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LIST OF ABREVIATIONS

2000 Convention		Hague Convention of 13.01.2000 on the International Protection of Adults
ADM	–	automated decision making
AI Act	–	artificial intelligence Act
AI	–	artificial intelligence
AIns.	–	artificial insemination
AMF	–	Autorité des Marchés Financiers
ANFP	–	Romanian National Agency of Civil Servants
ANI	–	Romanian National Integrity Agency
ANP	–	National Administration of Penitentiaries
ANPC	–	Romanian National Authority for Consumer Protection
app.	–	application
AR	–	augmented reality
ART(s)	–	assisted reproductive technology(ies)
art.	–	article(s)
BNR	–	National Bank of Romania
CA	–	Court of Appeal
CAF	–	common-self-evaluation framework
CAFR	–	Romanian Chamber of Financial Auditors
CBDCs	–	Central Bank digital currencies
CBRC	–	cross-border reproductive care
CC 1864	–	Romanian Civil Code from 1864
CC	–	Romanian Civil Code (Law no. 287/2009)
CCR	–	Constitutional Court of Romania
CEAOB	–	Committee of European Auditing Oversight Bodies
CGDSACP	–	County General Directorates of Social Assistance and Child Protection
civ. dec.	–	civil decision
civ. s.	–	civil section
civ. sent.	–	civil sentence

CJEU	–	Court of Justice of European Union
CNATDCU	–	Romanian National Council for the Accreditation of University Degrees, Diplomas and Certificates
CNCSIS	–	Romanian National Council of Scientific Research in Higher Education
CoE	–	Council of Europe
COMI	–	center of main interests
coord.	–	coordinator(s)
CP 1969	–	Romanian Criminal Code from 1969
CP	–	Romanian Criminal Code (Law no. 286/2009)
CPC 1865	–	Romanian Civil Procedure Code from 1865
CPC	–	Romanian Civil Procedure Code (Law no. 134/2010)
CPP 1968	–	Romanian Criminal Procedure Code from 1968
CPP	–	Romanian Criminal Procedure Code (Law no. 135/2010)
CRD	–	Consumer Rights Directive
crim. dec.	–	criminal decision
crim. s.	–	criminal section
crim. sent.	–	criminal sentence
CRPD	–	Convention of 26.09.2007 on the rights of persons with disabilities
CSD	–	Consumer Sales Directive
CVM	–	Cooperation and Verification Mechanism
DApps	–	decentralised applications
DCTS	–	Developing Countries Trading Scheme
dec.	–	decision/judgement
DeFI	–	decentralised finance
DESI	–	Digital Economy and Society Index
DIICOT	–	Romanian Directorate for Investigating Organized Crime and Terrorism
DLT	–	distributed ledger technology
DMFSD	–	Directive 2002/65/EC on Distance Marketing of Consumer Financial Services
DnA	–	deoxyribonucleic acid
DNA	–	Romanian National Anticorruption Directorate
DS	–	Doctoral School(s)

DSA	–	Digital Services Act
DSB	–	Doctoral School Board
DStB	–	Doctoral Studies Board
e.g.	–	*exempli gratia* (lat.) / for example (engl.)
EBA	–	European Banking Authority
EC	–	European Council
ECB	–	European Central Bank
ECHR	–	European Convention of Human Rights
ECtHR	–	European Court of Human Rights
ECTS	–	European Credit Transfer and Accumulation System
ed.	–	edition
EESC	–	European Economic and Social Committee
EIOPA	–	European Insurance and Occupational Pensions Authority
EPPO	–	European Public Prosecutor's Office
ESC	–	Economic and Social Council
ESMA	–	European Securities and Markets Authority
et al.	–	*et alii* (lat.) / and others (engl.)
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
EURODAC	–	European Dactyloscopy
EXD	–	Explanatory dictionary of the Romanian Language
FoMO	–	fear of missing out
GD	–	Government Decision
GDPR	–	General Data Protection Regulation
GEO	–	Government Emergency Ordinance
GI(s)	–	geographical indication(s)
GO	–	Government Ordinance
GVA	–	gross value added
HCCH	–	Hague Conference on Private International Law

HCCJ	–	High Court of Cassation and Justice of Romania
i.e.	–	*id est* (lat.) / that is (engl.)
ICJ	–	International Court of Justice
ICRC	–	International Committee of the Red Cross
ICSI	–	intracytoplasmic sperm injection
ICT	–	information and communication technology
ICTJ	–	International Center for Transitional Justice
IDS	–	Institute for Doctoral Studies
IFFS	–	International Federation of Fertility Societies
IFRS	–	International Financial Reporting Standards
IMF	–	International Monetary Fund
INML	–	Romanian National Institute of Legal Medicine
IOSUD	–	Organising Institution(s) for Doctoral Studies
IQ	–	intelligence quotient
IRI	–	Insolvency Registers Interconnection
ISA	–	International Standards on Auditing
ITE	–	initial teacher education
ITLOS	–	International Tribunal for the Law of the Sea
ITP	–	initial teacher preparation
ITU	–	International Telecommunications Union
IUI	–	intrauterine insemination
IVF	–	*in vitro* fertilisation
JHA	–	Justice and Home Affairs Council
LGDJ	–	Librairie Générale de Droit et de Jurisprudence
loc. cit.	–	*loco citato* (lat.) / in the place cited (engl.)
MAR	–	medically assisted reproduction
MICA	–	markets in crypto-assets
n.n.	–	author's note
NAPRPD	–	National Authority for the Protection of the Rights of Persons with Disabilities
NATO	–	North Atlantic Treaty Organisation

NCCD	–	National Council for Combatting Discrimination
NDC	–	nationally determined contributions
NFC	–	near field communication
NGO(s)	–	non-governmental organisation(s)
NIS	–	Romanian National Institute of Statistics
no.	–	number
NRRP	–	Romania's National Resilience and Recovery Plan
OECD	–	Organisation for Economic Co-operation and Development
OJ	–	Official Journal of the European Union
op. cit.	–	*opere citato* (lat.) / in the work cited (engl.)
ORDA	–	Romanian Copyright Office
ORNISS	–	Romanian Office of the National Registry of Secret State Information
p./pp.	–	page(s)
para.	–	paragraph(s)
passim	–	in various places (in text)
PCAOB	–	Public Company Accounting Oversight Board
PCIJ	–	Permanent Court of International Justice
PDO	–	Protected Designation of Origin
PGI	–	protected geographical indication
PICCJ	–	Prosecutor's Office within HCCJ
PIL	–	Private International Law
POB	–	Public Oversight Board
RIL	–	HCCJ Appeal in the Interest of Law
ROFDS	–	Rules of Organisation and Functioning of the Doctoral School(s)
RPD Committee	–	Committee on the Rights of Persons with Disabilities
s.n.	–	author(s) underlining
sent.	–	sentence
SFR	–	selective foetal reduction
SIS	–	Schengen Information System
SLAPP	–	Strategic Law-Suit against Public Participation
TALIS	–	OECD Teaching and Learning International Survey

TCA	–	Trade and Cooperation Agreement
TEC	–	Treaty establishing the European Community
TEEC	–	Treaty establishing the European Economic Community
TEU	–	Treaty on the European Union
TFEU	–	Treaty on the Functioning of the European Union
Trib.	–	tribunal
TSG	–	traditional speciality(ies) guaranteed
UCTD	–	Unfair Contract Terms Directive
UK	–	United Kingdom
UKGT	–	United Kingdom Global Tariff
UN	–	United Nations
UNBR	–	National Union of Romanian Bar Associations
UNESCO	–	United Nations Educational, Scientific and Cultural Organisation
US(A)	–	United States of America
v.	–	*versus* (lat.)
VAT	–	value-added tax
VIS	–	Visa Information System
vol.	–	volume
VR	–	virtual reality
WHO	–	World Health Organisation
WIPO	–	World Intellectual Property Organisation
WTO	–	World Trade Organisation

Table of Contents

THE INCIDENCE OF THE PRINCIPLE OF PROPORTIONALITY IN THE CASE OF PRECAUTIONARY MEASURES ORDERED IN THE ROMANIAN CRIMINAL PROCESS

Alina ANDRESCU[*]

Abstract

The object of the analysed topic deals with the limits and incidence of the criterion of proportionality in taking, maintaining or terminating insurance measures, offering several procedural remedies.

The purpose of the study is to determine some criteria of objectivity and predictability incident to the taking and maintaining of precautionary measures, in order to prevent the abuse of law and the blocking of the use of the patrimony of the person concerned, criteria offered in a set of guarantees of a procedural-criminal nature, the observance of which constitutes a result obligation for the judicial bodies issuing the measure.

The author carries out an analysis of the legal content of the protective measures in Romanian criminal procedural law from the perspective of the principles of ensuring the preemption of substantive European law and ensuring European public order, fundamental principles in the European and national normative construction, seeing in this legal order a standard capable of guaranteeing the defense concrete and effective of the rights of the procedural participants, drawing objective boundaries between them, the purpose being to increase the confidence of litigants in the judicial act.

Keywords: *precautionary measures, principle of proportionality, criminal process, European law, abuse of law.*

1. Introduction

The size and importance of precautionary measures at European level. As early as 1928, Professor H. Donnedieu De Vabres observed that „delinquency has no borders", which is why he argued that „the internationalisation of crime must be opposed by the internationalisation of repression"[1]. These conclusions represent a postulate, an objective law that highlights the need to adopt legal instruments, law and criminal procedure, capable of repressing the cross-border criminal phenomenon.

In the context of a Europe „without internal borders"[2] the reasoning of professor De Vabres seems to be more current than ever, the European legislative authority, the European Parliament and the Council, as well as the legislators of the member states, having the task of legislating at the Union level procedural instruments for the defense of the area of freedom, security and justice[3].

Given that criminality is often transnational in nature, European decision-makers have concluded that the seizure and confiscation of instruments and proceeds of crime is essential, being among the most effective methods of combating crime at the Union level, the activity representing an important objective in cross-border cooperation.

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[1] To be seen, H. Donnedieu De Vabres, *Les princípes modernes du droit pénal international*, 1928, p. 302, author and work cited by Jean Pradel et Geert Corstens, *Droit pénal européen*, 2nd ed., Dalloz, Paris, 2002, p. 39, ideas also taken over in our legal literature, see, Gh. Mateuț, *Tratat de procedură penală - Partea generală*, vol. I, C.H. Beck Publishing House, Bucharest, 2007, p. 40.

[2] The concept of a Europe without internal borders, for the first time, received normative content in Title II, art. G 3, lit. c) in the European Union Treaty, signed in Maastricht on February 7, 1992, hereinafter referred to as TEU, published in the Official Journal of the European Community, C-191/5/29.07.1992. Later, on the occasion of the improvement and republishing of the TEU, this principle was repeated in art. 3 of the Treaty, specifying that „the Union offers its citizens an area of freedom, security and justice, without internal borders, within which the free movement of persons is ensured...", TEU was republished in the OJ C-326/17/26.10.2012.

[3] We consider the provisions of art. 2 para. (2) within the framework of the Treaty on the functioning of the European Union (consolidated version), hereinafter cited TFUE, published in the OJ C-202/47/16.06.2016, according to which, „if the treaties attribute to the Union a competence shared with the member states in a determined field, the Union and the member states can legislate and adopt legally binding acts in this field", and in art. 4 para. (2) lit. j) TFUE, it is stipulated that „the powers shared between the Union and the member states are applied in the following main areas: letter j) the space of freedom, security and justice". From the content of these provisions of European value, it follows, explicitly, both the cooperation of the authorities on a legislative level, in order to ensure the legal, procedural framework for European cooperation in criminal matters, as well as the effective and efficient procedural cooperation of the judicial authorities, at the Union level, in defense of guaranteed social values.

In achieving such an objective, the principle of mutual recognition of court judgments and judicial decisions represented the cornerstone in the construction of the new vision of judicial cooperation in criminal matters within the Union, aspects decided on the occasion of the Tampere European Council of October 15 and 16, 1999.

In the framework of the Stockholm Program - „An open and secure Europe serving and protecting citizens”[4], the Union is committed to ensuring more effective identification, confiscation and re-use of the proceeds of crime.

2. The Union normative framework regarding the unavailability and confiscation

In a first stage, the adopted Union normative framework, in the matter of mutual recognition of non-availability orders and confiscation orders, was represented by the Framework Decisions 2003/577/JAI[5]and Framework Decision 2006/783/JAI[6] of the Council.

Later, Directive 2014/42/EU, the European Parliament and the Council[7] was adopted, in the content of which the main instruments regulated by the aforementioned Framework Decisions were brought together, on which occasion it was reiterated that the existence of an effective system of non-disposal and confiscation at European Union level is intrinsically linked to the proper functioning of the mutual recognition of freezing orders and confiscation orders.

Unfortunately, the regime established by these normative acts was not fully effective, considering that neither the framework decisions nor Directive 2014/42/EU were transposed and applied uniformly in the member states, which led to an insufficient degree of mutual recognition and sub-optimal cross-border cooperation.

The new problems that have arisen, represented by the existence of a fragmented system in terms of the recognition and enforcement of judicial confiscation decisions, have led the Union to reposition judicial instruments within a single, comprehensive system of confiscation and confiscation of instruments and proceeds of crime.

3. The reconfiguration of the European normative framework and the establishment of its obligation for the EU member states

Following the analysis of the efficiency criteria[8], the unanimous conclusion was that, in order to effectively ensure the mutual recognition of freezing orders and confiscation orders, the rules on the recognition and execution of these orders should be laid down in a binding Union act of legally and directly applicable.

For these reasons, the EU Regulation was adopted. 2018/1805 of the European Parliament and of the Council of 14.11.2018 on the mutual recognition of orders of non-disposal and confiscation[9], its normative content having direct applicability in the internal law of the EU member states.

In the content of the introductory part, at para. 12, of this Regulation, the European legislator emphasised that „it is important to facilitate the mutual recognition and execution of orders of non-availability and confiscation orders by establishing rules that impose on a member state the obligation to recognize, without other formalities, the orders of non-disposal and confiscation orders issued by another Member State in criminal proceedings and to execute those orders on its territory”.

Also on this occasion, it was recalled that, at the level of Union law, „procedures in criminal matters” represent an autonomous notion of law, interpreted by CJEU despite the ECtHR jurisprudence, the recognition

[4] The resolutions of the Stockholm Program, brought together under the motto „An open and secure Europe at the service of citizens and for their protection”, OJ C-115/04.05.2010, p. 1.

[5] Framework-decision 2003/577/JAI of the Council of 22.07.2003 regarding the execution in the European Union of orders to freeze goods or evidence, OJ L-196/02.08.2003, p. 45.

[6] Council Framework Decision 2006/783/JAI of 06.10.2006 on the application of the principle of mutual recognition for confiscation orders, OJ L-328/24.11.2006, p. 59.

[7] Directive 2014/42/EU, European Parliament and Council of 03.04.2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union, OJ L-127/39/29.04.2014.

[8] In this sense, see the Commission Communication of 28.04.2015, entitled „The European Agenda on Security” and the Commission Communication of 02.02.2016 on the Action Plan to strengthen the fight against terrorist financing, in which the Commission emphasised that „in order to undermines the activities of organised crime that finance terrorism, it is imperative that those criminals be deprived of the proceeds of crime”.

[9] EU Regulation 2018/1805 of the European Parliament and of the Council of 14.11.2018 on mutual recognition of freezing and confiscation orders, OJ L-303/1/28.11.2018.

and execution of judicial decisions of non-disposal by the Union states, not being conditioned by the existence of a criminal conviction. It was emphasised that the notion of criminal proceedings includes all types of non-disposal orders and confiscation orders issued following proceedings initiated as a result of the commission of a crime, their scope cannot be limited only to the orders falling under the scope of Directive 2014/42/EU, respectively those issued on the basis of convictions.

Another new aspect regulated in the Regulation is given by the recognition and execution of the decisions of the non-disposal orders issued in the framework of some judicial investigation procedures, in reference to the investigative activities of the judicial bodies, regardless of whether the investigated crimes are serious or less serious, which means a repositioning of the scope of the object of the non-disposal of assets, including both the assets obtained by committing crimes and those actually used/involved in the commission of such acts (criminal bodies)[10].

The new bases of the „judicial procedures in criminal matters", recognized at European level, in the content of which were also included the procedures issued/communicated unconditionally by the existence of a criminal conviction, determine the reconfirmation of the procedural guarantees that the persons concerned by the restrictive component on patrimonial rights, inherent effect of the measure of unavailability.

The standard of legality requires the issuing authority, when issuing a non-disposal order or a confiscation order, to ensure that the principles of necessity and proportionality are respected, *i.e.*, to check whether between the level of intrusion into the private life of the person concerned, as well as relative to the level of restriction of real rights, on the patrimony of the one concerned, and the judicial/procedural purpose pursued by the establishment of such measures, there is a balance[11]. Also, the issuing authority must consider that the non-disposal or confiscation order is issued and transmitted to the enforcement authority in another member state only when such a restrictive measure of real rights could be issued and used in an internal case.

In situations where the criminal procedural legislation of the issuing state also allows authorities other than the judicial ones to issue orders for the non-disposal of assets or order the measure of their confiscation, prior to their transmission to the enforcement authority, they must be validated by a judge, by the court or the prosecutor.

As part of the validation activity, in order to prevent arbitrariness and imbalance, the competent judicial authority must verify the aspects on the basis of which the conditions for the necessity and proportionality of issuing the order of non-disposal or the measure of confiscation have been found to have been met.

In situations where the confiscation was ordered by a final judgment of conviction, the issuing authority must specify in the confiscation order submitted to the enforcement authority whether the person concerned by the measure of confiscation and confiscation participated or not in the ongoing criminal process and, in the situations in which he did not participate, it must be specified and proven how exactly he was notified, notified about the existence of the process and its object.

After receiving the judicial confiscation decision issued on the basis of a conviction, the enforcement authority, if it finds that the person against whom the confiscation order was issued did not appear at the trial following which the confiscation order was issued, has the right not to recognize or not to execute confiscation orders. Also, the person subject to confiscation, who did not know about the existence of the procedures carried out by the issuing state completed with real insurance measures against his patrimony, must be ensured the exercise of an effective way of appeal, within which the person concerned can exercise his right of defence. Such national rules at the level of the executing state are in accordance with both the provisions of the Charter and those of the European Convention, especially in relation to the provisions of the right to a fair trial[12].

Along the same lines, in those situations where the executing state finds that there are real and objective reasons regarding a clear violation of a relevant fundamental right belonging to the person concerned by the

[10] In this sense, at para. 14 of the Regulation, it was shown that „crimes requiring the issuing and mutual recognition of orders to freeze goods in the framework of the Union criminal proceedings should not be limited to particularly serious crimes with a cross-border dimension, since Article 82 of the Treaty on the operation of the European Union (TFEU) does not impose such a limitation in terms of measures to establish rules and procedures to ensure the mutual recognition of judgments in criminal matters".

[11] At para. 21 of the Regulation, it was emphasised that „the issuing authority should be responsible for assessing the necessity and proportionality of such an order in each case", which means that, in situations where the person targeted by the restriction and intrusion of the blocking order wishes to dispute the necessity and proportionality of the measure must be addressed to the competent authorities within the issuing state, which is responsible for complying with the issuing criteria.

[12] In this sense, see ECtHR, Case *Apostolovi v. Bulgaria*, judgment from 07.11.2019, as well as ECtHR, Case *Filkin v. Portugal*, judgment from 03.03.2020, *www.echr.coe.int*.

application of the preventive measure, a right mentioned in the Charter, the right of the authority to enforcement not to recognize or enforce the order in question. The fundamental rights that should be relevant in this respect are, in particular, the right to an effective remedy, the right to a fair trial and the right to defence.

When considering a request from the executing authority to limit the period during which the asset should be subject to freezing, the issuing authority should take into account all the circumstances of the case, in particular whether the continuation of the freezing order could cause undue harm to the State execution.

Before deciding not to recognize or enforce a freezing or confiscation order based on any reason for non-recognition or non-enforcement, the executing authority should consult with the issuing authority to obtain any additional information necessary.

Pronouncing the judgment on the recognition and enforcement of the freezing or confiscation order and the concrete execution of the freezing or confiscation should take place with the same speed and with the same degree of priority as in similar domestic cases.

Where a confiscation certificate relating to a confiscation order relating to a sum of money is transmitted to several executing States, the issuing State should aim to avoid the situation of confiscation of more assets than necessary, and the total amount obtained from the execution of the order would exceed the specified maximum value. To this end, the issuing authority should, inter alia, indicate in the confiscation certificate the value of the assets, if known, in each executing state, so that the executing authorities can take this into account, maintain the necessary contact and dialogue with the authorities of enforcement in respect of the goods to be seized and to immediately inform the relevant enforcement authority(ies) if it considers that there may be a risk that the enforcement may concern an amount greater than the maximum amount. Where appropriate, Eurojust could exercise a coordinating role within its sphere of competence to avoid excessive confiscation.

The issuing authority should inform the executing authority if the authority of the issuing State receives an amount of money paid in connection with the confiscation order, it being understood that the executing State should only be informed if the amount paid in connection with the order affects the outstanding amount to be forfeited under the order.

Following the execution of a freezing order, and following a decision to recognize and enforce a confiscation order, the enforcing authority should, as far as possible, inform known affected persons of such enforcement or decision. To this end, the executing authority should make all reasonable efforts to identify the affected persons, to verify how they can be found and to inform them of the execution of the freezing order or of the recognition and enforcement decision of the confiscation order. In fulfilling this obligation, the executing authority could request assistance from the issuing authority, for example when the affected persons appear to reside in the issuing state.

The enforcement of a freezing order or a confiscation order should be governed by the law of the executing State and only the authorities of that State should be competent to decide on enforcement procedures.

4. The definition and scope of the concept of „precautionary measures" in the Romanian criminal procedure

A part of the Romanian legal doctrine[13] defines the preventive measures as measures of real coercion, consisting in the unavailability of assets and income belonging to the suspect, the defendant, the civilly responsible party or other persons, while another part of our doctrine[14] defines the preventive measures from in view of their procedural character, they represent real procedural measures that have the effect of making available movable and immovable assets belonging to the suspect, the defendant, the civilly responsible party or that are in the possession or property of other persons for a specific purpose[15].

[13] In this sense, see: Gr. Theodoru, I.-P. Chiș, *Treaty of Criminal Procedural Law*, 4th ed., Hamangiu Publishing House, Bucharest, 2020, p. 547; A. Crișu, *Criminal Procedural Law. The general part - according to the new Criminal Procedure Code*, 4th ed., revised and updated, Hamangiu Publishing House, Bucharest, 2020, p. 578.

[14] I. Neagu, M. Damaschin, *Criminal Procedure Treaty - General Part*, 4th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2022, p. 748; N. Volonciu, A.S. Uzlău and the collective, *New Criminal Procedure Code - commented*, Hamangiu Publishing House, Bucharest, 2014, p. 567.

[15] The purpose or finality of the precautionary measures consists in avoiding the concealment, destruction, alienation or subtilization (evasion) of immovable or movable assets from the effective foreclosure.

From our point of view, the real constraint, representing only the effect of a restriction with a real character, must be analysed as a natural consequence of the measure, being subsequent, but the definition offered to the measure must highlight the reassurance character, *i.e.*, the preventive purpose of the measure.

If the real coercion were regarded as the main attribute of the preventive measure, on the one hand, an error would be induced between the real prevention and the real punitive component, and on the other hand, a confusion would be created between the procedural preventive purpose (insurance) of the real measure and the effective patrimonial compensation of the civil party or the covering of court costs or the payment of the criminal fine, the latter relating to the termination of the criminal and/or civil action within the criminal process (highlighting the punitive nature).

Professor Siegfried Kahane, in defining precautionary measures[16], also starts from the objective/positivist aspect of the measure, *i.e.*, the unavailability of the targeted assets through the establishment of the seizure, positioning the factual consequence prior to the method of legal realisation.

Unfortunately, the doctrinal definitions do not highlight two defining components of the measure, namely its temporary and preventive character and its proportionality.

From a technical-legal perspective, provided by art. 249 para. (1) CP, the insurance measure can be defined as a form of real prevention, consisting in the temporary restriction of the exercise of one or some of the attributes of real rights[17], which has as its object immovable and movable assets, present and future, belonging to the suspect, the defendant, the civilly responsible party or in the property or possession of third parties[18], of a patrimonial value close to the damage caused and the criminal consequences generated, prevention materialised by the effective unavailability of the assets in order to prevent their concealment, destruction, alienation or theft from prosecution and enforcement.

Unfortunately, the doctrinal definitions do not highlight two defining components of the measure, namely its temporary and preventive character and its proportionality.

Even if we would be criticised that the definition provided would be more of an explanation of the precautionary measure, overcoming the synthetic form of its main features, we still believe that the temporality and proportionality of the real measure belong to its essence, requiring the emphasis to take place even within definition.

Although in para. (2) of art. 249 CPP[19] only seizure is provided as a form of exercise of non-disposal in the framework of preventive measures, however, as, justly, it has been observed in the criminal procedural legal doctrine[20], from the set of criminal procedural regulations, there are 3 ways of exercising preventive measures, respectively: the sequestration itself, the mortgage notation in the land register and the insurance attachment.

Although we are in the framework of an injunctive measure that has a limiting purpose and is well known from the moment of its disposition, however, nowhere does our legislator include proportionality among the criteria that must be taken into account at the time of ordering the injunctive measure, as well as during its development, although, as I stated above, the Union legislation requires the member states to regulate and respect in domestic law the proportion in terms of the quantitative extent of the unavailability in order to prevent arbitrariness and abuse by the authorities.

The criterion of proportionality concerns the balance between the value of the damage caused, the criminal consequences of a criminal sanction and the amount of assets made available from a person's patrimony.

For example, it would be disproportionate to seize by seizing the entire patrimony of a commercial company worth over one million euros in order to ensure the payment of a possible fine that cannot exceed the

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[16] We have in mind the definition of preventive measures expressed by Prof. Siegfried Kahane in Title IV called „Preventive measures and other procedural measures", in the content of the monumental work *The theoretical explanations of the Romanian Criminal Procedure Code - General part*, vol. I, by V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, Publishing House of the R.S.R. Academy, Bucharest, 1975, p. 337.

[17] Restrictive form of rights that, as a rule, concerns the component of the *abusus* disposition and, in some situations, also applies to *the usus* and *fructus* components.

[18] Considering the principle of legality of the criminal process, regulated in art. 2 CPP, seeing the intrusive nature of the precautionary measure, in order to prevent any abuses, we believe that the procedural subjects or the parties targeted by real measures restricting rights should be explicitly determined/indicated by the legislator.

[19] The reference is to the Criminal Procedure Code in force, adopted on the basis of Law no. 135/2010 regarding the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 486/15.07.2010, entered into force on February 1, 2014, according to art. 103 of Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the completion and modification of some normative acts that include criminal procedural provisions, published in the Official Gazette of Romania, Part I, no. 515/14.08.2013.

[20] See, I. Neagu, M. Damaschin, *op. cit.*, p. 749.

amount of 10,000 euros, or the seizure of a 200,000 euros villa belonging to the spouses for ensuring a future confiscation of 70 euros that could be ordered against one of the spouses.

The ratio between the value of the damage and criminal costs/sanctions, on the one hand, and the value of the assets made available is only one of the forms of establishing proportionality.

In addition to this criterion, in determining the proportionality of the measure, other criteria whose objectivity is obvious must be taken into account, such as:

- the exercise or not of the civil action within the criminal proceedings;
- solidarity or individuality of civil liability;
- the patrimonial guarantees offered/made available to the judicial bodies by the person(s) targeted by the measure in the form of a bond;
- voluntary compensation and/or reconciliation between the parties;

The criterion of proportionality must be verified throughout the maintenance of the precautionary measure and in cases where there are reasons for reducing the extent of the measure or terminating the measure, the legislator should grant the judicial body the right to order, ex officio, its removal.

5. *De lege ferenda* and conclusions

Preventive measures represent a way of prevention with a real character, which can only be taken within the framework of the criminal process, having a well-established purpose and being available for a determined period.

Considering the intrusive and restrictive character of real rights that is the object of the precautionary measures, we believe that it is necessary to rethink the procedural institution of the preventive seizure and introduce some objective criteria into the content of the regulatory legal provisions, based on which the proportionality test of the measure should be carried out, both at the time of disposition and during its existence.

In this sense, *de lege ferenda*, we propose the introduction in the content of art. 249 CPP of some objective criteria, able to ensure compliance with proportionality, as well as the regulation of some mechanisms for verifying this criterion during the course of the measure. It would also be necessary to specify the temporary nature of the measure in the legal content of the criminal procedure texts.

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THE PARTICIPATION OF THE PERSONS DEPRIVED OF THEIR LIBERTY IN THE CRIMINAL PROCEEDINGS BY MEANS OF REMOTE COMMUNICATION

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Abstract

Considered since ancient times, the sacred place where justice is administered, the courtroom is gradually opening up to new technologies, either for exceptional situations or for reasons related to the good administration of the act of justice.

The rapid pace at which the contemporary world is transforming into an informational world marks all areas of the society, therefore, justice cannot stand aside from the technological implications. Although it undeniably has a number of advantages such as speed and cost reduction, the implementation of IT technologies in justice brings with it a series of challenges and questions and leads to the adaptation of the working methods of justice actors, legal professionals, but at the same time it also marks a reconsideration of the way of exercising the rights of the parties involved in the judicial proceedings.

This paper work intends to address the compatibility of existing provisions in national law on the participation of persons deprived of their liberty in criminal proceedings by means of remote communication with the provisions of the European Convention on Human Rights and the case law of the Strasbourg Court in terms of the observance of the right of defense and the right to a fair trial.

Keywords: *videoconferencing, criminal procedure, person deprived of liberty, fair trial.*

1. Introduction

Conceived as a useful tool in cross-border proceedings in order to speed them up, and used in particular to hear persons in other countries, hearings by videoconference have gradually made their way into the national legal system.

Its widespread use during the Covid 19 pandemic changed mentalities and subsequent working practices, opened up new perspectives on this working tool which has proved its effectiveness, and today, after a period when it was used on an exceptional basis, participation in trials by videoconference seems to be successfully included among the usual working procedures in the courts of law.

This does not mean that ensuring guarantees of respect for the rights of the defense and the right to a fair trial is not the object of the concerns of legal experts, but on the contrary, it is their constant effort to make this procedural tool compatible with the requirements imposed by the conduct of criminal proceedings in a public, oral and adversarial manner, and at the same time compatible with the ECtHR case-law.

Videoconferencing has the advantage of facilitating remote hearings, thus avoiding unnecessary travel, reducing the costs of criminal proceedings and shortening the periods between the hearings. In the Member States of the European Union in particular, the use of information technologies in general and videoconferencing in particular is encouraged. For example, one of the objectives of the *Multiannual European E-Justice Action Plan 2014-2018*[1] was the extension of the use of videoconferencing, teleconferencing or other appropriate means of remote communication for hearings, as the case may be, in order to avoid the need to travel to court to participate in judicial proceedings, especially in cross-border cases. The same document also states that electronic communication between the judicial authorities of the Member States should be further developed, in particular within the framework of instruments adopted in the European judicial area in the fields of civil, criminal and administrative law (*i.e.*, via videoconferencing or secure electronic data exchange).

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[1] *prolege.ro*.

2. The provisions of national law on the participation of persons deprived of their liberty in trials by videoconference

The use of information technology in courts of law work is not a novelty element. In the old codification of criminal procedure, Law no. 281/2003 introduced provisions requiring the existence of specific facilities, such as technical means to ensure the hearing of the witness without being physically present in the courtroom where the hearing takes place[2], or those allowing the hearing or viewing of recordings of conversations or communications.[3]

De lege lata, *any person deprived of liberty*, whether under preventive measures or in the execution of a custodial sentence, may be heard by videoconference at the place of detention, irrespective of his or her status as a defendant, injured party, civil party, witness, etc. The provisions of art. 106 CPP, which contain general rules on hearing, enshrine the exceptional nature of this evidentiary procedure, which may not be used unconditionally, but only if certain special conditions are met.

Firstly, the evidentiary procedure of hearing by videoconference may be used only when there are certain circumstances which make it impossible to hear the detainee directly at the judicial body's premises (such as in the event of a disaster or illness of the detainee which makes it difficult for him/her to travel to the judicial body's premises, etc.). Secondly, it is necessary for the judicial body to assess that the hearing of persons in this way is not such as to prejudice the rights and interests of the parties or the proper conduct of the criminal proceedings. Thirdly, in cases where legal assistance is mandatory, according to the provisions of art. 90 CPP, the hearing of the detainee by videoconference can only take place in the presence of his/her lawyer at the place of detention.

Unlike the old criminal procedure provisions (art. 314 CPP 1968), which stipulated that the trial could only take place in the presence of the detainee, the current criminal procedure law, which entered into force on 1 February 2014 provides as a matter of principle that the trial must be take place *in the presence of the defendant,* whether or not *he/she is in detention.*

If the defendant is in detention (remanded in custody or serving a sentence), he or she must be brought to trial unless he or she has requested a trial in absentia, in which case he or she will not be brought to trial. Mandatory appearance at trial is justified because the defendant must be given an effective opportunity to be heard by the court, to confront the prosecution's witnesses and to exercise his/her right of defense.

Notwithstanding, the presence of the defendant at the trial is not only the mere physical appearance of the defendant, but also effective participation in the criminal proceedings, which includes not only the right to be present at the trial, but also the right to effectively hear and follow the proceedings (ECtHR, Case *Stanford v. The United Kingdom,* judgment from 23.02.1994, para. 26).

According to the provisions of art. 364 para. (1) thesis II CPP, a defendant deprived of liberty shall be deemed to be present if, with his or her consent and in the presence of his or her chosen or publicly appointed lawyer and, where appropriate, an interpreter, he or she participates in the trial by videoconference at the place of detention. According to art. 364 para. (4) CPP, if the defendant deprived of liberty has requested to be tried by default, he or she may make submissions in open court or take the floor, in the presence of his or her lawyer, by videoconference.

As can be noted, the criminal procedure provisions do not refer to the participation of other parties or litigants in the proceedings by means of videoconferencing, but in court practice this means of participation is used in respect of all participants without exception.

The rules of criminal procedure regulate the possibility of participation in the trial by videoconference also in the case of the settlement of the appeal against the decision ordering preventive measures, these provisions were introduced following the amendment of the Code of Criminal Procedure by GEO no. 18/2016. The purpose stated in the explanatory memorandum of the emergency ordinance adopting these legislative amendments was to „*to fall within the legal settlement terms*[4]".

With regard to appeals against preventive measures, the legislator has reaffirmed the need for the physical presence of the person deprived of liberty before the judge whenever possible. Only in the event that the

[2] Art. 86^7 CPP 1968, introduced by art. I item 45 of Law no. 281/2003, which speaks about -television networks with distorted image and voice- and „video and audio technical means".

[3] Art. 91^1 *et seq.* CPP 1968, amended by art. I item 47 of Law no. 281/2003.

[4] See, in this regard, the explanatory memorandum of the draft law on the approval of GEO no. 18/2016, available on the site of the Chamber of Deputies, *http://www.cdep.ro*.

defendant is missing, evades the procedure or is unjustifiably absent or simply cannot be brought before the judge, or in situations of force majeure or a state of necessity, or for medical reasons, the appeal will be resolved in his/her absence. However, with his or her consent and in the presence of a lawyer chosen or appointed by the bar, the defendant deprived of his or her liberty may participate in the settlement of the appeal by videoconference at the place of detention. In this situation he/she is deemed to be present, thus creating a legal presumption of the defendant's presence[5].

Therefore, according to the provisions of art. 204 para. (6) CPP, for the settlement of the appeal, the defendant is summoned. The appeal shall be conducted in the presence of the defendant, unless he or she is absent without justification, is missing, evades the procedure or cannot be brought before the judge because of ill health, force majeure or necessity. However, the defendant deprived of liberty is also considered to be present when, with his/her consent and in the presence of his/her chosen or appointed lawyer and, where appropriate, of the interpreter, he/she participates in the settlement of the appeal by videoconference, at the place of detention, in this respect, the provisions of art. 204 para. (7) CPP being applicable.

The same provisions are also applicable in what concerns: the settlement of the appeals against resolutions pronounced on preventive measures in preliminary proceedings, according to art. 205 para. (7) CPP; verification of preventive measures in preliminary proceedings, according to art. 207 para. (3) CPP; verification of preventive measures within the trial, according to art. 208 para. (3) CPP and the extension of the measure on the remand custody within the criminal proceedings, according to art. 235 para. (3) CPP.

This evidentiary procedure is used not only in court proceedings but also in enforcement proceedings[6], this means being used in the case of detainees in another prison when they are heard by the supervising judge in another prison. In this respect, the Regulation implementing Law no. 254/2013 contains detailed provisions on the modality the hearing is to be conducted.

The detainee's lawyer has access to the room in the penitentiary or detention center where the videoconference takes place, under the same conditions as the translator or interpreter if the detainee does not speak Romanian.

The administration of the place of detention shall be bound to organise specially designed and appropriately equipped premises for holding videoconferences[7]. The procedure for conducting the videoconference is detailed in the same Regulation implementing Law no. 254/2013, which, in art. 39, provides for all its stages, *i.e.*, the formulation of the request by the judicial body in charge of the case, the identification of the detainee and the taking of measures for his/her participation in the videoconference, the setting of the date and time of the connection, the transmission of the hearing by videoconference simultaneously between the two locations, with the possibility of recording it.

Written evidence cannot be produced in the hearing by videoconference, according to art. 38 para. (13) of the Regulation. The text finds physical impossibility of producing written evidence within this procedure, as the court or the judge must see it, analyse it and put it to the parties for cross-examination, and only then can the judge rule on it.

3. The compatibility of hearing by videoconference with the principles of criminal procedural law

How to reconcile e-justice with the principles that govern the criminal process? How compatible it is with these principles, in particular with the right of defense, as well as with the publicity and immediacy that govern the trial of cases? These are the questions we aim to answer in this chapter of the paperwork.

We show that in addition to the provisions stipulating the cases in which persons deprived of their liberty may be heard by videoconference, in general, there are also legal regulations specifically enacted for special situations, such as that caused by the Covid 19 pandemic.

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[5] M. Udroiu, *Procedură penală. Partea generală. Noul Cod de procedură penală (Criminal Procedure. General Part. New Criminal Code)*, 5th ed., C.H. Beck Publishing House, 2018, p. 345.

[6] According to art. 29 of Law no. 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings: „ (1) If a detainee is to be heard in a procedure provided for by this law by the staff or the judge supervising the deprivation of liberty from a penitentiary other than the one in which the detainee is, the hearing can take place by videoconference."

[7] Art. 37 of the Regulation implementing Law no. 254/2013: The directors of the penitentiaries have the obligation to set up a suitable space where the hearing of the detainees will take place via video conference.

For the period of this health crisis in Romania, the legislator has adopted special provisions concerning the hearing of persons in criminal trials (and not only) by videoconference.

Therefore, according to art. 15 of Law no. 114/2021[8] on certain measures in the field of justice in the context of the COVID-19 pandemic: „(1) If the judicial body considers that this does not prejudice the proper conduct of the trial or the rights and interests of the parties, persons deprived of their liberty, other than those under house arrest, shall be heard by videoconference at the place of detention, without their consent being required. (2) The hearing of persons other than those referred to in para. (1) shall be performed by videoconference, at the place where they are present, under their consent. They will be informed of this possibility at the first hearing or, where appropriate, by means of a notification performed by telephone, e-mail or other means which ensure that such notification is delivered and acknowledgement is received, and they will be asked whether they agree to this. The person shall be summoned for a hearing even if he or she is aware of the time limit. The summons shall also state that the hearing is to be held by videoconference, the manner in which it is to be held, the date and the time or, where appropriate, the time interval at which the hearing is to take place, and the fact that the person summoned is bound to observe the solemnity of the court hearing."

Two aspects emerge from the aforementioned text of law, which draw our attention. The first aspect is the hearing of the detainee by videoconference, without his or her consent, *i.e.*, even if he or she has expressed his or her intention to participate in the trial, in order to be heard directly by the court, and the second aspect is that of the presence of the lawyer at the place of detention, since the text makes no reference to the need to hear the detainee in the presence of his/her lawyer, chosen or publicly appointed.

The detainee's remotely hearing by means of audio-video communication, without the person appearing before the court, has been extensively examined by the ECtHR, which has ruled that hearing a person deprived of liberty in this way is in itself compatible with the right to a fair trial, but has held that particular attention must be paid to the safeguards accompanying the use of such an evidentiary procedure. In a number of cases against Italy relating to trials involving members of the Mafia, the European Court has ruled on the conformity of art. 6 ECHR with the use of videoconferencing. For instance, in Case *M.V. v. Italy*,[9] the Court noted that the applicant was arrested and remanded in custody on charges of murder and belonging to a mafia-type organisation and was subject to a restricted prison regime which, among other things, limited his contact with the outside world. Accordingly, the applicant was no longer brought to the hearing room from prison. He was, however, able to participate in the hearings by means of an audiovisual link with the hearing room. The applicant complained before the Strasbourg Court that he had been compelled to participate by videoconference in the appeal proceedings, alleging a violation of art. 6 para. (1) and (3) ECHR, as the use of this technical means made it difficult for him to exercise his rights of defense.

