

Households have, however, consumed more energy than ten years ago, which shows an increase in well-being, but also highlights the need to take action to improve the residential sector in terms of better thermal insulation, leading to lower energy consumption for heating/cooling homes, depending on the season and/or geographical area.

These observations are particularly valid for developed economies, while most developing economies face different problems: the need for much greater industrial and agricultural development, improved living conditions for the population, as well as non-economic problems, all leading to increased energy demand.

4. Conclusions on the current energy crisis and the need to develop and implement medium and long-term energy strategies

Electricity is the most widely used form of energy both in productive activities and for the needs of the population: lighting, heating, transport, etc. It is produced from several kinds of primary energy products: hydro, solar, wind, fossil fuels, uranium, and the conversion efficiency can differ considerably, depending on factors such as calorific value, plant efficiency, photon conversion efficiency, etc., which explains the variation in costs both during the investment phase and during operation.

Whereas centuries or even decades ago, primary energy products were converted to a considerable extent into mechanical energy for both industrial processing and transport, today electricity consumption has become predominant - for example, in 2018 it was four times higher than in 1974 (2021 TotalEnergies Report, Panorama Energies), which shows the need to analyse the production and distribution of electricity by destination, the two main directions to be addressed in national and international macroeconomic strategy.

In this respect, the sources of electricity generation are highlighted: fossil energies, nuclear energy, renewable energies.

Share of electricity production (%) in 2019

Coal	36.7
Oil	2.8
Natural gas	23.5
Nuclear	10.3
Hydro	16
Geoth./tide/other	0.5
Wind	5.3
Solar	2.6
Biofuels and waste	2.4
Total of electricity production	100

https://www.iea.org/reports/electricity-information-overview/electricity-production

Electricity from fossil energy products - coal, oil and natural gas, extracted or fracked, such as oil and shale gas - accounted for about 63% of the world's electricity in 2019. Each of these resources presents opportunities and risks.

Coal-fired power plants are reliable, coal is abundant, costs are among the lowest, but managing CO2 emissions requires large and unattractive investments.

Oil has been the subject of protracted negotiations between oil-rich countries, and natural gas is the subject of ongoing tensions in Europe, most notably the Russia-Ukraine war.

Electricity from nuclear power plants accounts for about 10% of the total and is based on the fission of the nucleus of a uranium-235 atom. On the planet, uranium is found in large but diffuse quantities in seawater, which is too expensive to collect, and concentrated in a few locations in Australia, Kazakhstan, Russia, Canada, Niger, Namibia and South Africa. Although nuclear power is carbon neutral, it is used sparingly because of fears of accidents such as Chernobyl in 1986 in the former Soviet Union and Fukushima in 2011 in Japan. Some incidents occurred before and after these accidents and were well managed by the people in charge of the respective plants, but the fear of recurrence has been retained in the public mind.

However, in the current international macroeconomic situation, in a pertinent vision of the feasible directions to take in long-term energy strategies, the use of nuclear energy cannot be ignored.

This is why public authorities, especially those in developed economies, are proposing the creation of new nuclear power plants, with the recent solution being smaller plants - known as Small Modular Nuclear Reactors ((SMNR), World Energy Outlook, International Energy Agency (IEA) 2021) - which are simpler to monitor and therefore represent lower and more manageable risks.

For example, France, which bases a large part of its energy resources on nuclear power, has planned to increase the use of this type of energy in its 2050 energy strategy, as has the United States, which is increasing the construction of SMNRs and also supports the spread of this type of resource in allied countries such as Romania.

Among renewable energy sources, hydropower has a special place, but its share of the world total is only 16%. Although it is completely clean, it requires large investments - dams, reservoirs, relocations, etc. - which can only be made with public financial effort, but are valuable assets for the countries where they have been built.

Wind electricity is a carbon-free energy source and produces only about 5% of total electricity, because it is conditioned by a number of factors: investment costs, relatively low profitability, dependence on wind, etc.

Solar electricity, with a share of just over 2% of the total, is cost-effective in geographical areas below the 40th parallel, i.e. in tropical areas, and is linked to the possibility of capturing solar radiation. In northern and temperate areas, the cost of investment does not justify their use, especially as climatic variations have become increasingly marked.