ECtHR held that although not expressly provided for in para. (1) of art. 6 ECHR, the possibility for the defendant to take part in the trial follows from the object and purpose of that article. Therefore, from the interpretation of letters c), d) and e) of para. (3) of the aforementioned article „everyone charged with a criminal offence" has the right „to defend himself", „to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf" and „to have the free assistance of an interpreter if he cannot understand or speak the language used in court", aspects that cannot be conceived without his presence. Therefore, the defendant has the right to participate effectively in the trial, which includes the right to attend, but also to listen to and follow the proceedings. In the Court's opinion, it is undeniable that the transfer of such a prisoner entails particularly stringent security measures and a risk of absconding or attacks. It may also provide the detainee with an opportunity to renew contact with the criminal organisations to which he is suspected of belonging, considering that by their mere presence in the courtroom they can exert pressure on other participants in the trial, in particular victims and witnesses.

In the light of the foregoing, the Court considers that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the „reasonable time" requirement in judicial proceedings.

In what concerns the exercise of the right of defense, the Strasbourg Court noted that the applicant was able to take advantage of an audiovisual link with the hearing room, which allowed him to see the persons

[8] Published in Official Gazette of Romania, Part I, no. 457/29.04.2021.

[9] Case *Marcello Viola v. Italy* from 05.10.2006, *http://hudoc.echr.coe.int*.

present and hear what was being said. He could also be seen and heard by the other parties, the judge and the witnesses, and had an opportunity to make statements to the court from his place of detention. Furthermore, the applicant's defense counsel had the right to be present where his client was situated and to confer with him confidentially. This was also a statutory right of defense counsel present in the hearing room. That being so, the Court finds that the applicant's participation by videoconference in the appeal hearings during the second set of criminal proceedings did not put the defense at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had the opportunity to exercise the rights and entitlements inherent in the concept of a fair trial, as enshrined in Article 6. It follows that there has been no violation of art. 6 of the Convention.

With regard to another case, *S. v. Russia*, the Strasbourg Court noted that the applicant was charged of murder and arrested on 30.04.2001, being provided with a publicly appointed lawyer. On 20.12.2001, the Novosibirskiy Regional Court found the applicant guilty, sentencing him to eighteen years' imprisonment. On the occasion of the appeal, the applicant requested to be assigned another lawyer to represent him in the appeal proceedings because his publicly appointed lawyer was unable to attend the hearing, as she was already engaged in another trial. On 31.10.2002, the Supreme Court of the Russian Federation examined the applicant's appeal. The applicant participated in the proceedings by video link. No defense counsel attended the hearing and the Court dismissed the applicant's appeal.

The Supreme Court granted an application for supervisory review by the Deputy Prosecutor General and quashed the Supreme Court's appeal decision of 31.10.2002. The Presidium found that the applicant's right to legal assistance had been violated in the appeal hearing and remitted the case for a fresh examination before the appellate court.

At the appeal hearing, the court rejected the applicant's request to attend in person, finding that the video link would be sufficient to ensure that the applicant could follow the proceedings and make objections or other submissions, and that this form of participation would be no less effective than if he was personally present in the courtroom, in circumstances where the applicant was in a detention center in the city of Novosibirsk, more than 3,000 kilometers from Moscow, where the court was located. The Supreme Court then introduced the applicant to his new publicly appointed lawyer, who was present in the Supreme Court's courtroom and then allowed them fifteen minutes of confidential communication by video link before the start of the hearing.

The applicant rejected the assistance of the publicly appointed lawyer. The Supreme Court, noted that the applicant did not rely on any divergence with the lawyer in his defense and did not request her replacement by another publicly appointed lawyer. On the same day, the Court examined the merits of the case and dismissed the applicant’s appeal.

In the analysis performed in this case, ECtHR reiterated that while art. 6 § 3 (c) confers on everyone charged with a criminal offence the right to defend himself in person or through legal assistance, it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems.

Furthermore, the Strasbourg Court revealed that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing. However, the attendance of the defendant in person does not necessarily take on the same significance for the appeal hearing. Regard must be had in assessing this question to, inter alia, the special features of the proceedings involved and the manner in which the defense’s interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant. An accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society and follows from art. 6 § 3 (c) ECHR. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness.

In the present case, the applicant was able to communicate with the newly-appointed lawyer for fifteen minutes, immediately before the start of the hearing. The Court considers that, given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to discuss the case and make sure that the lawyer’s knowledge of the case and his legal position were appropriate. Moreover, ECtHR considered that it is questionable whether communication by video link offered sufficient privacy. The Court recalled that in Case *M.V. v. Italy*, the applicant was able to speak to his lawyer via a telephone line secured against any attempt at interception. In the case at hand the applicant had to use the video-conferencing system

installed and operated by the State. The Court considers that the applicant might legitimately have felt ill at ease when he discussed his case with his lawyer.

In addition, in Case *M.V. v. Italy*, the counsel for the defendant had also been able to send a replacement to the video-conference room or, conversely, attend on his client personally and entrust the lawyer replacing him with his client's defense before the court. Similarly, in Case *G. v. Russia,* where the Court did not find a violation of art. 6 on account of a hearing via video link because, *inter alia*, „the applicant's two lawyers were present at the appellate hearing (in the hearing room) and could have supported or expanded the arguments of the defense and the applicant was able to consult with his lawyer in private before the hearing. Furthermore, since the applicant had two lawyers, he could choose one of them to assist him in the detention center during the hearing and to consult with him in private. None of the options described above was available to the applicant in the case at hand. Instead, the applicant was expected either to accept a lawyer he had just been introduced to, or to continue without a lawyer.

The Strasbourg Court notes that the Government did not explain why it was impossible to make different arrangements for the applicant's legal assistance. It accepts that transporting the applicant from Novosibirsk to Moscow for a meeting with his lawyer would have been a lengthy and costly operation. While emphasising the central importance of an effective legal assistance, ECtHR examined whether in view of this particular geographic obstacle the respondent Government undertook measures which sufficiently compensated for the limitations of the applicant's rights. The Court notes in this respect that nothing prevented the authorities from organising at least a telephone conversation between the applicant and the lawyer more in advance of the hearing. Nothing prevented them from appointing a lawyer from Novosibirsk who could have visited the applicant in the detention center and have been with him during the hearing. Finally, the Supreme Court could have adjourned the hearing on its own motion so as to give the applicant sufficient time to discuss the case with the lawyer.

For these reasons, the Strasbourg Court concluded that the procedure described did not satisfy the requirements of art. 6 para. (3) in connection with para. (1) of the same article of the Convention.

Considering these jurisprudential landmarks of the ECtHR, certain conclusions can be drawn regarding the use of videoconferencing for the hearing of persons deprived of their liberty.

This evidentiary procedure is not in itself contrary to the right to a fair trial or to the ECHR provisions. However, the measure must pursue a legitimate aim in a democratic society (preservation of law and order, prevention of crime, protection of witnesses and victims of crime, observance of the reasonable time limit for the resolution of the case).

Another aspect which emerges from the same case law concerns the guarantee of the right of defense, which implies, inter alia, the right to appear before a court. In relation to the issue under consideration, the judges of the Strasbourg Court consider that the presence in person of the defendant is not of the same decisive importance on appeal as at first instance.

The audio-video connection must be fluent, even if at some point there may be malfunctions due to technical limitations of the equipment, and allow the defendant to hear and see everything that happens in the courtroom, including the persons present (judge, prosecutor, lawyer, parties and participants - witnesses, experts, interpreters - in the case). In turn, the persons present in the courtroom must perceive the defendant, by seeing and hearing him/her, thus ensuring the public nature of the trial.

The assistance of the person deprived of liberty by his/her lawyer, chosen or publicly appointed, is particularly important. Likewise, the facilities relating to the time the lawyer has available to make contact with the defendant and prepare the defense are considered equally important in the overall fairness of the criminal trial procedure[10].

Returning to the regulations in national law on the use of videoconferencing in emergency situations, as stated above, they do not provide for the hearing of the person deprived of liberty at the place of detention in the presence of a lawyer chosen or publicly appointed. However, we consider that the general rules on the hearing of persons, namely the provisions of art. 106 para. (3) CPP shall be applicable if the person deprived of liberty finds himself/herself in one of the situations regulated by art. 90 CPP. Therefore, the hearing of the detainee may take place only in the presence of the lawyer chosen or publicly appointed and present at the place of detention. In practice, there may be difficulties in securing the defense, particularly when the publicly

[10] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român (European protection of human rights and the Romanian criminal process),* C.H. Beck Publishing House, Bucharest, 2008, p. 720.

appointed lawyer is a member of the bar of the court before which the case is pending and the place of detention is in another locality, sometimes at a considerable distance from the locality where the court has its office.

The solution of appointing a public lawyer from the bar of the locality where the prison is located is not without inconvenience either, since the appointed lawyer can only study the case file by travelling a considerable distance.

The right of defense is, of course, better assured in this situation when the detainee has a chosen lawyer, as the possibilities for the lawyer to exercise his/her rights and obligations in relation to the client are wider.

In court practice, in particular, publicly appointed lawyers are present, not at the place of detention, but in the courtroom, and before the start of the hearing, they are given the opportunity to make audio-video contact with the detainee by videoconference, in conditions of confidentiality. In our opinion, this is likely to affect the rights of the defense, given that the defendant could exercise under difficult conditions the rights recognized by law concerning the right to remain silent on all or certain aspects of the case and the right to consult his/her lawyer before and during the hearing .

Another important drawback is that, when the lawyer of the person being heard is next to him/her at the place of detention, he/she should, for a good defense, be in the courtroom at the same time, since during the hearing incidents may occur which require contradictory debates, difficult to sustain from another location.

With regard to the publicity of the court hearing, according to the provisions of principle contained in art. 127 of the Constitution of Romania, court hearings shall be public and the exceptions shall be provided by the law. The same provision is also contained by art. 14 of Law no. 304/2022 on judicial organisation. According to art. 14 of the Law on the judicial organisation, court hearings shall be public, except the cases provided by the law. The judgments shall be delivered in open court, except in the cases provided by the law. In the cases and under the conditions laid down by law, proceedings conducted by remote technical means of communication shall be considered public.

Furthermore, according to the provisions of art. 352 CPP, the court hearings shall be public, except the cases provided by the law. The hearings held in the council chamber shall not be public.

Publicity of the court hearing means that any person who does not have the capacity to pursue the proceedings in a particular case is guaranteed free access to the courtroom. The essence of this principle is precisely to create the conditions to ensure that everyone can participate in the administration of justice. In this respect, it is irrelevant whether no person was in the courtroom, when access was unrestricted.

The doctrine emphasised that the presence of the public enables it to be informed of the manner in which the act of justice is carried out and also ensures that the public or the press can control the manner in which the act of justice is carried out[11]. Italian illuminist Cesare Beccaria, in the context of the struggle against the inquisitorial system, pointed out that trials must be public, evidence in defense must also be public, so that public opinion can curb the force and passions that might exist in those charged with the instruction and judgment[12].

The public nature of the hearing is not absolute, there being special circumstances justifying the hearing of the case in a non-public session.

The Constitutional Court of Romania, in its case law[13], held that compliance with the requirement of publicity of court hearings imposed by art. 127 of the Constitution of Romania is not absolute and the legislator may derogate from it. The Code of Criminal Procedure provides for several exceptional situations in which the court, in accordance with the legal procedure, may declare the hearing not public, *i.e.*, if the trial of the case in a non-public hearing would be prejudicial to the interests of the state, morals, dignity or privacy of a person; the interests of minors or of justice; the safety, dignity or privacy of a witness or members of his/her family; the injured party is a minor, in case of offences specifically provided for by law-rape of a minor, sexual assault of a minor, sexual corruption of minors, child pornography, solicitation of minors for sexual purposes etc. (art. 352 CPP).

With reference to ensuring the publicity of the court hearing when the hearing of the detainee is carried out by videoconference, we consider that this principle is not undermined in its substance as long as the general public can follow the defendant's statements made through the audio-video system, can follow the proceedings taking place in the courtroom, and the defendant, in turn, maintains audio-visual contact with the courtroom.

[11] M. Udroiu, *Procedură penală., Partea generală. Partea specială (Criminal Procedure. General Part. Special Part)*, C.H. Beck Publishing House, 2010, p. 315.

[12] C. Beccaria, *Despre infracțiuni și pedepse (On crime and punishment)*, Scientific Publishing House, Bucharest, 1965, p. 22.

[13] CCR dec. no. 1668/15.12.2009.

Although the ECtHR case law does not contain specific reference to the issued under consideration, namely whether the hearing of the detainee would in any way violate the public nature of the hearing, the Court, nevertheless examined whether this procedure is compatible with the right to a fair trial, in its whole, stating that, as shown above, the detainee's participation in the trial in this manner is not in itself incompatible with the right to a fair trial. The right to a fair trial, as provided by art. 6 ECHR, refers to the right of any person to a fair and public hearing within a reasonable time. Therefore, the fairness of the procedure also relates to its publicity.

As shown above, in case Marcello Viola v. Italy, the Court assessed that the trial, in its entirety, was a fair one, noting that one of the aspects subsumed by fairness was the fact that the defendant and the other participants in the trial had an audio-visual connection during the hearing.

With regard to the principle of immediacy, which requires the court to carry out directly all steps in the proceedings and procedural steps and to come into direct contact with the evidence, the question that arises is to what extent compliance with this principle is ensured in the case of participation in the trial by videoconference.

The judge's production of the evidence, likely to clarify the factual circumstances, will give him/her the opportunity to note contradictions between the information emerging from the evidence and to complete the evidentiary material. When hearing the parties and witnesses, the members of the panel may intervene in order to clarify what is unclear, to complete and clarify all the facts and circumstances of the case. The judge's direct production of evidence will give the judge the opportunity to observe the behavioral manifestations of individuals and the court's observations on the credibility of witnesses can have very important consequences for the outcome of the trial.

Immediacy shall mean establishing the facts using primary sources of evidence, removing intermediate links that can gradually distort the information.

To what extent would the production of evidence in a mediated manner, by videoconference, prejudice the principle of immediacy? We consider that the evidence which could be misinterpreted as a result of its production by videoconference is that relating to the hearing of persons, irrespective of their capacity in the proceedings. As one author noted[14], in the procedure of hearing people, not only the content of their story itself is important for the formation of conviction, but also the observation of the psychological, behavioral and educational characteristics of the person listened to, the observation of the non-verbal language that validates sincerity or betrays the concealment of the truth. The probative value of such statements cannot be dissociated from the psychological characteristics of the person listened to unless they concern matters which are unanimously recognized or matters of fact already convincingly proved by other evidence.

The hearing by videoconference does not ensure the possibility for the judge, nor for other participants - prosecutor, lawyers, injured person - to observe with their own senses the verisimilitude of the statement given in this way. This leads to the consequence that some statements will be evaluated in a wrong light, it may be omitted to ask relevant questions for clarification or to establish the sincerity of the person, which means that there will be the risk of wrongly establishing the state of facts, which may be equivalent to a miscarriage of justice.

The right to be heard and the right to ask questions may be limited as long as the exercise of these rights necessarily implies being aware of the circumstances which need to be clarified.

4. Conclusions

The hearing of detainees by videoconference is useful in certain special situations, as it is a tool that facilitates cross-border procedures but also domestic procedures in emergency situations.

Although the hearing of detainees is not in itself incompatible with the right to a fair trial, especially when it is accompanied by the necessary safeguards, nevertheless, in relation to the inconveniences that may arise, it is possible to some extent to affect the right of defense as well as the principles governing the trial. That is why we believe that this working tool should remain exceptional, for exceptional situations.

[14] T.V. Gheorghe, *Beneficiile și limitele folosirii tehnologiei informației în judecata cauzelor penale (The benefits and limitations of using information technology in criminal trials)*, U.J. Premium no. 5/2023.

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CONJUGAL VISIT - RIGHT OR BENEFIT?

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Abstract

During the execution of custodial sentences, the conjugal visit enjoys a dual regulation: both as a right and as a reward. Between the two institutions, there are several differences that lead to the non-uniform application of legal provisions. The method of establishing the criteria for applying the reward is the subject of the present analysis and gives rise to a legitimate question: is the conjugal visit a right or a benefit?

Keywords: *execution of the sentence, conjugal visit, right, concubine, reward.*

1. Introduction

The legal situation of incarcerated individuals involves strict regulation by the legislator, both in terms of establishing coercive rules to ensure the effect of custodial sentences and in terms of setting legal provisions to guarantee their corresponding rights and freedoms.

From the analysis of the provisions of Law no. 254/2013, we will observe that the conjugal visit benefits from dual regulation: one primary, within the provisions establishing the rights of convicted persons, namely within art. 69, and one secondary, when the legislator refers to the aforementioned provisions regarding the rewards that convicted persons may benefit from, according to the provisions of art. 98 para. (1) letter d) of the same legislative act.

The manner in which the legal provisions regarding the right to conjugal visit are applied, as well as the conditions that the convicted person must meet, are aspects that we will consider in the following analysis and which will outline the necessity of legislative changes in this regard.

2. Conjugal Visit - an Applicable Right (to Some) of Incarcerated Individuals

Depending on the severity of the offense committed and the social danger it poses, the perpetrator of the offense may spend a considerable period being deprived of liberty, which leads to the need to ensure a procedure whereby their rights are respected, and they can effectively benefit from them.

It is no coincidence that we referred to the „*perpetrator of the offense*" without granting them a specific procedural status because the legislator establishes distinct regulations when the person holds the status of a suspect, then that of an accused, and finally that of a convicted person.

The first procedural status that the active subject of the offense acquires is that of a suspect, in which case deprivation of liberty may occur exclusively for a period of 24 hours, in accordance with the regulations regarding the preventive measure of detention, specifically the provisions of art. 209 para. (3) CPP[1]. In such a situation, it is not necessary to analyse the incidence of the right to conjugal visit, as long as the period for which they are deprived of liberty does not affect in any way family relationships or the proper development of the individual.

The second procedural status is that of the accused, in which case we must consider the provisions regarding the most severe of preventive measures, namely pre-trial detention, as regulated by art. 223-240 CPP. If the initial duration for which it may be ordered is 30 days, according to the provisions of art. 233 para. (1) CPP[2], this period may be extended for successive periods of 30 days up to the maximum duration set by the legislator for each procedural phase.

In the case of criminal investigation, the measure of pre-trial detention may be extended for a maximum of 180 days, according to art. 236 para. (4) CPP[3], which implies that with the completion of the criminal

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[1] Detention may be ordered for a maximum of 24 hours. The time strictly necessary for transporting the suspect or accused to the premises of the judicial authority, according to the law, is not included in the duration of the detention.

[2] During the criminal investigation, the duration of pre-trial detention of the accused cannot exceed 30 days, except when extended under the conditions of the law.

[3] The total duration of pre-trial detention of the accused during the criminal investigation cannot exceed a reasonable term and cannot be longer than 180 days.

investigation phase, another term is regulated for the other phases of the criminal proceedings. Expressly, criminal procedural legislation benefits from such regulation, establishing that during the trial, the duration of pre-trial detention cannot exceed 5 years at any time.

If in the case of the preventive measure of detention, a violation of the right to conjugal visit could not be retained, given the short duration for which it can be ordered, in the case of pre-trial detention, we can no longer support the same assertion. The period of 30 days, which can be repeatedly extended due to the complexity of the criminal investigations, requires a distinct regulation of the right to conjugal visit.

From the analysis of the legal provisions, it appears that the legislator intended to grant this right to a restricted category of individuals deprived of liberty before the pronouncement of a final conviction. According to art. 69 para. (1) letter a) of Law no. 254/2013, the holder of the right to conjugal visit is the person under preventive arrest, who is already in the trial phase. It is true that the legal text does not distinguish between the two procedural moments that fall within the trial phase, namely the trial before the first instance and the trial before the appellate court. However, we start from the presumption that the provision is equally applicable to both procedural stages within the trial.

Nevertheless, we notice that the legal provisions regarding the execution of custodial sentences do not regulate in any way the possibility for the individual deprived of liberty to benefit from the right to conjugal visit during the pre-trial phase.

The rationale behind the legislator's decision to establish a differentiated regime regarding the exercise of the right to conjugal visit is based on logistical considerations, not on aspects concerning the respect of the rights and freedoms of the individual deprived of liberty. The manner in which a preventive measure depriving of liberty is executed during the pre-trial phase creates significant organisational difficulties.

While the execution of pre-trial detention during the trial phase, after the court has been seized with one of the two referral acts, is carried out in a penitentiary, during the pre-trial phase, this preventive measure is executed in detention centers organised at the level of each administrative-territorial unit. The lack of sufficient space, accommodation conditions, as well as the related procedures that should be carried out by the administration of detention facilities, were sufficient elements for the legislator to exclude the exercise of a right recognized by law in this procedural phase.

In addition to the aforementioned, it is necessary to analyse the other conditions provided by the provisions of art. 69 of Law no. 254/2013, conditions that must be cumulatively fulfilled for the proper exercise of the right to conjugal visit.

The relationship between the individual deprived of liberty and the one with whom they are to participate in the conjugal visit must be one of marriage or cohabitation, the legislator thus setting the limits for exercising the right to conjugal visit when the individual deprived of liberty is married. Therefore, there is no alternative possibility to exercise this right if the person with whom they are married refuses to participate in such a procedure.

The proof of the relationship between the two is established distinctly, depending on its nature: if the individuals are married, the proof before the administration of the place of detention is made based on a legalized copy of the marriage certificate, unlike the situation where the relationship is based on a legally unregulated partnership. In the latter case, a sworn statement authenticated by a notary is required, stating that the two had a similar relationship before the deprivation of liberty.

The next condition provided by law exclusively targets those who are serving a custodial sentence, meaning a final court decision has been issued. Thus, the right to conjugal visit may be granted to the convict who has not benefited from permission to leave the place of detention in the last 3 months. Such an exceptional situation is justified by the fact that the convicted person could have had the appropriate meetings with their partner during the permission to leave the place of detention.

The last condition concerns the conduct of the person deprived of liberty, with the legislator aiming for them not to have been subject to disciplinary sanctions or for a reason for lifting the sanction to have occurred. In this case as well, a distinction is made between the two forms of deprivation of liberty: in the case of convicted persons, the absence of sanctions must be for at least 6 months before the moment they request the right to conjugal visit, unlike the situation of persons in pretrial detention, where the term is reduced to 30 days before the moment of the request.

We also note the moment to which the legislator refers, namely the date of the request for the right to conjugal visit, without there being an additional provision regulating the situation in which the disciplinary

sanction occurs after the request has been made, but before the person deprived of liberty actually benefits from their right. In such a situation, the only way to restrict the exercise of the right to conjugal visit is through the application of a disciplinary sanction that meets legal requirements and leads to the prohibition of the right to conjugal visit. In the absence of such a situation, the law does not expressly establish the conditions under which the person deprived of liberty could still exercise their right.

Beyond the legal limits of exercising the right to conjugal visit, it is important to also consider the social purpose of such regulation. Family life, interpersonal relationships, and the constant interaction between the two partners who form a couple are essential aspects in the process of social reintegration and resonate in interaction with other members of society.

Specialised literature[4] has highlighted the role of the family and, implicitly, of the relationships developed even during the period when one of the partners is serving a custodial sentence.

The last condition provided by the provisions of art. 69 para. (1) letter e) of Law no. 254/2013 is also not devoid of importance, according to which the person deprived of liberty engages in educational or work activities, on the occasion of which the administration of the place of detention may observe a constant tendency towards rehabilitation.

In addition to the legal provisions mentioned earlier, it is important to highlight the condition provided in art. 147 para. (2) of the Implementing Regulation of Law no. 254/2013, which requires that individuals participating in conjugal visits, both the person deprived of liberty and their partner, must submit to the administration of the place of detention a declaration stating that they do not suffer from any sexually transmitted disease or AIDS.

A special situation is encountered, both in specialised literature and in judicial practice, when exercising this right involves two individuals deprived of liberty. Thus, the legislator has established a series of provisions applicable to cases where the partners are subject to pre-trial detention - either during the trial phase or already convicted to a custodial sentence.

In this regard, judicial practice[5] has established that if both partners are deprived of liberty, it is not sufficient for the request to exercise the right to conjugal visit to be made by only one partner; both partners must make the request jointly. This dual condition seems to exist only when both partners are deprived of liberty. The judge delegated with overseeing the execution of the sentence and, subsequently, the trial court, have noted that the mere expression of will by one of the partners is not sufficient.

Analysing the legal provisions, this simultaneous expression of will condition is not evident. It is necessary for the convicted person to file the request and for their partner to submit the necessary documents.

The interpretation of the court in the decision rendered following the appeal against the decision of the judge delegated with overseeing the execution of the sentence leads to the conclusion that the reasons for rejection took into account a strict analysis of the legal provisions regarding the exercise of the right to conjugal visit. We believe that in such a situation, it was not necessary to verify the condition regarding the filing of the request by the other partner, as long as both were in the same place of detention, and the agreement regarding the conjugal visit was expressed.

3. Conjugal Visit - a Reward

As mentioned at the beginning of this analysis, the conjugal visit represents a form of expression of the detained person, materialised in a right expressly regulated within the law on the execution of custodial sentences. However, the right to conjugal visit can be supplemented, as well as restricted, which is why it is necessary to focus our attention on the supplementary regulations within Chapter IX of Law no. 254/2013 - a chapter entitled „*Rewards, Infractions, and Disciplinary Sanctions*".

The conduct of the detained person, constant involvement in activities organized at the detention facility, and diligence in work are some of the elements that the administration of the detention facility considers when rewards are granted. The conjugal visit is included in the category of these rewards, in the form of supplementing the right, when the convicted person meets the conditions provided by law.

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[4] I. Chiș, A.B. Chiș, *Execution of criminal sanctions*, 2nd ed., revised and completed, Universul Juridic Publishing House, 2021, p. 468-469.

[5] A.V. Iugan, *The Rights of Detained Persons*, Universul Juridic Publishing House, 2018, p. 92.

However, some mentions are necessary regarding the specific way in which this reward is granted, as the provisions within art. 212 of the Implementing Regulation of Law no. 243/2013 establish a mechanism whereby the convicted person effectively benefits from the reward.

So, the legal text makes a distinction between two moments: the first moment is when the administration of the detention facility concludes that the detained person should receive the reward regarding the supplementation of the right to conjugal visit, and the second moment is when the detained person benefits from the reward.

Between the two moments mentioned above, there is a maximum term of 3 months, a time interval during which there is a risk that the right may no longer be exercised, either for reasons attributable to the detained person - against whom disciplinary sanctions are applied, or for reasons not attributable to them - generated by the couple relationship they have or the inability of the partner to participate in such a meeting.

This gap that the legislator had in mind for organisational reasons raises questions about the real nature of the conjugal visit: is it a right or a benefit? If in the first part of the analysis we observed the necessary conditions for exercising the right to conjugal visit, and the regulation provides sufficient guarantees from which the certainty of exercising it results, in the case of rewards, the certainty of the supplementary exercise of this right does not present a certainty, which is why we believe that we are dealing with a benefit.

From a linguistic point of view, the notion of „*benefit*" also means „*advantage gained from a situation or activity"*, which seems to lead to the hypothesis I mentioned earlier: the premise is the existence of a deprivation of liberty, and participation in socio-educational programs is the precursor and foundation of the supplementation of the right to conjugal visit.

4. Conclusions

The legal situation of a person deprived of liberty should not be an impediment to exercising the rights recognized by the fundamental law and even less by the special law regarding the execution of custodial sentences.

Interpersonal relationships, including those akin to romantic partnerships, are an essential part of each individual's development process. The period during which one is deprived of liberty, as a consequence of inappropriate and illicit behavior, can be navigated more easily when the person deprived of liberty is in a position to effectively exercise their rights, including the right to conjugal visits.

The legislative restrictions that impose that intimate relationships with persons deprived of liberty occur only in two situations (in the case of marriage or in the case of a pre-existing cohabitation relationship before the moment of deprivation of liberty) represent an indirect limitation of the right to conjugal visits, without any explanation provided in this regard.

The role of the legislator is not to unjustifiably limit the exercise of rights that it has regulated but to ensure a uniform and efficient application of legal rules- aiming to maintain the natural relationships that the individual has developed before the moment of deprivation of liberty or will be able to develop both during and after their release.

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PROPOSALS FOR A BROADER APPROACH OF „MISUSE OF DEVICES AND PROGRAMS" PROVISION IN COMBATING CYBER-DEPENDENT AND CYBER-ENABLED CRIMES

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Abstract

The adoption, in 2001, in Budapest, of the Council of Europe Convention on Cybercrime brought an important step forward in the prevention and combatting cyber-related crimes, through the creation of a special indictment (art. 6) against the production, sale, procurement for use, import, distribution, import or making available of devices, computer programs, passwords or any other such data with the scope to further illegal access to a computer system, interception without right of a computer data transmission, an illegal data interference or an illegal system interference, offences comprised in the art. 2 to 5 of the Convention.

Although the offence in art. 6 represents the „mean-crime" in relation with the further commission of the above mentioned crimes against the confidentiality, integrity and availability of computer data and systems („purpose-crimes"), the nowadays Cybercrime phenomenon shows that the misuse of the devices and computer programs actually exceeds the legal boundaries of art. 2 to 5, and (technically) impacts much of the other forms of cyber-related or cyber-enabled offences, especially in the FinTech area, electronic payment, blockchain, cryptocurrency etc.

Taking into consideration the proliferation of illegal activities against personal information, confidential data or access credentials, especially the commercialization, especially in Dark Web, of codes, passwords, hacking tools, malware and other present or future cutting-edge system interference technologies, thus posing a great danger to the whole cyber-ecosystem, an improvement of art. 6, and of all the correspondent (related) articles in the special laws or the criminal codes adopted by the signatory countries, would contribute to the creation of an extensive and much comprehensive legal tool in the prevention and efficiently combating cybercrimes.

Keywords: *criminal liability, misuse of devices, cyber-dependent crimes, cyber-enabled crimes, CoE Convention on Cybercrime, illegal operations with devices and software.*

1. The context of computer programs and devices being used for committing cyber-related crimes

Generally, the phenomenon of cybercrime refers to a variety of criminal activities that are either committed against the computer data and systems or with the use of such automated „tools".

Under various names along the time, such as: *computer crime*, *e-crime*, *internet crime*, *digital crime*, *online crime*, *virtual crime*, *techno crime* or *net crime*, the „cybercrime" has yet a not commonly agreed definition, although the term is somehow known and used since 1970s.

And this is to be confirmed by the latest studies on the domain, that „the only consensus within the literature, is that there is no single clear, precise and universally accepted definition of cybercrime, a fact that is acknowledged by both academics and organisations alike"[1].

A simple, but comprehensive definition, we partially agree with, states that „cybercrime is the use of a computer as the instrument to further illegal ends"[2]. For all that, we must admit that not only computers may be the material object or the tool of a crime, but also computer data (data, software, applications etc.), that should be regarded in a distinctive manner.

The relevant international organisations seem to also have failed somehow in finding a commonly acceptable definition on cybercrime. For all that, we may acknowledge the United Nations Office on Drugs and

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[1] K. Phillips, J.C. Davidson, R.R. Farr, C. Burkhardt, S. Caneppele, M.P. Aiken, *Conceptualizing Cybercrime: Definitions, Typologies and Taxonomies*, Forensic Sciences, 2022, 2(2), p. 379-398, *https://doi.org/10.3390/forensicsci2020028*, available at *https://www.mdpi.com/2673-6756/2/2/28* (accessed on 14.04.2024).

[2] M.A. Dennis, *Cybercrime*, Encyclopedia Britannica, 19.04.2024, *https://www.britannica.com/topic/cybercrime* (accessed 28.04.2024).

Crime' s definition „cybercrime is an act that violates the law, which is perpetrated using information and communication technology (ICT)"[3].

The industry tends to see cybercrime as „an illegal activity involving computers, the internet, or network devices"[4] or as „illegal usage of any communication device to commit or facilitate in committing any illegal act"[5].

In the study „*Conceptualising Cybercrime: Definitions, Typologies and Taxonomies*", the authors[6] gathered from the literature different approaches of the term, as follows:

- Computer crime or computer-related crime;[7]
- *„any illegal behavior directed by means of electronic operations that target the security of computer systems and the data processed by them"* or *"any illegal behavior committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession and offering or distributing information by means of a computer system or network"*[8];
- *„actions directed against the confidentiality, integrity and availability of computer systems, networks and computer data, as well as the misuse of such systems, networks and data by providing for the criminalization of such conduct"*[9];
- *„criminal acts committed using electronic communications networks and information systems or against such networks and systems"*[10];
- *„a broad range of different criminal activities where computers and information systems are involved either as a primary tool or as a primary target"*[11].

The most interesting issue in analysing the phenomenon of cybercrime is the categorization. While most of the authors rely on a two-factor category of cybercrime, there are also specialists that argue in the favor of a three-factor categorization of cybercrimes.

The dual-approach is based mainly on distinguishing between *„cyber-dependent"* and *„cyber-enabled"* crimes. This option derives from the most accepted official and academic visions on cybercrime[12], whereas computer systems and data represent the target (object) of the illegal conduct or the tools that facilitate the commission of other (traditional) crimes.

According to some authors, *„cyber-dependent crimes are crimes that arose with the advent of technology and cannot exist outside the digital world, e.g., hacking, such as ransomware attacks or hacktivism"*[13]. In contrast, *„cyber-enabled crimes are traditional crimes that predate the advent of the technology, and are now facilitated or have been made easier by cyber technology. Cyber-enabled crimes range from white-collar crime to drug-trafficking, online harassment, cyberterrorism and beyond"*[14].

On the top of these classifications, there is the opinion of authors D. Wall and A. Pattavina[15] that cybercrime may be regarded from three perspectives:

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[3] *https://www.unodc.org/e4j/en/cybercrime/module-1/key-issues/cybercrime-in-brief.html*.

[4] *https://www.cisco.com/site/us/en/learn/topics/security/what-is-cybercrime.html*.

[5] *https://cybertalents.com/blog/what-is-cyber-crime-types-examples-and-prevention*.

[6] See also K. Phillips *et al.*, *op. cit.*

[7] *United Nations Manual on the Prevention and Control of Computer-related Crime*, United Nations, NY, USA, 1994 (accessed by Google Scholar on 14.04.2024).

[8] UN Congress Crimes Related to Computer Networks. *10th UN Congress on the Prevention of Crime and the Treatment of the Offenders*, UN, Vienna, Austria, 2000 (*https://www.unodc.org/documents/congress/Previous_Congresses/10th_Congress_2000*, accessed on 14.04.2024).

[9] Council of Europe, *Convention on Cybercrime*, European Treaty Series ETS-185, Budapest, Hungary, 2001, p. 1-25, *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561*.

[10] Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council and the Committee of the Regions: Towards a General Policy on the Fight against Cyber Crime*, Bruxelles, Belgium, 2007, vol. 267 (accessed through Google Scholar on 14.04.2024).

[11] European Commission, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, Bruxelles, Belgium, 2013 (accessed through Google Scholar on 14.04.2024).

[12] See also K. Phillips *et al., op. cit*.

[13] See M. McGuire, S. Dowling, *Cybercrime: A Review of the Evidence: Summary of Kedy Findings and Implications*, Home Office, London, UK, 2013 (available through Google Scholar).

[14] *Ibidem*.

[15] D. Wall, *The Internet as a Conduit for Criminal Activity* (October 21, 2015). Information Technology and the Criminal Justice System, A. Pattavina, ed., pp. 77-98, Sage Publications, Inc., 2005 (revised 2010, 2015), *https://ssrn.com/abstract=740626*.

„*Cyber-dependent crimes or true cybercrimes*”*,* where the computer is the target and the crime could not happen without a computer, *i.e.*, truly new opportunities for crime, *e.g.*, hacking, malware and DoS/DDoS, parasitic computing*;*

„*Cyber-enabled crimes or hybrid crimes*”*,* where a computers and data may be involved, but the crime could still be perpetrated without them, *i.e.*, new opportunities for traditional crimes, *e.g.*, frauds, scams, ID Theft, and phishing;

„*Cyber-assisted crimes or the use of computer in traditional crime*”*,* where the computer and data simply constitute the tool for the commission traditional crimes, *e.g.*, frauds, pyramid schemes, stalking, harassment, criminal communications.

As most of the researchers recognize, the significant classification system of cybercrime is provided by the notorious *Council of Europe (CoE) Convention on Cybercrime*, signed in Budapest in 2001. This instrument, supplemented by additional protocols over time, made a particular classification of computer crimes, as shown below:

- Offences against confidentiality, integrity and availability of computer data and systems
  - Illegal access (art. 2);
  - Illegal interception (art. 3);
  - Data interference (art. 4);
  - System interference (art. 5);
  - Misuse of devices (art. 6).
- Computer-related offences
  - Computer-related forgery (art. 7);
  - Computer-related fraud (art. 8).
- Content-related offences
  - Offences related to child pornography (art. 9).
- Offences related to infringements of copyright and related rights
  - Offences related to infringements of copyright and related rights (art. 10).
- Acts of a racist and xenophobic nature committed through computer systems

It is worth mentioning that, in 2013, the European Union adopted and enforced the Directive 2013/40/EU[16], that made available a definition of criminal offences in the area of attacks against information systems, as well as a categorization of such offences:

- art. 3 - Illegal access to information systems;
- art. 4 - Illegal system interference;
- art. 5 - Illegal data interference;
- art. 6 - Illegal interception;
- art. 7 - Tools used for committing offences;
- art. 8 - incitement, aiding and abetting and attempt.

Analysing the last two important pieces of legislation, one could come to the conclusion that, although slightly different (in concepts and definitions), both documents fail to provide with a general understanding of the concept of cybercrime, but offer a broad perspective of the crimes that may be committed against the computer systems and data.

2. Legal provisions on illegal operations with computer data, applications and devices

A distinct attention of this article is paid to the offence of *misuse of devices*, as it is considered as a „facilitating-offence”[17] and a helpful mean of committing other crimes in the area of computer systems and data (cybercrime).

The offence of misuse of devices first appeared officially in the CoE Convention on Cybercrime, in art. 6 (with the same name).

According to this document, 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:*

[16] Directive 2013/40/Eu of the European Parliament and of the Council on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ 2013, 218, 8-14, *https://eur-lex.europa.eu/legal-content/EN* (accessed on 20.04.2024).

[17] Versus a „facilitated-offence” or the „target offence” that is committed using the outcomes of the „facilitating-offence”.

- 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, with the intent that it be used for the purpose of committing any offences established in art. 2 through 5, and
- the possession of an item referred to in paragraph a.i or ii above, with the intent that it be used for the purpose of committing any of the offences established in art. 2 through 5"[18].

One could very easily note, as we also underlined in the text, that the European legislator in 2001 regarded all the acts comprised in art. 6 as offences only if committed with the intent or for the purpose of committing a specific set of offences, namely those provided in art. 2, 3, 4 and 5.

It is a curious approaching of this offence, mainly because it fails to take into consideration that all the acts mentioned in art. 6 (facilitating-offence) could be also used in committing of other crimes and offences, particularly those mentioned in the CoE Convention itself in art. 7 - Computer-related forgery, and art. 8 - Computer-related fraud, and also in art. 9 - Offences related to child pornography (as „facilitated-offences" or „target-offences").

It is a surprisingly decision of the lawmakers of that time to let apart the offences provided in art. 7 to 9, as being possible „facilitated-offences" („target-offences"), as they are usually committed, from the technical point of view, by the means of devices, programs, applications, codes or other similar data.

The Directive 2013/40/EU also addresses the „misuse of devices", and states, in art. 7 - Tools used for committing offences, that *„member states shall take the necessary measures to ensure that the intentional production, sale, procurement for use, import, distribution or otherwise making available, of one of the following tools, without right and* ***with the intention that it be used to commit any of the offences referred to in art. 3 to 6****, is punishable as a criminal offence, at least for cases which are not minor:*

- a computer program, designed or adapted primarily for the purpose of committing any of the offences referred to in art. 3 to 6;
- a computer password, access code, or similar data by which the whole or any part of the information system is capable of being accessed.".

It is worth remembering (see above mentions) that art. 3 to 6 of the Directive refer to offences that are generally committed against data and computer systems.

Again, the European lawmakers made a clear distinction between the so called „cyber-dependent offences" and „cyber-enabled offences", and urged Member States to adopt legislative measures to indict (as „facilitating-offence") the conduct related to the production, sale, procurement, distribution or making available of computer programs or codes only in the situation that the respective acts are committed without right and with the intention to serve for the further commission of just the „computer-dependent offences" (as „facilitated-offences").

This time, also, the mentioned acts (see art. 7) cannot be regarded as offences unless the target-offence itself is not one against a computer system or data.

Having these two important pieces of legislation in place, the European Member States did take measures and established different legal solutions to comply.

Thus, the proposals of a distinct legal provision criminalising the misuse of devices and programs have further been adopted in the substantive criminal law of many countries, such as:

Austria - Section 126c of the Criminal Code[19] considers the crime of „misuse of computer programs arid access data" the alternative acts of producing, introducing, distributing, selling or otherwise making available „*a computer program or a compatible equipment which has been obviously created or adapted due to its particular nature to commit an unlawful access to a computer system (section 118a), an infringement of the secrecy of telecommunications (section 119), an unlawful interception of data (section 119a), a damaging of data (section 126a) or an interference with the functioning of a computer system (section 126b)*". So, the Austrian legislator

[18] Art. 6 CoE Convention on Cybercrime (ETS no. 185, *https://rm.coe.int*, accessed on 20.04.2024).

[19] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Austria%20_30%20May%2007_En.pdf.*

backed the CoE Convention and incriminates the misuse of device and data only in the case of a specific sort of computer crimes: the computer-dependent crimes.

Belgium - art. 550bis of the Criminal Code, in para. (5) punishes the person who „*unduly possesses, produces, sells, obtains with a view to his use, imports, distributes or makes available in another form, any device, including computer data, primarily designed or adapted for allowing the commission of the offences provided for in paragraph (1) to (4)*[20]", while art. 550ter, in para. (4) addresses the same illegal conduct, but in connection with the offences of data interference (alteration, deletion, damaging) and system interference (preventing the correct functioning of a computer system…). One can note that these „misuse of device and programs"- like offences in the Belgian legislation are linked with the further commission (or further intent to commit) of only cyber-dependent offences, as also envisaged by art. 6 of the CoE Convention on Cybercrime.

Bulgaria - art. 319e of the Criminal Code[21] only considers a crime when a perpetrator circulates computer or system passwords thus causing disclosure of personal data or an information representing a state secret, so no entirely mapping with the CoE Convention on Cybercrime, art. 6.

Canada - art. 342.2 of the Criminal Code, amended by the „Protecting Canadians from Online Crime Act" (SC 2014, c.31)[22], refers to „*everyone who, without lawful excuse, makes, possesses, sells, offers for sale, imports, obtains for use, distributes or makes available a device that is designed or adapted primarily to commit an offence under section 342.1*[23] *or 430*[24]*, under circumstances that give rise to a reasonable inference that the device has been used or was intended to be used to commit such an offence*". Also in this case, the provision only covers the situation when the material acts of this offence are put in a direct link with the commission (or with the intent to the commission) of a computer-dependent crime.

Czech Republic - on its Criminal Code[25] has Section 231 under the name of „Obtaining and possession of access device and computer system passwords and other such data" that criminalise any conduct of a person who „*produces, puts into circulation, imports, exports, transits, offers, provides, sells, or otherwise makes available, obtains for him/herself or for another, or handles - a device or its component, process, instrument or any other means, including a computer program designed or adapted for unauthorised access to electronic communications network, computer system…*". Partially mapping with the art. 6 of the CoE Convention on Cybercrime, the Czech legislators considered the offence of Section 231 only in the context of the perpetrator's intent to commit a "breach of secrecy of correspondence" [under Section 182-1 b), c)] or a criminal offence of "unauthorised access to computer systems and information media" [under Section 230 para. (1), (2)]. So to say, one facilitated cyber-enabled offence and one facilitated cyber-dependent offence.

Cyprus - adopted the Law no. 22(III)/2004[26], revised, that actually copy-pasted and slightly adapted the legal provisions from the CoE Convention on Cybercrime. Thus, art. 8 of Law no. 22(III)/2004 is a reproduction of art. 6 of the Convention, and therefore the criminalising of the „misuse of devices" is linked with the intent of the perpetrator to commit only a cyber-dependent offence, as stated by the law.

Estonia - art. 216[1] of the Criminal Code[27] maps with the art. 6 of the CoE Convention on Cybercrime and consider an offence of „Preparation of computer-related crime" the conduct of a person „*for the purposes of committing the criminal offences provided in art. 206*[28]*, 207*[29]*, 208, 213*[30] *or 217*[31] *of this Code…*". One can observe that the Estonian Penal Code extended the applicability of the „misuse of devices and programs" also to a cyber-enabled crime, respectively the computer-related fraud (art. 213).

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[20] Illegal access to computer data and systems, damage caused to computer system and data, and data interference.

[21] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Bulgaria%20_9%20May%2007_En.pdf*.

[22] *https://laws-lois.justice.gc.ca/eng/annualstatutes/2014_31/page-2.html#docCont*.

[23] Unauthorised use of computer.

[24] Section 430 (1.1) Mischief in relation to computer data.

[25] *https://antislaverylaw.ac.uk/wp-content/uploads/2019/08/Czech-Republic-Criminal-Code.pdf*.

[26] *https://www.olc.gov.cy/olc/olc.nsf/ECB669A2EBF5FE75C225871100236DEC/$file/The%20Convention%20of%20the%20Council%20of%20Europe%20on%20Cybercrime%20(Ratification)%20Law%20of%202004%20-%20L.22(III)-2004.pdf*.

[27] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20ESTONIA%20_april%202008_.pdf*.

[28] Interference in computer data.

[29] Hindering of operation of computer system.

[30] Computer-related fraud.

[31] Unlawful use of a computer system.

Finland - chapter 34, sections 9a and 9b of the Criminal Code[32], criminalise the conduct of possessing, importing, acquiring for use, manufacturing, selling or otherwise making available or disseminating devices, computer programs, information system's passwords, access codes or equivalent information, as well as instructions for the manufacturing of a computer program or a set of programming instructions, with the intent to cause harm, to damage the data processing or the functioning of a information system or a communication system, or to decode or disable the technical protection of electronic communications or the protection of an information system. It is worth noting that the target offence represents, also in this case, a computer-dependent offence, thus in accordance with the provision of art. 6 of the CoE Convention on Cybercrime.

France - art. 323-3-1 of the Criminal Code[33] maps in part with the provisions of art. 6 of the CoE Convention, and criminalise „*the import, possession, offering, distributing or making available of an equipment, an instrument, a program or computer data, created or specially adapted for the commission of one or more crimes, as provided by articles 323-1[34] to 323-3.*". As noted, the French legislator preferred to indict the so-called „misuse of device and programs" just with the conditions of further commission of a cyber-dependent crime.

Germany - art. 202c of the Criminal Code[35] maps for a large percentage with the art. 6 of the CoE Convention, and relates the „*creating, procuring for himself or another party, selling, giving over to another party, disseminating or otherwise providing access to passwords, security codes….computer programs whose purpose is to commit such an act*" to the preparation of "*a criminal offence pursuant to section 202a[36] or 202b[37]*". We observe that the German legislator remained in the same paradigm of computer-dependent crimes when it comes to the „misuse of devices and programs".

Hungary - art. 300/E of the Criminal Code[38] partially maps with the art. 6 of the CoE Convention, and conditions the unlawful conduct by the commission of an offence under art. 300/C, that covers both cyber-dependent crimes (such as illegal access to a computer system and data, and data interference) and cyber-enabled crimes (such as computer-related fraud - alignment 3).

Ireland - Offences Related to Information Systems Act 2017, section 6[39] (use of computer programme, password, code or data for purposes of section 2, 3, 4 or 5) represents a copy of the provisions of Article 6 of the CoE Convention on Cybercrime, and relates the „misuse of devices and programs" only to the other offence of the same law, mentioned in section 2[40], section 3[41], section 4[42] and section 5[43], thus computer-dependent offence.

Italy - in the Criminal Code[44], art. 615 quarter „*whoever, in order to obtain a profit for himself or others or to cause damage to others, illegally procures, reproduces, disseminates, communicates or delivers, codes, keywords or other means suitable for access to a computer system or electronically, protected by security measures, or in any case provides indications or instructions suitable for the aforementioned purpose*", while art. 615 quinquies „*whoever, with the aim of illicitly damaging a computer or telematic system, the information, data or programs contained therein or pertinent to it or to favor the total or partial interruption or alteration of its functioning, procures, produces, reproduces, imports, disseminates, communicates, delivers, or, in any case, makes equipment, devices or computer programs available to others*". One could easily observe that the Italian legislators mapped with the art. 6 of the CoE Convention on Cybercrime, and considered the offence only if committed in connection with another computer-dependent crime.

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[32] *https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf*.

[33] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20France%20_26%20March%2007_En.pdf*.

[34] Illegal access to a computer system and system interference.

[35] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Germany%20_1%20June%2007_En.pdf*.

[36] Data espionage (unauthorized access to data).

[37] Data interception.

[38] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20profile%20Hungary%20_7%20June%2007_En.pdf*.

[39] *https://www.irishstatutebook.ie/eli/2017/act/11/section/6/enacted/en/html#sec6*.

[40] Accessing information system without lawful authority.

[41] Interference with information system without lawful authority.

[42] Interference with data without lawful authority.

[43] Intercepting transmission of data without lawful authority.

[44] *https://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/Documents/CountryProfiles/567-LEG-country%20Italy%20_26%20%20April%202008_pub.pdf*.

Lithuania - art. 198-2 of the Criminal Code maps with the general provisions of the art. 6 of the CoE Convention on Cybercrime, and relate the respective offence of „Illegal possession of the devices, computer program, passwords, access codes and other data with intent to commit a crime" by the further commission of certain articles of the Code, such as art. 166[45], art. 196[46], art. 197[47], art. 198[48], and art. 198-1[49]. Despite the existence of article 166 that refers to the breaching of the private correspondence inviolability, the rest of the target offences are generally those also comprised in art. 6 of the CoE Convention on Cybercrime, meaning computer-dependent crimes.

Netherlands - Section 139d of the Criminal Code[50], states in para. (2) that „any person who: a. manufactures, sells, obtains, imports, distributes or otherwise makes available or has in his possession a technical device that has been primarily adapted or designed for the commission of such serious offences, or b. sells, obtains, distributes or otherwise makes available or has in his possession a computer password, access code or similar data that can be used for accessing a computer device or system or a part thereof, with the intent of using it in the commission of a serious offence, as referred to in section 138ab(1)[51], 138b[52] or 139c[53]". Obvious that the Dutch legislators did not entirely mapped the art. 6 of the CoE Convention, but still connected the „misuse of devices and programs" (Section 139d) with the commission of cyber-dependent offences (as described above).

Poland - in Chapter XXXIII - crimes against the protection of information in the Criminal Code[54], there is art. (Rule) 269b criminalised the conduct of a person who „*manufactures, acquires, disposes of, or provides facilities to other persons or computer programs designed to commit an offence referred to in art. 165 para. (1) point (4)[55], art. 267 para. (2)[56], art. 268a para. (1)[57]…, art. 269 para. (2)[58], or art. 269a[59], and the computer passwords, access codes or other data, allowing access to information stored in a computer system or network of ICT*". With a single exception [the offence mentioned in art. 165 para. (1) point (4)], the offence of „misuse of devices and programs" merely enclose references to other cyber-dependent offences, mapping with the „request" of the art. 6 of the CoE Convention on Cybercrime.

Portugal - Law no. 109/2009 on the Cybercrime[60] states in art. 3 - Computer Forgery, para. (4), that „whoever imports, distributes, sells or holds for commercial purposes any device that allows the access to a computer system, to a payment system, to a communications system or to a conditioned access service", while in art. 4 - Computer Damage, para. (3) shows that „the same penalty of para. (1) will be applied to those who illegally produce, sell, distribute or otherwise disseminate to one or more computers or to other systems devices, software or other computer data intended to produce the unauthorised actions described in that paragraph[61]". Finally, the art. 6 - Illegal access, para. (2), states that „the same penalty will be applied to whoever illegally produces, sells, distributes or otherwise disseminates within one or more computer systems devices, programs, a set of executable instructions, code or other computer data intended to produce the unauthorised actions described under the preceding paragraph[62]". Analysing the above-mentioned legal provisions, we can notice that the Portuguese legislators somehow mapped the art. 6 of the CoE Convention on Cybercrime, and conditioned the „misuse of devices and programs" by the existence of only a cyber-dependent crime.

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[45] Violation of inviolability of a person's correspondence.
[46] Unlawful influence on electronic data.
[47] Unlawful influence on an information system.
[48] Unlawful interception and use of data.
[49] Unlawful connection to an information system.
[50] *https://legislationline.org/sites/default/files/documents/f3/Netherlands_CC_am2012_en.pdf*.
[51] Computer trespass (Illegal access).
[52] Hindering the access to or use of a computer device or system.
[53] Illegal interception of data.
[54] *https://eurcenter.net/wp-content/uploads/2020/09/Criminal-Procedure-Code-of-Poland-1997-amended-2004.pdf*.
[55] Endanger the life and health by impairing, preventing, or otherwise affecting the automatic processing, collection or transmission of data.
[56] Unlawful obtaining of information.
[57] Data interference.
[58] Destroying / damaging a device.
[59] System interference.
[60] *https://cibercrime.ministeriopublico.pt/sites/default/files/documentos/pdf/portuguesecybercrime_law.pdf*.
[61] Meaning the deletion, altering, destroying, in whole or in part, damaging, removing or rendering unusable or inaccessible programs or other computer data of others.
[62] Meaning the „illegal access to a computer system".

Romania - art. 365 CP[63] represent a copy of the art. 6 of the CoE Convention on Cybercrime, and it is obvious that the offence of „Illegal operations with devices and computer programs" is only linked with the target offences mentioned in art. 360 to 364[64], meaning just cyber-dependent crimes.

Spain - has a distinct situation in terms of the legal provisions in its Criminal Code[65] for „misuse of device and programs", and the principal sections are: **197ter** - that mainly deals with producing, acquiring for use, importing of computer programs and passwords or codes with the intent to further illegal access computer systems and data, personal data interference and eavesdropping of electronic communications, **264ter** - that deal with unauthorised producing, acquiring of or importing computer programs, passwords or codes and similar data with the intent of committing any of the offences mentioned in sections 264[66] and 264bis[67]. There is also section **400** that refers to the „manufacture, receipt, obtainment or possession of tools (…) computer data or programs (….) with the intent to commit the criminal offences" related to forgery (documents, currency, cards).

Sweden - although there is no distinct offence dealing with the „misuse of devices and programs", in Section 9c of the Chapter 4 in the Swedish Criminal Code[68], the legislators criminalised the „installation of a technical device with the intent to breach telecommunication secrecy or to perform….an unlawful interception".

United States of America - art. 2512 of Chapter 119 in Title 18 of the Criminal Code[69] on the manufacturing, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited considers the aforementioned offence only in connection with illegal interception of electronic communications or oral communications. Art. 1030 „fraud and related activity in connection with computers" of Chapter 47, in para. (5) has a provision that addresses the „transmission of a program, information, code, or command, and as a result of such conduct, (a person) intentionally causes damage without authorization, to a protected computer". So, the US legislators did not take too much attention to what kind of target offences to related the „misuse of devices and programs", while preferred to cope with this issue on a case-by-case basis, and depending on the topic of the chapter.

As we previously demonstrated in another study's results[70], almost all the above legal provisions have certain features in common, such as:

- the reference to products like: computer programs, applications, computer data, devices, passwords or codes 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 type of crimes (offences), mainly cyber-dependent offence, but also cyber-enabled offences;
- the existence of the intent or the scope (target) to commit further offences.

Analysing all the above mentioned national legal provisions, we may draw the conclusion that the overwhelming majority of them are mapping or are inspired by the art. 6 of the CoE Convention on Cybercrime, that is *per se* a good thing. At least, there is an agreed framework in regards the "misuse of devices and programs".

The common thing for many of them is the legislators' decision to criminalise the „misuse of devices and programs" only if in connection with specific or general computer-dependent offences, that we may accept from a national criminal justice policy point of view.

Notwithstanding the foregoing, there are states that approached the issue in a slightly different way, by criminalising the „misuse of devices and programs" in connection with both cyber-dependent offences and cyber-enabled offences, and even with other kind of offences (*e.g.*, Austria - infringement of the secrecy of

[63] *http://www.vertic.org/media/National%20Legislation/Romania/RO_Criminal_Code.pdf*.

[64] Art. 360 – Illegal access to a computer system, art. 361 – Illegal interception of a transmission of data, art. 362 – Data interference, art. 363 – System interference, and art. 364 – Unauthorised transfer of computer data.

[65] *https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf*.

[66] Altering the integrity of computer data.

[67] System interference.

[68] *https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf*.

[69] *https://www.law.cornell.edu/uscode/text/18/part-I/chapter-119*.

[70] See M. Dobrinoiu, *Criminal Liability in the Case of Vendors of Software and Hardware Further Used in Cybercrime Cases*, International Conference „Challenges of the Knowledge Society", Bucharest, 2022, „Nicolae Titulescu" University Publishing House (*http://cks.univnt.ro/download/cks_2022*).

communications, Bulgaria - disclosure of personal data and state secrets, Czech Rep. - breach of secrecy of correspondence, Germany - data espionage, Lithuania - breaching the secrecy of correspondence, Poland - endangering the life and health by impairing, preventing or otherwise affecting the automatic processing, collection or transmission of data, Portugal - access to a conditioned access service, Spain - committing offence related to forgery, Sweden - breach of telecommunications secrecy).

So, it appears that not only the cyber-dependent or cyber-enabled offences could be a „target offence" that may justify the criminalization of the „misuse of devices and programs" offence, but many other illegal conducts, when committed with the help of specially designed devices, computer systems, computer data, passwords or codes.

3. Types of Cyber-enabled offences as „facilitated-offences" by misusing devices and programs

As official papers, studies and research materials found, the cyber-enabled offences are usually crimes/offences that do not traditionally depend on computer systems, computer data or electronic devices, but they suffered modifications over time in scale and form by the use of computers, networks or means of electronic communications. Among them, the most prevalent, for our analysis, are:

- **Economic related cybercrimes** - cyber fraud, fraudulent financial operations, card cloning, financially motivated Phishing (Spear Phishing, Smishing, Vishing, Quishing) or Pharming, Ransomware, Scareware, Intellectual property crimes, CEO fraud - Business Email Compromise (Whaling), establishment and operation of illegal online marketplaces, illegal online gambling, online money-laundering, digital wallet draining, establishment and operation of criminal digital assets exchanges, mixers, stablecoins, illegal or criminal decentralised finance (DeFi), account takeover etc.;
- **Non-necessarily economic related cybercrimes** - cyber forgery (Email Spoofing, Web Spoofing, Hyperlink Spoofing, Caller ID Spoofing), non-financially motivated Phishing and Pharming, ID Theft, establishment, operation and provision of end-to-end encrypted communications platforms and services etc.;
- **Individual related cybercrimes** - Social Engineering, Virtual Mobbing, Cyberstalking, Cyber-bullying, online harassment, illegally disclosure of private data, illegally accessing of electronic communications services (*e.g.*, social media), online or electronic child sexual offences, online hate speech, online extortion, commercialization of online identities and credentials, romance scams, online sexual grooming etc.;
- **Government related cybercrime** - Cyber-espionage, Cyber-terrorism, Hacktivism, online recruitment and training for terrorist or ideologically purposes, online illegal propaganda, creation and distribution of fake news, interference with voting systems, online violations of human rights etc.

As observed by analysing the above-mentioned illegal activities (offences, crimes etc.), there is a common link between all of them: the use of computer data, devices or even systems, as well as the intent to commit further (cyber-related) offences.

From a technical perspective, many of these cyber-enabled crimes rely on devices, programs, applications, passwords, codes and other same digital data that ease, facilitate or make possible the commission of the illegal or unauthorised material acts.

On the other hand, in many legislations, there are offences that for being committed require „digital tools" (as instruments), and they are not necessarily regarded as computer-enabled crimes (such as: the counterfeiting of banknotes with a computer system and a printer, misleading and altering reality in an official document, written on a computer system by a public servant etc.).

4. Conclusions

This article has the meaning to draw attention of the fact that the EU lawmakers and other legislators, from Europe and beyond, missed to approach the offence generally called „*the misuse of devices and programs*" from a broader perspective of the outcomes, namely the possibilities that the material and technical acts of this „facilitating-offence", as well as their results, may very well facilitate or may constitute the foundation for the commission of another offences, and not necessarily those „cyber-dependent".

In our opinion, taking into consideration the fast-evolving cybercrime ecosystem, and the large implementation of new technologies, legislators and law enforcement agencies must keep the pace with the continuously, newly, complex and more sophisticated tactics, techniques and procedures, as well as with the

tools used by cybercriminals in performing their nefarious activities in cyberspace or in the visible, natural and traditional environment.

For that, we think that they need to adopt a much larger perspective in what regards the production, the commercialization, the detaining and the making available of devices, computer programs, applications, passwords, codes or other similar data, considering a criminal behavior not only when the intent is to further affect computer data and systems, but also when this intent is directed towards committing other sort of traditional or new kind of crimes and offences (see cyber-enabled crimes and offences).

In order this to happen, and the legal systems to be prepared for what comes next in the field of cybercrime (and not only), the legislators have to urgently adapt the national criminal laws with relevant and comprehensive legal provisions that also cover the way in which the computer systems, the electronic devices, the programs and applications, as well as the passwords, credentials or other such data may be used, intentionally and without right, to enable the commission of all sort of offences, irrespective if they are against the confidentiality, integrity and availability of computer systems and data or against other legal protected social values.

Such a discussion may arise, for example, about the creation, production, selling, acquiring, importing/exporting, making available etc. of AI-powered tools that are nowadays on a high trend as key enablers of committing both cybercrimes as well as other traditional crimes or even new types of crimes.

Another interesting issue may be related with the creation, procurement and distribution of digital tools that may be used in FinTech crimes, that are generally cyber-enabled crimes.

In the absence of a correct and comprehensive legal provision in place, the national criminal law systems (as well as law enforcement agencies) may not apply the principle *nullum crimen sine lege*, while struggling to use the existing legislation approaching the new faces of more technologized offences.

The idea of this article is to emphasise the need for a legislation update, with the following two aspects:

- the definition of „cyber-dependent crimes" and "cyber-enabled crimes"
- the modification of the related articles on „misuse of devices and programs" adding also the „cyber-enabled crimes" as target offences that may be intended to be committed or even committed with the prohibited devices, computer programs, passwords, codes or likewise data.

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SOME CONSIDERATIONS REGARDING THE PROVISIONS OF LAW NO. 254/2013 ESTABLISHING THE REGIME OF EXECUTION OF CUSTODIAL SENTENCES, THE SUMMONS PROCEDURE, THE HEARING, PRESENCE IN COURT AND RIGHT TO DEFENCE OF THE DETAINEE

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Abstract

Art. 39 of Law no. 254/2013[1], bearing the title „Establishing the detention regime for custodial penalties" requires a wide debate, as it comprises regulations that are contradictory, to say the least, mainly within para. (14) to (19) of this legislation. These provisions pertaining to art. 39 are correlated within Law no. 254/2013 with art. 56, titled „The exercise of a convicted person's rights" - para. (12), and with art. 104 - „Challenging a decision by the disciplinary board" - para. (12). The regulations falling under the scope of this study are essential for the observance of convicted persons' rights, their right to free access to a court of justice (art. 21 of the Romanian Constitution), and to a fair trial, in proceedings related to challenges against the resolutions passed by the custodial supervisory judge in response to applications by inmates regarding the observance of their rights and against the decisions of the disciplinary board in matters relating to the customisation or the amendment of their custodial regime.

Keywords: *detainees, free access to justice, enforcement of custodial sentences law, right to defence.*

1. Introduction

Ab initio, we point out that, pursuant to provisions set forth under art. 56 para. (2) of Law no. 254/2013, „The provisions under art. 39 para. (14)-(19) will apply accordingly in regard to challenge applications submitted by convicted persons against the resolutions of the custodial supervisory judge, in regard to the exercise of detainees' rights."

When this type of cases is brought before a judge, the court may decide not to order the detainee to be brought before the magistrate, pursuant to art. 39 para. (16) of Law no. 254/2013, as the convicted person is summoned to appear before the judge only when the court so decides. In our opinion, this practice may spark a debate regarding the infringement of the right to defence (and to a fair trial), as there appears to be a disbalance in the principle that mandates that both the prosecution and the defence are able to employ equally powerful procedural instruments.

To the same respect, we conclude that a detainee will be discriminated against, as long as their presence in person before the court is by law not mandatory, while the prison administration (or their representative) and the prosecutor's office by default can raise exceptions, submit applications and argue, they can be heard by the court, as they participate in the proceedings in person, while the convicted person cannot effectively take part in the proceedings, as they are only brought to the court upon an order thereof.

This is how the principle of oral, direct and adversarial proceedings is breached, and this principle is inseparable from the requirements of a fair trial, one in which the court may discern between truth and error, thus ruling in accordance with the facts argued by both parties to the criminal proceedings.

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[1] Published in the Official Gazette of Romania no. 514/2013.

2. Paper content

Indeed, the convicted person and the prison administration are allowed to submit written arguments and memos, pursuant to art. 39 para. (15) of Law no. 254/2013, but in reality this right is closely tied to the right to consult the case file that is stored in the archive of a district court, *not inside the correctional institution*. Inmates can only access the case file following a written request submitted to the court, as this right is not provided for during the trial phase before a custodial supervisory judge, where proceedings are held inside the penitentiary.

In the trial phase before the custodial supervisory judge, the hearing of a detainee, pursuant to art. 56 para. (3) of Law no. 254/2013, is mandatory, and it should be carried out at the very place of detention.

In this phase, the convicted person has the possibility to argue their complaint or to withdraw their application, without being able to gain access to the arguments submitted by the prison administration, being therefore unaware of the motives behind whatever measures had been ordered in regard to the exercise of the prisoners' rights.

The custodial supervisory judge will issue a motivated resolution, settling the application, within 15 days of the submittal date, pursuant to art. 56 para. (6) of Law no. 254/2013, and the resolution is notified to the detainee and to the prison administration, within 3 days of the adjudication date.

Thus, the reasoning of the custodial supervisory judge will remain unbeknown to the detainee, who will not be able to learn why the court decided upon a certain solution, nor will they know what the prison administration argued in regard to the situation brought before the court.

The only possibility of a convicted person to consult the documents in their respective case file is, therefore, as mentioned above, to develop a request to consult and make photocopies of the case file and to submit it to the court, which represents a significant financial effort, in order for the prisoner to gain access in person to the court archives, and some inmates are unable to sustain such expenses. Therefore, in the trial phase before the custodial supervisory judge, the detainee is deprived of an effective possibility to consult the case file registered in the wake of their application, also being unable to be informed of the arguments of the prison administration or to study other documents therein.

The provisions under para. (14)-(19) can also be found within art. 104 - Challenging the decision of the disciplinary board - which allows convicted persons to appeal the decisions of the disciplinary board, in regard to any disciplinary sanctions handed down for the prisoners' acts of misconduct.

In accordance with art. 104 of Law no. 254/2013, in the event of a challenge lodged by an inmate against the resolution that settles the (application) against the disciplinary board's decision, in the trial phase, the court will hear the convicted person, with no exceptions, and the provisions under art. 39 para. (14)-(19) will apply accordingly.

And so, we find ourselves in the same above mentioned situation, similar to art. 56 para. (12) of the Law no. 254/2013, regarding the violation of the right to a fair trial, the breach of the principle that mandates equally powerful procedural means to be at the disposal of both prosecution and defence, and the infringement of the principle of oral, direct and adversarial proceedings.

A paradoxical situation is created by the need to hear the convicted person, in the context where the court may order the detainee to be brought in person before the judge for one or more court dates, but only when so requested. Failure to bring the prisoner to court in the trial phase inherently brings an impossibility for the detainee to be heard and to effectively argue their defence, thus being unable to make applications or requests, to raise exceptions, to be asked and heard by the court, in order to clarify all the circumstances and aspects required if the court is to discern the truth.

In accordance with art. 39 para. (14), the convicted person and the prison administration will be summoned to appear before the court in the proceedings related to the settlement of a challenge - this means that the summons to the prisoner will be served at the correctional facility, pursuant to art. 257-260 CPP.

Summoning a person to appear before a court implies that the presence of that person is mandatory, taking into consideration the provisions of art. 257 para. (1) CPP, that defines this notion as the „summoning of a person before a criminal investigation body or a court of law"; so the legal provisions therein are clear, otherwise the lawmakers would have opted to use the concept of „notification" or „communication" instead of „summoning".

In practice, courts will issue so-called summons „without the need to appear", which means that the convicted person will not be brought before the judge by the prison administration on the day of the trial and

the proceedings will unfold in the absence of the detainee, preventing the latter from being able to argue their own case.

Pursuant to art. 39 para. (17) from Law no. 254/2013, the „prosecutor and the prison administration representative will take part in the proceedings and submit arguments", meaning that the trial phase will be completed without any contribution from one of the parties (namely, the convicted person), which constitutes a lack of proportion that breaks the balance between prosecution and defence taking part in criminal proceedings, in terms of procedural means.

Moreover, the proceedings before the custodial supervisory judge are assimilated, mutatis mutandis and de plano, to a first instance adjudication on the merits of a case, and the judicial procedure before a trial court - where the resolution of the custodial supervisory judge is challenged - becomes assimilated to an avenue of appeal.

As we previously demonstrated, the convicted person has no actual possibility to consult their case file and to gain knowledge of the criteria/motives argued by the penitentiary's administration, so it would be mandatory for the detainee to take effective part in the proceedings before the court, if we are to observe their right to a fair trial and to defence.

It should be noted that, in the legal framework regarding the enforcement of criminal judgments, there are no provisions that could ensure the actual presence of a convicted person before a court of law.

As for the participation of the convicted person in the trial and the consultation of the documents pertaining to the case file, we consider them to be mandatory, in order to prepare a defence, but art. 39 para. (16) of Law no. 254/2013 prevents both: „The convicted person is brought to the proceedings only if so ordered by the court, in which case the detainee shall be heard". Thus, the defence is not effective, but merely formal, and in this case we are in the presence of a discriminatory practice afflicting the convicted person, in comparison to the rights enjoyed by the legal counsellor representing the penitentiary (who is a party in the proceedings) and the representative of the prosecutorial service, who both take part in the proceedings and are offered the chance to submit arguments, to submit requests, to raise exceptions and to offer evidence, etcetera.

Pursuant to art. 351 para. (1) CPP, „the case is tried before a legally constituted court of law and it shall unfold in an oral, direct and adversarial court session".

However, the existence of para. (16) in art. 39, containing the actual wording „only if so ordered by the court", contradicts the principle set forth under art. 351 CPP, insofar as the proceedings must be carried out „before a court of law", and the practice of bringing over the convicted person only if so ordered by the judge creates a contradictory and adverse situation, detrimental to the detainee.

An examination of the current-day court rulings will reveal that only 4% of the cases involving a petition to challenge a resolution by the custodial supervisory judge or against a decision by the disciplinary board are granted, which is an insignificant number, compared to the number of the registered applications.

It can also be noted that in all of the cases, albeit legally summoned before the court, the parties did not attend the proceedings (the detainees were absent on the trial date) and the trial unfolded in the absence of the prisoner. It is not a refusal from the part of the detainee that invariably causes their impossibility to be present in court, but it is also a consequence of the prisoner not being brought before the court for the settlement of the case, as previously pointed out.

Another relevant aspect concerns the letter of summons issued by the court, where there is a mention made in respect to the provisions of art. 258 para. (1) letter e) CPP, namely „the mention that the summoned party has the right to an attorney to accompany them on the trial date that was set". In practice, this requirement is not met, on one hand as a result of the convicted person's failure to participate or to be present in court and, on the other hand, as a consequence of the detainee's impossibility to contact their respective lawyer (who, most of the times, is court-appointed), again, because the detainee is not personally brought to court, and the appointed attorney does not show up at the detention facility to confer with the petitioner, in order to prepare a defence.

This explains why courts will grant so extremely few applications against the resolutions of the custodial supervisory judge, regarding the customisation of the detention regime, and against the decisions of the disciplinary boards; another factor is the lack of actual merits or the omission to properly explain the reasoning behind an application, both in terms of the facts and of the applicable law, in the absence of an effective defence, that could be able to submit a sound reasoning, based on conclusive, useful evidence, that allows the court to draw conclusions as to the merits of the detainee's application.

We will now revert our attention to the exercise of due process rights and to the procedural timeframes set forth under the law, ascribing the manner in which a prisoner is to be summoned before the court, for the purposes of arguing the merits of their application.

The relevant legal provisions in this respect set forth certain regulations regarding the service of a court's letter of summons, as well as other documents pertaining to the procedure. Thus, in accordance with art. 155 para. (1) point 11 CPC, the inmates will be served their court summons at the penitentiary's administration.

In civil cases, the service of court summons is regulated by peremptory norms, laying down two principles regarding the summoning of parties to a civil case:

- in civil matters, the parties' presence is not mandatory, but it is mandatory that all parts to the case be duly served with their summons, as per art. 153-157 CPC;
- as a rule, the parties will be served with their court summons, and only in exceptional circumstances the case is adjudicated without the actual participation of the litigants (such as resolving a conflict of jurisdiction, a challenge regarding the unreasonable duration of the proceedings, a complaint against the resolution of the said challenge), or sometimes the participation of the parties is left at the discretion of the court (for example, the procedure for securing evidence, the non-contentious judicial proceedings, injunction orders, small claims applications, etcetera).

There is a major difference between the contents of the criminal court letter of summons and the contents of the civil court letter of summons, namely, in the case of criminal summons, pursuant to art. 258 para. (1) letter e) CPP, it is mentioned that the *summoned party has the right to an attorney that will accompany them on the due date*, while the civil summons will mention that „*once the letter of summons has been served, and the party acknowledged the receipt thereof by signing the advice of delivery slip, either personally or through legal representative or retained counsel (…) the summoned party is presumed to have knowledge of the following court dates, subsequent to the one for which the summons was served to them*".

It should also be noted that, in the case of civil proceedings, even if the party has been duly served with the letter of summons, pursuant to regulations of a peremptory nature set forth under the provisions of art. 153 CPC - „The obligation to summon the parties", as previously explained, the summoned party is under no obligation to show up in court or to participate in the proceedings.

Thus, according to scholars[2], the service of court summons is a law institution that allows a person to be summoned at a given date before a judicial body (the judge for rights and liberties, for example, in such circumstance when a proposal to remand a person in pre-trial detention, when the defendant was not previously taken into custody, or for the purpose of an early hearing or early securing of evidence), before the prosecutorial bodies (for instance, the suspect or the witnesses will be summoned for a hearing), the preliminary chamber judge (where the civil party is summoned in order to specify whether or not they request that the introduction of a party who bears civil liability in the case), or before the trial court (either first instance, court of appeal or when exercising extraordinary legal remedies, after sentencing).

Further on, the service of due process acts is defined as the procedural means by which the judicial bodies:

- convey a process act or a copy thereof to a participant (for example, a copy of the indictment that is notified to the defendant or a copy of the minutes of the criminal sentence that is notified to the prosecutor, to the parties, to the aggrieved person and, when the defendant is in preventive custody, to the administration of the respective place of detention, so that a legal remedy may be exercised;
- notifies the participants in criminal proceedings of a process act or measure that was taken or is about to be taken or it informs the participants about a procedure incident that needs to be settled (for example, informing the aggrieved person that charges were dropped).

In regard to the notification, it has been noted by scholars that it represents the means by which a judicial body informs the participants to a criminal process that a certain act was or was not carried out or that a measure was taken (for instance, the parties are notified of the date when the application to transfer the case is set to be examined, with the mention that they can submit arguments and memos, also being allowed to attend the court session where the matter is to be settled; the same is when the aggrieved person is informed that the defendant was released from pre-trial custody).

The aspects set apart the institution of summoning, on one hand, and notification, on the other hand, and we will point out that „*whenever the rules set forth in regard to the service of court summons are disregarded,*

[2] M. Udroiu, *Criminal Procedure Synthesis*, General Part, 3rd ed., vol. 2, C.H. Beck Publishing House, Bucharest, 2022, p. 1403.

the person, the person can be brought before the judicial body on the basis of a bench warrant, pursuant to art. 265 para. (1) CPP, whereas the law provides no retaliatory measures when a civil court notification/invitation or notice is be disregarded"[3].

Scholars have made detailed arguments[4] on the differences between the summoning and the invitation of a person, the service of the summons, the means employed for serving a letter of summons, thus defining the criminal procedure law institution of summoning.

In the matter of summoning parties and participants to a criminal process, a major difference stands out, in comparison to civil cases, which is that parties are not mandated to appear (to actually present themselves before the court), but it is mandatory for all parties to be duly served their letters of summons, and the court may examine the case even when the parties are absent, provided that the service was duly rendered (if the parties acknowledged the receipt of the summons).

In regard to the notification of parties in civil cases, this institution falls under the provisions set forth in art. 229 CPC, which stipulates that „*the party who personally or by agent filed an application to the court and is informed of the court date, as well as the party that was present in court, either personally, through legal representative or through retained counsel, even when their power of attorney does not include being informed of the following court date, will no longer be served a letter of summons for the trial phase before that court, as it is presumed that the party is informed of all subsequent court dates*".

It is also worth noting that the service of court summons in criminal proceedings is peremptory and, also, the summoned person is under an obligation to present themselves at the date and place set by the summoning judicial body; when a party who was duly served a summons letter fails to appear before the judicial body, as a rule, the criminal process can continue in the absence thereof, while material witnesses, expert witnesses and court interpreters who fail to appear can be subject to a judicial fine; also, failure to appear when summoned constitutes grounds for the issue of a bench warrant.[5]

One supplemental reason, besides those already examined above, that is worth considering, is the fact that it is impossible to exercise any judicial remedies against a final criminal district court ruling (revision, challenge against enforcement, challenge for annulment, reopening criminal proceedings in case of an in absentia trial), if the object thereof is a challenge against the resolution of the custodial supervisory judge in regard to the exercise of prisoners' rights or if the object of the trial was a decision by the prison panel in charge with customisation, establishment and amendment of the detention regime or if it was a decision by the disciplinary board; the only possible solution in these situations is the dismissal of the application, as inadmissible, and for that reason it becomes imperative that the convicted person participates/is brought before the court, in opposition to the current regulations set forth under art. 39 para. (14)-(19) of Law no. 254/2013, which stipulates that the effective participation of the detainee is left at the court's discretion.

3. Conclusions

To conclude, in light of the abovementioned arguments, and taking into account that the right to justice is fundamental in a democratic state, that the right to free access to justice should be guaranteed for all categories of persons, even to prisoners, as knowing this right to be enshrined in art. 21 of the Romanian Constitution, it is mandatory to submit a proposal to amend the law, prompting the legislators to modify the provisions set forth under art. 39 para. (14)-(19) of Law no. 254/2013, in the way that a convicted person's presence in court to be actual and effective, not just formal, when the scope of the trial is a challenge against the resolutions of a custodial supervisory judge or against a decision by the discipline board. This will ensure that the effective (and not illusory) right to a fair trial is observed, if the convicted person is to be present in court by default (except when the detainee requests, prior to the hearing and in writing, that they want the application settled in their absence), and also if the convicted person's other procedural rights are observed as well (the consultation of the case file and access to legal counsel, etc).

[3] I. Neagu, M. Damaschin, *Criminal Procedure Treatise. General Part - in Light of the New Criminal Procedure Code*, Universul Juridic Publishing House, Bucharest, 2014, p. 672.

[4] Gh. Mateuț, *Criminal Procedure, General Part*, Universul Juridic Publishing House, Bucharest, 2019, p. 932-950.

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CONSIDERATIONS OVER PARAPHILA AND PAEDOPHILIA-BASED CRIMINAL OFFENCES AGAINST SEXUAL FREEDOM AND INTEGRITY

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Abstract

Common knowledge of how society works stands as sufficient proof to how wide is the array of mental disorders that have a significant impact on what is specific to certain offenders. The purpose of this thesis is to raise the level of awareness regarding the degree in which such persons, duly diagnosed with this type of deviant behaviour, pose a threat to society, and to also consider the response to such conduct, which should consist in security measures that are able to contain urges of such kind, desires that most of the times escape some of the aggressors' ability to control on their own. Therefore, we emphasise that, in order to prevent more people from falling victim to such persons, a firm reaction of the legislators is considered mandatory, followed by a similar reaction from the judicial bodies, especially in regard to those who admit and accept the fact that they suffer from this type of conditions, as we are about to demonstrate.

Keywords: *paraphilia, paedophilia, expert report, compulsion to undergo medical treatment, non-voluntary hospital admission.*

1. Introductory elements to the notions of paraphilia and paedophilia

Ab initio, it is necessary to mention and to make understood the meaning of *paraphilia*, as a noun, which designates any intense and persistent sexual interest, other than sexual interest for genital stimulation of foreplay involving human partners, who are phenotypically normal, who have reached the age of physical adulthood and who are consenting. Specialised literature qualifies a paraphiliac disorder as a paraphilia that causes the individual to experience emotional discomfort and various dysfunctionalities, of a paraphilia whose pursuit involves harm to oneself of the risk of harming others[1].

Paedophilia is a serious problem that has been known ever since ancient times, one that is able to bring about negative results both to the paedophiles themselves, as for the target person of the paedophile, at the moment when the former is manifesting their fantasies. Paedophilia, as a subspecies of paraphilia, is catalogued as a mental disorder and is also considered deviant behaviour[2]. As we start off from the concept of „paraphilia", paedophilia is defined as a disorder of the sexual orientation or of the choice of the object thereof, in which the subject displays, for six months or longer, a series of reoccurring and persistent fantasies of a sexual nature, in which the object of their desire consists in prepubescent persons, usually younger than 13.

We need to clarify that we intend to reproduce and to properly quote certain definitions, concepts and classifications such as they appear in the day-to-day use of psychology and psychiatry scholars, in their own works and other such articles, since the thesis hereby submitted is focused on the analysis of certain medical conditions in an area highly specific to psychology and to the treatment of mental illnesses, one that has an impact on the very creation of the preexisting situations of the offence, in the case of transgressions committed in connection to the deviant behaviour that we are going to be examining.

We shall continue our article by proving how the above mentioned fantasies are able to generate a high level of tension, discomfort or impairment of day-to-day functionality in the case subject.

According to the Diagnostic and Statistical Manual of Mental Disorders (DSM IV), paraphilias are intense reoccurring sexually arousing fantasies and impulses of types of behaviour that involve in general the use of

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[1] American Psychiatric Association, DSM-5 Diagnostic and Statistical Manual of Mental Disorders, 2013, p. 690.