Following the Paris Agreement of 2015, the European Commission has developed and commented on the "Strategic vision for a carbon-neutral economy in 2050", in which it proposes the adoption of a legislative package for all Member States of the European Union, which will combine short-term actions with those aimed at achieving long-term objectives for the development of the energy sector and its impact on the whole economic and social life in the European countries and at international level.

In order to achieve this goal, European specialists have made a series of proposals ("Relever le défi énergétique et climatique en Europe: les propositions de cinq think tanks", 2018, Terra Nova, Institut Jacques Delors, I4CE, Iddri) concerning public policies and the involvement of the private sector in the implementation of the green economy in the national strategies of the Member States of the European Union. First of all, medium- and long-term carbon dioxide emission reduction targets had to be defined, with 2050 as the distant horizon. This definition, initially presented in 2018, has now been considerably complicated by the Covid-19 pandemic and, even more intensely, by the Russia-Ukraine war, which has heightened already existing trade tensions between the West - the United States of America, the European Union, etc. - and countries in the East, including Russia, China, India, Iran, etc.

Moreover, the actions envisaged must respect the rights of the population, firstly in terms of access to energy products and, secondly, in terms of the supply of goods and services that go hand in hand with a civilised life in 21st century conditions, a supply that can be greatly distorted by imbalances between supply and demand on the international energy market.

In any case, the actions that will follow the realisation of climate investments need to be linked to financial policies and regulations, both in the public system and in the private sector - banking and capital markets - in order to make available the necessary funds, usually large sums, to cover the costs of building and maintaining low or zero carbon energy assets.

Given the complexity of the field in terms of technological progress, the energy transition can only be carried out with the necessary resources, both material and financial, as well as human, an adequate qualification of the latter, together with a sufficient number of specialists being an essential condition for the success of the action.

In the European Union, the financing of environmental policies included in national and/or Community development strategies will have to involve to a large extent the funds that are set up at EU level for vocational training - Erasmus+ and Erasmus PRO - and for research and innovation, which will have to be massively supported, and therefore financed, all the more so since it has been noted that the EU is lagging behind the USA and China, which is adversely affecting the competitiveness of European economies.

Also in relation to climate objectives, public policies will have to pay special attention to trade relations with third countries, as carbon dioxide emissions may be attributable not only to domestic products but also to imported ones. This will be done by regulating the "carbon tax at the border" and by adopting a set of measures to fight so-called environmental dumping - for example by imposing a low-carbon emission certificate on all companies, both domestic and foreign, exporting to the country concerned - all compatible with World Trade Organisation rules.

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THE URGENCY OF ASSERTIVENESS IN A GLOBAL WORLD

Elena NEDELCU[*]

Abstract

This paper is a plea for learning and practicing assertive behavior in all areas of social life. First of all, it aims to clarify the notion of assertiveness and to delimit the assertive behavior from the aggressive and passive one. One argues for the need to use assertive behavior on a large scale, highlighting the benefits it brings to the individual and society. Practicing assertiveness helps individuals to understand themselves more easily, to understand others better, to resolve conflicts more quickly, and to eliminate the negative stress that comes with it. Being a form of communication, which is direct, open, respectful and honest, assertiveness inhibits defense mechanisms and distortions, being an effective way to communicate and resolve interindividual and social differences. The paper starts from the hypothesis that in the former communist societies the social-civic dialogue is still precarious and insufficient and therefore, the need to learn and practice assertiveness becomes more pressing. Democratic 'construction' can only be achieved with socially-politically competent citizens (elites and masses alike), as assertiveness occupies a central place among socio-political competences. This paper also makes a concise portrait of the assertive person. Finally, the main ways to achieve an assertive management and its effects on organizational efficiency are explored.