[2] *https://ro.yestherapyhelps.com/how-do-you-intervene-psychologically-with-pedophiles-12798*.

object, causing the subject to experience pain or degradation or causing the same to the partner thereof, to children or to other non-consenting person, as long as such fantasies or impulses are present for six or more months. The fantasies of paraphiliac stimuli can become a mandatory prerequisite for obtaining sexual arousal and are always part of the sexual activity. Sometimes, paraphiliac preferences only manifest occasionally (during high-stress periods). In other cases, the paraphiliac is able to sexually function without any paraphiliac fantasies or stimuli[3].

For paedophilia, voyeurism, exhibitionism and frotteurism, the diagnosis is reached if the person already acted in accordance to these impulses of if the sexual fantasies are able to cause a significant interpersonal difficulty[4].

According to specialised literature, individuals known to have sexually approached several children will deny having an attraction towards children, but refuse to admit there was any sex-related behaviour or any physical contact.[5]

The sexual seduction of a child is a tool of vengeance. Paedophiles have, in many cases, fallen themselves victims of childhood sex abuse, and a feeling of triumph and empowerment may accompany the transformation of their passive trauma into an actively perpetrated victimisation. From a medical perspective, paedophilia is a mental disorder, that manifests as an abnormal preference as to what is a „sexual object"[6].

Such anomalies will manifest in the form of avoidance of what is considered standard heterosexual intercourse, favouring children as sexual partners, as the only individuals whose existence triggers the sexual arousal of the paedophile. Generally, psychiatrists define paedophilia as a deviant sexual practice, characterised by erotic impulses that are mostly or even exclusively directed towards children[7].

The persons who experience paedophiliac inclinations have a fixation towards children, one of both an emotional and a sexual nature. The cause of this so-called fixation is hard to alter, and they are able to easily swing to a state of anxiety or to a psychotic episode, if they prove unable to resolve their inner conflicts.[8]

Reason seems to tell us that medical emergency intervention is what it takes to mitigate and to eliminate such impulses.

2. Expert reports and fact-finding in regard to the assessment of paraphiliac and paedophiliac deviant behaviour

In order to observe and to precisely establish what are the psychological disorders that may afflict a defendant, we think that it is mandatory that a psychiatric expert report be ordered, as it is necessary to establish, to clarify and to assess the facts by an expert witness, in order to clarify and to determine which are the mental conditions of that defendant, but also to establish a treatment plan that will alleviate of even wipe out the paedophiliac deviance altogether.

It is important to focus on the deviant conduct, from a medical perspective, because it is upon this criterion that we deem as deviants those individuals who are incapable of observing the rules of proper conduct in society, as a result of their physical and mental shortcomings. Therefore, if transgression of the laws is a particular form of deviant behaviour, a mental disorder is a different type of deviance, since the patient, as a result of their behaviour, strays from the requirements of normalcy, which are integrated in the very concept of mental health.

Deviant behaviour, as a general concept, can be defined as the „multitude of behavioural types whose features appear more or less offensive, reprovable or reprehensible, that generate disapproval, hostility and certain unpleasant consequences to the perpetrators thereof." More so, individuals who display abnormal behaviour neither clearly adhere, nor do they clearly exclude the voluntary perpetration of their offences. Seen as a transgression of the applicable rules in a given social system, deviant behaviour reopens the debate on both the social regulations, but also on the unity and the cohesion of the system itself.[9]

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[3] American Psychiatric Association, *op. cit.*, p. 702.

[4] D.B. Iliescu, G. Costea, A. Enache, L. Oprea, V. Gheorghiu, V. Astărăstoae, *The Psychiatric Forensic Expert Report, an Interdisciplinary Approach*, Timpul Publishing House, 2013, p. 205.

[5] American Psychiatric Association, *op. cit.*, p. 685.

[6] G.O. Gabbard, *Psychodynamic Psychiatry Treatise*, Trei Publishing House, 2007, p. 296.

[7] T. Stoica, *Psihosexology*, Medicală Publisher, Bucharest,1972, p. 316.

[8] F. Tudose, C. Tudose, L. Dobranici, *Psychiatry and Psychopathology Treatise for Psychologists*, Trei Publishing House, 2011, p. 591-593.

[9] M.N. Turliuc, *The Psychology of Deviant Behaviour*, Universitaria, European Institute, 2007, p. 42.

We often find in specialised literature various studies focused on the pathological personality, placing the emphasis on the individual, when it comes to the perpetration of the deviant acts, and suggesting that, most times, the transgression of social regulations is perpetrated by deficient individuals, unable to adapt to the cultural and social context of their lives. Even more so, according to this criterion, the disorder means a non-voluntary or even coerced choice, that can give motive to the deeds of the deviant.[10]

It has been said that it takes a social reference model in order to assess a certain type of behaviour as being pathological or abnormal, and based upon that model can we ascertain the legal or illegal nature of a certain act, as well as its tortious consequences. Abnormal behaviour is considered to be problematic, because it raises difficulties both to the perpetrator, as an individual, and to society in which the offence is committed. However, insofar as mental disorders often have a defensive, protective or compensating nature, it is challenging to draw a clear line between normal and abnormal behaviour[11].

Therefore, the development of a psychiatric forensic expert report is decided by the necessity to conclude whether the existence of certain mental disorders had a contribution or not in the perpetration of this type of offences.

Also, it appears without doubt that paedophilia, as a sub-species of paraphilia, constitutes a serious disorder, one that derails the aggressor's behaviour, and, as any other physical or mental condition, it requires treatment before anything else, in order to obtain a total remission thereof or, failing that, in order to at least alleviate the condition.

In addition, experts have proven that, by clinical and paraclinical assessment, certain aspects can be clarified:

- what is the level of accountability of the perpetrator in relation to the self-acknowledgement of their deviant behaviour, by using the medical approach, the only one able to produce results;
- how to adapt the prosecution and conviction of certain persons who were unable to understand the significance and the consequence of the actions for which they are being held liable, and who are at risk to miss the significance of the prosecution and of the penalty imposed;
- taking adequate security measures - compulsory medical treatment and a decrease in the social threat posed by the patient.[12]

To this end, certain objectives of the expert report that would be ordered in any criminal proceedings regarding offences against sexual freedom and integrity can be identified as viable, in light of the considerations above, such as:

- whether or not is the person examined displaying and deviant behaviour or mental disorder that belong to the paraphiliac-paedophiliac spectrum;
- as per the above mentioned diagnosis, what is the development stage of the said deviant behaviour/mental disorder and what is the current state of the person under examination;
- whether or not the person under examination is simulating or concealing a mental disorder that belong from the paraphiliac-paedophiliac category;
- what personality features are characteristic to the person under examination and whether or not they are influencing the emergence of a general propensity towards the perpetration of offences against the sexual freedom of children;
- if the subject under examinations is displaying elements of typical features of a person who survived sexual abuse themselves; when the answer is affirmative, to establish what is the extent of the damage and what are the odds that the subject will replicate the deviant behaviour themselves;
- what is the degree of the subject's accountability, as an expression of the level of acknowledgement of the severity of their own offences to be observed at the precise moment when the examination is carried out;
- how serious a threat is the person under examination, in terms of current and general social dangerousness, considering the possibility of them committing an offence or adopting other type of antisocial behaviour;
- if there is a need to perform a medical intervention, using specific therapy and specialised treatment plans, in order to limit or to eliminate the sexual impulses targeted at children, based on the current and general

[10] M.N. Turliuc, *op. cit.*, p. 30-31.
[11] *Ibidem*.
[12] D.B. Iliescu, G. Costea, A. Enache, L. Oprea, V. Gheorghiu, V. Astărăstoae, *op. cit.*, p. 97-98, 117, 336.

social dangerousness of the subject;

- what therapy would be adequate in order to prevent a repeated offence from the same subject and to help rehabilitate the subject, in dependence to the type of paraphiliac-paedophiliac deviance/disorder that is diagnosed in the subject;
- whether or not is a security measure such as mandatory medical treatment able to prevent the risk of a repeated offence from the same subject that was examined, once they are reinserted into society, after serving a custodial sentence.

3. The need for specialised treatment, in order to cure the patient

The need to identify and pursue a medical treatment of a defendant standing trial for sexual offences against children resides, on one hand, in the necessity to make sure such criminal behaviour will not be reiterated in the future, and on the other hand in the need to alleviate the paraphiliac disorder, because the essence of the addiction is represented by the perpetrator's lack of control over their own repeated, persisting behaviour, that has failed to adapt.

This being the case, the subject affected by this type of deviance cannot resist the urge to give in to a conduct that places them in the realm of criminal offences, and in such circumstance, they go through a period of tension, followed by a feeling of liberation, once the act is accomplished. However, the attempts of a person suffering from paedophilia most of the time result in a significant state of frustration and discomfort. The individual, at this point, enters a phase of uncontrollable reiterations of the same behaviour and ceases to properly function in society, in their profession or in their respective families.

The treatment for paedophilia is a complex reality, and throughout history it was scaled in many sizes, it involved various techniques that touch upon both psychology and medicine.

A psychological or psychiatric treatment plan of the paedophile should take into account, before anything, that the subject is a patient, regardless whether they committed sexual abuse or not.

The specialists have proven that a professional who is treating such patients must keep in mind that their attitude towards the individual can prove decisive at the time of the treatment. They also proved it's essential to adapt the treatment in accordance to the particulars of each case, because there is a vast array of factors that can influence a person and can vary the effectiveness of the treatment. These rehabilitation plans can be scheduled as programmes, keeping track not only of the shift in sexual preferences, but also of the connection between the paedophile and the search for cognitive changes. It has been emphasised that, in most cases of this type, the favoured paradigm is of a cognitive-behavioural nature, although other approaches have been used, such as psychodynamic[13].

In practice, it is recommended to use the cognitive restructuring method and the training in stress management - because, in certain cases, impulsive behaviour is linked to anxiety impulses. It is also a possible perceived inability in adults to maintain a relationship with other adults that, in some cases, reveals itself as one of the causes that makes the paedophile become interested in children. Paedophiles have a certain pattern for a determined age group or gender. It has been noted that there is a higher frequency in recruiting victims from younger age groups and to also internationalise such offences, as many paedophiles will travel with higher interest to countries with a lower standard of living, such as Eastern Europe[14].

In an attempt to change sexual behaviour, several alternative methods and programmes have been proposed, and most of them are similar to those used in other paraphilias or in dealing with substance abuse.

The prevention of such offences is fundamental in order to stop the paedophile subject from repeating this behaviour, assuming that one offence was perpetrated. It must be kept in mind that the treatment of a paraphilia, such as paedophilia, is a complex and difficult challenge, but it is not impossible[15].

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[13] *https://ro.yestherapyhelps.com/how-do-you-intervene-psychologically-with-pedophiles-12798*.

[14] D.B. Iliescu, G. Costea, A. Enache, L. Oprea, V. Gheorghiu, V. Astărăstoae, *op. cit.*, p. 209, 509.

[15] Paul Feodoroff, a psychiatrist working at the Ottawa University, has a very different approach. In fact, he has recently published an article under the title „Can People with Paedophilia Change? Yes, They Can!". The study, co-authored by Feodoroff, involved analysing 43 men whose general arousal was assessed in two separate occasions. On every testing session, the participants listened to erotic tales being read to them, describing children or adults, while the changes in their erectile state were being recorded by a penile plethysmography, which is basically a ring fitted on the penis, that takes measurements of the changes in the blood circulation. All the men indicated a pattern of paedophile arousal on the first testing, which means they became aroused upon hearing the child stories. However, approximately half of those men (49%) indicated a shift in the arousal pattern, on the next testing session: the arousal caused by children decreased, while the arousal caused by adults increased. I cannot say what the cause was, because this study did not come with a treatment. The participants

Another aspect that must be considered is the vast variety of cases, each with its own specifics; while some suffer and experience guilt for their paedophiliac disorder, others deem their actions as legitimate and even hold the child responsible for the abuse, if perpetrated.

All these elements, by mutual agreement, ought to be taken into consideration and given a different kind of treatment, as the only instrument that is able to achieve the purpose is the development of a forensic psychiatric expert report.

The term „paedophilia", as encountered in specialised literature that studies this deviance[16], is often applied to various social contexts to any sexual interest manifested towards a child of to the act itself of sexual abuse against children. Another problem that was noticed is linked to the stigmatising of paedophiles in society, and this is a deterrent to patients who would consider specialised medical help, in order to get their condition treated.

Therefore, it is mandatory to take into account the need to place the abuser under treatment, in order to prevent the offence from being repeated, but also in order to repair the mental disorders that may afflict the paedophile.

A patient diagnosed with paraphilia should undertake a perversion therapy plan, in order to develop their own internal control, that will stop the victimisation behaviour and will increase the patient's abilities to relate with other people.[17]

4. Whether or not it is adequate to subject diagnosed paedophiliac aggressors to compulsory medical treatment

From what we examined earlier, it would appear, beyond any doubt, that such offenders need to be subject to an appropriate treatment plan in order to restore their behaviour to a condition that is not affected by a paraphiliac disorder, namely by paedophilia. Therefore, we conclude that it would be necessary to subject such patients to compulsory and provisional medical treatment, as it has been proven that medication and psychological therapy combined constitute the most successful methodology.

An important aspect that needs to be kept in mind is the fact that the prevention of offences is achieved, on one hand, in relation to the perpetrator, by what is called the *special prevention*, which makes sure that the offender is coerced and re-educated; *general prevention*, on the other hand, is aimed at everyone else who can be subject to criminal liability and who, under the threat of the penalty provided for under the law, will comply and adjust their behaviour in accordance with the regulations.

Criminal law doctrine also insisted on the fact that, for crime prevention to be effective, it is mandatory to observe the principle of humanity in criminal law, since inhuman or degrading penalties or treatments will not determine the desired change in the perpetrator's attitude. The author also insists that, under such circumstances, criminal policy should not swing to the opposite extreme, because stripping the penalty of its afflictive component will completely undermine the prevention of crimes[18].

In direct relation to this goal, it is important to mention the following.

At the end of the 19th century, a theory that gained momentum claimed that fighting crime strictly within the confines of the penalties provided for under the Criminal Codes was proving inefficient, in many cases.

It was so noticed that certain categories of offenders are beyond criminal coercion. Such categories of persons, as far as fighting crime was concerned, were considered to be „threats" that fell under the scope of criminal law, as, on one hand, such persons were directly involved in the perpetration of an act stipulated by criminal law and, on the other hand, it was through these acts that they emerged into the attention of the authorities.

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were chosen strictly based upon being tested twice, regardless of whether they took a treatment or not. Feodoroff indicates this study, and another set of evidence, suggesting that paedophilia is not pre-programmed and that it can change. For example, he mentions that, on a global level, the repeat offence rate of child abusers is relatively low and that, despite the increase in population, there is a decrease in sexual abuse against children. If paedophilia could not be changed, he claims, we would expect a higher rate of repeated offences and an increased number of sexual abuses. The same is indicated by other studies showing that sex offenders will generally display a decrease in the risk of repeating the offence over time, which he holds as proof that their sexual interests change [J.M. Cantor, J.P. Fedoroff, *Can Paedophiles Change? Response to Opening Arguments and Conclusions*, Curr Sex Health Rep 10, 2018, p. 213-220].

[16] *https://psihologiejudiciara.ro/tulburarea-pedofila-o-simpla-orientare-sexuala-o-tulburare-sau-o-infractiune/*.

[17] F. Tudose, C. Tudose, L. Dobranici, *op. cit.*, p.590.

[18] M.A. Hotca, *Criminal Law Manual, General Part*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2020, p. 375.

These threats, as noted by the literature, can be defeated NOT by means of criminal penalties, but only by preventive measures, since they are not rooted in situations that constitute transgressions of criminal law, and therefore security measures must be introduced, in order to prevent crimes from happening[19].

One of the most important moments, that ushered in the introduction of security measures in the European Criminal Codes, was the International Conference for Codifying Criminal Law held in Rome, in 1928.

Security measures were first regulated, under this denomination, in the Romanian Criminal Code of 1936.

Specialists have emphasised that security measures provided for under criminal law are mainly intended to be prevention means, aimed at averting the perpetration of acts stipulated by criminal law, by the removal of the threats that have caused such measures to be taken.

On a secondary plan, these security measures are also meant to coerce, because they are imposed by judicial bodies against the will of the subjects. The subsidiary nature of the security measures makes them more alike criminal penalties, who are first and foremost means of coercion[20].

Therefore, the provisional and compulsory medical treatment is a security measure, a preventive coercion measure whose purpose is to ward off a state of dangerousness that can generate acts stipulated by criminal law, of the magnitude of those supposedly committed in the case at hand.

This measure represents the strongest element, and it is able to support the judicial bodies in their efforts to reprehend serious criminal phenomena that threaten physical, mental and sexual integrity of the most vulnerable of persons - children. Once the perpetrators meet with a swift response, one that makes use of these levers of criminal law, akin to the other category of criminal sanctions - the penalties - we can only expect a positive impact in what concerns the treatment of psychiatric disorders and the prevention of repeating the offences.

In this context, it is important to point out to *Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA,* which stipulates, *inter alia*, the measures that need to be taken in order to prevent the perpetration of such offences:

- offenders should be subject to an assessment of the danger posed by the offenders and the possible risks of repetition of sexual offences against children;
- Member States shall take the necessary measures to ensure that persons who fear that they might commit any of the offences referred to in art. 3 to 7 may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of such offences being committed.

One cannot ignore the vision of Romania's lawmakers, who understood the need to establish a specific framework for this type of penalties and, pursuant to the provisions of art. 245 para. (1) CPP and art. 109 para. (1) CP, the security measure of compulsory and provisional medical treatment can be ordered if the suspect or defendant, because of a disease, including one caused by chronical alcohol or psychoactive substance abuse, poses a threat to society. Turns out that, in order for this security measure to be ordered, two conditions must be simultaneously met: there must be an illness affecting the defendant and the existence of that illness must pose a threat to society, as revealed by the forensic psychological expert report.

Certain details need to be clarified in regard to the security measures, beyond the position that a perpetrator may have in relation to the acknowledgement of their own disorder and the admittance thereof.

Observing art. 109 and 110 CP, of interest to this article, we can derive one first conclusion as to the moment up to which such measures can be ordered. Pursuant to the abovementioned legislation, the lawmakers decided that a perpetrator can be subject to any of those measures until their full recovery or until such time as the condition alleviates enough to stop being considered a public threat.

According to the dictionary of the Romanian language, the notion of „recovery" implies that a person has been healed of a certain disease, while an alleviation only means an improvement of the patient's state of health. Considering that the conditions described above can only be ascertained in terms of „recovery" and „alleviation" until the subject has been exposed to the same triggers that initiated the deviant behaviour prior to the treatment, we deem the role of the therapist as crucial, being of first and foremost importance in assessing, after

[19] C. Mitrache, C. Mitrache, *Drept penal român, Partea generală*, 5th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023, p. 268.

[20] T. Dima, A.S. Nicolescu, *Criminal Law. General Part*, Hamangiu Publishing House, Bucharest, 2023, p. 694-695.

the completion of the treatment plan, to what extent has the thread disappeared and whether or not the perpetrator has become fit to re-enter society. In our opinion, though, such an exposure will never be safe, in the case of such persons.

Therefore, it is our proposal that the lawmakers keep in mind the establishment of a treatment plan that the abuser will continue to follow even after the completion of a full recovery or a significant alleviation, because such results are volatile. It would certainly be worth analysing the legal framework in which such a subsidiary measure can be ordered, and it is our opinion that it should be coined as another security measure. In case the perpetrator does not comply, the consequences may affect the chances of a conditional release or rehabilitation.

Another way of looking at this reveals that, in the case of compulsory medical treatment, if the perpetrator does not comply and refuses to undertake the treatment, the court may order another measure, the non-voluntary hospital admission.

It is our opinion that, given the optional nature of the hospital admission in the particular situation when the offender refuses to undergo the mandatory medical treatment, this measure may become arbitrary to an extend that it could be misunderstood by the perpetrator, who may think the court cannot order them to be admitted into a medical facility. However, given the social dangerousness of the offences perpetrated by these abusers, we think it would be useful that, in a future bill to amend the Criminal Code, the lawmaker should make it mandatory to forcibly admit into hospital an offender who suffers from such deviant behaviour, should they refuse to comply to the compulsory treatment, and thus the prevention of a new threat may become even more viable.

5. Conclusions

To conclude, in the event that one of these security measures is taken, even at the request of the offender, they should understand that they've taken upon themselves to submit to the treatment prescribed by a specialist doctor, until full recovery or until such time the illness alleviates to the extent where it no longer poses a threat; this obligation is a real necessity and it is able, to the purpose of those above mentioned, to prevent the perpetration of very serious offences, with deep consequences on the psychological and emotional development of the victim.

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THE PROCEDURE OF VERIFYING PRECAUTIONARY MEASURES IN CRIMINAL PROCEEDINGS

Ştefan Alberto LUPU[*]

Abstract

This paper aims at providing an overview of the institution of precautionary measures also called preliminary injunction measures in the criminal trial, namely of the procedure instituted by the legislator in art. 250[2] CPP and on the terms in which the judicial bodies are obliged to verify whether or not the grounds for maintaining precautionary measures still exist. It is a matter of principle that protective measures, like precautionary measures, are measures that have the effect of limiting the fundamental rights of the person against whom they are ordered, and the manner in which they are ordered and maintained must observe the limits and guarantees of the right to a fair trial. The present study will mainly focus on the aspects related to the way in which this procedure is carried out by the judicial bodies, as well as the contradictions encountered in the legal practice on the legal termination of protective measures, on the nature of the terms regulated by art. 250[2] CPP and on the conditions that must be analysed in this verification procedure.

Keywords: *verification, termination of right, terms, obligation, equitable, measure.*

1. Introduction

The precautionary or injunction measures have generated many a debate over time, both at the doctrinal and jurisprudential level, discussions that looked at both the way of regulating these procedural measures in the Criminal Procedure Code and their practical applicability. These procedural measures are of particular importance in the conduct of the criminal proceedings and they can give rise to various particular situations with relevance for criminal practitioners. Precautionary measures are provisional procedural measures, with a right-restricting real nature, which aim at guaranteeing the repair of the damage caused by the crime, the execution of the fine, the injunction of the special seizure or the extended confiscation, as well as the guarantee of the payment of legal expenses generated by the conduct of a criminal judicial proceedings.

The need to analyse the institution of precautionary measures verification, as regulated in art. 250[2] CPP, comes on the one hand from the laconic way of drafting the text which creates application difficulties for the judicial bodies and on the other hand from the non-unitary present jurisprudence on this institution.

This paper will mainly address certain general issues about precautionary measures in the criminal trial, namely the conditions under which these preventive measures can be taken and the procedure provided by law, and then the current opinion of the courts on the nature of the terms in which they should carry out the procedure for verifying the precautionary measures by the judicial bodies, and whether or not a sanction is required in case of non-compliance with these terms as well as criticisms related to the practical way in which the juridical bodies understand the existence of the grounds requiring the maintenance of these measures during the course of the criminal trial.

Also, through this paper, we set out to highlight the ambiguities in the drafting of art. 250[2] CPP, which in its current form, creates practical problems, questioning the legislator's omission regarding certain important procedural aspects. Among these aspects, we are going to review the omission of the legislator to establish the maximum term until which the insurance measure must be verified in the preliminary chamber procedure and to propose by *de lege ferenda* the necessity of the legislator's intervention on the text provided by art. 250[2] CPP in the sense of establishing the term in which the verification of precautionary measures must be carried out during the preliminary chamber procedure, it being well known that there are cases in which the preliminary chamber proceedings extend over a longer period of time.

Also, after analysing the verification procedure as it is regulated by the provisions of art. 250[2] CPP case, we are going to discuss the need for the intervention of the legislator to clarify the norm in terms of establishing the consequences that may occur in the event of non-compliance with the deadline for the verification of

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precautionary measures. Although we are of the opinion that at this moment, there is a regulation in the Criminal Procedure Code of the consequence in case of non-compliance with the verification deadlines, it being expressly regulated by the provisions of art. 268 para. (2) CPP, nevertheless, considering the non-unitary practice in the matter, it is necessary that the legislator intervene in order to correct the provisions of art. 250^2 CPP, *i.e.,* by the express addition of the legal termination solution of the injunction measures.

The issue of the terms established by the legislator in the provisions of art. 250^2 CPP, for verifying the precautionary measures, is important from the viewpoint of art. 6 ECHR on the observance of the right to a fair trial and questions the existence of a legislative vacuum consisting in the absence of a rule expressly regulating the consequences that may arise if the precautionary measure established on a person's assets is not subject to verification by to the judicial bodies within the term established by the legislator, depending on the procedural phase of the case. Therefore, the simple regulation of a rule that only establishes the conduct of the judicial bodies to verify the precautionary measures within certain terms without expressly indicating what sanctions are ordered in case of non-compliance with the terms of 6 months or one year provided by the law, renders incomplete the rule set by art. 250^2 CPP and give rise to the legislator's obligation to intervene and complete this norm.

We appreciate that in the matter of precautionary measures, a review of the legal provisions is necessary, especially with regard to art. 250^2 CPP, so that this institution is adapted to the new aspects of judicial practice. The revision of the procedure for verifying the precautionary measures is necessary, given that they are measures triggering the restriction of certain fundamental rights, and thus, in order to guarantee compliance with all procedural guarantees, the law must be clear, predictable and provide the necessary levers so that the limitation brought by these measures does not become excessive, abusive and disproportionate.

The introduction of the provisions of art. 250^2 in the Criminal Procedure Code and the establishment of the mechanism for verifying precautionary measures was necessary. However, it seems that the application of these provisions in the criminal trial is more of a formality. This emerges from the current judicial practice. The mere fact of forwarding for debate of the parties the „maintenance" of the injunction measures without an effective analysis on the existence of the need to maintain them, makes this procedure ineffective for the purpose for which it was enacted. The verification involves a concrete, thorough and mandatory analysis for the judicial bodies. Any deviation from the legal method of carrying out this procedure results in violating certain rights of the persons against whom these measures were instituted, or this is not the purpose of the verification procedure introduced by the legislator.

2. Precautionary measures: conditions and procedure

Precautionary measures are regulated in the provisions of art. 249 *et seq.* CPP and represents the mechanism by which the prosecutor, the preliminary chamber judge or the court, ex officio or upon request, may order the non-disposal of the assets of the suspect, the defendant or the civilly responsible party in order to avoid concealment, destruction, alienation or evasion from prosecution of goods that may be subject to special seizure or extended confiscation or that may serve to guarantee the execution of the fine or legal expenses or the repair of the damage caused by the crime.

By their effect, the precautionary measures guarantee the execution of the patrimonial obligations arising from the resolution of the criminal action and the civil action within the criminal trial.[1] They do not imply the loss by the owner of the asset's property, but of the right of material and legal disposal over it.

CPP regulates three distinct categories of precautionary measures: the sequestration itself, the mortgage notation and the seizure measure. The last two are considered special forms of seizure. The purpose of the precautionary measures is the unavailability of both movable assets and of immovable assets.

The functionality of these measures is only precautionary and not reparative. The application of the measure does not automatically represent the coverage of the damage, the court must oblige by its order the coverage of the damage caused by the crime. For instance, the seizure report may not constitute a title by which the defendant could be prosecuted for the payment of civil damages [2].

[1] I. Neagu, M. Damaschin, *Treatise on criminal procedure. General part*, 3rd ed., revised and completed, Universul Juridic Publishing House, Bucharest, 2020, p. 721.

[2] *Idem*, p. 722.

From the analysis of the provisions of art. 249 CPP, a series of conditions regarding the taking of injunctive measures emerge: precautionary measures to guarantee the execution of the fine may only be taken on the assets of the suspect or the defendant, and in this case applies the principle according to which criminal liability is personal, or, in order to ensure the execution punishment, only the property of the person to be held criminally liable may be confiscated; the injunction measures ordered for special seizure or extended confiscation may be taken on the assets of the suspect, the defendant or the persons in whose ownership or possession the assets to be confiscated are located and the insurance measures instituted in order to guarantee the repair of the damage caused by the commission of the crime or to guarantee execution of judicial expenses may be ordered on the assets of the suspect, the defendant or the civilly responsible party only up to the concurrence of the probable value of the damage incurred and the expenses caused by the criminal trial.

As a rule, the precautionary measures are optional, the legislator establishing, in art. 249 para. (1) CPP, the possibility for the courts to assess in relation to all the data of the case if the establishment of these precautionary measures is justified and necessary. However, the provisions of art. 249 para. (7) CPP provide that the precautionary measures are mandatory if the injured party is a person without exercise capacity or with restricted exercise capacity. Also, certain normative acts regulate the obligation to take these precautionary measures. See in this regard Law no. 241/2005 on preventing and combating tax dodging[3] or Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption[4] which provide for the mandatory establishment of precautionary measures in the event of the commission of one of the deeds criminalised by these laws.

Taking precautionary measures is ordered during the criminal investigation, by the prosecutor, by justified ordinance, at the request or ex officio, in the preliminary chamber procedure by the preliminary chamber judge by conclusion and may be ordered ex officio, at the request of the prosecutor or the civil party cases as well as in the trial phase, by the court by conclusion, judgement or decision, ex officio, at the request of the prosecutor or the civil party.

The suspect, the defendant, the civilly responsible party and any other interested person may file an appeal against the decision to institute precautionary measures as well as against the way of carrying out these measures. The appeal against the prosecutor's ordinance may be introduced within 3 days from the date of notifying the order to take the measure or from the date of its implementation, to the judge of rights and freedoms from the court that would have the competence to judge the case for merits. The appeal is not suspensive of execution. The resolution of the appeal is done in the council chamber, with the summons of the person who formulated the appeal and the interested persons and with the mandatory participation of the prosecutor.

As for the conclusion by which a precautionary measure was ordered by the preliminary chamber judge, the trial court or the appellate court, the defendant, the prosecutor or any other interested person can file an appeal within 48 hours of the ruling or, as the case may be, from communication. The appeal is suspensive of execution, it is submitted to the first court or appellate court that issued the contested decision and is forwarded, together with the case file to the hierarchically superior court. The appeal is settled in a public hearing, with the participation of the prosecutor and with the summons of the defendant and the interested party who formulated it.

3. The procedure for verifying the precautionary measures

According to art. 250^2 CPP, „throughout the criminal trial, the prosecutor, the preliminary chamber judge or, as the case may be, the first court periodically checks, but no later than 6 months during the criminal investigation, or one year during the trial, if the grounds that determined taking or maintaining the precautionary measures, ordering, as the case may be, the maintenance, restriction or extension of the ordered measure, or the lifting of the ordered measures, the provisions of art. 250 and 250^1 applying accordingly."

This legal text was introduced into the Criminal Procedure Code by Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of consolidated cooperation regarding the establishment of the European Public Prosecutor's Office

[3] Published in Official Gazette of Romania no. 672/27.07.2005.
[4] Published in Official Gazette of Romania no. 219/18.05.2000.

(EPPO)[5]. Considering that the precautionary measures are not available for a certain period of time, as is the case with the precautionary measures, the legislator understood to establish also at the level of the precautionary measures the obligation of their periodic verification, in order to analyse by the judicial bodies whether the precautionary measures continue to be proportionate and they are still justified to be maintained as interferences in the fundamental rights of the person against whom they were instituted.

Therefore, from the provisions of art. 250^2 CPP, it appears that the prosecutor, the preliminary chamber judge as well as the court must carry out a check on the injunctive measures instituted on the assets of the suspect or the defendant, no later than 6 months during the criminal investigation, or one year during the trial in the sense of to analyse whether the reasons that determined the taking or maintaining of the precautionary measures still exist.

In this procedure, the existence of the grounds that led to the taking of these measures will be analysed by referring to new elements involved in the case and the proportionality of the measure will be examined considering the speed of the procedure, the length of time during which the goods were unavailable, maintaining the proportional nature of the interference in the exercise of the right of ownership.[6]

In this procedure, it is not possible to verify, in principle, whether the conditions stipulated by the law were met at the time of taking the protective measures, the judicial bodies will not analyse whether there were grounds that led to the taking of the precautionary measures, but only if they exist. This verification procedure cannot be interpreted as an appeal against the act by which these precautionary measures were established. By way of exception, certain illegalities existing at the time of the measures taking may be analysed, but only in the context where they have a flagrant character [7], for example the nature of the goods subject to precautionary measures can be questioned, *i.e.*, if an asset that cannot be the object of the precautionary measures or the quality of the person with respect to whom these measures were taken, for example, a injunctive measure may not be ordered to guarantee the punishment of the fine on the assets of persons who are not related to the criminal case, since the imposition of these measures has consideration of the principle of the personality of criminal liability, thus only the assets of persons likely to be criminally sanctioned with a criminal fine may be made unavailable.[8]

During the criminal investigation, the procedure for verifying the protective measures is non-contradictory, the prosecutor not having the obligation to summon the defendants or to hear them An appeal against the prosecutor's order can be made by the defendant or by any interested party, within 3 days from the date of communication of the order maintaining the measure. The appeal is settled by the judge of rights and liberties from the court that would have jurisdiction to judge the case on merits. The appeal will be resolved according to the provisions of art. 250 CPP. In the event that the prosecutor ordered the prosecution of the defendant before the resolution of the appeal against the order to maintain the protective measures, the provisions of art. 250 para. (5^1) CPP, otherwise the appeal will be resolved by the preliminary chamber judge.[9]

During the preliminary chamber procedure and in the trial phase, however, the procedure is adversarial, so the verification of precautionary measures will be discussed with the prosecutor, the civil party, other interested persons and the defendant. The court session will be held in the council chamber, if the case is in the preliminary chamber procedure, or in public session if the case is in the trial phase. On the verification of the precautionary measures, the court will issue a decision that may be challenged within 48 hours from the decision or, as the case may be, from communication. The appeal will be resolved within 5 days of registration.

As regards the procedure for verifying the precautionary measures and the competent body to carry it out in the hypothesis that the case is the appeal of the contestation against the conclusion of the preliminary chamber judge ordering the start of the trial or the return of the case to the prosecutor's office, there is no express regulation. However, in the literature[10] it has been appreciated that even in this situation incidents *mutatis mutandis* become considerations of dec. no. 5/2014, ruled by HCCJ in the resolution of an appeal in the interest of the law by which it was established that the preliminary chamber judge from the court seised by indictment, whose conclusion ordering the start of the trial was appealed, has the competence to rule on

[5] Published in Official Gazette of Romania no. 167/18.02.2021.
[6] A.V. Iugan , *Procedural measures* , C.H. Beck Publishing House, Bucharest, 2023, p. 322.
[7] *Ibidem.*
[8] M. Udroiu, *Synthesis of Criminal Procedure. General part*, C.H. Beck Publishing House, Bucharest, 2020, p. 1046-1047.
[9] A.V. Iugan, *op. cit.*, p. 318.
[10] *Ibidem*.

precautionary measures, according to the legal provisions that regulate precautionary measures in the preliminary chamber procedure, until the resolution of the appeal provided for by art. 347 CPP. Practically, applying *mutatis mutandis* this decision also in the matter of precautionary measures means that if the case is in the phase of appeal against the conclusion of the preliminary chamber judge and the verification of the precautionary measures is required, the verification procedure will have to be done by the judge from the Court notified with the indictment, namely from the Court on merits.

4. The deadlines for carrying out the procedure for verifying the precautionary measures

An important practical problem is the analysis of the nature of the terms provided by the provisions of art. 250^2 CPP, namely the terms of 6 months and one year in which the judicial bodies must order the verification of the precautionary measures and the sanction that is applied in case of exceeding these terms. As shown in the previous sections, when it comes to the deadlines for verifying the precautionary measures and the sanction that occurs if these deadlines are exceeded, the judicial practice is non-uniform, the Courts` ruling on this aspect in different ways.

According to art. 250^2 CPP case, the verification of precautionary measures is done periodically, but no later than in 6 months in the criminal investigation, and one year during the trial. From the analysis and interpretation of this legal text, it follows that the prosecutor is obliged to carry out the procedure for verifying the precautionary measures no later than 6 months from the date on which they were instituted and the court will set a deadline for verifying the precautionary measures not later than a year. As for the preliminary chamber, the provisions of art. 250^2 CPP does not regulate what the verification term would be. We appreciate that in this procedure as well a deadline for verifying the precautionary measures should be established, especially given that the preliminary chamber procedure extends over a long period of time and in the context in which there are doctrinal opinions that qualify the preliminary chamber as a phase distinct part of the criminal trial and not a stage specific to the trial phase, to which the same verification period, *i.e.*, one year, should be applied.

But what happens when the precautionary measures are not verified by the judicial bodies within these terms? The provisions of art. 250^2 CPP does not regulate either the sanction that would occur in case of exceeding the deadlines in which the verification of the security measures must be carried out.

In the absence of an express regulation in the matter of precautionary measures regarding the incidental sanction in case of non-compliance with the verification deadlines, we appreciate that the provisions in this matter must be compulsorily corroborated with the provisions of art. 268 CPP and if the judicial bodies would exceed the deadlines provided by the legislator for the verification of precautionary measures, their omission would have the effect of the direct application of the provisions of art. 268 para. (2) CPP, namely to state that the precautionary measure has ceased by law.

The direct application of the provisions of art. 268 para. (2) CPP was also the solution ruled by certain courts. Thus, in judicial practice[11] it was noted: *«The provisions of art. 268 para. (2) CPP shows that when a procedural measure may only be taken for a certain period of time, the expiration of this term automatically causes the measure to cease to be effective. Even if in the regulation art. 249 et seq. CPP there is no explicit mention of the type „the precautionary measure is taken for a duration of", from the very obligation of its verification "no later than" the clear intention of the legislator that the preventive measure is taken or maintained only for a certain limited period emerges.»*

Also in judicial practice, one raised the issue of the need to qualify the nature of the terms provided for by art. 250^2 CPP, namely if they are substantive terms or procedural terms. In this sense, it was appreciated that the substantive terms are those that protect rights, prerogatives and extra-procedural interests, pre-existing to the criminal trial and independent of it, limiting the duration of certain measures or conditioning the performance of acts or the promotion of actions that would annihilate a right or an extra-procedural interest . Unlike the substantive deadlines, procedural deadlines are the deadlines that protect the procedural rights and interests of the participants in the criminal trial and contribute to the discipline and systematisation of the procedural activity in order to ensure the timely and just achievement of the purpose of the criminal trial. Or, considering that in the matter of precautionary measures, it is about the protection of pre-existing extra-procedural rights, it was assessed that the maximum terms of 6 months and 1 year, within which the precautionary measure must be

[11] HCCJ, crim. s., crim. dec. no. 547/20.09.2022, *www.scj.ro*, last time consulted on 16.03.2024.

checked, are substantial terms, and the expiry of the substantial terms attracts a specific sanction, *i.e.,* legal termination [12].

In judicial practice as well, there were also courts which appreciated that the terms provided by the provisions of art. 250^2 CPP are recommendation terms and would not attract the sanction of legal termination of injunction measures.

In support of this opinion, one started from the fact that the legislator did not foresee a procedural sanction in the case of the judicial body remaining inactive or exceeding the deadline. The explanation lies in the fact that it is a term of procedure, of recommendation, which may be used by procedural subjects and judicial bodies according to the legitimate individual or general interest or of the criminal trial, but the possible sanctions are extra-procedural . At the same time, it was also appreciated that, unlike the regulation in the matter of preventive measures, evoked in support of the legal termination solution, in the case of which art. 241 CPP expressly establishes the situations of termination by law, such a regulation is not found regarding precautionary measures. In the court's opinion, the legal solution of applying this text by analogy in the case of precautionary measures cannot be accepted, since the legal terms have distinct legal natures (procedural terms in the case of precautionary measures and substantive terms in the case of preventive measures).[13]

Furthermore, in the opinion of those who qualify the terms provided by art. 250^2 CPP as recommendation terms, it is also taken into account the fact that art. 241 CPP does not contain a rule of principle, a norm of a general nature that could become applicable to the analysed hypothesis, but represents a special norm, whose sphere of incidence is clearly defined in its very content, being thus of strict interpretation and application - *specialia generalibus derogant*. An interpretation by analogy implies the extension of the solution in similar matters that do not benefit from express regulation, where the law is silent, and not in hypotheses for which the legislators themselves evaluated the solutions, within distinct regulations. In the case of precautionary measures, the law wording expressly provides the solutions, art. 250^2 CPP listing only the maintenance, restriction, extension or lifting of the preventive measure, not the legal termination.

As regards the nature of the terms established by the provisions of art. 250^2 CPP, important are also the issues discussed during the meeting of the chief prosecutors of the criminal and judicial investigation section of the PICCJ - DNA, DIICOT and the prosecutor's offices within to the appellate courts [14] where it was concluded that *„it is difficult to accepted that, by legally establishing this maximum term, the legislator would have aimed for it to be only a recommendation and that exceeding it would remain without any consequences regarding the precautionary measure; it is not a simple term to speed up the procedures, but one that protects substantive rights among the fundamental ones, so that the protection must be concretized by considering that upon the expiration of this maximum legal duration, in the absence of a provision to maintain the measure, it ceases by law. However, the legal text is obviously unconstitutional due to the lack of any provision regarding the consequence of exceeding the maximum duration. Therefore, the appropriateness of raising an exception of unconstitutionality must be analysed."*

As far as we are concerned, we appreciate that the terms provided by art. 250^2 CPP are not recommended terms, they are substantive terms and exceeding these terms cannot be without sanction. The fact that the legislator did not provide in the newly introduced legal text a sanction for non-compliance with these deadlines does not grant them the nature of recommendation deadlines. The fact that they cannot be qualified as recommendation deadlines results from the wording of the text, from which it follows that *„one **checks** periodically **but no later** than 6 months during the criminal investigation, and one year during the trial".* So the terms used „checks" and „no later than" establish an obligation and not a possibility/ a faculty /a recommendation. The legislator established an imperative deadline, the non-verification of precautionary measures within this deadline having as *ope legis* effect the termination of these measures.

Moreover, we appreciate that in the matter of precautionary measures also we should take into account the considerations of the HCCJ RIL dec. no. 7/2006, pronounced in the matter of preventive measures[15] according to which *„In the light of the constitutional provisions and the international regulations to which reference was made, these mandatory provisions of the Criminal Procedure Code require strict compliance with the deadlines*

[12] CA Bucharest, dec. no. 440/19.09.2023 and Conclusion no. 271 of 16.05.2023, *www.rejust.ro*, last time consulted on 16.03.2024.

[13] HCCJ, dec. no. 209/30.03.2022, *www.scj.ro*, last time consulted on 16.03.2024.

[14] Minutes of the non-unitary practice meeting at the national level - prosecutors, Bucharest, May 27-28, 2021, p. 61-62, *www.inm-lex.ro*, last time consulted on 16.03.2024.

[15] Published in the Official Gazette of Romania, Part I, no. 475/01.06.2006.

for verifying the legality and validity of the preventive incarceration measures during the trial, because otherwise there would be no guarantee that deprivation of liberty may only take place under the conditions determined by law". Or, on the same reasoning as that considered by the supreme court in the matter of preventive measures, we appreciate that the norm established by the provisions of art. 250^2 CPP is an imperative norm, as it results from its wording and from the terms used by the legislator, and the non-verification within the established terms of the precautionary measures would disregard man's fundamental guarantees, such as the observance of the right to property which may be limited only in the conditions determined by law.

The legal nature of these terms is given by the purpose of the regulation, art. 250^2 CPP being introduced for disciplining and systematising the procedural activity regarding precautionary measures. The legislator reflected on these terms considering the need to respect the proportional character of the measure in relation to the duration and evolution of the procedure. The rationale for establishing the obligation through the phrase „no later than" was precisely that of eliminating arbitrariness as regards the indefinite maintenance of a right-restricting measure. Therefore, these terms cannot be qualified as mere recommendations and cannot go beyond the purpose intended by the legislator, namely preventing the accused from using their assets, in order to avoid the imposition of an excessive individual burden.

We agree that the current regulation of art. 250^2 CPP is unclear and one should intervene precisely because there is a non-uniform practice in terms of how this text is applied by the judicial bodies; however, we appreciate that the legislator has directly outlined certain aspects that, when combined, can give a solution to this non-unitary practice, as follows:

First of all, from the text of art. 250^2 CPP law the obligation results to verify the precautionary measures within the terms established by the legislator, this obligation being highlighted by the phrase „no later than".

Secondly, given the obligation established by the legislator and the nature of the precautionary measures as measures restricting rights, we believe that the mere corroboration of the provisions of art. 250^2 CPP with the provisions of art. 268 para. (2) CPP, provisions regarding deadlines, can clarify the situation of the sanction and the solution that would be imposed in the event that the injunction measures were not verified within the deadlines provided by the legislator.

Last but not lease, we consider that the very fact that the legislator wanted to regulate at the level of precautionary measures also, similar to the matter of preventive measures, the institution of verification, proves the fact that the legislator was primarily concerned with respecting the proportionality of the duration of the precautionary measure with the restriction of the right to property and put at the disposal of the persons against whom these measures were instituted the necessary levers for the defence of their property right, so that one can discuss, within the established terms, whether or not such interference with these rights is still justified. Therefore, the assessment that the verification terms would be mere recommendation terms only would disregard the legislator's intention.

On the same note, by dec. no. 24/26.01.2016[16], CCR retained that, in the absence of ensuring effective judicial control over the measure of making assets unavailable during a criminal trial, the state does not fulfil its constitutional obligation to guarantee the private property of the natural/legal person.

5. The condition of proportionality of precautionary measures

According to the provisions of art. 250^2 CPP, the Court charged with verifying the precautionary measures will check whether the reasons that determined the taking or maintaining of the precautionary measures still exist and will examine the proportional character of the interference in the exercise of the right to property.

By dec. no. 19/2017[17], pronounced by HCCJ in an appeal in the interest of the law, the Supreme Court showed that *„the institution of a precautionary measure obliges the judicial body to establish a reasonable ratio of proportionality between the purpose for which the measure was ordered (for example, in order to seize assets), as a way of ensuring the general interest, and the protection of the accused persons' right to use their assets, in order to avoid imposing an excessive individual burden"*. With regard to the proportionality between the purpose pursued when establishing the measure and the restriction of the accused person's rights, it was assessed that this *„must be ensured regardless of how the legislator assessed the necessity of ordering the seizure, as arising from the law or as being left to the discretion of the judge. The condition follows both from art. 1 of the*

[16] Published in Official Gazette of Romania no. 276/12.04.2016.
[17] *www.scj.ro*, last time consulted on 11.03.2024.

First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms, as well as from art. 53 para. (2) of the Constitution of Romania, republished (the measure must be proportional to the situation that determined it, to be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom)".

Therefore, one of the important aspects that must be taken into account by the Court in the procedure in which the precautionary measures are verified is to analyse whether the maintenance of the precautionary measures still meets the proportionality conditions at the time when the judicial body performs the verification. The judicial bodies must take into account and respect the proportionality test so that the measure, by its duration and purpose, does not turn with the passage of time into an excessive burden for the person whose assets were made unavailable [18].

In the procedure of precautionary measures verification, the solution of lifting precautionary measures must be possible and considered by the court when **the effective duration of this measure is excessively long, in relation to the duration and evolution of the procedure and the consequences it triggers exceed the normal effects of such a measure** .

In judicial practice, the analysis of the existence of the measure proportionality and the existence of the grounds that lay at the basis at the establishment of these measures has become more of a formality, especially in cases where deeds provided for in special laws that require the mandatory taking of precautionary measures are investigated.

In a case pending before the CA Bucharest[19], the Court admitted the appeal filed by the defendants against the conclusion by which the precautionary measure was maintained in the procedure provided by art. 250^2 CPP, annulled the contested conclusion and ordered the case to be re-tried because the court on merits did not proceed with an effective verification of the precautionary measures instituted on the defendants' assets, it did not effectively analyse whether the grounds that determined the adoption or maintenance of the precautionary measure still exist. In this regard, the judicial review court held that *„the assertion of the trial court regarding the proportionality of the measure with respect to the intended purpose (...) presents a degree of generality that does not allow the judicial review court to discern what the actual arguments were in relation to which the court made this statement*" and that *„the examination of proportionality presupposes, first of all, that the court must make sure that the value of the seized goods does not significantly exceed the value of the damage attributed to the person concerned"*.

Analysing the manner in which the first court on merits applied the provisions of art. 250^2 CPP, the Court found that *„the first court on merits did not carry out any concrete analysis on the approximate value of the assets subject to the precautionary measure in order to assess whether the restriction of the value up to the level for which the precautionary measure was taken on all the assets initially subject to the sequestration, especially in the circumstances in which the goods are immovable located in the Municipality of Bucharest and in the Ilfov County, and may have significant values that, added up, substantially exceed the alleged damage in the case",* and continued *„the same assets were subject to precautionary measures both for a prejudice of 3,895,590 lei and for a prejudice of 2,324,377 lei"*.

In the same case, in a second procedural cycle, in the retrial of the case after the annulment, the Court [20], analysing the appeal against the conclusion by which the precautionary measures were maintained by the Bucharest Trib. in the retrial, found again that the court checked only formally whether the grounds still exist that led to the taking of precautionary measures, considering that *„although in the disputed conclusion the Tribunal analysed aspects regarding the fulfilment of the legal conditions to order the maintenance of precautionary measures, it analysed only formally the proportionality of the measure with respect to the intended purpose"* and that *"the valuation of the assets imposes with regard to the proportionality of the measure, since in the case, given the fact that at the time of taking the injunction measure the damage was estimated at the amount of 3,895,590 lei, later being reduced to the amount of 2,324,377 lei, it could be an excessive discrepancy between the value of the presumptive damage and the value of the assets made unavailable"*.

Concluding on the aspects identified in the judicial practice, we find that at the level of the courts, the procedure for verifying the precautionary measures does not achieve the purpose for which it was introduced in

[18] ECtHR, Case *Forminster Entreprises Limited v. the Czech Republic*, judgment from 09.01.2008, *www.hudoc.echr.coe.int.ro*, last time consulted on 16.03.2024.

[19] CA Bucharest, crim. s., crim. dec. no. 26/CO/18.01.2023, unpublished.

[20] CA Bucharest, crim. s., crim. dec. no. 492/CO/17.10.2023, unpublished.

the provisions of the Criminal Procedure Code. In the exposed case, there was no effective verification of the precautionary measures imposed on the defendants, the solution to maintain the injunction measures being ordered based on a general conclusion such as *„the court considers that the precautionary measures ordered in the case would be proportionate to the purpose pursued by their establishment"* without mentioning the criteria and the reasons on the basis of which this reasoning was built, should also be pointed out in the content of the decision. The need to understand the purpose for which this verification procedure was introduced is important and must be kept in mind by judicial bodies. The legislator sought to regulate a procedure intended to reanalyse aspects that have the effect of restricting/limiting certain fundamental rights, as through the establishment of precautionary measures the right to property is restricted.

Or, in the *supra* case, it was proven that this purpose was not taken into account by the court, given that: a) the precautionary measures were instituted on the defendants as early as 2017, an aspect that required the analysis of proportionality in relation to the period in which the assets were unavailable; b) the assets that are subject to the precautionary measures are immovable property, which at the time of the verification exceeded by far the value of the estimated damage in question, which required at least a solution to restrict the protective measures, and c) the value of the imputed prejudice gave rise to real debates, since one started from the premise that the damage would be 3,895,590 lei, but after returning the case to the prosecutor's office motivated by the lack of clarity of the accusations in terms of the damage, it was valued at 2,324,377 lei.

Another important aspect encountered in the judicial practice is constituted by the solutions ruled by the courts in the procedure of verifying the precautionary measures in the cases in which the deeds provided for in the special laws that impose the obligation to take the precautionary measures, for example Law no. 241/2005 on preventing and combating tax dodging[21] or Law no. 78/2000 for the prevention, detection and sanctioning of corruption deeds [22].

In these cases, often the solutions provided are to maintain the precautionary measures, the motivation being given by the fact that they are mandatory according to the law. We consider that such a motivation disregards the rationale of the legislator considered at the time of the introduction of art. 250^2 in the Criminal Procedure Code. In this case, if we had as premise exclusively the fact that the precautionary measures are mandatory because they are provided by law, we would leave without effect a legal provision, namely art. 250^2 CPP and we would create a difference of treatment among those who have instituted precautionary measures, which contravenes the right to a fair trial. In addition, it should be borne in mind that the provisions of art. 250^2 CPP were introduced in the said Code l by Law no. 6/2021, so after Law no. 78/2000 or Law no. 241/2005, the latter were not adapted to the changes brought to the Criminal Procedure Code, as the provisions of these laws have not been reanalysed also through the prism of introducing a procedure for their verification in the matter of precautionary measures.

In this situation, we reckon that the proportionality of the measure must be analysed regardless of whether the measure is mandatory or not. Any other interpretation would invalidate a legal norm, and this may only be done under the conditions expressly provided by law. This being the case, we appreciate that it is necessary for the legislator to intervene in order to clarify the rules in the matter of precautionary measures.

6. Conclusions

The procedure of verifying precautionary measures raises extensive and important debates. The manner in which this procedure is regulated triggers discussions in judicial practice, the non-unitary jurisprudence being obvious on certain issues with an essential aspect in carrying out the verification procedure by the judicial bodies. As we have shown, the provisions of art. 250^2 CPP lack accessibility and predictability. Although the purpose of establishing this procedure for verifying precautionary measures, similar to preventive measures, is clear, the legislator's intention to protect fundamental human rights being obvious, the nevertheless the frame drawn by the legislator, the conditions for effective verification and the method of applying this procedure are not clear, such a lack of clarity having the effect of diametrically opposed solutions or procedures.

We consider that the intervention of the legislator is necessary to clarify the way of applying this procedure, and the important aspects that should be addressed have been pointed out in this article. The importance of establishing certain essential conditions in this procedure would clarify the contradictory aspects faced by the

[21] Published in the Official Gazette of Romania no. 672/27.07.2005.
[22] Published in the Official Gazette of Romania no. 219/18.05.2000.

practitioners in the field of criminal law but also the persons directly involved, namely those against whom these right-restrictive measures are instituted.

We still maintain the importance of this procedure's existence in the current regulation. But a simple regulation in the Criminal Procedure Code is not enough, it is necessary for this regulation to be clear, to establish a complete procedure, with all the conditions that should be taken into account by the judicial bodies. A norm that establishes a certain conduct/rule, especially in the matter of measures restricting rights, must not have gaps, any gap in the application of a legal provision affects the rights of the person against whom it should be applied.

At this moment, the provisions of art. 250^2 CPP do not have the capacity to confer security to the legal relationship they regulate. The reality of this fact is proved by the judicial practice, which is non-unitary, contradictory and creates an imbalance in the matter of the solutions that may be ordered in the procedure of verifying the precautionary measures.

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TO THE CLASSIFICATION OF THE POWERS OF THE APPELLATE COURT ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE

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Abstract

The paper examines the essence of the appellate court as a controlling judicial instance and clarifies the basic principle according to which the appellate court works and issues judicial acts. Based on this, a check was made to match the nature of the appellate court proceedings with the nature of the classification of his powers as proposed in art. 334 of the Bulgarian Criminal Procedure Code. At the end of the paper, a new classification of his powers, compatible with the nature of appellate judicial review, was developed.

Keywords: *court, review, trial, sentence, accused party, prosecutor, judicial powers.*

1. Introduction

This report is related to the clarification of the meaning and application of significant norms of the Criminal Procedure Code of Republic of Bulgaria. The word is about important texts that outline the type and arrangement of the powers of the appellate court, as well as the cases in which they should be exercised. The aim is to ensure without problem understanding and application of art. 334, art. 335, art. 336 and art. 337 of the Bulgarian Criminal Procedure Code. This is of essential importance both for the rights of citizens and for the full adaptation of the intended legal norms to the spirit of the control judicial proceedings themselves. Here, normative resolutions of problems are proposed in accordance with the philosophy of second-instance judicial proceedings and with the need to preserve „by all means" the role of the appellate court as a full-fledged guarantee against procedural error in criminal proceedings. It necessarily follows that the report recommends and insists on the principled compatibility of the appellate proceedings, both with Chapter Two of the Code and with the tasks of criminal proceedings. Only with such compatibility a fair trial can be ensured and citizens' confidence can be strengthened in the judiciary in the Republic of Bulgaria.

2. Paper content

Before considering the powers of the appellate court, it is appropriate to point out that the appellate proceedings are an important guarantee of both the public and the private interest in the criminal process, since both interests require the correct decision of the criminal case. The appellate proceedings provide precisely this opportunity, as it is controlling in its legal nature and is aimed at eliminating vicious judicial acts from the legal world. The verification of the correctness of an act issued by the first judicial instance before a higher instance, and more precisely before the next judicial instance, is also denoted by the word combination - appellate review.

Before the court of second instance are attacked, *i.e.,* appeal and protest not entered into force judicial acts of the court of first instance. More specifically, the appellate court verifies the correctness of the judgments issued by the court of first instance in criminal cases of a general and private nature - art. 313 of the Bulgarian Criminal Procedure Code. Validation is performed in three directions.

Firstly, the contested judgment is examined for legality. The appellate court verifies whether the sentence rendered complies with the material and procedural law applicable to the case, and also whether the criminal proceedings themselves were conducted in accordance with the requirements of the law.

Secondly, the assailed judgment is examined for reasonableness. This means that the appellate court checks whether the facts accepted as established by the verdict correspond to the evidence and means of proof in the case. The appellate court answers the question of whether there is an overlap between the factual conclusions of the judge and the evidentiary material from which they are drawn.

Thirdly, it is checked whether the sentence passed is fair. The appellate court reviews the penalty imposed by the verdict. The review concerns the individualization of punishment, *i.e.*, the control includes the manner in

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which the court of first instance has determined the type and amount of punishment according to the degree of public danger of the act and of the perpetrator in the specific criminal proceedings.

It is important to note that, according to the Bulgarian law, the appellate court makes a comprehensive review of the contested sentence, regardless of the grounds on which it was appealed. What's more, the intermediate appellate review instance shall also revoke or modify the sentence in the section that has not been appealed, as well as with respect to the persons who have not filed an appeal, if there are grounds therefore. Proceedings before the intermediate appellate review instance shall be instituted by protest of the prosecutor or by appeal of the parties (the accused party, the victim and their defenders). Appeals and protests shall be filed within 15 days after the announcement of the sentence. Appeals and protests shall be filed through the court which has pronounced the sentence - art. 319 of the Bulgarian Criminal Procedure Code.

The control proceedings commented here are most significant for the rights of citizens in view of the so-called the revision for correct on the non-enforced first-instance verdicts according to the operation of the appellate principle. According to this principle, the verdicts are checked for the presence of defects, the removal of which is imperative to reach a lawful and fair administration of justice in the country. Georgi Mitov successfully notes that the Bulgarian: „appellate review of the sentence has a complex nature. It combines within itself judicial control over the activity of the court of first instance and the rendered judicial act with a specific form of examination and decision of the case on its merits. In other words, the appeal is a manifestation of judicial control over the sentence and the administration of justice"[1] In this sense, our appellate proceedings constitute a „second - first instance"[2] on the merits of the criminal case. The appellate court can therefore rule anew and in a different sense on the questions of guilt and criminal responsibility of the defendant. He can re-decide the case by convicting an acquitted or acquitting a convicted.

Another distinctive feature of the Bulgarian appellate proceedings, as it became clear above, is the effect of the prohibition on worsening the situation of the accused party (*non reformatio in peius*). This prohibition, as generally noted in the theory, provides the defendant with peace of mind on appeal and prohibits the court from aggravating his situation unless there is an accompanying protest by the prosecutor or an accompanying complaint by the private complainant or private prosecutor.[3] When aggravation of the defendant's position is sought by the appellate court, the protest and appeal must be relevant, *i.e.*, to contain an express request for that - art. 335, para. (4) and art. 336, art. 337 para. (2) of the Bulgarian Criminal Procedure Code.

In case of need, the appellate court can make a factual determination in the case (art. 332 in conjunction with art. 315 of the Bulgarian Criminal Procedure Code), this follows from the principle that it can decide the criminal case on its merits. For this purpose, the appellate court is unrestricted in its review, it fully checks the correctness of the verdict, regardless of the reasons given by the parties. The main view that I seek to share with the report is precisely that the powers of the appellate court and their arrangement in law should be marked by the operation of the appellate principle. In other words, from the position of the appellate court of „second-first instance". Has this been achieved at the normative level?

When analysing the provisions of chapter Twenty-one of the code, it is inevitable not to undergo a teleological and systematic interpretation of art. 334 of the Bulgarian Criminal Procedure Code. The purpose of the law is an attribute of the law itself.[4] Law as an organised system has a certain direction conditioned by the achievement of significant social results. It can even be assumed that „law is a means of achieving certain social goals by legal means"[5] As for the *ratio legis* inserted in the appellate proceedings, it should be specified that it must be discovered and deduced through interpretation by the interpreter, because it is nowhere specifically indicated by the legislator. In this sense, jointly interpreting the provisions of section one of chapter Twenty-one of the Bulgarian Criminal Procedure Code, the purpose of the appellate procedure is to serve as a tool to ensure that in the social community, criminal law cases will be resolved, solely and only with the help of effective correct criminal convictions. Therefore, the legislator proceeds from the understanding that the work of the first instance court includes the possibility of making a procedural error and, in view of this, it is necessary to provide control judicial proceedings for its possible establishment and elimination. The results of social practice show, not only that a mistake can be made in the decision of the case by the first court instance, but that a mistake is too often

[1] Г. Митов, *Въззивно производство по наказателни дела*, Изд. „Сиби", Sofia, 2016, p. 41.
[2] *Idem,* p. 42.
[3] *Idem,* p. 46.
[4] Р. Ташев, *Теория на тълкуването*, Изд. „Сиби", Sofia, 2000, p. 234.
[5] *Idem*, p. 234-235.

made. This is what G. Mitov also observed: „the appeal aims at legal peace so that an incorrect and illegal judicial act does not remain. We cannot accept that the purpose of the appeal is to set aside or modify the first instance judgment. Unfortunately, in practice, this is often the case - in a significant number of appealed cases, the result is exactly this - the attacked act is amended or cancelled"[6]. The appellate court is the „guardian" of the correct decision of the case. It is designed as a „second-first" instance in essence and last instance on the facts of the case, namely, in order to be able to really and effectively reach the undesirable but often admitted procedural error by the court of first instance. It is not argued here that mistakes are made in all first-instance cases in the country, or that the error of the first instance must necessarily be expected by litigants and citizens, but that such mistakes are often made, and that the powers of the appellate court must be adapted to this circumstance. Is it so *de lege lata*?

This question should be answered in negative. The arrangement of the powers of the appellate court is not in line with either the purpose of the appellate proceedings or the results of social practice.

According to art. 334 of the Bulgarian Criminal Procedure Code: the intermediate appellate review court may:

1. revoke the sentence and return the case for another examination by the first-instance court;
2. revoke the first-instance court sentence and issue a new sentence;
3. modify the first-instance sentence;
4. rescind the sentence and terminate criminal proceedings in cases under art. 24 para. (1) items 2 to 8a and 10 and para. (5);
5. suspend criminal proceedings in cases under art. 25;
6. confirm the first-instance sentence.

From the gradation of the powers of the appellate court two things immediately make an impression:

- firstly, the legislator places as the most important (begins with) a power that is not distinctive for appellate proceedings. Revoke of the sentence and return of the case for a new trial is a typical control-revocation power and is characteristic of the cassation proceedings. It is reasonable from the point of view of the purpose of the law to impose as leading the powers to set aside the first-instance judgment and decide the case on the merits, as well as that of amending the first-instance judgment;
- secondly, the legislator unjustifiably puts the suspension and termination of the criminal proceedings before the confirmation of the first-instance sentence, as if they were more frequently advocated hypotheses in social practice. Thus, it is hardly indicated to the law enforcers that the confirmation of the first-instance judgment is the most distant, the rarest, the most unacceptable and the most extreme procedural possibility. The appellate court affirms only if there is nothing else to do in the case - it is baseless!

According to the above arguments, it is imperative that the powers of the appellate court should be preserved, but rearranged in order of importance. Their rearrangement should also be guided by the results of the systematic interpretation of all provisions of the appellate procedure. This means that the new enumeration of the appellate court's powers should be guided by the fact that the appellate court is an instance that can conduct fact-finding and decide the case on its merits.

I propose the following *de lege ferenda* amendment to art. 334 of the Bulgarian Criminal Procedure Code. The intermediate appellate review court may:

1. revoke the first-instance court sentence and issue a new sentence;
2. modify the first-instance sentence;
3. confirm the first-instance sentence;
4. revoke the sentence and return the case for another examination by the first-instance court;
5. rescind the sentence and terminate criminal proceedings in cases under art. 24 para. (1) items 2 to 8a and 10 and para. (5) of the Bulgarian Criminal Procedure Code;
6. suspend criminal proceedings in cases under art. 25 of the Bulgarian Criminal Procedure Code.

The proposed new arrangement of the powers of the appellate court is already in line with the purpose of the proceedings itself and ultimately with the spirit of art. 338 of the Bulgarian Criminal Procedure Code, according to which the appellate court confirms the sentence only when it finds that there are no grounds for its cancellation or amendment.

[6] Г. Митов, *op. cit.*, p. 182.

A proposal to amend the law must also be made in accordance with art. 335 of the Bulgarian Criminal Procedure Code. As a starting point for this undertaking art. 335 para. (3) of the Code will be used.

According to art. 335 para. (3) of the Bulgarian Criminal Procedure Code: „in cases under art. 348 para. (3) the appellate court shall revoke the sentence and remit the case to the first instance, unless it can itself eliminate the violations allowed or these might not be avoided in a new examination of the case". This refers to the cases where an appellate review is reached a second time in the same case. Then, in order to achieve procedural economy and speed, the legislator prescribes an obligation for the appellate court to decide the case on its merits, *i.e.*, the appellate court decides the case instead of returning it a second time to the trial court for decision. In art. 335 para. (3) of the Bulgarian Criminal Procedure Code, an internal reference is made to paragraph 2, and no such reference is made to paragraph 1 of the same article. Should such a reference be made?

From the strict interpretation of art. 335 para. (3) of the Bulgarian Criminal Procedure Code comes to the conclusion that the cases referred to in art. 335 para. (1) of the Bulgarian Criminal Procedure Code do not fall within its scope. Therefore, when the conditions of paragraph 1 are present again, the appellate court can return the case instead of deciding it on its merits. In art. 335 para. (1) of the Bulgarian Criminal Procedure Code indicates a case where the appellate court revokes the sentence and sends the case to the prosecutor. From art. 335 para. (3) of the Bulgarian Criminal Procedure Code, the appellate court has no obligation to decide the case on its merits if it comes to the conclusion a second time that the case should be returned to the prosecutor. Such an obligation exists only if the case has to be returned a second time to the court of first instance. The problem is not in the dual application of the authority to cancel and return the case for a new trial, but in the fact that art. 335 para. (2) of the Bulgarian Criminal Procedure Code demanded the cancellation of the sentence and the return of the case for a new trial to the court of first instance due to significant violations of the procedural rules. The revoke of the sentence and the return of the case in the sense of art. 335 para. (1) of the Bulgarian Criminal Procedure Code is because of the finding of the appellate court that the crime for which the proceedings were initiated on the complaint of the private complainant is of a public nature. The return of the case to the prosecutor is due to mistakes made in the qualification of the crime, and not due to significant violations of the procedural rules. Probably for this reason, para. (1) of art. 335 is excluded from the scope of art. 335 para. (3) of the Code. Whether this is an accidental act of the legislator or his well-thought-out action remains a mystery, because he has nowhere indicated that the ground for cancellation of the sentence is the violation of the substantive law contained in it (wrong legal qualification of the act), as well as themselves the duties of the prosecutor after receiving the returned case. Any mandatory instruction of the court to the prosecutor regarding the legal qualification applicable to the case is a form of interference in the prosecutorial function. Thus, from the analysis of art. 335 para. (3) of the Code, it is concluded that it is correct, para. (1) of art. 335 to be dropped, instead of being included in the content of art. 335 para. (3) of the Bulgarian Criminal Procedure Code. Georgi Mitov is of a similar opinion: „(…) there are no grounds for the appellate court to cancel the contested judicial act and return the case for a new examination. Establishing a different nature of the crime is related to the application and interpretation of the substantive law. In the specific case, the finding by the appellate court of the fact that the crime, subject of consideration in the proceedings, which is based on the victim's complaint, is of a general nature, goes beyond the application and interpretation of the substantive law and has significant procedural consequences with a change in the nature of the order of examination of the criminal case... the possibility of the court to return the case to the prosecutor upon establishing a change in the nature of the crime subject of the proceedings, *de lege ferenda* should be an independent power, which is specified in a separate text".[7]

In view of the frequency of application in practice and discussion in theory of art. 336 para. (1) item 1 of the Bulgarian Criminal Procedure Code, and for its qualitative distinction from art. 337 para. (1) item 2 of the same Code, it is important to provide for an explicit legislative distinction between these two cases of deterioration of the situation of the defendant by the appellate court. This can happen satisfactorily with the development of a definite legal norm in which to define the concept of „the law for a more heavily punishable crime" and to list, for example, its most typical manifestations. This will bring clarity to the exercise of individual powers by the appellate court, as well as the possibility of relating by analogy other similar factual cases under the hypothesis of art. 336 para. (1) item 1 of the Bulgarian Criminal Procedure Code, which will significantly ease the work of the parties in the case! The general beneficial result would be to limit the possibility of making a

[7] *Idem*, p. 246-247.

procedural error in the case! Nowadays it is minimised through theory. It is there that the concept of „more heavily punishable crime" is associated with a mistake made in the qualification of the crime, while „increasing the amount of punishment" is associated with a mistake made in the individualization of criminal responsibility. In the first case, the appellate court corrects the error by applying a law with a more severe legal qualification, if there was an accusation of this in the first court instance. In the second case, the appellate court corrects the error by maintaining the qualification given in the case and increasing the criminal liability of the defendant.

Moreover, the adoption of a definitive legal norm to describe and distinguish the content of the concepts: „a law providing for equally or for same crime" will also have a positive impact on legal practice - art. 337 para. (1) item 2 of the Bulgarian Criminal Procedure Code. Currently, the distinction between the cited terms in practice is achieved by using the most general standards developed for this purpose in theory. For example, the „same punishable crime" is present when, in the case, the appellate court has to classify the crime under another component of the same crime or under the same component of the crime, but with an insignificant change of the facts of the accusation. The term „equally punishable crime law" refers to the cases when the appellate court misrepresents the facts relevant to the case under a new crime category (qualification), different from the previous one, as the punishment for both categories is the same.[8]

3. Conclusions

In conclusion, with the problems outlined above in the formulation and application of art. 334, art. 336 and art. 337 para. (1) item 2 of the Bulgarian Criminal Procedure Code sought to confirm the view that the appellate court should function as a „second-first" court with clear and logically distributed procedural authority. With the permissions and recommendations proposed in the report, the provisions of the appellate proceedings become more precise and more applicable, both for the competent state authorities and for the citizens of the Republic of Bulgaria.

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[8] *Idem*, p. 203.

SOME ASPECTS OF COMPARATIVE LAW REGARDING CHILD PSEUDOPORNOGRAPHY AND VIRTUAL CHILD PORNOGRAPHY

Bogdan NICULESCU[*]

Abstract

The present study aims to bring to the fore domestic law provisions and their interpretation in national judicial practice in four (4) countries with a long democratic tradition, namely the United States of America, France, the Netherlands and Belgium, with regard to pseudo-child pornography and virtual child pornography, in order to find answers to questions such as: Are pseudo-child pornography and virtual child pornography criminalised in the laws of these countries? What were the reasons considered for their criminalisation or non-criminalisation? What is the link between A.I. and these subspecies of child pornography and how can this technology be integrated into the fight against the phenomenon? How is pseudo-child pornography reconciled with the principle of legality of criminalisation? And more.

The proposed objective is to update the local doctrinal studies in the field of pseudo-child pornography and virtual child pornography from the perspective of comparative law, in order to provide arguments for and against the criminalisation of these types of child pornography, including how to reconcile the competing social values at stake.

New socio-technological realities also require addressing and understanding how I.A. technologies have influenced the proliferation of child sexual abuse material online, the extent of this phenomenon, and identifying effective solutions to prevent and combat the scourge.

Keywords: *virtual child pornography; pseudo child pornography; comparative law; principle of legality of criminalisation; artificial intelligence technology.*

1. Introduction

The crime of child pornography, together with the sexual exploitation of children, is classified as a serious form of violation of fundamental human rights, in particular the freedom and integrity of the sexual personality and human dignity[1] .

With the development of information and communication technology, crime has taken on a predominantly digital character, and recent innovations in the field of artificial intelligence are on the verge of generating a new, alarming phenomenon of unimaginable proportions and incalculable consequences for society in general and minors in particular, in terms of child pornography.

Recently, several articles[2] from reputable online publications have raised an alarming phenomenon, on an upward trend, regarding the generation of illegal content online using AI, specifically the generation of pornographic material with real or non-existent minors.

A coordinated, effective, cohesive and timely response, adapted to common social values shared by democratic states, is urgently needed to counter this scourge.

The present study aims to highlight provisions of national law and their interpretation in the national judicial practice of four (4) countries with a long democratic tradition, namely the United States of America, France, the Netherlands and Belgium, with regard to child pornography and virtual child pornography, in order to find answers to questions such as: Are child pornography and virtual child pornography criminalised in the

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[1] In the same sense, A. Mărgineanu, *Combaterea exploatării sexuale a copiilor și a pornografiei infantile*, in Caiete de drept penal no. 3/2013, p. 63-89.

[2] See, article *US receives thousands of reports of AI-generated child abuse content in growing risk",* published on 31.01.2024 on the Reuters website, *https://www.reuters.com/world/us/us-receives-thousands-reports-ai-generated-child-abuse-content-growing-risk-2024-01-31/*, accessed on 10.04.2024; also article *Society needs to be alert': Most people are unaware AI is being used to create child abuse content*, published on 19.02.2024 on the Euronews website, *https://www.euronews.com/next/2024/02/19/society-needs-to-be-alert-most-people-are-unaware-ai-is-being-used-to-create-child-abuse-c,* accessed on 09.05.2024; also, article *AI-Generated Child Sexual Abuse Material May Overwhelm Tip Line*, published on The New York Times website on 22.04.2024, *https://www.nytimes.com/2024/04/22/technology/ai-csam-cybertipline.html*, accessed on 10.05.2024.

legislation of these countries? What were the reasons considered for their criminalisation or non-criminalisation? What is the link between AI and these subspecies of child pornography and how can this technology be integrated into the fight against the phenomenon? How is pseudo-child pornography reconciled with the principle of legality of criminalisation? And more.

At the same time, it aims to update the local doctrinal studies[3] in the field of child pseudopornography and virtual child pornography from a comparative law perspective.

These sub-classes of child pornography bear particular attention in the current global socio-technological context, in which AI technology has taken hold and is making its presence felt in many areas of modern life at a pace seemingly hard for states to match in terms of its regulation; its innovative nature and varied capabilities have been exploited, surprisingly or not, including by criminals for illegal purposes such as social engineering via deepfake[4].

2. Brief considerations on the legal foundations and significance of the subject matter

All these realities were anticipated, to some extent and with some precision, by the original architects of the criminalisation of this scourge at international level; thus, on 20 November 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child, which laid down in art. 34 the obligation of States Parties to protect children against all forms of sexual exploitation and sexual violence.

To this end, States shall, in particular, take all appropriate national, bilateral and multilateral measures to prevent: a) the inducement or coercion of children to engage in unlawful sexual activities; b) the exploitation of children in prostitution or other unlawful sexual practices; c) the exploitation of children in pornographic performances or materials.

Subsequently, complementary to the Convention, on 18 January 2002, the Optional Protocol on the sale of children, child prostitution and child pornography entered into force, including a legal definition of child pornography in art. 2 letter (c), according to which *child pornography* means any depiction, by whatever means, of children engaged in real or simulated explicit sexual activity or any other exposure of the sexual organs of children, primarily for sexual purposes.

At the same time, the Protocol established a series of commitments of the signatory states for the implementation of its directives, in the field of substantive and procedural law, among which we note those contained in art. 3 point 1 letter c), 2) and 3), under which it became imperative to criminalise in national law at least the following activities, whether committed domestically or internationally, individually or in an organised manner: the production, distribution, dissemination, import, export, offer, sale or possession of pornography, as defined in art. 2, for the purposes mentioned.

With regard to child pornography in electronic format, the first international legal instrument to address, among other things, this phenomenon was the Convention on Cybercrime[5], adopted on 23 November 2001 in Budapest under the auspices of the Council of Europe.

To this end, the signatory parties undertook to adopt the necessary legislative or other measures to criminalise the following conduct, when committed intentionally and unlawfully, under their domestic law: (a) the production of child pornography for the purpose of distribution by means of a computer system; (b) the offering or making available of child pornography by means of a computer system; (c) the distribution or transmission of child pornography by means of a computer system; (d) the act of procuring for oneself or for another person child pornography by means of a computer system; (e) the possession of child pornography in a computer system or a computer storage medium.

The term „child pornography" was defined as any pornographic material that visually depicts: a) a minor engaging in sexually explicit conduct; b) a person of full age, depicted as a minor, engaging in sexually explicit conduct; c) realistic images depicting a minor engaging in sexually explicit conduct.

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[3] See: M. Angel, B. Pasamar, *Child pornography on the Internet: the basis and limits of criminal law intervention*, in Caiete de drept penal no. 2/2008, p. 1-43; S. Corlățeanu, A. Cîrciumaru, S. Corlățeanu, *Elemente de drept comparat referitoare la combaterea pornografiei infantile prin mijloace de drept penal*, in Dreptul no. 11/2007, p. 213-229.

[4] Deepfake is a fake, digitally manipulated video or audio file produced by using deep learning, an advanced type of machine learning, and typically featuring a person's likeness and voice in a situation that did not actually occur, in accordance to definition provided by *https://www.dictionary.com/*, accessed on 10.05.2024.

[5] Known as the „Budapest Convention", available at CETS 185 – Convention on Cybercrime (*coe.int*), accessed on 03.05.2024.

The latter two subcategories are defined in the literature[6] as *pseudo-child pornography*(b) and *virtual child pornography*(c).

It should be noted that all 4 States concerned by this study are signatories[7] to the Budapest Convention, some of which have made reservations[8] under art. 9(2) of the Convention, 4 of the international normative act concerning these sub-classes of child pornography.

3. Regulation in the United States of America

In US law, the subject of criminalising child pornography has been debated in relation to the right to free speech, guaranteed by the First Amendment[9] to the US Constitution, being essentially a human form of expression; the debate has taken place at the highest level of the US judiciary, the Supreme Court, which has set certain benchmarks in the process of criminalising and interpreting the law in relation to child pornography.

One of the representative cases in this regard was *Miller v. California*[10], in which the Supreme Court set the standard for assessing the obscenity of speech/form of expression at three points[11], namely: (a) whether based on contemporary community standards, an ordinary person would consider the work, viewed in its entirety, to evince an obscene interest; (b) whether the work depicts or illustrates, in a patently offensive manner, sexual conduct or excretory functions as defined by state law; (c) whether the work as a whole is devoid of serious literary, artistic, political, or scientific merit.

Subsequently, in *Ferber v. New York*[12], the Supreme Court clearly delineated child pornography from First Amendment protection, even though the Miller test for the type of content under consideration is not met; thus, it reasoned that the protection of children from sexual abuse is paramount, and material depicting sexual activity involving children is closely related to such abuse and has no artistic value; thus, the production, distribution or promotion of such material is exempt from First Amendment protection.

In *Osborne v. Ohio*[13], the Supreme Court extended its interpretation in the above case to the mere viewing or possession of child pornography, based on the same arguments, plus the thesis that acting to decrease the demand for child pornography implicitly decreases the production of such content(supply), and that the material can be used to lure and sexualize children for the purpose of their subsequent abuse.

Some two decades after the *Ferber v. New York* decision, the Court was again called upon to rule on the constitutionality of child pornography rules, but this time contained in a federal law, the Child Pornography Prevention Act of 1996[14]; the case was called *Ashcroft v. Free Speech Coalition*[15], in which the Court declared two provisions of that law unconstitutional because their language was too broad with respect to material that was neither obscene under the Miller test nor produced through the exploitation of real children, as in the Ferber case, thus violating First Amendment protections.

Only one of the two provisions is of interest for the present analysis, namely the one that covered „any visual depiction, including any photograph, film, video, image or computer-generated image" that „is or appears to be of a minor engaging in sexually explicit conduct"[16]; the provision aimed at criminalising different types of conduct, such as production, procurement, distribution, involving so-called pseudo-child pornography and virtual

[6] See, M. Angel, B. Pasamar, *op. cit., loc. cit.*

[7] See the list of signatory states to the Budapest Convention, *Parties/Observers to the Budapest Convention and Observer Organisations to the T-CY – Cybercrime* (*coe.int*), accessed on 10.05.2024.

[8] See the list of States that have entered reservations to various provisions of the Convention, *https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=185&codeNature=0*, accessed on 10.05.2024.

[9] Adopted on December 15, 1971, it was the first of ten amendments to the US Constitution, forming the so-called „Bill of Rights"; it was intended to limit the power of Congress to make laws for the establishment of any religion or prohibition of the free exercise thereof, or to abridge freedom of speech, freedom of the press, or the right of the people peaceably to assemble and to petition the government for the redress of grievances; *https://ro.wikipedia.org/wiki/Primul_amendament_la_Constitu%C8%9Bia_Statelor_Unite_ale_Americii*, accessed on 06.04.2024.

[10] Settled by judgment of the Court of 21.06.1973, *https://supreme.justia.com/cases/federal/us/413/15/*, accessed on 06.04.2024.

[11] The criteria are cumulative, conventionally referred to as the „Miller Test".

[12] In which the Court delivered its judgment of 02.07.1982; *https://supreme.justia.com/cases/federal/us/458/747/*, accessed on 06.04.2024.

[13] Settled by judgment of the Court of 18.04.1990, *https://supreme.justia.com/cases/federal/us/495/103/*, accessed on 06.04.2024.

[14] *https://www.congress.gov/bill/104th-congress/house-bill/4123/text*, accessed on 06.04.2024; the act aimed to criminalise child pornography online, including virtual child pornography.

[15] Settled by judgment of the Court of 16.04.2002, *https://supreme.justia.com/cases/federal/us/535/234/*, accessed on 06.04.2024.

[16] Art. 2256 para. 8 letter A of the US Code, as amended by the 1996 Act.

child pornography, where the resulting content did not involve real children in sexually explicit conduct, but either adults appearing to be minors or computer-generated images of non-existent children.

In contrast, the Court upheld the validity of the arguments in *Ferber v New York in* relation to another type[17] of virtual child pornography, which renders the image of a real child, but altered by means of a computer system so as to create the impression of the child's involvement in sexual activities[18] (for example, by superimposing the image of a child's face over the face of an adult engaged in sexual activities).