Keywords: *assertiveness, social competence, communication efficiency, democracy, transactional analysis.*

1. Introduction: Democracy and assertiveness in a global world

In a synthetic sense, assertiveness is self-assertion achieved by arguing for personal ideas, feelings, rights while respecting other persons' ideas, feelings, rights in a direct, honest and appropriate way. This implies the need for its widespread manifestation in those societies that are democratic or wish to become democratic. In former communist societies, the need to learn and practice assertiveness, to express one's ideas and exercise one's rights is self-evident as we should consider that they are still deficient in terms of social communication in general and civic dialogue in particular. The democratic 'construction' can only be achieved together with socially and politically competent citizens (the elite and the masses alike). Assertiveness occupies a central place in socio-political competences.

Moreover, after two years characterized by the pandemic, widespread panic and, at the same time, the restriction of the citizens' rights and freedoms around the world, we see an imposed or voluntary setback of social interaction and political-civic communication even in the consolidated democracies of the world. Due to the fact that democratic, moral, capitalist principles were compromised by certain governments when trying to deal with the complex health crisis facing the global world, the citizens' confidence in the governmental elite suffered a significant decline, as they started questioning their government's good intentions and political abilities. The newly created global socio-political context has caused more and more authorized voices to worriedly point to the decline of democracy around the world. The report 'The State of Democracy in the World in 2021' (Institute for Democracy and Electoral Assistance: IDEA International) analyzing 165 countries in 2020 and 2021 and examining these countries' political and social situation in the last 6 years, concludes that democracy has deteriorated throughout the world. For the first time, the United States were added to the annual list of countries that registered a democratic decline, noting that the decline began in 2019. More than two-thirds of the world's population live in backsliding democracies or autocratic regimes, a trend accentuated by the coronavirus pandemic, according to the annual report released by IDEA International.

Correcting this state of affairs, reinventing and revitalizing the democratic project requires greater involvement, active, competent and responsible participation of citizens in defining and solving the problems of the global world. Participation in turn implies a high level of social and political competence, among which communication skills and assertiveness play an important role. We could say that the reactivation of assertive behaviors, the awakening of the social and political competences of the citizens is becoming an emergency in today's world.

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2. Paper content

2.1. Assertiveness: major social competence

To succeed in life, one needs both professional and social skills. Professional skills help one technically perform at the expected level in one's profession. However, as exercising most professions involves social interaction, achieving a high level of professional performance also requires possessing the right social skills. In other words, one's social skills are badly needed not only in our professional and family life, but also in the community, in all areas that involve human interactions. According to S. Moscovici, social skills rank first in everyday behavior and are facilitators of professional and social performance, strongly correlated with maintaining the health of the individual.[1]

The 'father of social competence', the psychologist M. Argyle, imposed the term social skills in 1983, defining it as 'a behavioral pattern that offers the society individuals capable of producing certain desired effects on other individuals' (Viorel Robu, 2011, p. 15). These effects may be related to personal motivations or goals assigned to the other, such as the development of learning, recovery or work skills. According to M. Argyle, social skills can be assessed objectively and developed through training; the main social competences that human beings have to varying degrees are: assertiveness, gratification and support, nonverbal communication, verbal communication, empathy, cooperation and attention to others, knowledge and problem solving, and self-presentation.

Social skills refer to people's relationship skills (B. Bernard, 1995). Being socially competent means 'being sensitive, possessing especially the ability to get positive responses from the others; flexibility, including the ability to adapt to both primary and dominant cultures (cross-cultural competence); empathy, communication skills and a sense of humor' (apud Constantinescu, 2004, in Viorel Robu, 2011).

Daniel Goleman (2001) links social competence to emotional intelligence. In order to manifest interpersonal power, the individual must have self-control and the ability to overcome anxiety and stress. The art of relating involves - to a large extent - the development of the ability to manage both one's own emotions and those of others. Connecting to the demands of others requires mastering one's own emotions, a minimum of inner calm and patience: forgetting about your own problems and listening to the problems of the person next to you. As a result, the social competence is a dimension of the emotional intelligence. Goleman believes that the active ingredients inherent in this form of intelligence are: self-confidence, self-control, motivation, empathy, establishing and directing interpersonal relationships.[2] In conclusion, in Goleman's view, assertiveness is a fundamental component of social competence.