Responding to society's need to balance competing general interests (the right to free speech and the protection of children from sexual abuse and exploitation), a year later, in 2003, the US Congress passed the *Procedural Remedies and Other Tools to End Child Exploitation Today Act*[19]; among other things, the Act brought its provisions in line with the principled rulings of the Supreme Court in the Miller, Ferber and Ashcroft cases on virtual child pornography.

The Act changed the previous wording „appears to be a minor" to „indistinguishable from that (*n.n.*, *image*) of a minor", thereby narrowing the scope of the rule to limit interference with freedom of expression to what is necessary to achieve the stated objective; thus, it was an offence to possess or distribute any visual depiction of sexually explicit conduct involving „a computer image, computer-generated image or digital image that represents or is virtually indistinguishable from that of an actual minor" to an ordinary observer (not an expert).

In addition, it introduced a case[20] which would remove criminal liability for the offence if the subject of the visual depiction was a real adult (over 18) at the time of production or was merely a virtual creation and not a real minor, but the burden of proving these elements was on the defendant; thus, to the extent that the case did not involve a real minor, the requirement in *Ferber v. New York* excluding First Amendment protection only for child pornography involving real children was also respected; the rationale for reversing the burden of proof from the prosecutor to the defendant as to the non-existence of a real child in the pornographic visual depiction, despite appearances, was that the person creating or receiving child pornography was certainly in a better position than the prosecutor in this regard, especially since no effective tools were available to identify the source of the materials.

However, this legal defence was explicitly excluded for the other form of virtual child pornography, which involved transforming[21] images of real children in such a way that they appeared to be engaged in sexual activity; the justification was that the rule was intended to prevent the creation of a sexually explicit image using an innocent image of a child, the possible distribution of which clearly created a real danger to the image, dignity and privacy of the child in question, despite the fact that they had not been directly involved in the sexual activity depicted.

These virtual child pornography and pseudo child pornography provisions introduced by the PROTECT Act of 2003 have stood the test of time to date, as they are also found in the current *US Code* in Title 18 - Crimes and Criminal Procedures, Part I - Crimes, Chapter 110 - Sexual Exploitation and Other Abuse of Children, *Section 2256*[22].

Note the topography of the criminalisation of child pornography in the US Criminal Code, *i.e.*, within the spectrum of social relations concerning sexual exploitation and other abuse of children, and not within the social relations concerning public morality[23]; therefore, the legal object protected by the criminal norm is mainly concerned with the individual rights of children - their freedom and integrity of sexual personality, freedom of will, dignity and privacy.

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[17] In the literature it is referred to as pseudo-pornography, as distinct from virtual child pornography proper, which involves the generation of entirely computer-generated pornographic images of unreal children; see, M. Eneman, A.A. Gillespie, B. Carsten Stahl, *Criminalising fantasies: the regulation of virtual child pornography, https://gup.ub.gu.se/file/207727,* accessed on 10.04.2024.

[18] The provision was found in art. 2256 para. 8 letter C of the US Code.

[19] The acronym in English being the „PROTECT Act of 2003", also known as the „Amber Alert Law", *https://www.congress.gov/congressional-report/108th-congress/senate-report/2/1?q=%7B%22search%22%3A%22%5C%22protect+act+of+2003%5C%22%22%7D&s=5&r=29*.

[20] In American criminal law, this type of legal defence is known as the affirmative defence.

[21] The Act concerned digital transformation, known in American legal parlance as „morphed child pornography images".

[22] Article defining the terms used in the criminalisation of child pornography conduct, including „minor", „sexually explicit conduct", „production", „visual depiction", „computer", „child pornography", „identifiable minor", „indistinguishable from".

[23] This legal object is protected by other offences found in Chapter 71 of the US Criminal Code, entitled „Obscenity".

4. Regulation in the Kingdom of the Netherlands

In the Kingdom of the Netherlands, the criminalisation of child pornography is found in the *Dutch Criminal Code, under* Title XIV - Offences against morality, in *art. 240b*, and covers both child pornography as such and virtual child pornography and pseudo-child pornography.

The offences include the production, possession and distribution of, inter alia, an image or data medium containing an image of a sexual act involving or appearing to involve a person who is visibly under the age of 18[24].

The last two subcategories of child pornography in the above list became criminal offences with the entry into force of the Act of 13 July 2002 amending the Dutch Criminal Code and Criminal Procedure Code[25], which raised the age threshold for the person covered by the protection of criminal law from 16 to 18 and introduced the phrase „apparently involved".

Thus, the new legislative formula covered the following three assumptions[26]: (1) representation of a real child; (2) representation of a real adult person who looks like a child; (3) realistic representation of a non-existent child engaged in sexual conduct.

It should be noted that these three situations are based on the hypotheses referred to in art. 9(9). 2 of the Budapest Convention on Cybercrime concerning the definition of child pornography, an international legal instrument which inspired the Dutch legislator, among others[27].

What made the image pornographic in the first place was the depiction of sexually explicit behaviour of a person apparently under the age of 18, including the exposure of genitals or pubic area in an ostentatious manner[28]; on the other hand, the way in which the image was created was equally eloquent in this respect, if it served to sexually stimulate the viewer (*e.g.*, by adding text/voice, overlaying some elements or removing others, resulting in a sexual character, focusing on certain anatomical parts of the person's body, especially those sexual or considered erogenous)[29].

At the same time, the arguments that underpinned the criminalisation of virtual child pornography and pseudo-pornography focused on the need to prevent behaviour that would have encouraged or attracted children to adopt inappropriate sexual behaviour or that would have generated a subculture of promoting sexual abuse of children; at the same time, the aim was to ease the burden of proof on the investigating authorities in the sense that it was no longer necessary to prove the use of real children for the production of pornographic material, which was impossible to prove solely on the basis of available visual evidence[30] .

The phrase „is apparently involved" in art. 240b of the Dutch Criminal Code signifies the indistinguishable character of an image of a real child engaged in sexually explicit conduct, and the standard for assessing this factual aspect relates to an ordinary observer without relevant expertise in the field, as follows from the case law[31] of the Supreme Court of the Netherlands.

At the same time, regardless of whether the person depicted in the image is an adult, but, on the basis of his or her physical appearance, looks like a minor, under the age of 18, criminal liability is incurred for committing the offence of child pornography, with its subspecies, pseudo-child pornography; this assessment of the age of the person depicted remains a question of fact, left to the discretion of the judge, who has not raised questions of constitutionality of the incriminating text from a *lex certa* perspective to date.

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[24] See Dutch Criminal Code, form in force at the date of access - 29.04.2024, available in the official language of the Kingdom of the Netherlands at the following address *wetten.nl - Regeling - Wetboek van Strafrecht - BWBR0001854 (overheid.nl)* as well as in the Romanian version, in the form in force on 01.10.2012, available at *Codex Penal – Criminal Code of the Kingdom of the Netherlands* (*just.ro*), accessed on 28.04.2024.

[25] Available at Staatsblad 2002, 388|Overheid.nl > Officiële bekendmakingen (*officielebekendmakingen.nl*), accessed on 01.05.2024.

[26] See, in this respect, Memorandum of the Minister of Justice of the Kingdom of the Netherlands no. 27745-299b on the legal issues raised in the parliamentary debates on the 2002 draft law, ante-referred, published in the Dutch Official Gazette on 20.06.2002, available at kst-20012002-27745-299b.pdf (officielebekendmakingen.nl)accessed on 02.05.2024.

[27] See Explanatory Memorandum to the Act of 13 July 2002 amending the Criminal Code and the Criminal Procedure Code of the Kingdom of the Netherlands, available at Parliamentary document 27745, no. 3|Overheid.nl > Official announcements (*officielebekendmakingen.nl*).

[28] See Supreme Court of the Kingdom of the Netherlands, judgment from 07.12.2010, Case no. 08/00787 B, *https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2010:BO6446*, accessed on 20.03.2024.

[29] See Instructions of the College of Prosecutors General, published in the Official Gazette no. 19415/2016, *https://zoek.officielebekendmakingen.nl/stcrt-2016-19415.html*, accessed on 04.05.2024.

[30] See Supreme Court of the Kingdom of the Netherlands, judgment from 12.03.2013, Case no. 11/04168, *https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:BY9719*, accessed on 20.03.2024.

[31] *Ibidem*.

Therefore, in contrast to the case law of the US Supreme Court, as set out above, the Dutch legislature has held that the criminalisation of virtual child pornography does not infringe the freedom of expression and the right to privacy of its nationals; the general interest of preventing and combating child pornography as a whole, encompassing both real and virtual child pornography, which are essentially inseparable, prevails over the competing private interests at stake.

5. Regulation in the Kingdom of Belgium

In the law of the Kingdom of Belgium, child pornography is found in the *Belgian Criminal Code*, Title VIII - Crimes and Offences against the Person, Chapter I - Offences against Sexual Integrity, the Right to Sexual Self-Determination and Public Decency, Section 2 - Sexual Exploitation of Minors, Subsection 3 - Images of Sexual Abuse of Minors, *art. 417/43 to 417/47*[32] and punishes both child pornography as such and virtual child pornography and pseudo-child pornography.

It criminalises conduct such as producing, disseminating, possessing or accessing images of sexual abuse of minors, among others.

As regards the phrase „images of sexual abuse of minors", art. 417/43 defines such images in accordance with the authentic interpretation of the term 'child pornography' found in art. 2 letter c) of Directive 2011/93/EU[33] of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, a legal instrument which, together with the Lanzarote Convention and the Budapest Convention, among others, has been a source of inspiration for the Belgian legislator in this area[34].

Thus, the term encompassed the following three assumptions: (1) depiction of a real child; (2) depiction of a real adult person who looked like a child; (3) realistic depiction of a non-existent or apparent child engaged in real or simulated sexual conduct or exposing genitals, primarily for sexual purposes.

The Belgian legislator's vision of placing child pornography offences within the spectrum of offences protecting social relations relating mainly to the integrity of the sexual personality, human dignity and the private life of the person dates back to 2022, initially the offence was placed under the auspices of Title VII - Offences against the family and public order, Chapter VII - Offences against morality, art. 383 bis[35].

With regard to the criminalisation of virtual child pornography and pseudo child pornography, defined in hypotheses 2 and 3 above, the *ratio legis* was aimed at complying with international obligations in this area, ensuring a high degree of predictability of the criminal law and protecting the image of the minor per se, even in the case of pseudo child pornography.

With regard to the latter, a case decision[36] considered the request of the defendant, convicted at first instance of possessing and accessing images of apparently underage persons engaged in sexually explicit conduct, to refer the matter to the Constitutional Court of the Kingdom of Belgium for a review of the constitutionality of the incriminating provision - at that time art. 383bis of the Belgian Criminal Code with the principle of legality in criminal matters; the defendant argued that the law refers to „a person who appears to be a minor engaging in sexually explicit conduct", which is a purely subjective concept leaving room for too wide a margin of appreciation on the part of the judge.

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[32] See Belgian Criminal Code, in its current form, *https://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?imgcn.x=57&imgcn.y=15&DETAIL=1867060801%2FF&caller=list&row_id=1&numero=3&rech=4&cn=1867060801&table_name=LOI&nm=1867060850&la=F&chercher=t&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&cc=DROIT+PENAL&sql=dt+contains++%27CODE%27%2526+%27PENAL%27+and+cc+contains+%27DROIT+PENAL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&trier=promulgation#LNK0120*, accessed on 15.04.2024.

[33] OJ L 335/1/17.12.2011.

[34] See Explanatory Memorandum to the Act of 31.05.2016 on the amendment of the Belgian Criminal Code to implement European obligations in the field of sexual exploitation of children, child pornography and trafficking in human beings, among others, published in the Official Gazette on 08.06.2016, *https://www.lachambre.be/doc/flwb/pdf/54/1701/54k1701001.pdf#search=%221701%20%2054k%20%3Cin%3E%20keywords%22*, accessed on 03.05.2024; this legislative act amended art. 383bis of the Belgian Criminal Code, the seat of the child pornography offence until 30.03.2022, when the article was repealed.

[35] See Belgian Criminal Code, as in force from 01.08.2016, *https://codexpenal.just.ro/laws/Cod-Penal-Belgia-RO.html*, accessed on 20.04.2024.

[36] See CA Liège, judgment from 19.01.2023, *https://juportal.be/content/ECLI:BE:CALIE:2023:ARR.20230119.1?HiLi=eNp1kUFuwjAQRe/iRddxAiRMVlGJwFJErIgewAKLjhQRK4QVYkNXvUa76jkK92qcTkBEZvvf+HvmfwV8CkcEL94DJ359Dj5RxyxG4JZ6wEyNuzUaPJRW9a0aACv1VpXYXD6u34gWBBaErVk6y2VeLPN5kciFSDuv0e2nTwcdt9QftfQlVetDo2PHzOS+q4OGNwf91CEiB+O8dkoOpndwJeLRjUa7KB8u4RryKVVZiOWrkOlt6+Sglx/C5l1uHFiWzpNMrJKVEJ0+phZlv5yvX0QmA9L2QyQkL2pONf+98ah/8djo6Q+lza3s*, accessed on 15.04.2024.

The court rejected the defendant's request, arguing that, by criminalising pseudo-child pornography and virtual pornography, the Belgian legislature had sought to prevent and combat all forms of child pornography, in accordance with the consensus view of the States parties to the Budapest Convention, to which Belgium had acceded, without making any reservations in that regard; at the same time, because of the general nature of the laws, their interpretation and application leave the courts with a certain margin of discretion, but the result of the interpretation must be reasonably foreseeable and consistent with the substance of the offence.

The foreseeability of the law does not preclude the person concerned from seeking expert advice in order to assess, to a reasonable extent in the circumstances of the case, the consequences which might flow from a particular act[37].

The Court concluded that the criminal law does not place the judge in the position of deciding, on the basis of a purely subjective assessment, whether or not the person depicted in the pornographic material is legally a minor, but only to decide whether the material produced endangers the image of a minor by the explicit sexual conduct it depicts.

6. Regulation in the French Republic

In France, child pornography is regulated in the *French Criminal Code*, Book II Crimes and Offences against Persons, Title II - Offences against the Individual, Chapter VII - Offences against Minors and the Family, Section 5 - Peril to Minors, Subsection 2 - Sexual Offences against Minors, *art. 227-23*[38] and covers in principle only child pornography as such and virtual child pornography. Conduct such as fixing or recording, disseminating or possessing pornographic images or representations of a minor is criminalised.

From the perspective of virtual child pornography, it is worth mentioning the amendments made by Law no. 98-468/1998 on the prevention of sexual offences and the protection of minors[39] to art. 227-23 of the French Criminal Code, according to which the phrase „representation of a minor" was inserted in the precept of the incrimination, as an alternative to the phrase „image of a minor" of a pornographic nature, and a relative legal presumption of the existence of the state of minority was inserted for the person appearing in the pornographic image, when his/her appearance looks like that of a minor, and the burden of proof to the contrary is on the accused.

The representation of minors in pornographic poses covers the virtual domain, which does not exist, as it emerges from the parliamentary debates held during the formulation of amendments to the bill under discussion[40].

This thesis was also confirmed by the French Court of Cassation in its case law[41] when it ruled on an appeal brought by the defendants accused of importing and distributing to the public a film in which the protagonist, an animated character, „undoubtedly presents the characteristics of a small child, in particular in view of his small size in relation to the adult characters around him, the absence of morphological signs suggesting that he might be an adult and his facial features which make him appear as a very small child", a character who was having sexual relations with adult women; the court dismissed the defendants' appeal, holding that the legislature's intention was to punish the dissemination of pornographic depictions of minors and that the scope of the offence was broadened by including in the subject-matter of the offence, previously limited to the image of a minor, any visual, photographic or cinematographic depiction of a child, any depiction of a minor; the offence therefore also covered unreal images of an imaginary minor or even images resulting from the transformation of a real image.

The French legislator's intention not to criminalise child pornography is clear from the last sentence of art. 227-23 of the French Criminal Code, which states that the provisions of the offence also apply to images of a person whose physical appearance is that of a minor, unless it is proved that the person was at least 18 years old at the time the image was taken or recorded.

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[37] Case *Cantoni v. France*, judgment from 15.11.1996, para. 35, *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62627%22]}*.

[38] See the French Criminal Code, in its current form, *https://www.legifrance.gouv.fr/codes/id/LEGIARTI000043409170/2021-04-23/*, accessed on 02.05.2024.

[39] Published in the French Official Journal on 18.06.1998, *https://www.legifrance.gouv.fr/loda/id/LEGIARTI000006492895/1998-06-18/*, accessed on 04.05.2024.

[40] *https://www.senat.fr/rap/l97-265/l97-265.html*, accessed on 08.05.2024.

[41] See French Court of Cassation, crim. s., judgment from 12.09.2007, *https://www.legifrance.gouv.fr/juri/id/JURITEXT000007640077?fonds=JURI&page=1&pageSize=10&query=%22l%27aspect+physique+est+d%27un+mineur%22&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT*, accessed on 07.05.2024.

However, by reversing the burden of proof from the prosecution to the accused regarding the adult status of the person whose physical appearance is similar to that of a minor, even actual cases of pseudo-child pornography can be sanctioned, to the extent that the accused fails to prove the contrary.

7. A look at the extent of virtual child pornography and pseudo-child pornography and the challenges posed by AI

At the beginning of the paper I mentioned the huge amount of material on sexual abuse of minors[42], which is spread in the virtual environment, but which is recently amplified by the use of AI technology to generate such content.

Among law enforcement in the United States, a country in whose jurisdiction social networks or electronic communications service providers[43] with a significant percentage of global users operate, the sense of helplessness in the face of the explosive number of such materials flooding the online environment has increased with Meta's announcement[44] of the integration of end-to-end encryption into electronic messaging services earlier this year[45]; added to this is the growing number of computer-generated materials from AI of such sexual abuse of real or non-existent children, which further increases the logistical and human effort to investigate the circumstances in which these materials were produced; once it is established that these are virtual child pornography materials, the investigation is not as definitive as it should be, since, under US law, this type of virtual child pornography of fictitious children is not criminalised in this situation[46]; these situations significantly reduce the chances for prompt intervention in cases of sexual abuse of real children, whose victimisation is disseminated online.

In addition, it is also worth noting the ease[47] with which criminals can use AI to modify the source code of real child sexual abuse material so that the result does not change the nature of the content, but only its logical (digital) fingerprint[48], so that the material cannot be recognised by the filters used to detect and remove illegal content.

However, the same AI is able to offer solutions to overcome these obstacles in an effective way; for example, a joint project of the Centre for Artificial Intelligence and Robotics of the United Nations, Interregional Crime and Justice Research Institute (U.N.I.C.R.I.) and the Ministry of Interior of the United Arab Emirates, called *„AI for Safer Kids"*, was launched in 2020 and aims to effectively combat online child abuse, including sexual abuse, by providing information, best practices and tools for using AI, and facilitating the exchange of experience between law enforcement agencies from 72 countries[49].

It should be noted that at this point in time, AI technology is not so reliable that the results of its processing are not duplicated by human examination, and this is even more so for child sexual abuse material; however, it does take many of the time-consuming tasks off the shoulders of those involved in preventing and combating this scourge online and offline, such as identifying duplicates of such material in an automated way, as well as facilitating the identification of new victims.

Against the current backdrop of the extent of online dissemination of child sexual abuse material, the technology industry has come up with its own solutions to the use of AI technology. in identifying, removing and reporting this type of illegal content in their own online platforms that they manage or for which they provide electronic communication services; some companies use these machine learning processes in ways that are compatible[50] with respect for the human right to privacy in its substance, and others in ways that have sparked

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[42] In English, „Child sexual abuse material".

[43] Like Meta, Twitter, Snap Inc., TikTok, Google etc.

[44] The company was listed as the most prolific partner for law enforcement agencies in identifying and reporting the circulation of child sexual abuse material on social networks it managed.

[45] See *Law Enforcement Braces for Flood of A.I.-Generated Child Sex Abuse Images*, The New York Times website, published on 30.01.2024, *https://www.nytimes.com/2024/01/30/us/politics/ai-child-sex-abuse.html?searchResultPosition=1*, accessed 15.04.2024.

[46] The so-called *„affirmative defense"* set in favor of the defendant, mentioned above.

[47] In the same vein, *Law Enforcement Braces for Flood of A.I.-Generated Child Sex Abuse Images, op. cit., loc. cit*.

[48] Known as a „hash".

[49] Project available at *https://unicri.it/topic/AI-for-Safer-Children-Global-Hub*, accessed on 10.05.2024.

[50] For example, the Safety AI tool offered by Google to combat child sexual abuse online by detecting, removing and reporting new potentially harmful or illegal content; more information is available at *https://protectingchildren.google/#alliances-and-programs*, accessed on 10.05.2024.

controversy and legal disputes[51], such as the generation of a facial recognition fingerprint[52] used to identify victims and offenders, based on a huge database containing billions of photos taken from the internet and social media.

Thus, there is an acute need to regulate the use of this AI technology, with potentially diametrically opposed capabilities, depending on the purpose of its use.

In Europe, more specifically within the political edifice called EU, a draft law on AI is currently being debated in the legislative forums of the European Parliament and the Council of the European Union, and has recently been provisionally agreed[53]; the future legislation aims to maximise the benefits of this new technology in order to strengthen democracy, respect for human rights and the environment, as well as to minimise its potential risks and impact; it could also be used to combat the proliferation of child pornography, including virtual and simulated child pornography, online.

Also in the United States, with a more specific objective, a bill[54] called the Commission of Experts on Child Exploitation and Artificial Intelligence Act has recently been introduced in the US Congress, aiming to establish a commission to devise a legal framework useful in the prevention, detection and prosecution of AI crimes against children.

8. Conclusions

We found that the field of virtual child pornography and pseudo-child pornography involves relatively different legislative solutions in the positive law of the United States, the Netherlands, Belgium and France.

Similar to the US Criminal Code, French law does not incriminate pseudo-child pornography, but places the question of whether or not this type of child pornography is punishable in practice on the evidentiary level; the option thus reconciles the competing interests at stake, on the one hand, the individual's particular interest in privacy and freedom of expression, and, on the other hand, society's overriding interest in preventing and combating the use of minors for sexual abuse or exploitation, and in protecting their dignity and privacy.

It is noted that this option of criminalisation is also consistent with the view of the legislator in the United States of America and France on placing the offence of child pornography mainly in the spectrum of social relations relating to birth and protecting minors from prohibited conduct.

In contrast, the legislation of the Kingdom of the Netherlands mainly protects social relations relating to birth and the development of collective morality in the sense of the repugnance of the conduct contained in child pornography, while the legislation of the Kingdom of Belgium had the same vision until the legislative amendment in 2022, but subsequently kept the offence in the sphere of these social relations only in a subsidiary manner.

Thus, we note that the criminalisation of virtual child pornography and pseudo-child pornography is closely related to these states' view of the social relations affected mainly by the specific conduct of child pornography.

We have also found that some regulations on virtual child pornography, as well as their interpretation and application in practice, such as the legislation of the United States of America and the Kingdom of the Netherlands, offer a high standard of predictability of the rule, such as to significantly limit the power of interpretation and discretionary application of the judiciary, in accordance with the principle of legality of incrimination *nullum crimen sine lege* and its component *lex certa*.

As art. 2256 of the US Criminal Code is worded, and as art. 240b of the Dutch Criminal Code is interpreted in case law, with regard to virtual child pornography, the standard „indistinguishable from the image of a minor" could also be used to reformulate the precept of criminalisation of pseudo-child pornography.

[51] See Report provided by the Research Service of the European Parliament, November 2020, *https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS_BRI(2020)659360_EN.pdf*, accessed on 10.05.2024.

[52] For example the Clearview AI tool, offered by a US start-up of the same name, further information is available at *https://www.clearview.ai/contact*, accessed on 10.05.2024.

[53] See press release posted on 09.12.2023 on the European Parliament's website, *https://www.europarl.europa.eu/news/ro/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai*, accessed on 10.05.2024.

[54] See, press release issued on 16.04.2024 by Congressman Nick Langworthy, *https://langworthy.house.gov/media/press-releases/congressman-langworthy-introduces-legislation-combat-use-artificial*, accessed on 10.05.2024.

We state this because the standard „adult person appearing to be a minor" used for child pornography has different perspectives of interpretation[55]; one in which criteria extrinsic to the physiognomy, somatic features and secondary sexual characteristics[56] of the person depicted are used, the other in which the assessment is based strictly on the latter criteria (physiognomy, somatic features, secondary sexual characteristics).

Thus, according to the first variant, accessories or style of dress or hairstyle suggesting the idea of a minor, such as a school uniform, braided pigtails, a Barbie doll/schoolbook in hand, a backpack on the back, etc., could be traced, perhaps complementing a shy or playful attitude, independently of the visibly mature physical appearance of the person depicted, in order to characterise the material as child pornography.

In contrast, the other option only includes in the classification of this type of child pornography elements related to physical appearance, such as an adolescent face, the presence of facial acne, visibly immature somatic features, lack of facial or pubic hair or the onset of such hair.

It should be pointed out that even in the latter variant, subjectivity is not excluded in assessing the appearance of minority, especially in situations where we are talking about young adults whose physical appearance is close to that of a 16-17 years old minor, bearing in mind that the transition to adulthood is natural, gradual and relatively imperceptible.

This degree of subjectivity can make the difference between a conviction and an acquittal, with all the legal consequences that entails.

Therefore, we believe that the competing interests at stake can and must be reconciled in a fair manner, the desiderata being greater predictability of the law, respect for the principle of *ultima ratio* and proportionality between the means and the end, and the degree of adequacy of the means to the objective pursued.

In our view, this reconciliation can be achieved by reformulating the provisions criminalising child pseudo-pornography by reference to the following *standard*: the image of a real adult, whether or not digitally distorted, so that it is indistinguishable by itself from that of a prepubescent or pubescent minor engaged in sexually explicit conduct by an ordinary observer without close scrutiny.

The reference to a prepubertal or pubertal minor leads to an exclusive analysis of the physiognomy, somatic features and secondary sexual characteristics of the person represented, and the degree of differentiation from a minor at the age of majority is higher, thus reducing the judge's margin of discretion.

Thus, we would remove the ambiguity as to whether or not the criterion of physiognomic image is exclusive in determining whether the minor is a minor, the subjectivity of distinguishing a minor teenager from a young adult, and we would protect the image and prevent frivolous sexualisation and the generation of a subculture of promoting sexual abuse or sexual exploitation of the most vulnerable minors, while respecting freedom of expression and the privacy of the individual; we would have a necessary compromise for the simultaneous protection of competing interests.

Logic and consistency in regulation would oblige us to limit virtual child pornography - realistic images of a non-existent minor - to the same category of minors, prepubertal or pubertal.

Of course, a note of subjectivity would still persist when the judge has to analyse and respond to a defence by the defendant that, in his opinion, the real adult or fictitious minor depicted in the picture does not appear as a pubertal minor, but as a minor on the verge of majority, say 17, thus invoking a factual error.

However, as has been crystallised in the ECtHR case-law[57], because of the general nature of laws, their wording cannot be absolutely precise, and more or less imprecise formulas are necessary in order to avoid excessive rigidity; equally, the foreseeability of the law does not preclude the person concerned from seeking the advice of experts in order to assess, to a reasonable extent in the circumstances of the case, the consequences which might result from a given act.

Of course, in the context of this proposal, the adulthood or imaginary character of the person represented would fall to the defendant, as provided for in US law, since he is certainly in a better position than the prosecutor in this respect.

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[55] The conclusion is all the more obvious in wording such as that used in art. 374 para. (4) CP for child pseudo-pornography, according to which *pornographic material* means any material that *presents* a person of legal age as a minor engaging in sexually explicit conduct; the term „presents" *prima facie* leads us to think of a context detached from the mere physiognomy of the person represented in that material.

[56] In the literature, secondary sexual characteristics are understood to mean in girls – the appearance of pubic hair and mammary development, respectively the appearance and dimensions of the testicles, penis and pubic hair in boys; for details, see D. Navolan, D. Stoian, M. Craina, *Sexologia de la A la Z*, 2nd ed., Victor Babeș Publishing House, Timișoara, 2020, p. 21.

[57] ECtHR, Case *Cantoni v. France*, para. 31, 35, *supra*; Case *Kokkinakis v. Greece*, judgment from 25.05.1993, para. 40, *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62384%22]}*, accessed 09.05.2024.

A final point should be made here, namely the need for multidisciplinary studies to prove or disprove the existence of a serious link between the creation and possession of virtual child pornography or pseudo-pornography and the sexual abuse of children, as there are relevant voices[58] arguing that criminalising such conduct would actually reduce the consumption of actual child pornography with real minors; the answer to such a question needs to be provided, as important competing interests are at stake, such as freedom of expression and individual privacy, and on the other side a concept, also important for the development of a modern and robust society, but volatile over time - collective sexual morality.

On the other hand, we have noted the extent of child pornography in the electronic environment, especially virtual child pornography, and the challenges posed by the use of artificial intelligence in the creation of such content.

In this respect, the direction of action is to integrate as a way of working in this kind of cases AI tools, capable of analysing, classifying and reporting, in a much shorter time and with greater accuracy, a volume of data incomparably superior to human capabilities; it would also be necessary to involve the providers of online platforms and services, which can host and propagate such illegal content, for proactive detection using AI technology.

The sheer volume of material circulating around the world makes a reactive approach to the phenomenon, by investigating after the fact cases of child pornography in digital format, ineffective and implausible; the thesis is all the more eloquent because, at present, a major shortcoming is the lack of a standardised classification[59] of the content of child sexual abuse material between the various parties involved in the process of preventing and combating child pornography - law enforcement agencies, non-governmental organisations, companies in the AI industry. Such a shortcoming also affects the effective cooperation between public and private partners in several countries.

Thus, a unified approach to the problem is needed from both a legislative and administrative point of view from developed countries in order to reduce as much as possible the causes of the proliferation of this scourge.

Finally, we stress the importance of following the future legal instruments at international level, especially at the EU and US level, for regulating the use of AI, mentioned above, in order to analyse and assess, to a reasonable extent, the impact and effectiveness of these regulations in combating child pornography online, but the subject will probably be reserved for a future study.

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BRIEF CONSIDERATIONS REGARDING THE UNCONSTITUTIONALITY OF THE PROVISIONS OF ART. 126 PARA. (4) AND (5) CPP

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Abstract

During the Preliminary The unconstitutional nature of the provisions of art. 126 para. (4) and (5) CPP has not yet been ascertained by the Constitutional Court, however, its way of drafting involves extensive discussions at the level of judicial practice.

Specifically, the power of the judicial body to establish the status of threatened witness and to establish the protection measures referred to in art. 125 CPP in conjunction with art. 126 para. (1) CPP covers situations that call into question firm, coherent and adequate interventions to ensure the safety of the persons involved, which may also involve restrictions on the exercise of fundamental rights of defendants.

However, in the latter hypothesis, the texts of law that exceed the generic regulatory framework and allow the execution of specific actions must also be subordinated to the principle of legality, as well as the constitutional conditions regarding the restriction of the exercise of certain rights provided by the provisions of art. 53 of the Romanian Constitution.

Thus, it may be regarded that the legal provisions criticised are unconstitutional insofar as they do not recognise, during the preliminary chamber proceedings, the power of the preliminary chamber judge to rule on the protection measures, i.e., the manner in which his/her competence is exercised. In this way, the provisions of art. 1 para. (5) of the Fundamental Law on the clarity, precision and predictability of the law and the provisions of art. 124 para. (3) of the Romanian Constitution on the principles of judicial independence and separation of judicial functions are violated.

This paper aims to present all these aspects and to provide the author's point of view on the reasons why the text of art. 126 para. (4) and (5) CPP is unconstitutional.

Keywords: *the principle of legality, threatened witness, protection, unconstitutionality, preliminary chamber proceedings.*

1. Introduction

The theme of this paper was chosen in consideration of the unconstitutional character, in the opinion of the author, of the provisions of art. 126 para. (4) and (5) CPP, applicable in cases currently pending before the courts in Romania.

In this regard, the paper presents a detailed analysis of the admissibility conditions of the exception of unconstitutionality having as object the above-mentioned laws, the, what can be useful both from the perspective of a lawyer's plea for the defendant he represents, and for the judge before whom such a problem is raised in court.

It is also notable that the Court before which an exception of unconstitutionality is risen will not analyse the constitutional character or the lack thereof in relation to the normative text invoked. On the contrary, this Court will strictly examine the conditions of admissibility of the exception, and will, depending on the fulfilment of these conditions, to admit the defendant's request and to send the exception for resolution to the CCR, this being the only judicial body that has the material and functional jurisdiction to rule on such issues.

On the other hand, insofar as the exception invoked by the defendant does not cumulatively meet all the requirements laid down by law to be admissible, the court rejects the exception of unconstitutionality as unfounded.

Last but not least, despite the fact that the Court before which such an exception is invoked does not proceed to the resolution of its merits, but only analyses the procedural aspects, in the paper, the author also provides the motivation on the exception of unconstitutionality of the provisions of art. 126 para. (4) and (5) CPP, given its usefulness for the analysis to be made by the Constitutional Court.

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2. Conditions for admissibility of the exception of unconstitutionality

From the perspective of the admissibility conditions, the provisions of art. 29 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court (hereinafter referred to as „Law no. 47/1992") set forth that „the Constitutional Court shall decide on exceptions raised before the courts of law or commercial arbitration concerning the unconstitutionality of a law or ordinance or of a provision of a law or ordinance in force, which is related to the settlement of the case at any stage of the dispute and whatever its subject matter."

In addition, the notification of the Constitutional Court shall be ordered by the court before which the exception of unconstitutionality was raised, by a conclusion that will include the views of the parties, the opinion of the court on the exception, and, and will be accompanied by the evidence submitted by the parties. If the exception has been raised ex officio, the conclusion must be reasoned, including the parties' claims, as well as the necessary evidence. With the conclusion of the complaint, the court will send the Constitutional Court and the names of the parties in the trial including the data necessary to carry out the procedure of summoning them.

In other words, the only aspect submitted to the analysis of the court regarding the exception of unconstitutionality invoked before it is its admissibility, the merits of the exception being examined by the Constitutional Court, by virtue of its attributions established by art. 146 of the Romanian Constitution and art. 11 para. 1 item A letter d) of the Law no. 47/1992.

Therefore, the conditions of admissibility of the exception of unconstitutionality of art. 126 para. (4) and (5) CPP will be further analysed.

First, the legal provisions whose unconstitutionality we request to be ascertained are contained in a law, respectively in the content of Law no. 135/2010 on the Criminal Procedure Code, thus entering under the constitutional review exercised by CCR pursuant to art. 11 para. (1) item A letter d) of the Law no. 47/1992.

Second, the legal provisions criticised were not declared unconstitutional by a previous CCR decision.

Thus, the Court before such an exception is raised must take into account that previously, The Constitutional Court has not ruled in the sense of admitting the exception of unconstitutionality of the provisions of art. 126 para. (4) and (5) CPP.

Consequently, the criticism of unconstitutionality regarding the normative provision cited above was not declared unconstitutional by a previous CCR decision, the exception, from this perspective, being admissible.

And, according to art. 29 para. (3) of the Law no. 47/1992, „provisions found to be unconstitutional by a previous decision of the Constitutional Court may not be subject to the exception". By interpreting *per a contrario* this legal provision, it is unequivocally clear that the provisions found to be constitutional by a previous CCR decision may be subject to the exception of unconstitutionality.

Third, the legal provisions whose unconstitutionality is requested to be ascertained are related to the settlement of the case taken into consideration by the author, condition stated in the content of art. 29 para. (1) of Law no. 47/1992, republished.

In this respect, the connection with the settlement of the case is highlighted by the fact that the eventual admission of the exception of unconstitutionality would determine the legislator that, based on the provisions of art. 147 para. (1) of the Romanian Constitution to establish the content of these provisions in accordance with the constitutional norms, with the provisions of art. 6 ECHR and with the text art. 47 of the Fundamental Charter of the European Union in such a way as to confer a fair character on the procedure, and thus the full efficiency and right of defense of the defendant.

More specifically, if this status of threatened witness were NOT maintained, within the limits of the object of the preliminary chamber procedure, the defendants would have the opportunity to hear directly as provided by art. 6 ECHR, the respective witnesses, could make requests and exceptions regarding the possible illegality of the award of the threatened witness status by reference to the real quality of the person heard under the protection measures and/or other requests concerning the current and legitimate nature of the measures ordered, but also with regard to the existence of any strategy or workmanship that had as purpose the administration in bad faith of a means of proof, which could influence the decision on the case resolution in the preliminary chamber procedure.

In addition, the admission of the exception of unconstitutionality would lead to the removal from the category of evidence of the statements of protected witnesses, lacking the probative basis to a considerable extent the accusations directed against the defendant because of the cause envisaged by the author.

The request for referral to the CCR is based on the premise of the need to control the provisions criticised with the constitutional provisions indicated infra, procedural interest distinct from the limited evidentiary value of the declarations obtained according to the provisions of art. 103 para. (3) CPP (which could be analysed and capitalised exclusively on the assumption of a solution of condemnation, renunciation of the penalty or postponement of the penalty enforcement, or, appreciated on a case-by-case basis by the judge of the case distinct from the analysis aimed at controlling the conformity of the provisions criticised with the provisions of the Fundamental Law).

3. The unconstitutionality of art. 126 para. (4) and (5) CPP

3.1. The constitutional provisions in the report to be ascertained unconstitutionality of art. 126 para. (4) and (5) CPP

The text of law subject to the exception of unconstitutionality contravenes the provisions:

- art. 1 para. (5) (Romanian State) of the Romanian Constitution: *„(...) In Romania, the observance of the Constitution, its supremacy and laws are mandatory*.";
- art. 15 para. (1) (Universality) of the Romanian Constitution: *„Citizens benefit from the rights and freedoms enshrined in the Constitution and other laws and have the obligations provided for by it*.";
- art. 20 para. (1) and (2) (International human rights treaties) of the Romanian Constitution: *„(1) The constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party*."; *„(2) If there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania is a party, and the internal laws, the international regulations shall take precedence, unless the Constitution or internal laws contain more favorable provisions*.";
- art. 21 para. (3) (Free access to justice) of the Romanian Constitution: *„Parties are entitled to a fair trial and to the settlement of cases within a reasonable time*.";
- art. 23 para. (12) (Individual freedom) of the Romanian Constitution: *„(...) No penalty can be established or enforced except under the conditions and under the law*";
- art. 24 para. (1) (Right to Defense) of the Romanian Constitution: *„Right to Defense is guaranteed*.";
- art. 52 para. (1) (Right of the person harmed by a public authority) of the Romanian Constitution: *„The person harmed in a right of his or in a legitimate interest, by a public authority, or, by an administrative act or by failure to resolve within the legal term of an application, it is entitled to obtain recognition of the claimed right or legitimate interest, cancellation of the act and repair of the damage*.", as well as;
- art. 53 para. (2) second sentence (Restriction of the exercise of certain rights or freedoms) of the Romanian Constitution: *„(...) The measure must be proportionate to the situation that caused it, applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom*".

Consequently, in the opinion of the defense, the text of art. 126 para. (4) and (5) CPP infringes the provisions of art. 1 para. (5) of the Romanian Constitution which enshrines the principle of legality, which imposes the obligation of the legislator that the legal norms it adopts be precise, clear, and predictable.

The imprecision and lack of predictability of the texts required to be subject to unconstitutionality control, violating the principle of legality, also affect the right to a fair trial, provided for by the provisions of art. 21 para. (3) of the Romanian Constitution, on those of art. 6 para. (1) ECHR, as well as those of art. 47 para. (2) of the Charter of Fundamental Rights of the European Union, implicitly being disregarded also the provisions of art. 11 para. (1) and (2) and art. 20 of the Romanian Constitution.

On the contrary, the texts of art. 24 of the Romanian Constitution regulating the right to defense, but also are violated those of art. 53 of the Romanian Constitution regarding the restriction of the exercise of certain rights or freedoms.

By the provisions whose unconstitutionality is invoked the provisions of art. 124 of the Romanian Constitution on the execution of justice and art. 126 para. (1) and (2) of the Romanian Constitution are violated regarding the jurisdiction of the courts and the court procedure, art. 131 para. (1) of the Romanian Constitution regarding the role of the Public Ministry, as well as art. 132 of the Romanian Constitution on the Statute of Prosecutors.

3.2. Reasons for unconstitutionality of the provisions of art. 126 para. (4) and (5) CPP

In this regard, we consider that the provisions of art. 126 para. (4) and (5) CPP, contrary to the provisions of the Fundamental Law of the Romanian State.

Specifically, the competence of the judicial body to establish the status of threatened witness and to establish protective measures to which art. 125 CPP refers in conjunction with art. 126 para. (1) CPP addresses situations that call into question firm, coherent and appropriate interventions to ensure the safety of the persons involved, which may also involve restrictions on the exercise of fundamental rights of defendants.

However, in such a last hypothesis, the laws that exceed the generic regulatory framework and allow the execution of specific actions must also be subordinated to the principle of legality, as well as the constitutional conditions regarding the restriction of the exercise of certain rights provided by the provisions of art. 53 of the Romanian Constitution.

Provisions of art. 126 para. (4) and (5) CPP provide for the competence of the prosecutor to grant the status of threatened witness and the establishment of one or more protective measures, texts of law that pervade a general framework in which authority can act in order to restrict the fundamental rights of defendants, without the establishment of clear and effective safeguards to protect them from any illegal, discretionary or abusive application of these measures.

In particular, an absolute confidentiality of the prepared acts is established, lacking any possibility of control over these acts, aspects that affect in an excessive manner the principles of adversariality and equality of arms, and, to which is added the arbitrary, uncontrollable manner, in which the prosecutor performs the checks on the maintenance of the conditions that determined the taking of the protection measures, actions with a pronounced abstract character.