2.2. Assertiveness -premise of efficient communication

Assertiveness theory was outlined in the late 1950s and early 1960s in the work of psychologist A. Salter and was composed of key concepts in humanitarian psychology and transactional analysis. According to Lange and Jacubowski (1976), assertiveness means 'upholding one's own rights and expressing one's own thoughts, feelings, and beliefs in a direct, honest, and appropriate manner without violating the rights of the other' (Constantinescu, 1998).

R. Alberti and M. Emmons argue that assertiveness is an instrument with which you can achieve equality in the interpersonal relationships you establish with those around you (I. Moraru, 2012, p. 46). According to J. Cotraux, assertive behavior through which someone asserts himself is 'that type of behavior that allows a person to act as best as possible in one's own interest, to defend one's point of view without exaggerated anxiety, to express one's feelings sincerely and to use one's own rights without denying the other's'[3]. Lowrence (1997) extends the concept of assertiveness to 'the learning ability to adapt behavior to interpersonal situation on demands so that positive consequences are best and negative ones– minimum.'

In the same context, M. Rocco states that 'assertiveness aims to make the individual able to express his personality, continuing to be socially accepted without fear of arousing hostility in the environment (…).' It also 'means: to assert your rights, make your legitimacy admitted; to make clear and constructive assessments (...); to express your opinion without restraint (...) in the face of hostile interlocutors'[4].

Assertiveness expressed through the assertion 'I' helps to maintain one's position and point of view without attacking the other person (H. Cornelius and S. Faire, 1996, pp. 93-104). The assertion 'I' implies clarification and is the beginning of the conversation, not a conclusion. It is an opener of communication that allows the expression of feelings about an event, without blaming and without asking the other person to

[1] Chelcea S, *Un secol de cercetări psihosociologice*, Polirom Publishing House, Iaşi, 2002.
[2] Viorel Robu, *Competenţe sociale şi personalitate*, Lumen, 2011, Iasi, p. 24.
[3] J. Cotraux apud. Dafinoiu I., Vargha J.-L., *Psihoterapii scurte: strategii, metode, tehnici*, Polirom Publishing House, Iași, 2005, p. 52.
[4] M. Roco, *Creativitate şi inteligenţă emoţională*, Polirom Publishing House, Iaşi, 2001, pp. 166 and 167.

change. The choice for assertiveness is 'not always easy. It often requires a conscious choice, a degree of flexibility and ability, some courage and confidence in the communication process'[5].

Practicing assertiveness helps individuals to understand themselves more easily, to understand others better, to resolve conflicts more quickly, and to eliminate the negative stress that comes with it. Being a form of communication, which is direct, open, respectful and honest, assertiveness inhibits defense mechanisms and distortions, being an effective way to communicate and resolve interindividual and social differences. The assertive option - the premise and expression of democratic behavior - streamlines social dialogue and facilitates the exercise of free will in everyday life.

In the specialized literature, the correlation of assertiveness with the efficiency of communication is increasingly common. In A. Solter's analysis, assertive behavior is examined as an optimal and most constructive means of interpersonal interaction, being in opposition to the most widespread destructive methods: manipulation and aggression. J. Cl. Abric, in turn, links the efficiency of communication with the ability of the interlocutor to listen and express himself. 'For communication to be effective and qualitative, it is necessary to listen; to observe; to analyze; to control; to express yourself'[6].

In Ad. Baban's opinion, efficient and assertive communication requires adherence to the following principles: 'say NO when a personal right or value is violated; motivate your statement without justifying yourself – don't apologize; express your personal opinions specifically, clearly - avoid general wording; accept and compliment; be direct; ask for feedback - to prevent misinterpretation; change the conversation or avoid the person when you cannot communicate assertively; refer to the inappropriate behavior of a person with a positive remark; focus on behavior and not on the person when you want to make a remark; highlight the negative consequences of his behavior on you, specify the desired behavior, offer alternatives to the behavior you want to change; analyze the costs and benefits of behavior'[7].

2.3. Assertive behaviors from the perspective of transactional analysis

In 'The Assertive Woman', Stanlee Phelps and Nancy Austin (2002) analyze, in addition to assertive behavior, three other patterns of behavior, in the form of life stereotypes and behavioral stereotypes, respectively, *i.e.* passive, aggressive and passive-aggressive (indirectly aggressive) behaviors. From this analysis one could observe that assertiveness opposes both aggression and passivity. Assertiveness means neither giving up nor a lack of combativeness.

Next, I will try to describe the three types of behavior (aggressive-passive-assertive) from the perspective of the basic principles of transactional analysis[8], namely:

a. People are OK! Every human being has value and dignity as a person. All people are equal.

b. Every human being has the ability to think, except in the case of major brain disorders. In conclusion, man has the responsibility to decide what he wants from life and to live with the consequences of his decisions.

c. Human beings decide their own destiny. Throughout their lives, they can change their decisions. Although most of their ways of interacting with the world have been formed since childhood, they can rethink and change them throughout their lives.

We aim to establish which of these behavioral types mentioned above subscribe to these principles. We will try to find out the possible correspondences between the three states of the Ego (Adult-Parent-Child) and these types of behavior.

Eric Berne, the initiator of Transactional Analysis, describes human personality and interpersonal relationships from the perspective of the three states of the ego: the Child Ego State, the Parent Ego State, and the Adult Ego State. An ego state refers to a set of behaviors, thoughts and reasoning, emotions and feelings, associated and activated by a life situation. In each of us, these conditions exist from a very early age to an advanced age.

In the 'Parent' state, the person analyzes and explains things in the same way as one of his parents or educators did. Due to the 'Parent' state, many of the reactions have become automated, which saves time and energy. The parent's behavior often falls under the formula 'this is how it should be ...', 'I know how it should be ...', which, in certain circumstances, can favor the appearance of aggressive behavior on the part of some interlocutors (those who are of the 'Parent' type).

Being in the 'Child' state, the person reacts like a small child. The child does not always analyze the

[5] Helena Cornelius, Shohana Faire, *Stiinta rezolvarii conflictelor, Stiinta si Tehnica*, 1996, p. 93.
[6] Abric J.C., *Psihologia comunicării: teorii şi metode*, Polirom Publishing House, Iaşi, 2002, p.193.
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[8] Transactional Analysis is an explanatory theory of personality and a therapeutic system dedicated to personal development and change.

consequences of his actions on himself and others. The child's behavior is in the formula I want ...'.

The 'Adult' state: the independent person assesses the situation objectively, analyzes the information, expresses his opinion, formulates the problem and can present his decision. The adult is aware of his own goals, emotions and needs and is able to coordinate these elements in his own activity. The action formula typical for the 'Adult' state is 'I choose ...', 'I want.'

The aggressive behaviour. The aggressive individual is the arrogant, critical, egocentric, conflictual. He adopts the position of superiority, being accustomed to systematically underrate and devalue his interlocutors. He is competitive, ambitious, even stubborn, he does not accept to lose. He insists on his rights and is ready to use force to obtain them. He is critical of everyone and pretentious, so he is unpleasant. It is the typical behavior of the autocratic manager, not permissive with employees and subordinates who, in order to impose respect, cultivate fear in the organization. Aggressive behavior corresponds to the attitude 'I'm OK, you're not OK!' and is associated with the states of a revolted child or a critical (normative) parent. Those who relate to the aggressive usually respond with the same behavior or avoid it. Nonverbal aspects of aggressive behavior are: very loud voice and fast speech pace; cold, expressionless eye contact that fixes the interlocutor; stiff, tense posture, tense body, legs apart, asymmetrical position; hands clasped or on the hips, abrupt, wide or directive gestures; distance less than 0.5 m; very short latency, frequent interruptions.