Moreover, the legal text criticised regulates the possibility of granting threatened witness status and the establishment of protection measures, without establishing the judicial body competent to rule on the protection measures ordered pursuant to art. 125 in conjunction with art. 126 para. (1) CPP, the manner in which the aforementioned competence is exercised, in the event that the measures of protection of witnesses ordered by the prosecutor during the criminal investigation are maintained after the moment of the sentencing, respectively in the preliminary chamber procedure.

Thus, it may be considered that the legal provisions criticised are unconstitutional insofar as they do not recognize during the Preliminary Chamber Procedure the competence of the judge of the Preliminary Chamber to rule on the protection measures, and the way in which its competence is exercised. In this way, the provisions of art. 1 para. (5) of the Fundamental Law regarding the clarity, precision and predictability of the law and the provisions of art. 124 para. (3) of the Romanian Constitution are violated regarding the principles of judicial independence and separation of judicial functions, as regulated by the provisions of art. 3 CPP.

By reference to the requirements of the provisions of the Romanian Constitution invoked, the provisions of art. 126 para. (4) and (5) CPP actually regulates the maintenance in the Preliminary Chamber Procedure of an exceptional restriction on the exercise of the defendants' right of defense. However, maintaining such a restriction, corroborated by the lack of an expressly regulated procedure for its verification and termination, when the conditions in question no longer require that this continues amount to an unlawful restriction on the exercise of fundamental rights.

Administration of the evidence with witnesses in the criminal trial, under the conditions of art. 126 para. (1) CPP, is an exception to the general rules regarding the hearing of witnesses. For this reason, it is necessary that this exception be expressly regulated, both in terms of the competent judicial bodies to order, to verify, and, to note the need to modify or terminate the measures of protection of witnesses, as well as the procedure corresponding to the exercise of these attributions, at all stages of the criminal process, thus, including in the preliminary chamber procedure (similar to preventive measures or medical safety measures ordered by the prosecutor during the criminal investigation).

On the contrary, the exceptional character of obtaining the declarations with limited value under the conditions of the provisions of art. 126 CPP, imposes the temporary, time-limited nature of the measures put in place, as well as the lack of any criteria of opportunity and arbitrary subjectivism (features that cannot constitute the basis of the guarantee of the fundamental rights analysed).

Last but not least, the exceptional character of a situation and the efficiency of the evidence management activity cannot be a justification to violate the law order, legal and constitutional provisions regarding the

competence of public authorities or the conditions under which restrictions may be brought to the exercise of fundamental rights and freedoms.

All the issues raised do not represent simple criticism of faulty drafting or omission of some legal texts and, where appropriate, signals of legislative gaps, but genuine issues of unconstitutionality.

For these reasons, admission of the exception of unconstitutionality on these grounds would result in the content of these provisions being determined in accordance with constitutional rules, which would give a fair character to the procedure and would give the necessary efficiency to the right to defense of defendants.

4. Conclusions

This paper aims to emphasise the importance of observing the provisions of the Fundamental Law, including (or especially) the defendant being tried in a criminal case.

In order to ensure this compliance, the legislator provided for the procedure of invoking the exception of unconstitutionality.

In criminal trials, this possibility is extremely important, ensuring the observance of the fundamental rights of the criminal process, as well as the rights of the defendant.

As regards the unconstitutionality of the provisions of art. 126 CPP, it should be noted that all the requirements regarding the admissibility of the exception are met, thus, the argument presented in this paper can serve as a real help for legal practitioners, be they lawyers, prosecutors or judges.

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THE LEGAL TERMINATION OF THE UNVERIFIED PRECAUTIONARY MEASURES WITHIN THE 6-MONTH PERIOD, DURING THE PRELIMINARY CHAMBER PROCEDURE

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Abstract

During the Preliminary Chamber procedure, the precautionary measures ordered must be checked by the Preliminary Chamber Judge or the Preliminary Chamber panel, as the case may be, within the 6-month legal term.

In judicial practice, there have been situations where this deadline has not been met in terms of verifying the legality of these measures, meaning in which it is necessary to clarify some aspects at the level of understanding and applying some normative texts.

Thus, from the interpretation of the provisions of art. 250² CPP, reported to the provisions of art. 268, para. (1) and (2) CPP, failure to comply with the legal term of 6 months results in the decline from the exercise of the right to continue to verify the subsistence of the grounds that led to the taking and maintenance of the precautionary measures and the legal termination of the measures ordered, with the consequence of their lifting.

Given that the institution of the Preliminary Chamber (found in the Special Part, Title II CPP) is not part of the institution of judgment on the merits (found in the Special Part, Title III CPP), the term to which we have to refer is 6 months, not 1 year, this procedure is not „in the course of the judgment" (the phrase inserted by the legislator in the norm contained in art. 250² CPP).

The purpose of this paper is to explain and detail the above-mentioned aspects by the co-authors in order to provide a set of arguments that can be used by practitioners, if they are faced with the non-verification of the precautionary measures within the legal term, during the Preliminary Chamber procedure.

Keywords: *Preliminary Chamber, legal term, precautionary measures, decline from the exercise of the right, non-verification.*

1. Introduction

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 issue of the maximum period within which the precautionary measures must be verified during the Preliminary Chamber Procedure.

In this respect, one must take into consideration that the maximum legal term available for the verification of the necessity to maintain the precautionary measures in accordance with the CPP is no more than 6 months or else the legal termination of the measures ordered occurs.

However, despite the clarity of the above mentioned criminal legal norm, the National courts had a non-unitary practice from this point of view, an aspect which led to the non-compliance with the procedural rights of the persons concerned by the precautionary measures in question.

The chosen topic is important from the perspective of the consequences of non-compliance with this term by the Judge of the Preliminary Chamber by reference to the precautionary measures subject to verification, given the general obligation to ensure that the right to a fair trial and the right to defense are also respected from this point of view.

The co-authors intend to answer the matter under consideration in respect of the final minutes of the proceedings, rendered by the CA Bucharest, on 6 February of the current year in a particular case file, *i.e.*, case no. 21959/3/2021/a1.1, whereby this issue is motivated in detail and unequivocally.

Furthermore, the paper addresses the relevant judicial practice by presenting opinions expressed in recent HCCJ case-law on the subject of this study.

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2. The legal termination of the unverified precautionary measures within the 6-month period

2.1. Brief considerations on the factual situation deduced to judgment

For a preliminary purpose, a series of clarifications on the factual situation deduced to the judgment of the Preliminary Chamber Panel of the CA Bucharest in Case file no. 21959/3/2021/a1.1, are necessary for a full understanding of the findings of the final minutes of the proceedings on 06.02.2024.

Thus, in the foregoing case it was ordered the establishment of the precautionary seizure of all immovable movable property (*i.e.,* constructions, land, cars, valuables, amounts in bank accounts, etc.), belonging to a defendant natural person and a defendant legal person. These measures were ordered to repair an alleged damage caused to the state budget by committing the tax evasion offense, which was the object of the money laundering process, for special confiscation, according to the indictment.

Against the ordinance dated 03.06.2020 the two defendants have filed appeals, pursuant to art. 250 CPP, both of which were rejected as unfounded by the Bucharest Tribunal.

Subsequently, analysing the legality of the legal certainty of the precautionary seizure, the Preliminary Chamber Judge held, according to art. 250^2 CPP, that the precautionary measure set forth by the Ordinance of 03.06.2020, of the Prosecutor of the Prosecutor's Office attached to the Bucharest Tribunal, is legal and thorough and it is necessary to maintain the seizure instituted.

It was also held that, according to art. 250^2 CPP [1] *„in the entire course of the criminal trial, the prosecutor, the Judge of The Preliminary Chamber or, as the case may be, the Court periodically checks, but no later than 6 months during the criminal investigation, respectively, one year during the trial, if the grounds that determined the taking or memorising of the precautionary measure subsist, ordering, as the case may be, maintaining, restricting or extending the ordered measure, respectively raising the ordered measure, the provisions of art. 250 and 250^1, applying accordingly*."

Last but not least, as regards the allegations of the defendants from which it follows that the insurance measure has ceased by right as a result of non-compliance with the 6-month period provided by the provisions of art. 250^2 CPP in which the precautionary measures should have been verified, the Preliminary Chamber Judge assessed that they were unfounded.

2.2. Recitals of the CA Bucharest from the final minutes of the proceedings no. 70/CP/06.02.2024

Analysing the documents and papers of the file, in relation to the formulated requests and arguments invoked in their support, CA Bucharest's Preliminary Chamber Panel found that the appeals are well founded.

Thus, it was assessed that, according to the provisions of art. 250^2 CPP, throughout the Criminal trial, the prosecutor, the preliminary chamber judge or, as the case may be, the, the Court of law periodically checks, but no later than 6 months during the criminal investigation, respectively one year during the trial, if it subsists the grounds that determined the taking or maintaining the precautionary measures, as the case may be, maintaining, restricting or extending the ordered measure, respectively raising the ordered measure, the provisions of art 250-250^1 being applied accordingly.

Preliminarily, CA Bucharest considered that it was necessary to analyse the nature of the terms provided by art. 250^2 CPP, in relation to the reasons invoked in support of the appeals.

According to the Decision of the Court, precautionary measures consist in the freezing of the envisaged goods, by instituting a seizure on them. As a result of the establishment of seizure, the owner of these assets loses the right to introduce them or strike tasks, the measure affecting the attribute of the material legal provision, throughout the criminal process, until the final settlement of the case[2].

Also, by dec. no. 894/17.12.2015[3] regarding the exception of unconstitutionality of provisions art. 249 para. (1) CPP, the first sentence, CCR held that the interference generated by ordering the seizure on the movable immovable property of the suspect, defendant, defendant, the civilly responsible person or other persons in the property or possession of which are located the goods are related to fundamental rights, namely the right of ownership, it is regulated by law, respectively art. 249 *et seq.* CPP, has as legitimate purpose the conduct of the

[1] As introduced by Law no. 6/2021, published in the Official Gazette of Romania no. 167/18.02.2021.

[2] See HCCJ dec. no. 2/2018, the Panel for the settlement of some legal issues determines that addresses the notion of „freezing" to which are referred to the provisions of art. 249 para. (2) CPP.

[3] Published in the Official Gazette of Romania, Part I, no. 168/04.03.2016.

criminal investigation, being a judicial measure applicable during the criminal trial, is imposed, being appropriate *in abstracto* to the legitimate purpose pursued, the following, it is necessary in a democratic society to protect the values of the rule of law.

At the same time, the interference analysed is proportional to the case that determined it, since the insurers are provisional, as they are disposed during the Criminal trial, and the Court, analysing the principle of proportionality, the, in its constant jurisprudence, it held that it presupposes the exceptional character of restrictions on the exercise of rights or freedoms.

Likewise, by dec. no. 24/20.01.2016[4], CCR held that in the absence of ensuring an effective judicial control over the freezing of assets during a criminal trial, the State does not fulfil its constitutional obligation to guarantee private property to the natural/legal person.

According to the CA Bucharest, precautionary measures are thus real, temporary interim procedural measures, which aim to guarantee the reparation of the damage caused by the crime, the execution of the fine penalty, the enforcement of the special confiscation measure or of the extended confiscation, as well as the guarantee of the payment of the judicial expenses generated by the conduct of a Criminal judicial procedure. Moreover, substantial terms are those that protect rights, prerogative extra-judicial interests, preexisting criminal proceedings independent of it, limiting the duration of measures, or making the performance of acts conditional or promoting actions that would annihilate an extra-judicial right or interest.

Unlike substantial deadlines, procedural time limits are the terms that protect the rights of the procedural interests of the participants in the Criminal proceedings contribute to disciplining the systematisation of the procedural activity in order to ensure the timely achievement of the purpose of the Criminal trial. The establishment of substantial time limits is likely to ensure the certainty of the extent of Criminal liability, of sanctions or other measures that restrict the extra-judicial freedoms of the injured person.

Thus, in the matter of the precautionary measures, it is about the protection of extra-judicial pre-existing rights, CA Bucharest has assessed that the maximum terms of 6 months and 1 year in which the insurance measure must be verified are substantial deadlines. The classification of time limits as substantial or procedural considers the nature of the rights and interests they protect and not the sanction that occurs in case of non-compliance (whether expressly provided for in particular, whether it is regulated in a general way).

The reason for the existence of a certain differentiation, from the essence of the classified object precisely determines the division into categories, and the effect occurs to this classification and does not precede it. The fact that the legislator did not provide in the newly introduced text a sanction for non-compliance with these deadlines does not give them the nature of procedural deadlines, as long as the nature of the term of verification of the insurance measure does not depend on the express regulation of a sanction but, as has been shown, on the nature of the protected interests.

From the analysis of the law text, it follows that the legislator has sought to impose an obligation on the judicial bodies, that of carrying out the verification of the subsistence of the grounds which determined the taking or maintenance of the insurance measure „*no later than*" the term of 6 months, respectively 1 year.

Such an obligation imposed on judicial bodies cannot be appreciated at the same time as a recommendation, only because it was not expressly provided for one of the sanctions that are imposed by necessity as a result of the finding of non-compliance with an imperative deadline, namely, the decline of the criminal judicial body from the exercise of the procedural right, such as the nullity of the procedural act made over time or, from a substantial point of view, from a substantial point of view, legal termination (*ope legis*) of unverified measures within the imperative term imposed by law.

Also, as was noted in the doctrine on the classification of terms[5], for example in the field of preventive measures, the circumstance that a judgment after the expiry of the duration of the previously ordered preventive measure leads to the finding of legal cessation of this preventive measure, does not mean that it is the effect of the nullity of that judgment on the grounds that the court was revoked from the „*right*" to rule it again after the expiry of the time limit, but it is the effect of reaching the deadline of a procedural measure in the conditions in which there is no other valid decision to prolong it.

As such, CA Bucharest noted that the term in question is a peremptory (imperative) term since a procedural activity must be carried out within it (verifying the legality of the precautionary measures). The reason for the

[4] Published in the Official Gazette of Romania, Part I, no. 276/12.04.2016.

[5] See N. Volonciu, A.S. Uzlău, *The New Criminal Procedure Code, commented*, Hamangiu Publishing House, 2014.

term of six months/one year established to verify the legality and reliability of the insurers is to ensure compliance with the proportionality of the measure in relation to the duration and the evolution of the procedure, namely, to remove the arbitrariness that deprives maintenance on an indeterminate duration of a restrictive measure of rights.

Moreover, the maintenance of the precautionary measures in the Criminal process must comply with the proportionality requirements imposed by the ECtHR, The Court of Strasbourg pointing out that „lifting of the precautionary measures should be possible when their effective duration is excessively high in relation to the duration and the course of the procedure and the consequences that it has produces exceed the normal effects of such a measure”[6].

Under these conditions, CA Bucharest has assessed that the sanction that intervenes in case of non-compliance with the maximum terms of 6 months 1 year in which the insurance measure must be verified is to be regarded from the point of view substantial is the legal termination (*ope legis*) of unverified measures within the imperative term imposed by law.

By applying these principles to the case, the Court observed that the last verification of the precautionary measures took place on 21.01.2021, thus, at the time of the analysis carried out by the Preliminary Chamber Judge of the First Court, by the conclusion challenged (16.01.2023), the substantial, imperative deadline imposed by art. 250^2 CPP was exceeded.

As such, the Court noted that the term in question is a peremptory (imperative) term since a procedural activity must be carried out inside it (verifying the legality of the precautionary measures). The reason for the term of six months/one year set forth to verify the legality and reliability of the insurers is to ensure compliance with the proportionality of the measure in relation to the duration and the evolution of the procedure, namely, to remove the arbitrariness that deprives maintenance on an indeterminate duration of a restrictive measure of rights.

Additionally, the maintenance of the precautionary measure in the criminal proceedings must respect the proportionality requirements imposed by the ECtHR, the Court of Strasbourg said that „*the lifting of the insurance undertaking should be possible when its effective duration is excessively high in relation to the duration and course of the procedure and the consequences it produces outweigh the normal effects of such a measure*”[7].

Thus, CA Bucharest stated that under these conditions, the sanction that occurs in case of non-compliance with the maximum time limits of 6 months 1 year in which the precautionary measure must be verified is the termination of right (*ope legis*) of unverified measures within the mandatory time limit imposed by law.

Finally, applying these principles to the particular case subject to judgement, the Bucharest Court of Appeals noted that the last verification of the precautionary measures took place on 21.01.2021, thus, at the time of the analysis carried out by the Preliminary Chamber Judge of the First Court of 16.01.2023, the substantial, imperative term imposed by art. 250^2 CPP was exceeded. Consequently, the Court considered that the sanction of non-compliance with this term is the legal termination of the insurance measures, which is pursuant to art. 425^1 para. (7) point 2 letter a) CPP. As a result, the Court admitted the appeal declared by the defendants against the merits of 16.01.2023 issued by the Trib. Bucharest in case no. 21959/3/2021/al.1.

3. Conclusions

This paper emphasises the importance of observing the deadlines provided by law for the verification of the precautionary measures during the Preliminary Chamber procedure, by analysing the considerations pronounced by the CA Bucharest in a given case.

It is also notable that the nature of the deadlines for verifying the legality and thoroughness of these interim measures of a patrimonial nature in the criminal proceedings, which presented difficulties in practice, is clarified, because of non-unitary judicial practice at the level of national courts.

Last but not least, the paper may be of interest to legal practitioners, given that the recitals of the CA Bucharest judgment under review can serve as a model both for possible defenses formulated by lawyers, as well as for prosecutors or judges in Criminal matters.

[6] See Case *Forminster Enterprises Limited v. Czech Republic*, judgment from 09.01.2009, para. 76-78.
[7] *Ibidem.*

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PRECAUTIONARY MEASURES IN CRIMINAL TRIAL - MATTERS REGARDING THE PROCEDURAL AND SUBSTANTIVE TIME-LIMITS

Georgian Mirel PETRE[*]

Abstract

Given that the judicial practice is non-unified with respect to the time-limit in which the precautionary measure ordered in criminal cases must be verified, I consider it appropriate to analyse in terms of interference with the suspect/defendant's patrimony the possibility of the judicial bodies to maintain the measure, both before the deadline established by law has expired, as well as after, in order to unify/standardise the application of the legal provisions in the matter.

In other words, the judicial practice is non-unified with respect to the time-limit in which the grounds, which were the basis for taking the precautionary measure in criminal proceedings, can be verified, meaning that there are theories according to which the previously mentioned time-limit is a recommendation time-limit, and not a substantial one which would result in the loss of the right to maintain the measure, after its fulfilment.

Keywords: *precautionary measures, substantive time-limits, procedural time-limits, non-unified judicial practice.*

1. Introduction

On the occasion of the research in order to write this paper, I find that even in the specialised doctrine there are several opinions regarding this subject, with arguments both in favour and against the previously stated matters, both from the perspective of the effects and from the procedural perspective.

Regarding the applicability of the CPP provisions, more precisely the phrases/terms used by the legislator, we come to the conclusion that they impose on the judicial bodies the obligation to verify the precautionary measure within certain terms to be analysed.

The importance of the study of this issue is given by the intrusion into the fundamental rights and freedoms of the person, by violating the ECHR and the established ECtHR practice regarding property rights.

Starting from the rights conferred by the Romanian Constitution, one may notice that, beginning even with art. 44, they state that the right to property is guaranteed by the state, its violations not being allowed, except in the situations expressly and limitedly provided by law.

The establishment of precautionary measure on the assets of the suspect/defendant is a violation of the constitutional provisions and a serious infringement of the right to property, if the measure is disproportionate or unfounded in relation to the seriousness of the accusation brought.

Through this paper I propose to analyse the conditions under which precautionary measures can be taken in criminal trial, their purpose, the time-limits in which they must be checked, and also their reasonable or unreasonable duration, by reference to the ECtHR jurisprudence, the national jurisprudence, and from the perspective of the specialised doctrine in relation to this institution.

With the adoption of the current Code of Criminal Procedure, the Romanian legislator understands that they must comply with all European conventions and treaties to which Romania is a party and harmonise domestic legislation by offering securities regarding the person accused of committing an act provided for by the criminal law, as the ECtHR rules through all the judgments it pronounces.

2. Aspects regarding the matter of precautionary measures

The seat of the matter can be found in art. 249-256 CPP, Chapter III, articles which regulate the general conditions for taking such precautionary measures, their challenge depending on the stage of the proceedings, their verification, the procedures, but also the special cases of capitalization of goods, return of items or restoring the previous situation.

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Precautionary measures are procedural measures with a real character and can be ruled by the prosecutor during the criminal investigation, by the judge of the preliminary chamber in the procedure of the preliminary chamber and by the court, in order to seize the movable or immovable assets belonging to the suspect or the defendant, to the civilly responsible party or other persons, followed by order of the special or extended confiscation, the repair of the damage produced or the execution of the fine or court costs.

Therefore, the purposes for which such measures can be ruled are expressly and limitedly provided by law, without the possibility of being ordered for reasons other than those stated previously.

By establishing such precautionary measures, the patrimonial assets of the suspect/defendant or the aforementioned persons are sought to be made unavailable/to be seized, with the result that the court will reap the benefits of their value through the decision it will rule, if necessary.

In other words, in the case where the court reaches the conclusion that the accused person has committed the crime beyond any reasonable suspicion, and their conviction is to follow, it will also order special or extended seizure, under the conditions provided by the provisions of art. 112 and 112[1] CP.

The decisions ordering the precautionary measures are enforceable, establishing some provisional procedural measures to avoid the concealment, destruction, alienation, or evasion of the assets which may be the object of the previously stated precautionary measures or which may serve to guarantee the execution of the fine or of the legal expenses or the reparation of the requested and admitted civil damage.

By establishing these measures, the aim is to make movable or immovable assets unavailable, *i.e.,* prohibiting their transfer until a final decision is issued, the Court holding that the precautionary attachment also affects the attributes of *usus* and *fructus*, when the assets, object of the seizure, are collected and handed over to specialised institutions[1] for safekeeping.

In the specialised doctrine[2] it was correctly noted that the analysis of taking a precautionary measure must meet 3 cumulative conditions:

- the precautionary measure must be necessary in order to avoid the concealment, destruction, alienation, or evasion of the assets;
- the goods on which the measure is ordered should be subject to special seizure or extended seizure, or can be used to guarantee the execution of the fine or legal expenses or the repair of the damage caused by the crime;
- the requirement of proportionality, by analysing it in relation to the restrictive effect in terms of the property and the intended purpose.

I am of the opinion that the precautionary measure must be analysed by reference to the requirement of proportionality before any other analysis, given the interference with the property/ownership right of the person which they have/own? and the limitation in the absolute of the measure in terms of transfer or encumbrance of the asset object of the precautionary measure.

In other words, I believe proportionality is analysed, primarily, by reference to the seriousness of the accusation brought, which will necessarily be analysed through the lens of the immediate interference with the right to property. By establishing such measures, as I mentioned before, the property will no longer be transferred during the criminal trial; or, if the measure is disproportionate in relation to the seriousness of the act, we note a direct impact on the patrimony, which violates the constitutional provisions of a democratic state, but also the constant ECtHR jurisprudence.

By dec. no. 19/RIL/2017, HCCJ held that *„The introduction of a precautionary measure holds the judicial body to establish a reasonable ratio of proportionality between the purpose for which the measure was ordered (for example, in order to seize the assets), as a way to ensure the general interest, and the protection of the right of the accused person to use their property, in order to avoid imposing an excessive individual burden. Proportionality between the purpose sought when the measure was instituted and the restriction of the accused person's rights must be ensured regardless of how the legislator assessed the necessity of ordering the seizure, as arising from the law or as being left to the discretion of the judge. The condition follows both from art. 1 of the First Additional Protocol to the ECHR, as well as of art. 53 (2) of the Constitution of Romania, republished (the*

[1] M. Udroiu, *Sinteze de procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2018, p. 1035.
[2] *Idem*, p. 1036.

measure must be proportional to the circumstance that determined it, be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom)"[3].

Moreover, noting the provisions of art. 250^2 CPP, we find a legislative amendment brought by art. 19 point 2 of Law no. 6/2021, consisting of an intervention of the legislator, justified by the fact that whenever there is a precautionary measure during the criminal trial, the judicial bodies have the obligation to periodically check whether the grounds taken into account when taking such measure are still valid.

Assuming this article will take into account the non-unified judicial practice of the courts with regard to the time-limits provided by the provisions of art. 250^2 CPP, following an analysis of whether this deadline is a recommendation or if it is a deadline the non-compliance of which attracts *de plano* the impossibility of the judicial bodies to maintain the precautionary measure.

The Criminal Procedure Code explains, through the lens of art. 268, the consequences of non-compliance with the general time-limits:

1. „when for the exercise of a procedural right the law provides for a certain deadline, failure to comply with such deadline entails the decay of the exercise of the right and the invalidity of the act made after the deadline";

2. „when a procedural measure can only be taken for a certain period of time, the expiration of such period resulting automatically in the termination of the effect of the measure";

3. „for the other procedural time-limits, in case of non-compliance, the provisions regarding invalidity shall apply"[4].

In my view, I consider it appropriate to bring into discussion the classification of the time-limits in the Code of Criminal Procedure, both to be able to give efficiency to the provisions found in Chapter II, and to understand the difference in the effects, of which violation could imply.

In other words, it must be analysed with priority if the time-limits provided by the legislator for the precautionary measures are recommendable or if they could attract the consequences provided for in art. 268 CPP.

In the hypothesis provided by para. (1) of art. 268 CPP, we can observe that the legislator intends to set certain time-limits within which the proceedings or procedural acts can be carried out, and failure to comply with it entails the loss of the right to perform it and the invalidity of the act.

Correctly, the Romanian legislator applies the sanction of the loss of the right to perform the act done beyond the time-limit established by law, through the lens of the artificiality of carrying out the procedures in violation of the legal provisions, proclaiming the express invalidity of the act done, directly harming the interests protected by the legal regulations.

Moreover, the criminal procedure code offers the possibility to carry out proceedings and procedural acts within a certain period, in compliance with the conditions provided by law, for the purpose of ensuring a good conduct of the criminal trial, offering sufficient guarantees regarding the exercise of proceedings and procedural rights, without understanding that this sanction would, in concrete terms, punish the recipient of the criminal procedural law, being a just sanction for the passivity the latter shows in defending their rights and freedoms.

The penalty of forfeiture establishes the existence of the right, without being able to affect it, but intervenes during the proceedings in order to protect the scheme of the criminal trial, in order not to create artificial procedures.

As for paragraph II of the same article, the Romanian legislator separates the procedural time-limit from the proceedings time-limit, in that it directly shows the consequence of the legal termination of the effect of the measure.

That being the case, after clarifying the aspects regarding the procedural time-limits and the substantive time-limits, it will be established which provisions are applied to the procedural measures, synchronising the institutions provided for in the Code of Criminal Procedure.

In my opinion, the failure to check the precautionary measures during the proceedings entails the termination of the right, with the consequence of their removal.

[3] HCCJ RIL dec. no. 19/2017.

[4] Art. 268 para. (1), (2) and (3) CPP.

It is true that the legislator did not provide, in art. 250^2 CPP, the solution of establishing the legal termination of the precautionary measure, as they provide in the case of precautionary measures in art. 241 CPP, but it provides for the solution of removing the precautionary measures.

The removal of precautionary measures, being provided as a solution in art. 250^2 CPP, may be the consequence of the disappearance of the grounds which led to their taking/maintaining during the procedures or of the illegal nature of the measures, revealed on the basis of new circumstances, which lead to this conclusion.

I am of the opinion that the removal of precautionary measures can also be the consequence of their legal termination, when the judicial bodies reach such a conclusion.

This being so, I note the fact that the text under art. 250^2 CPP establishes as an obligation for the judicial bodies the verification of the existence of the grounds which determined the taking or maintenance of precautionary measures, for the reasons shown in the statement of reasons (absence of an express legislative provision that imposes verification of grounds); that the text of the law in question establishes deadlines by which the judicial body is obliged to proceed with the evaluation of the precautionary measures, from the perspective of the existence of grounds, and that non-compliance with such deadlines entails the legal termination of the measures.

It is true that art. 250^2 CPP does not expressly provide for the situation in which the judicial body can determine the legal termination of precautionary measures, but art. 268 para. (2) CPP (text of a general nature and applicable in terms of all procedural measures) provides as a sanction the termination of the effects of procedural measures when they can only be taken for a certain period, if such period has expired.

To reach this conclusion, I consider that the precautionary measures are not taken for a certain period, as is the case with preventive measures or surveillance measures, but, after taking the precautionary measures, the failure to fulfil an obligation established by law, namely that of verification of the existence of the grounds taken into account when taking the measure, entails its legal termination, in accordance with the provisions of art. 268 para. (2) CPP, since the period in which the verification is mandatory, *i.e.*, 6 months or a year, becomes a time-limit in which the precautionary measure can be taken.

Only an interpretation of this kind may be consistent with the purpose for which the verification obligation was established, as well as the protection conferred by the Constitution on the right to property.

Regarding the date from which the time-limit obliging the judicial body to verify the existence of grounds is calculated, if the cases have been suspended, I am of the opinion that precisely art. 367 CPP, which establishes the obligation to verify precautionary measures during the trial, establishes also *mutatis mutandis* the obligation to verify the existence of the grounds which led to the taking/maintenance of precautionary measures, given the fact that both preventive measures and precautionary measures are intrusions into the fundamental rights of the accused, respectively the right to freedom and the right to property, on the one hand.

By dec. no. 336/30.04.2015, CCR ruled in para. 24: *«as regards the definition of the „time-limit", in the matter of criminal procedure, means the time interval within which or until which certain activities or acts can or must be carried out in the criminal trial, it is also the date on which or the time interval within which or until which can be fulfilled, it is not allowed to be fulfilled or must be fulfilled an act, an activity or a procedural measure or exercised a procedural right, a sanction or a measure of criminal law, as applicable.*

By establishing the time-limit, as regulated in art. 268-271 CPP, the law ensures the fulfilment of procedural acts within the time intervals imposed by the natural sequence of procedural stages, intended to guarantee the execution of the act of justice. Unlike the substantive deadlines, which ensure the protection of legitimate rights and interests in the event of their restriction, the procedural deadlines require that all operations specific to each procedural phase be carried out at a reasonable pace, in order to achieve the purpose of the criminal trial (…)», and in para. 25 that, *„in relation to their character and effects, the procedural time-limits were classified into peremptory (imperative) terms - those within which an act must be fulfilled or performed, a time-limit which creates a limitation, the act must be performed before the time-limit is fulfilled; regulatory (recommended) deadlines - those deadlines which fix a period of time for the performance of certain proceedings or procedural acts, but may attract disciplinary sanctions or a judicial fine for the person who had the obligation to comply with it"*.[5]

[5] CCR dec. no. 336/30.04.2015, published in the Official Gazette of Romania no. 342/19.05.2015.

According to the definitions given by the Constitutional Court, the time-limits ensuring the protection of legitimate rights and interests in case of their restriction, are substantive and not procedural time-limits, and with regard to the provisions of art. 250^2 CPP, they were enacted precisely to guarantee the protection of the right to property, by imposing on the judicial bodies the obligation to verify the existence of grounds, in terms of precautionary measures.

As I have already shown, the obligation to verify precautionary measures must be placed in the same field as that of verifying the existence of the grounds that determined the taking/maintaining of precautionary measures [art. 208 para. (4) CPP], for the reason that, on the one hand, the intrusions concern fundamental rights of the accused, and on the other hand, the verification obligations are identically regulated, even regarding the term in which the verifications can be made, in the sense that both regulations establish by using the phrase „but not later" the obligation to check within the time-limits provided by the relevant texts [art. 250^2 CPP and art. 208 para. (4) CPP].

This being so, we note that the time-limit is not one of recommendation, but one that lays down the obligation of the judicial bodies to verify the precautionary measures, and the sanction for failure to fulfil the obligation cannot be other than that provided for in art. 268 para. (2) CPP, respectively termination of the effects of the precautionary measures.

We also note that the reasoning presented in this work is appropriated by the HCCJ itself, by dec. no. 547/20.09.2022) from file no. X, they retaining, in essence, the following:

«The provisions of art. 268 para. (2) CPP shows that when a procedural measure can only be taken for a certain period, and its expiration automatically results in the termination of the effect of the measure. Even if in the regulation of art. 249 *et seq.* CPP there is no explicit mention of the type, „the precautionary measure is taken for a duration of", from the very obligation of its verification, „no later than" the clear intention of the legislator that the precautionary measure be taken or maintained only for a certain limited time. Substantial time-limits are those which protect rights, prerogatives and extra-procedural interests, pre-existing to the criminal trial and independent of it, limiting the duration of some measures or conditioning the performance of acts or the promotion of actions that would annihilate a right or an extra-procedural interest. Substantial time-limits (of material or substantive law) are calculated according to the provisions of art. 186 CP, according to the system of natural computation (*computado naturalis*), when the time-limit is expressed in days or weeks (the day is counted as 24 hours, and the week as 7 days), and according to the system of civil computation (*civilis computado*) when the time-limit is expressed in months or years. The fact that the legislator did not provide in the newly introduced legal text a sanction for non-compliance with these deadlines also, does not give them the nature of recommendation deadlines, as long as the legal provisions in question regulate an obligation, and not just a possibility. Consequently, exceeding the peremptory time-limit of one year provided for in art. 250^2 CPP, will entail the forfeiture of the criminal judicial body from exercising the procedural right to order the maintenance of the precautionary measure, as well as the nullity of the procedural act made after the deadline and, from the point of view of substantive view, termination by law (*ope legis*) of the precautionary measures.

The legal nature of this term is given by the purpose of the regulation, being established for the discipline and systematisation of the procedural activity regarding the precautionary measures. This is also the Explanatory Memorandum of Law no. 6/2021, which shows that, in practice, cases have been reported in which ANABI was notified with requests for the capitalisation of goods seized for over 5 years, which no longer had value, the goods becoming unsalable over time, and the costs of administration exceeding the value of the goods. In order to increase the efficiency of the measures available to ANABI, it was necessary to regulate the *ex officio* verification if a precautionary measure generates losses or disproportionate costs. Compared to the effects it produces, the one-year term is a peremptory one, since a procedural activity must be carried out within it (verification of the legality and validity of the precautionary measure). This term holds the judge of the preliminary chamber, respectively the court, to order the verification of the legality and validity of the criminal seizure before its expiration. The reason for the one-year term established to verify the legality and validity of the precautionary measure is to respect the proportional nature of the measure in relation to the duration and evolution of the procedure, respectively to eliminate arbitrariness as regards the indefinite maintenance of a measure restricting rights.

At the same time, the maintenance of the precautionary measure in the criminal trial must comply with the proportionality requirements imposed by the ECtHR, the Strasbourg Court showing that „the lifting of the precautionary measure should be possible when its effective duration is excessively long in relation to the

duration and evolution of the procedure and the consequences it produces go beyond the normal effects of such a measure" (Case *Forminster Enterprises Limited v. Czech Republic*, judgment from 09.01.2009, p. 76-78).

The immediate purpose of the time-limit established by art. 250^2 CPP is the protection of the accused person's right to use their assets, in order to avoid the imposition of an excessive individual burden. So, by establishing the time-limit, the legislator was primarily concerned with respecting the proportionality of the duration of the precautionary measure with the restriction of the right to property. Therefore, the sanction for non-compliance with the indicated time-limits is the one provided by the provisions of art. 268 para. (1) CPP, so that failure to comply with it entails the forfeiture of the judicial bodies from the right to verify the precautionary measure, respectively the nullity of the act carried out in this regard by exceeding the deadline.

With regard to the fact that, by the conclusion of the meeting on March 14, 2022, pronounced by the CA Bucharest, 1st crim. s., in file no. X, the requests made by the defendants, to declare that the precautionary measures taken in the criminal investigation file no. Y of the PICCJ - DNA, Anti-corruption Section, and by dec. 552/14.09.2022, HCCJ, crim. s., rejected the appeals filed by the defendants, the supreme court appreciates that the existence of a *res judicata* cannot be retained under this aspect, the judicial body called to analyse the existence of the grounds for taking or maintaining a precautionary measure, should ensure that the legality of such measure is observed. Although it was requested by the defendants to remove the precautionary measure regarding aspects including their legality and proportionality, the High Court, in majority opinion, will no longer proceed with their analysis, considering the solution ruled.[6]»

3. Conclusions

Transposing the considerations of the HCCJ decision above mentioned, we are going to note that regardless of the procedural phase we are in, the time-limits established by the legislator for verifying the existence of the grounds for precautionary measures (either 6 months - during the criminal investigation, or 1 year - in the phase of the preliminary chamber and the trial) is an imperative one, of forfeiture.

In order to reach this conclusion, in the interpretation of the provisions of art. 250^2 CPP, I used the reasoning *a pari causa*, which allows the deduction of some consequences, in order to be able to draw a parallel between two similar situations, in the absence of an express rule, which regulate one of them, and in the present case, the lack of regulation refers to the consequences of not complying with the obligation to verify the precautionary measures, consequences which are regulated in the matter of precautionary measures and which are also applicable in the case of the first measures.

In this regard, we note the provisions of art. 271 para. (1) CPP, with the marginal title „*Calculation of deadlines in the case of privative or restrictive measures of rights*", which provides that „in the calculation of deadlines regarding precautionary measures or any restrictive measures of rights, the time or the day from which it begins to run and the day on which the time-limit ends is included in its duration", text of law that places precautionary measure (restrictive of rights) in the same regulatory field as custodial measures.

In conclusion, as the HCCJ rightly held, the time-limits established by the legislator for the verification of the grounds that were the basis for taking the precautionary measures are substantial time-limits of forfeiture, and their violation must be materialised, mandatorily, by establishing their legal termination.

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DETERMINING THE BLOOD ALCOHOL LEVEL OR THE PRESENCE OF PSYCHOACTIVE SUBSTANCES AMONG RAILWAY STAFF

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Abstract

This article aims to analyse the concrete way in which the concentration of alcohol in the blood or the presence of psychoactive substances among the railway staff is determined, in the wider context of the analysis, within a separate scientific approach, of the railway crime regarding the fulfillment of the duties of service under the influence of alcoholic beverages or other substances, provided by art. 331 para. (2) CP.

Following the examination of the Order of the Minister of Transport and Telecommunications no. 855/1986, we will be able to observe the causes for which, in order to prove the concentration of alcohol or the presence of psychoactive substances among railway personnel with duties regarding the safety of railway traffic, the judicial bodies end up applying, by extension, the provisions of a normative act aimed at judicial probation in the case of persons involved in events or circumstances related to road traffic.

In this context, this approach seeks to raise the issue of the need for a clear and predictable infralegal regulation, which takes into account the specificity and the current realities in the railway and medical fields, in order to provide real support for the judicial bodies regarding the proof of the found railway crime within the Criminal Code.

Keywords: *railway staff, alcohol concentration, order, methodological norms, breathalyzer.*

1. Introduction

According to art. 331 para. (2) CP, the crime of being at work under the influence of alcohol or other substances is the act of railway personnel with duties regarding the safety of the means of transport, intervention or manoeuvre on the railway to fulfil their duties, having an alcohol concentration of over 0.80 g/l pure alcohol in the blood or, as the case may be, being under the influence of psychoactive substances.

Starting from these considerations, we mention that, in order to establish the presence/concentration of alcohol in the blood of railway personnel, there is regulated, at the infralegal level, the Order of the Minister of Transport and Telecommunications no. 855/24.02.1986 regarding some measures to strengthen discipline in the units of the Ministry of Transport and Telecommunications (hereinafter, Order no. 855/1986). This normative act, which, although it was not published in the Official Gazette, is in force and continues to produce legal effects, an aspect also confirmed by the Ministry of Transport through Address no. 1735/28.01.2024.

Order no. 855/1986 provides a series of rules that aim, in principle, at the prevention and disciplinary sanctioning of the introduction or consumption of alcoholic beverages in the units of the Ministry of Transport and Telecommunications or, as the case may be, of railway personnel coming to work under the influence of alcoholic beverages[1].

To the extent of the violation of such conduct, it is generally stipulated that: „Persons who are guilty of introducing or consuming alcoholic beverages in the unit, of showing up to the work schedule under the influence of alcohol, as well as the direct managers and those of the units that know, allow or do not take the necessary measures in case of the commission of such acts, will be sanctioned with the greatest severity, including the termination of the employment contract”[2].

After mentioning these rules, the order brings together, at the end, a sequence of appendices that provide: Instructions regarding the detection and sanctioning of some violations committed by the personnel of the railway units under the influence of the consumption of alcoholic beverages (*Annex I*); Guide for drawing up the report of the physical state of the person who signs that he has consumed alcoholic beverages (*Annex V*); Guide regarding the use of the „Breathalyzer” device (*Annex VI*); Instructions for the application of the Order of the

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[1] See point 1 of this order.

[2] See point 2 of this order.

Ministry of Health and Social Provisions no. 757/1961 regarding the collection of the blood sample, in order to measure the blood alcohol level (*Annex VII*) or Extract from the guide for blood alcohol measurement (*Annex VIII*).

In this context, in contrast to railway traffic, for the purpose of judicial probation of the concentration of alcohol or the presence of psychoactive substances among the drivers of road vehicles or trams [in the conditions of the existence of the crime of driving a vehicle under the influence of alcohol or other substances (art. 336 CP)], we find published in the Official Gazette of Romania, Order of the Minister of Health no. 1512/2013 for the approval of the Methodological Norms regarding the collection, storage and transport of biological samples for the purpose of judicial probation by establishing the alcohol level or the presence of psychoactive substances in the body in the case of persons involved in events or circumstances related to road traffic (hereinafter, Methodological Norms).