On the other hand, ***passive behavior*** is associated with the 'I'm not OK - You're OK!' attitude. It is the attitude of the submissive, the self-deprecating who (consciously or not) are inferior in relation to others. They feel overshadowed by others, they have no initiative, they are addicted, compliant, obedient. They are good performers, if given directions. As a rule, the passive person is dominated by all kinds of fears: of being hurt or hurting oneself, of failure, of being rejected, of conflict, of being in trouble, and so on. The passive individual is accustomed to give up easily or to avoid any confrontation with others, adapts to the demands of others, does not defend his own rights and lets himself be dominated. The others often try to take advantage of his weaknesses: they make unjustified or exaggerated requests, or they reject even his few and timid requests. In most cases, the adapted child is the one who favors this position.

All these characteristics of the passive individual are transparent and in his nonverbal manifestations: looking down or in vain; standing rigid, defensive, symmetrical or bent in front of the interlocutor; restless hands, hesitant movements, gestures oriented towards one's own body; distance greater than 1m; long pauses between the moment the interlocutor finished what he had to say and the answer; very low volume, monotonous voice, low speech pace.

Passive-aggressive behavior: 'I'm not OK – you're not OK!' Cottraux considered it typical a behavior for a person who denies his own rights, without taking responsibility for it. On the contrary, this type of individual blames the others, being convinced that the others are to blame for his obedience. The person characterized by this type of behavior is accustomed to: passively oppose performing routine social and professional tasks; complain about not being understood and appreciated by others; be gloomy and quarrelsome; criticize and despise authority without reason; express envy and resentment towards the obviously more prosperous; express exaggerated and persistent accusations of personal misfortune; alternate between hostile defiance and penance. This individual is the Victim par excellence, crying for pity, being susceptible, vulnerable, non-communicative. Moreover, this type of person has a stable low self-esteem, is pessimistic, preaches misfortune and disaster.

Assertive behavior: 'I'm OK – you're OK!' In transactional analysis, this behaviour is defined as 'the attitude of the winners', that of the champions. This person defends his rights (in a non-aggressive way), without violating the rights of the others. Assertive behavior involves a parallel Adult-Adult transaction. The assertive person behaves like an adult and at the same time perceives his interlocutor also as an adult. In addition to this, this type of individual remains in this state of Adulthood even if his interlocutor leaves it. Assertiveness is the existential position described by self-confidence and trust in others, cooperation, team spirit, equal negotiation, tolerance and fair play. The assertive person can control his own behavior, maintain verticality and balance, while respecting the wishes and rights of others. Nonverbal characteristics of assertive behavior are: direct eye contact, without fixing the interlocutor; calm, quiet but firm, well-modulated voice; relaxed body position; straight back posture; keeping an appropriate distance during conversation, of approximately 0.5-1m; answering without hesitation after the interlocutor spoke.

2.4. The portrait of the assertive person

If we were to draw a portrait of an assertive person, we could say the following about him[9]:

- <u>He knows what respect means.</u> Everyone has

[9] https://nospensees.fr/7-caracteristiques-personnes-assertives/.

the right to respect for the simple fact that he is human. The Declaration of Independence of the United States (1776) states that the true value of a man is a grace from God and not what he does by himself and that all men are endowed by God with an innate value. As well as this, the assertive individual abides by Kant's categorical imperative: 'Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.' this type of person applies the principle of respect both in relation to himself and to all that is beyond himself: people, concepts, ideas, things, actions, etc. He rejects violence and ill-treatment and is concerned with preserving not only personal dignity, but also that of the others.

- He honestly connects with the others. He builds good relationships with the others, realizing that this construction cannot be based on falsehood and hypocrisy. To be honest, then, is to declare one's intentions and act accordingly, that is, to present oneself to the world as one is. In short, it means not deceiving oneself or the others. And it is at this point that sincerity seems to be the same as authenticity. The assertive person is sincere with those around him without hurting them, he shows integrity and inspires confidence.
- He knows himself; he accepts and appreciates himself. He trusts himself without sharing a sense of self-sufficiency or superiority. This type of individual shares both the feeling of greatness and the fragility of the human being, because, in fact, *'man is only a reed, the most fragile in nature: but he is a thinking reed. There is no need for the whole universe to rage against him in order to crush him. Some steam, a drop of water might be enough to kill him. But even if the whole universe were to crush him, man would still be nobler than the one who kills him ...'* (Blaise Pascal 'Thoughts' in *Selected Writings*, translated into Romanian, Ştiinţifică Publishing House, Bucharest, 1967). Assertive people define themselves as rational human beings, while acknowledging their imperfection and fragility. They are aware of their qualities and opportunities as well as their vulnerabilities and disadvantages. From this feeling of imperfection emanates their desire to grow, to improve their disadvantages, to surpass themselves.
- He demonstrates emotional stability and self-control. Assertive people manage to put in place the mechanisms necessary for their emotional regulation, their dominant attitude being serenity. Of course, an assertive person is also experiencing feelings of anger, anguish, pain, but he understands that he must not let go of these negative emotions with such a high energy load. He applies these principles to others as well: he knows how to listen to and understand their feelings, and he tries to calm them down. He does not seek to manipulate his interlocutor by looking for weaknesses and mistakes.
- He cultivates his communication skills. He realizes that, often, difficulties in relationships, conflicts derive from deficiencies in communication: lack of empathic listening, sincerity, a real desire to reach an agreement, clarity of the message, ability to assert oneself, etc. Assertive people are concerned and have - to a large extent - the ability to listen actively, comprehensively, to express themselves simply, clearly and sincerely. They are willing - whenever necessary - to invest in the development of communication skills.
- He knows how to set boundaries. He understood that one could not always respond to the expectations and desires of the others by completely forgetting oneself. Moreover, the assertive person not only understood that one should not be blamed for this, but also that there are certain limits to everything and that there are situations that require clear boundaries. The assertive person can say 'NO', he can set limits without trying to feel guilty.
- He is emotionally independent. Manifestation of indifference or rejection by others is tolerated. Assertive people seek to be consistent with their own values, beliefs, needs, do not act only to gain the approval of others, do not work according to the herd principle. Like any human being, the assertive person prefers to be in agreement with others, enjoys their approval, confirmation. At the same time, this type of individual prefers to lose this approval if the price is to give up one's own beliefs, if one is asked to act against one's own conscience.

It is important to mention that all these features are dynamic, they are never complete, they do not manifest the same at any time or in any field, they are always perfectible. The following characteristics could complete the portrait of the assertive person[10]: high level of self-confidence; taking responsibility for the problem; motivation to achieve one's goals correctly; interest in how others feel and think; active listening, fairness; encouraging feedback.

3. Conclusions: The individual and social benefits of assertiveness

Being an expression of self-respect and respect for the others, sincerity and openness to the others, self-control and positive self-esteem, assertive behavior tends to inhibit anxiety and reduce depression. A person could not be both assertive and anxious at the same

[10] M. Constantinescu, *Competenţa socială şi competenţa profesională*. Economică Publishing House, Bucharest, 2004, p. 30.

time, because assertiveness prevented anxiety (J. Wolpe, 1958).

Assertiveness understood as an aspiration to assert oneself, to value one's self, inhibits feelings of inferiority and insecurity. It is the path towards the individual's self-realization in personal, professional and social life. Besides being a means of gaining respect, self-realization also involves the exercise of self-knowledge, acceptance and self-esteem, sincere connection with the others, emotional independence, limitation and delimitation of certain behaviors and last but not least, the development of communication skills. In a word, it is assertiveness! That is why assertiveness should not only remain a behavioral therapy (used by psychologists or psychiatrists in the treatment of neurosis or other mental illnesses), but it should be introduced and used in schools, universities, organizations, corporations, etc.

Moreover, for a democratic society to evolve, to consolidate, it needs assertive people, who are neither aggressive nor obedient. Democracy needs people who are active subjects in socio-political life, who respect, apply and militate for human rights, who are socially and politically (civically) competent. One should not forget that when it comes to socio-political competences, a central place is occupied by assertiveness.

Taking into account the warnings of IDEA International regarding the decline of democracy around the world, the need to learn and practice assertiveness at all levels of society is ever more pressing. Revitalizing the democratic project requires greater competent and responsible involvement of citizens everywhere in defining and solving the problems of the global world. This involvement in turn requires learning, practicing, reactivating assertive behaviors. History shows us that the sleep of assertiveness can produce dictatorships!

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