Analysing the aspects of common interest contained in the two normative acts, we will be able to state that, unlike the Methodological Norms, Order no. 855/1986 does not (also) regulate a procedure aimed at judicial probation in the case of railway offences, as would naturally be required, under the conditions of a rule of criminalization at the primary level (CP - Law no. 286/2009) which requires the existence of a certain concentration of alcohol in the blood. Such an order seeks, in substance, to establish disciplinary liability by means of a procedure similar to that aimed at establishing criminal liability in the case of traffic offences, but which does not enjoy an update in relation to the existing realities in the railway or medical field and, thus as we will see, and those found in the plan of substantive criminal law.

In these conditions, the question arises of the need for an order that aims at a common procedure regarding the determination of the consumption of alcoholic beverages and the establishment of the alcohol concentration among the railway staff, a normative act that provides for clear, accessible and up-to-date provisions, both in view of supporting the control bodies regarding the establishment of disciplinary violations, as well as the judicial bodies for the purpose of proving the offense provided for in art. 331 para. (2) CP.

2. The procedure for detecting alcohol in exhaled air

Annex I of Order no. 855/1986 groups a series of instructions in the content of three chapters concerning general aspects regarding the ascertainment of the consumption of alcoholic beverages, forms and procedural matters for ascertaining such consumption, as well as the category of disciplinary offenses applicable in the case of the consumption of alcoholic beverages. Within the general aspects, Annex I provides that the procedure for ascertaining the consumption of alcoholic beverages is applied in all cases when the railway staff:

- shows up at work and shows signs of having consumed alcoholic beverages;
- shows signs of having consumed alcoholic beverages during work;
- is caught on the act, consuming alcoholic beverages during work (regardless of the quantity consumed);
- committed violations that produced events nominated by the management of the Department of Railways, or that endangered traffic safety[3].

Such a procedure is carried out by the head of the unit[4] where the violation occurred, or, as the case may be, by his substitute, and for staff working in the current line or in isolated points/cantons, independent stops, fuelling points, water pumps, etc.) by the head of the nearest unit or by the bodies with training and control tasks[5].

Regarding the actual ascertainment procedure, Annex I provides that, in the situation where the staff shows signs of being under the influence of alcoholic beverages when presenting at work or during work, the

[3] See point 1 of Chapter I.

[4] According to point 2 of Chapter I from Annex I to Order no. 855/1986, by *head of unit*, in the meaning of these instructions, is meant: head of RCM, head of RCT, head of section, head of depot, head of shed, head of wagon inspection, head of construction site or head of station (building maintenance, welding, centralization and remote control, electrification, industrial production, centralised-remote control apparatus, line repairs, welding line repairs, CT installations, buildings etc.) travel agency heads, RCM heads, service heads (reception of locomotives or wagons, financial, public food etc.), as well as the heads of units having the same name as the above within the Bucharest Metro Operating Company.

[5] According to point 2 of Chapter I of Annex I. Also, point 3 establishes that the personnel who perform functions and activities of a continuity nature (movement employees, inspection locksmiths, mechanics, mites, etc.) have the obligation to check the condition of the personnel to whom the service is handed over hand over the service to notify the higher hierarchical body (station head, section head etc.), when he finds that he is under the influence of alcoholic beverages and not to hand over the service to the person in question.

ascertaining bodies will proceed to conclude a report[6], take a statement of the person in question, the use of the breathalyzer, respectively when collecting the blood sample in order to establish the blood alcohol level (Chapter II, point 1). On the other hand, in the situation where the railway staff is caught while on duty consuming alcoholic beverages, by one of the bodies that have the right to make the finding, regardless of where they are and regardless of the amount consumed, a minute and when taking a statement from the person in question (Chapter II, point 2).

Regarding the results obtained as a result of the use of the sample with the breathalyzer, to the extent that, after blowing, the reagent column remains yellow, there is a presumption that the suspected person did not consume alcoholic beverages, [Chapter II, point 5 para. (3)], while in the situation where the reagent column turns green, it is assumed that the suspect has consumed alcoholic beverages [Chapter II, point 5 para. (3)]. In the latter case, the employed person will be immediately replaced from the job and used in activities that do not concern traffic safety, until the situation is finally resolved (Chapter II, point 3)[7].

Last but not least, it should be mentioned that, although blowing into the breathalyzer is mandatory for railway staff whenever there are indications or, as the case may be, it has been noticed that the person in question is under the influence of alcoholic beverages[8], the railway staff can refuse to submit to the use of such evidence. In this case, his option will be recorded in the findings report, under the signature of the head of the unit and the witnesses [pt. 5 para. (5)], in which case the refusal to use such evidence will constitute grounds for the disciplinary termination of the employment contract[9].

Under these conditions, we can state that, as regards the detection of the presence of alcohol in exhaled air, such a procedure does not raise problems from the perspective of the clarity of the rule, a fact for which it is necessary to keep it in the future regulation (common to the field of disciplinary and criminal liability), in the case of taking blood samples in order to determine the amount of alcohol in the blood, an aspect of interest both for establishing disciplinary and criminal liability, things are somewhat different .

3. Procedure for taking biological samples

3.1. Preliminary aspects

From the very beginning, we mention that the taking of the blood sample is done at the request of the ascertaining body and is mandatory both in the hypothesis in which, following the sample with the breathalyzer, the reagent vial turns green (regardless of the height), and in the situation in which the person suspected of having consumed alcoholic beverages requests such a sampling [point 6 para. (1)]. Practically, in the two hypotheses, an obligation arises both for the railway staff and for the medical unit to proceed with the collection of blood samples.

In this context, we recall that, unlike the provisions of art. 185 para. (1) of GD no. 1391/2006[10] which establish, among other things, the obligation to take biological samples in order to determine the alcohol level of the driver of the road vehicle only when the test result shows a concentration higher than 0.40 mg/l of pure alcohol in the exhaled air [letter a)], for the birth of the obligation for the railway personnel to be subjected to the taking of biological samples, the existence of a certain concentration of alcohol in the exhaled air is not necessary, given that the text of the order speaks of coloring the vial of the reagent in green regardless of what height is reached.

However, the question arises, naturally, why such an obligation does not persist in the case of railway personnel subject to the taking of biological samples only in the hypothesis that the concentration shown by the breathalyzer is greater than 0.40 mg/l of pure alcohol in exhaled air, given that, as is well known, the concentration of alcohol in the blood is, as a rule, twice that of the exhaled air. Faced with such a dilemma, the

[6] We note that with regard to the record of ascertaining the physical condition of the person who shows signs of having consumed alcoholic beverages, it will be concluded in the presence of two witnesses from the staff of the railway unit and, in their absence, from outside the unit, which shows trust and objectivity, taking into account the indications found in annex no. 5 to MTT Order no. 855/1986.

[7] In both cases, the vial with the reagent will be attached to the original report after it has been closed and sealed according to the guidelines [Chapter II, point 5 para. (2)].

[8] See point 5 para. (1) from Cap. II.

[9] According to Chapter III point 1 letter c), „the disciplinary termination of the employment contract is applied to: c) personnel who refused the breathalyzer test or blood sample collection, based on the statement of findings;"

[10] GD for the approval of the Regulation of application of GEO no. 195/2002 regarding traffic on public roads.

answer to such a question can be related to the nature of the liability that operates according to the degree of alcohol concentration in exhaled air.

Specifically, if in the case of railway personnel with duties regarding the safety of railway traffic, an alcohol concentration of no more than 0.8 g/l of pure alcohol in the blood leads to the most serious disciplinary sanction - termination of the employment contract[11], under the conditions in which the text of point 2 of Order no. 855/1986 speaks of his presence at work under the influence of alcoholic beverages, in the case of the driver of a road vehicle such a concentration leads, instead, to the detention of contraventional liability. That is why, looking at the consequences that can occur in terms of patrimonial/private and family life, the specialised administrative body provided, as a means of protection for the railway staff, the obligation to take biological samples regardless of how high the ampoule ends up being colored of reagent in green.

Next, if we refer to the category of instruments that can be the basis for the birth of such an obligation, we appreciate that the future regulation must not only look at the hypothesis of testing the alcohol level in exhaled air exclusively by means of the reagent vial, but also the one in which the establishment of such of concentrations is done by means of the alcohol test (certificate). In this context, we remind that, in the practice of judicial bodies, in addition to disposable alcohol test ampoules with an air collection balloon[12], breathalyzers (Dräger breathalyzer) are used to determine alcohol levels[13]. Moreover, the bodies of railway-specific entities or those within the railway safety inspectorates use, in addition to alcohol test ampoules and breathalyzers as part of actions to prevent and combat the consumption of alcoholic beverages among railway personnel.

Under these conditions, we appreciate that the future order will have to provide for the obligation to take biological samples also in the situation where the presence of alcohol in the blood was detected, beforehand, with the help of the breathalyzer (certificate). Moreover, such reasoning may also be applicable *mutatis mutandis* in the situation where control bodies use breathalyzers, homologated and metrologically verified technical devices for determining the concentration of alcohol in the blood.

In addition to these assumptions, the situation in which submission to the taking of biological samples can also arise as a result of the request for the taking of biological samples coming directly from the control bodies (in particular, those by the police), without having previously been requested to test the alcohol in the exhaled air. Such a hypothesis could even constitute grounds for the disciplinary liability of the railway staff[14] and/or the criminal liability for the crime of refusing or avoiding the taking of biological samples.

In this context, we recall that, according to art. 331 para. (3) CP, the crime of refusing or avoiding the taking of biological samples is the act of employees with duties regarding the safety of the means of transport, intervention or manoeuvre on the railway to refuse or evade the taking of biological samples necessary in in order to establish alcohol concentration or the presence of psychoactive substances. Such a crime, similar to those already existing in the field of road, air or naval traffic, was recently introduced by the Romanian Parliament through Law no. 314/2023 for the amendment of art. 331 CP[15]. In consideration of some situations in practice when the railway staff proceeded to refuse or evade the taking of biological samples, without such conduct being able to attract criminal liability, but only the disciplinary one, the legislator felt, in a way correctly, the need to eliminate any barriers in detecting and preventing the crime of being at work under the influence of alcoholic beverages or other substances, provided for in art. 331 para. (2) CP.

Returning now to the request received, directly, from the ascertaining bodies, it was shown in the practice of the supreme court that the crime of refusing or avoiding the driver of a vehicle, the driving instructor in the training process or the examiner of the competent authority, from taking from the taking of biological samples, does not impose «as a prerequisite, the testing of exhaled air in order to establish the alcohol level. Therefore, the claims of the defense in the sense that „exhaled air testing appears as a *sine qua non* procedure, without which the objective side of the offense provided for by art. 337 CP cannot be outlined", exceeds the legal

[11] Looking in this context, we can say that, in contrast to the current Criminal Code, which requires the existence of an alcohol concentration of 0.8 g/l of pure blood alcohol in the old Criminal Code, for the crime of presence at work under the influence of alcoholic beverages, it was necessary to ascertain the state of intoxication of the railway personnel who directly ensured the safety of the movement of the means of transport of the railways [art. 275 para. (2) from the Criminal Code.].

[12] Târgu Mureș County Court, crim. sent. no. 591 of May 30, 2017; Focșani County Court, crim. sent. no. 1212 of September 30, 2019, available on the website: *www.rolii.ro*.

[13] Buzău County Court, crim. sent. no. 570 of June 13, 2019, available on the website: *www.rolii.ro*.

[14] In the provisions of point 1 letter c) from Chap. III.

[15] Published in the Official Gazette, Part I no. 1013 of November 7, 2023.

provisions incident to the matter and is based on an erroneous interpretation of the provisions of the criminal law»[16].

However, we appreciate that, in order to comply with the principle of the legality of incrimination, it is necessary, at least, to have a rule that establishes such an obligation for the railway staff to submit to the taking of biological samples, to the extent that there is a request, in this sense, coming from the police body. Such an obligation can be found either in the contents of the future order, or, rather, at the primary level, an example in this sense can even be represented by Law no. 195/2020. We mention in this sense that, according to art. 38 of GEO no. 195/2002 regarding traffic on public roads: „Drivers of vehicles, except for those pulled or pushed by hand, car instructors certified to carry out the practical training of people to obtain a driving license, as well as the examiner of the competent authority, during the practical tests of the exam to obtain a driving license, are obliged to submit to breath testing and/or the collection of biological samples in order to establish the blood alcohol level or the consumption of psychoactive substances, *at the request of the traffic policeman*, s.n."

Therefore, the detecting agent, in addition to the option in which he opts, in advance, for testing the exhaled air, should also be able to have at his disposal the mechanism in which he directly requests the railway staff to participate in the collection of biological samples[17]. To the extent that the railway staff, having been notified by the police officer of the consequences of his refusal or evasion, does not comply with the request from him, he will conclude a record of such conduct, which he will before the criminal investigation bodies, according to art. 61 CPP.

According to point 7 of Chapter II of Annex I, the collection is done within no more than two hours from the moment of finding and drawing up the report, unlike the collection of biological samples in the case of road vehicle drivers, in which case the Methodological Norms provide, in the content of art. 9 para. (1), that: „The collection of biological samples in order to establish the alcohol level or the presence of psychoactive substances in the body will be done in the shortest possible time after the occurrence of the road event or the circumstance that requires their collection." In this context, considering that, from a scientific point of view, the collection of blood samples must be carried out as quickly as possible, it would be useful for the future order to provide for the need to collect them in the shortest possible time.

3.2. The actual procedure of collecting biological samples

In concrete terms, such a procedure is carried out by a doctor or, in its absence, by a healthcare professional, in accordance with the provisions of the „Guide on blood sample collection" (Annex no. 7) and with those of the excerpt entitled „The guide for the dosage of alcohol in the blood" (Annex no. 8)[18]. In the situation where the railway staff refuses or avoids taking the blood sample, this will be recorded in the minutes by the head of the unit and confirmed by the witnesses (point 10). In the conditions in which the act of refusal or evasion from the collection of biological samples leads to the termination of the individual employment contract of the railway personnel with attributions regarding the safety of railway traffic[19], we will, in practice, be faced with an accumulation of legal responsibilities (criminal and disciplinary), an aspect which, however, will be able to be dealt with more extensively in a separate scientific approach.

Analysing the content of Annexes no. 7 and 8 of Order no. 855/1986, we can see that the medical staff collects a single biological sample in order to determine the alcohol concentration of the railway staff. However, as is well known, in order to establish the phase of absorption or elimination of alcohol from the body, it is necessary to perform a retroactive calculation of the concentration of alcohol in the blood, which is carried out following the ordering of a medico-legal expertise. The use of such an evidentiary procedure in order to establish the alcohol concentration at the time of detection of the railway personnel with attributions regarding the safety

[16] See HCCJ, crim. s., crim. dec. no. 369/RC/28.09.2021, *www.scj.ro*. Similarly, in another decision (CA Ploiești, crim. s., crim. dec. no. 739/11.09.2019, *www.rolii.ro*) it was noted that „the incriminating text does not provide for the prerequisite of testing with the breathalyzer device, being necessary, in order to fulfil the constitutive elements of the crime, only the request of the police bodies to take biological samples from the defendant and the refusal or the evasion of the defendant, a driver detected in traffic, from this sampling."

[17] Moreover, also in criminal doctrine [S. Bogdan (coord.), D.A. Șerban, G. Zlati, *New Criminal Code. Special part. Analyses, explanations, comments. The Cluj perspective*, Universul Juridic Publishing House, Bucharest, 2014, p. 609), it was specified that the ascertaining body will still be able to opt either for the option of testing the exhaled air, or for the direct request addressed to the driver to participate in the taking of biological samples, the same being applicable, from our point of view, and regarding railway staff.

[18] See point 7 of art. II.

[19] See Chapter III point 1 letter c) from Annex I.

of railway traffic implies, from a medical point of view, the necessity of collecting two blood samples at an interval of one hour one towards the other.

In this context, considering the scope of the implications regarding labor relations, including the one aimed at the dissolution of the individual employment contract in the case of railway personnel, the need to take two blood samples at an interval of one hour from each other may represent and a guarantee for the railway staff in the face of dismissal decisions that do not present a solid foundation from a scientific point of view, namely that at the time of the performance of the duties of the service, the employee with attributions regarding the safety of railway traffic was, in fact, under the influence of alcoholic beverages[20] or, as the case may be, that he had a certain alcohol concentration (if we refer to the rest of the railway staff who do not hold such duties)[21]. Under these conditions, the standard of the need to take two biological samples under the conditions shown above must be part of the content of the future normative act, even looking, exclusively, from the perspective of the mechanism for establishing the disciplinary liability of railway personnel.

Now, looking at the field of road traffic, we can see that the double sampling is also provided for in the Methodological Norms, which stipulate that, for the determination of blood alcohol, two blood samples will be collected at an interval of one hour from each other, and failure to comply with such an obligation will lead to the impossibility of performing the retroactive estimation of the blood alcohol level[22]. Under these conditions, the lack of the second blood sample will lead, on the model of judicial probation in the case of traffic offences, to an impossibility of performing the retroactive calculation at least regarding the establishment of criminal liability[23].

However, even in the absence of the forensic report containing such a calculation, we cannot omit the fact that the testing of the alcohol concentration in the blood, in order to incur criminal liability, can be carried out in practice and by means of other means evidence, such as the toxicological analysis report (a single sample taken), the breathalyzer result, the suspect's or the defendant's acknowledgment of the consumption of a certain amount of alcohol, or even the clinical examination report, such evidentiary means being able, equally, to be the basis for establishing disciplinary liability.

In this context, also analysing the decisions handed down by the courts regarding the crime of being at work under the influence of alcohol or other substances [art. 331 para. (2) CP], I was able to find that, similar to the proof of the traffic offense provided for in art. 336 para. (2) CP, the judicial bodies, in an almost unanimous way, proceed in the case of the railway offense to collect two blood samples at an interval of one hour from each other, precisely in order to establish the ascending slope or, as the case may be, descending from the alcohol level of the railway staff[24].

As an example, taking into account „the entire evidentiary material administered in the case, namely the defendant's statements, (...) the minutes of consent for the collection of biological samples and for the physical examination dated 03.11.2017, the clinical examination sheet and the report on the collection of biological samples - annex 6 and, respectively, annex 2 to the Methodological Norms, both dated 03.11.2017 (...)”[25], we can observe that the evidentiary means provided for proving traffic offenses are taken over by the judicial bodies in order to substantiate the content of the railway offense provided for in art. 331 para. (2) from the Criminal Code[26].

[20] As required by point 3 of the order.

[21] According to Chapter III. point 1 of Annex I: «Disciplinary cancellation of the employment contract, according to the provisions of art. 35 letter f) of the Disciplinary Statute of the personnel of the transport units applies to: a) the personnel whose blood sample was taken upon presentation and during the service for which the communication of the analysis laboratory was received with the mention „alcohol in the blood 0.5 gr/1000 or more;”».

[22] See art. 10 para. (1) and 102 of the Methodological Norms. With the mention that the exceptional situation when it will no longer be necessary to collect two biological samples will be when the certified technical means does not indicate the presence of alcohol in the exhaled air, the taking of the second sample can only be carried out at the request of the person involved in the events or circumstances in relation to road traffic [art. 10 para. (2) from Methodological Norms].

[23] If not even in the case of the disciplinary one.

[24] Brașov Court, crim. sent. no. 25/15.01.2024; Alexandria Court, crim. sent. no. 329/08.11.2023; Arad Court, crim. sent. no. 1378/25.08.2023, Miercurea Ciuc Court, crim. sent. no. 202/15.03.2023, Cluj-Napoca Court, crim. sent. no. 1203/11.11.2022; Bucharest Court, 1st District, crim. sent. no. 90/18.02.2022 (*www.rejust.ro*); Buzău Court, crim. sent. no. 505/18.06.2021; Răcari Court, crim. sent. no. 239/16.12.2021, remained final on the criminal side by CA Ploiesti, crim. s., crim. dec. no. 497/19.04.2022; Buzău Court, crim. sent. no. 75/04.02.2020; Focșani Court, settlement pen. no. 1212/30.09.2019 (*www.rolii.ro*).

[25] Buzău Court, crim. sent. no. 75/04.02.2020; Buzău Court, crim. sent. no. 570/13.06.2019 (*www.rolii.ro*).

[26] The two annexes mentioned in the sentence are an integral part of the Order of the Minister of Health no. 1512/2013 approving the Methodological Norms.

However, in the context of the trial of the same railway crime, we also find in practice an isolated decision in which it was held that according to: „toxicological-alcohol analysis bulletin no. 3511/540/A-12/16.08.2016, issued by IML Mr. Mureș, it turned out that, at 03:40 on 13.08.2016, the blood alcohol level of the defendant S.G.L. was 1.00 g‰ of pure alcohol in his blood". However, under the conditions in which the unexpected control of the control bodies within the S.N.T.F.C. - The Traffic Safety Service took place at around 1:20 a.m. and considering the existence of a blood alcohol level of 1.00 g‰ of pure alcohol in the blood, it is difficult to say whether, at the time of the control, the railway staff was really on an upward slope or, as the case may be, descending, in the absence of taking a second blood sample at an interval of one hour from the first sample. That is why the establishment of criminal liability in the case of railway personnel becomes much more difficult to achieve in practice in the situation where a longer period of time passes from the moment of capture to the time of collecting biological samples, a fact likely to cancel/reduce from the accuracy of the scientific result obtained.

In the light of the above-mentioned jurisprudence, we can conclude that the judicial practice, almost unanimously, imposes, for scientific reasons, on the model of proving the traffic offense (by referring to the Methodological Norms), the need to take two biological samples in order to prove the railway offense provided for in art. 331 para. (2) CP, reasoning that could operate even with regard to disciplinary liability, in the context of its implications for the person/property of the railway staff that could be affected by incurring disciplinary liability.

3.3. Aspects of criminal procedural law

In the event of the occurrence of one of the „cases provided for in point 1 letters a), c), d)[27], the files of the staff to whom the finding was made at the presentation or during the service, will also be sent to the criminal investigation bodies". As can be seen, such a norm aims at the obligation to report to the criminal investigation bodies, among others, in the event that the concentration of alcohol in the blood of the railway staff, less that of the one responsible for the safety of railway traffic (in the context of the special norm found at point 7[28]), resulting from blood sampling, is greater than 0.5 g/l. In such a hypothesis, observing the content of the offense provided for in art. 331 para. (2) CP, which speaks of the existence, regarding the employees with attributions regarding the safety of the means of transport, intervention or manoeuvre on the railway, of an absorption of more than 0.80 g/l of pure alcohol in the blood, remains debatable the thesis regarding the automatic notification of the criminal investigation bodies regarding the commission of an alleged act provided for by the criminal law, in the conditions where such persons do not possess, by hypothesis, the quality imposed by the incrimination norm[29].

On the other hand, in the situation of the personnel who compete for traffic safety in the railway units, in addition to the immediate termination of the employment contract, the criminal investigation bodies will be notified, according to the law, in the situation where he is found guilty of the introduction and consumption of alcoholic beverages in the unit or, as the case may be, they show up to the work schedule under the influence of alcohol[30]. However, from the perspective of the automatic notification of the criminal investigation bodies regarding a possible commission of the offense provided for in art. 331 para. (2) CP, it is necessary to treat with prudence some situations which, obviously, exclude *de plano* the incurring of a criminal liability [*e.g.*, the railway staff provided for in art. 331 para. (2) CP is caught introducing alcoholic beverages on the job (having a bottle of wine in his bag) or, as the case may be, is caught consuming alcoholic beverages while on duty, to the extent that the breathalyzer test result (certificate) indicates a value of no more than 0.1 g/l pure blood alcohol]. That is why, we believe that in such cases it is necessary to make a clear demarcation between disciplinary and criminal

[27] According to Chapter II point 1 letters a), c), d): «Disciplinary cancellation of the employment contract, according to the provisions of art. 35 letter f) of the Disciplinary Statute of the personnel of the transport units applies to: a) the personnel whose blood sample was taken upon presentation and during the service for which the communication of the analysis laboratory was received with the mention „alcohol in the blood 0.5 gr/1000 or more"; c) to the staff who refused the breathalyzer test or the collection of the blood sample, based on the statement of findings; d) to the staff who were caught consuming alcoholic beverages while on duty (regardless of the quantity);».

[28] According to point 7: „The cases of indiscipline provided for in point 3 above will also be referred to the criminal investigation bodies, according to the law."

[29] It is true that such verification can be done once the criminal prosecution in rem has started, but we believe that some caution must be shown regarding those reports that concern acts committed by persons who cannot, obviously, possess the quality of personnel with duties regarding the safety of railway traffic.

[30] See point 7 in conjunction with point 3 of the order. In fact, a similar rule that covers the entire railway staff can be found in Chapter II point 3 para. (3): „In the cases provided for in point 1 letters a), c), d), the files of the personnel to whom the finding was made at the presentation or during the service, will also be sent to the criminal investigation bodies."

liability, by drawing some filters regarding reporting to criminal investigation bodies, so that the latter do not end up being reported with facts that, obviously, are the exclusive object of disciplinary liability.

4. Finding the presence of psychoactive substances

According to art. 332 para. (2) CP, constitutes the crime of being at work under the influence of alcohol or other substances of railway personnel with duties regarding the safety of the means of transport, intervention or manoeuvre on the railway who perform their duties under the influence of psychoactive substances. Against the background of the lack of a definition of *psychoactive substances*[31], the Panel for resolving some legal issues within the HCCJ, reiterating the reasoning expressed by the supreme court in a decision handed down on appeal in cassation[32], held in the operative part of dec. no. 48/2021[33] that: «The use of the phrase „psychoactive substances" from the criminalization norm of art. 336 para. (2) CP includes, in addition to the category of substances referred to in Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the normative acts in force, republished, and the substances provided for in the content of Law no. 143/2000 regarding the prevention and combating of illicit drug trafficking and consumption, republished, with subsequent amendments and additions, and of Law no. 339/2005 regarding the legal regime of plants, narcotic and psychotropic substances and preparations, with subsequent amendments and additions».

In justifying this solution, the court reiterated, for the most part, what was already expressed in its previous jurisprudence, noting, among other things, the fact that: «The term „psychoactive substances" designates a wide range of substances likely to produce such consequences, this category includes both narcotic and psychotropic substances, as expressly defined by art. 2 letters c), d) from Law no. 339/2005 regarding the legal regime of plants, narcotic and psychotropic substances and preparations, as well as other substances with psychoactive effects, regardless of whether they are part of the category of those under national control, in the sense of art. 2 letter d1) from Law no. 339/2005, or those subject to the legal framework provided by Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided by the normative acts in force. The properties of substances or mixtures of substances from the above-mentioned categories and the harmful effects of their consumption on the central nervous system, resulting in changes in the functions and psychic processes or in the behavior of the consumer, represent elements of an objective nature, substantiated from a medical point of view and accepted unanimously at the international and national level. (…) By using the phrase, the legislator wanted that the category of „psychoactive substances" could include any substance that produces „stimulation or inhibition of the central nervous system of the person, resulting in changes in the functions and mental processes and behavior or creating a state of dependence, physical or mental". An additional element in support of this conclusion also emerges from the fact that the same phrase is used by the legislator in other contexts within the Criminal Code, for example in art. 77 letter f), where it regulates as an aggravating circumstance „the commission of the crime in a state of voluntary intoxication with alcohol or other psychoactive substances, when it was provoked in order to commit the crime".»

Although the reasoning of the supreme court took into account the offense provided for in art. 336 para. (2) CP, it applies equally to the railway offense found in art. 331 para. (2) CP. Under these conditions, the proof of the existence of a psychoactive substance among the railway staff will cover any of the substances found in the three normative acts mentioned above.

Next, regarding the mechanism for proving the presence of such substances, we specify that, unlike the Methodological Norms on road traffic which provide for a series of clear provisions in this regard, Order no. 855/1986, surprisingly, did not/does not deal with the issue of taking biological samples in order to establish the presence of psychoactive substances, neither from the perspective of criminal liability, nor by referring to the disciplinary one. We must admit, however, that this could be seen as justified under the old regulation, as such criminalization did not exist until the entry into force of the current Criminal Code. However, with the introduction of Law no. 286/2009 of the act consisting in the performance of duties by the railway personnel

[31] We mention that based on art. 241 of Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code, by psychoactive substances are meant the substances established by law, at the proposal of the Ministry of Health.

[32] HCCJ, crim. s., crim. dec. no. 365/RC/16.10.2020, *www.scj.ro*.

[33] Regarding the examination of the referral made by the CA Ploiești, crim. s. and for cases involving minors and family, in crim. dec. no. 5989/315/2020, by which a preliminary ruling is requested for the resolution of a matter of law in principle, published in the Official Gazette, Part I no. 698/14.07.2021.

with attributions regarding the safety of railway traffic under the influence of psychoactive substances [art. 331 para. (2) thesis II CP], at the infralegal level a correlation with the primary norm was no longer ensured, by creating a procedure aimed at collecting biological samples (blood and urine) in order to prove the presence of such substances.

In these conditions, looking at the period 1986-2014, when the presence at work under the influence of psychoactive substances was not considered a crime, to the extent that railway staff with attributions regarding the safety of railway traffic were caught, for example, consuming alcoholic beverages during working hours program, the individual employment contract should be terminated immediately. On the other hand, in the hypothesis that the same staff was caught under the influence of psychoactive substances, his deed failed to meet, from a formal point of view, even the conditions for holding a disciplinary offense[34]. Therefore, such an approach taken by the institutions/authorities with attributions in this field may seem somewhat surprising, both on the old regulation and, above all, in the context of the current Criminal Code, in which the issue of the cumulation of criminal liability with of the disciplinary one.

Returning to the judicial probation, although no court decisions have been identified, so far, regarding the commission of the offense provided for in the contents of the second sentence of art. 332 para. (2) CP, but only cases in progress at the level of the Transport Police Directorate[35], until a future intervention at an illegal level, we can only appreciate that, similar to testing the concentration of alcohol in the blood, the judicial bodies will be required to refers (as an emergency solution) to a normative act that is not specific to the railway domain, but to the road domain, as is the case with the Order of the Minister of Health no. 1512/2013 for the approval of the Methodological Norms. It is true that, from a criminal procedural perspective, carrying out the collection procedure based on the Methodological Norms cannot lead *eo ipso* to the exclusion of the means of evidence thus administered (toxicological analysis report or clinical examination), being difficult to prove, in our opinion, the existence an injury that cannot be removed other than by cancelling the act.

But, even so, referring to the provisions of an order aimed at a traffic sector other than the railway, leaves a big question mark from the perspective of the role of the competent institutions/authorities in ensuring an accessible and predictable legal framework for its recipients, whether we are talking in this case by law enforcement bodies, by bodies of specific railway entities, or even by those who are subject to disciplinary or criminal procedures.

5. Conclusions

Following the analysis of the illegal legislation, we were able to establish the existence of an order that no longer benefits from an update in relation to the existing realities in the medical field (*e.g.*, the need to take two blood samples at an interval of one hour from each other) or, after case, with those found in the Criminal Code (*e.g.*, the lack of a procedure for ascertaining the presence of psychoactive substances in the body of railway personnel).

In the face of such shortcomings and in the context of a regulation aimed, in substance, at the establishment of disciplinary liability among railway personnel, the judicial bodies are required to apply by analogy, in proving the railway offense provided for in art. 331 para. (2) CP, specific provisions in the field of road traffic. In these conditions, on the model of judicial probation in the case of road incidents, it becomes necessary to issue an updated order that provides for a series of methodological rules in order to establish the alcohol level and the presence of psychoactive substances in the case of persons involved in events or circumstances related to railway traffic.

Regarding the content of the future order, given that Order no. 855/2016 presents, among other things, aspects aimed at the prevention and disciplinary sanctions of railway staff for the consumption of alcoholic beverages, we appreciate that these provisions should also be found in the future normative act, in an accessible

[34] Of course, we do not exclude from the plan that the deed of the railway staff could have been included in some general rules, such as the duties regulated in the statute.

[35] As an example, we remind you that: „On the evening of September 27 this year, during the action carried out by the policemen of the Galați Regional Transport Police Department, they carried out checks to detect railway personnel who, in the exercise of their duties, are under the influence of alcoholic beverages or of psychoactive substances. Thus, a man, a locomotive engineer, who worked on two passenger trains, was detected. Following testing with the device provided, indications emerged regarding the possible presence of psychoactive substances." (*https://www.politiaromana.ro/ro/stiri-si-media/stiri/verificari-ale-politistilor-pe-linia-depistarii-personalului-feroviar-aflat-sub-influenta-alcoolului-sau-a-substantelor -psychoactive*, last accessed on 20.03.2024).

and coherent manner for its recipients, with consideration of current medical issues. Obviously, another solution could be the one in which the procedure aimed at determining the concentration of alcohol in the blood or the presence of psychoactive substances, in order to incur disciplinary liability, be the subject of a separate order from the one aimed at judicial probation in the purpose of establishing criminal liability. However, in the context of the intrinsic link between the two types of liability, as well as the advantage of already administering some means of evidence, we believe that the solution of issuing a single order that groups, in a harmonious manner, both aspects of nature is preferable evidence that will then substantiate the legal liability of the railway staff.

Regarding the issuer of the future normative act, considering that there are procedures that concern both the activity of the railway staff and that of the medical staff in the medical units belonging to the Ministry of Health (subsidiarily, those from the network of the Ministry of Transport and Infrastructure can also be mentioned[36]), we appreciate that it would be appropriate to initiate this initiative jointly by the Ministry of Transport and Infrastructure together with the Ministry of Health.

Of course, the Ministry of Internal Affairs can also be considered as the initiator, in the context of the activity of the criminal investigation bodies within the Transport Police Directorate, but we believe that, rather, the most important role in the development of the future instrument must be held by the two ministries with main competences regarding railway and medical aspects, it being sufficient for the Ministry of Internal Affairs to hold, in this case, the role of approver.

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- Buzău Court, crim. sent. no. 570/13.06.2019;
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[36] Found in Annex no. 2 to GD no. 370/2021 regarding the organisation and functioning of the Ministry of Transport and Infrastructure, published in the Official Gazette of Romania, Part I, no. 333/01.04.2021.

THE SPECIFICITY OF THE MINOR'S LIABILITY IN COMPARATIVE CRIMINAL LAW

Ana-Maria ROTĂRESCU[*]

Abstract

Criminal liability, offense and punishment are the three pillars of criminal law and therefore the core of criminal law. In the absence of certainty as to criminal liability, the system of legal rules governing social relations, in order to protect them, would be seriously undermined, making it impossible to re-establish the broken legal order.

Criminal liability is the most serious form of legal liability, since it occurs when the most important social values are harmed, social values that become legal values by virtue of the legislator's defense.

One category of active subjects of a conflict - seen as a criminal legal relationship - is minors. The increasing number of crimes committed by minors has led to a criminal phenomenon among minors.

The regulation of the criminal liability of minors is a constant in all legal systems, differing in terms of the age of criminal liability and the system of punishment applied by each State. Also, as we shall see, the criminal legislature in other countries has attached particular importance to the regulation of the criminal liability of minors by enacting special laws in this regard.

The objective of the present research is to analyse the institution of criminal liability of minors in comparative criminal law in order to identify a solution that best suits the prevention of juvenile crime.

Keywords: *minors, criminal liability, comparative law, sanctions, age of criminal liability.*

1. Introductory considerations

The development of juvenile delinquency in the world, and the variety of forms in which it manifests itself, in relation to the seriousness of some of them, is a major problem, which has given rise to constant concerns at the level of each State regarding the legal regime applicable to juvenile offenders. In other words, this constant of the mutability over time of the minor's criminal liability cannot be dissociated from European civilization and legal culture, as is also noted in the literature[1].

Combating juvenile delinquency is a concern of European countries, which have long been faced with an increase in the number of crimes committed by minors, recidivism among minors, an increase in the number of crimes committed by minors against other minors, points out M.A. Hotca[2], Alexandru Boroi and G.Ș. Ungureanu[3]. We note that the phenomenon of juvenile delinquency has been and still is a concern of European countries, given the need for regulation to combat or reduce juvenile delinquency.

The specialist doctrine[4] points out that European law is based on the European legal tradition, explained by the common medieval origins of some provisions and by the evolution of divergent components until the modern era. In this context, the Continental or Romano-Germanic law system and the Common Low system stand out.

Following the analysis of the regulation of the criminal liability of minors in comparative law, objective differences in substance between the highly industrialised Western countries and other countries are highlighted, and a typology characterised by the way in which each country explains the existence of the phenomenon of criminality. Aspects also noted by the specialist practice since 1985[5].

We thus note a variability in the regulation of the criminal liability of minors, both in terms of the nature and the content of this institution, determined *inter alia* by a diversity of age limits considered, as well as by the system of sanctions applicable to minors who commit offenses.

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[1] O. Brezeanu, *Juvenile justice and European integration*, SDR no. 1-2/2004, pp. 223-233.

[2] M.A. Hotca, *Criminal Code. Comments and explanations,* Bucharest, C.H. Beck Publishing House, 2007, p. 1598.

[3] Al. Boroi, G.Ș. Ungureanu, *The sanctioning system for minors in a European vision,* in Revista de drept penal, year IX, no. 2 (April-June), Bucharest, 2002, pp. 30, 31.

[4] O. Brezeanu, *The minor and criminal law*, All Beck Publishing House, Bucharest, 1998, pp. 83-112.

[5] D. Szabo, *Some reflections on contemporary criminology,* SCJ no. 4/1985, pp. 342-349.

As regards the system of sanctions applicable to minors who commit offenses, criminal law systems follow two models: the traditional or penal model, according to which minors are punished from a certain age, and the more recent, non-criminal model, which gives priority to educational measures. Other legal systems provide for a mixed system based on both punishments and educational measures, for example Switzerland and Germany.

In carrying out this research, research methods appropriate to legal theory and doctrine were used, using the logical method, comparative analysis, systematic analysis, description and deduction.

2. Criminal liability of minors in comparative law

2.1. The criminal liability of minors in the legislation of some EU Member States

2.1.1. Belgium

A. The seat of matter

Juvenile offenders under 18 years of age cannot be subject to the sanctions regulated by the Criminal Code, as they are subject to the provisions of the Youth Protection Act of 8 April 1965 and are tried by the youth courts. However, if juvenile offenders are over 16, they can in some cases be tried in ordinary courts.

Nota bene, according to the literature,[6] the principle that minors may not commit offenses has always been accepted in Belgian law, in relation to the specific case, with the Law of 8 April 1965 providing for the possibility that the public prosecutor always refers juvenile offenders to the youth court, mainly on the basis of the state of danger in which they find themselves and less in relation to the act qualified as an offense. This is why Belgian law has not explicitly provided for a minimum age threshold from which the minor is criminally liable for the act committed and qualified as a crime, there are concrete cases in case law where minors aged 8 and 9 have been prosecuted and sent to the youth court for committing an act by which they have suppressed the life of a person.

B. Limits of criminal liability

Looking at Belgian criminal law, we note that the age of criminal majority is set at 18, and minors under this age cannot be sentenced to a penalty. The principle of criminal irresponsibility and the presumption of lack of discernment are not expressly provided for in a legal text. Art. 36 para. (4) of the Youth Protection Act of 8 April 1965 stipulates that the Youth Court is competent to hear applications from the Public Prosecutor's Office concerning persons prosecuted for an offense committed before the age of 18. Art. 37 of the Youth Protection Act of 8 April 1965 also provides that the youth court may establish measures for the protection, preservation and education of the persons it judges.

In certain cases, the age of criminal liability may be lowered to 16 years, in view of the fact that art. 38 of the Act of 8 April 1965 states that, in view of the offense committed, if the juvenile court considers the measures provided for in art. 37 to be inappropriate, it may refer a minor who has reached the age of 16 and under the age of 18 to the ordinary courts.

Also, following the study carried out in this case, we note the existence of a draft law to amend the 1965 law to reduce the age of criminal liability to 12 years[7]. Thus, the Law of 13 June 2006 amending the legislation on the protection of juveniles and the treatment of minors who have committed offenses establishes that the court may impose certain obligations on minors under 12 years of age.

C. Penalty system

One of the particularities of the Belgian system concerning juvenile offenders is its pragmatism, based on the theory of social defense, with the criminal liability of minors only being an exception[8].

The Law of 8 April 1965 regulates the possibility of the following **measures** for minors**:**

- placement in a foster family under the supervision of the youth protection committee;
- placement in a specialised center.

These measures cease automatically on reaching the age of 18.

[6] V. Brutaru, *Liability of minors in different European countries*, in Revista Universul Juridic no. 6/2015, p. 19.
[7] *Criminal liability of minors*, *https://www.senat.fr/lc/lc52/lc52.html*, last accessed on 17.02.2024.
[8] T. Dascăl, *Minority in Romanian Criminal Law,* C.H. Beck Publishing House, Bucharest, 2011, p. 87.

The same law also provides that the court may apply to minors, cumulatively, **certain measures**, as follows:

- reprimand, except for those who have reached the age of 18, and continue to leave them with foster families, reminding them to supervise them better in the future;
- order their supervision by the competent social service;
- order enrolment in an educational programme;
- require them to provide educational or general interest services, in relation to their age and abilities, for a maximum of 150 hours, organised by a specialised service or a specialised individual;
- oblige them to undergo medical treatment, in a psychological or psychiatric service or in a service specialising in alcoholism or drug addiction;
- entrust them to a legal person for the purpose of training or participation in an organised activity;
- place them in an institution for the purpose of treatment, education, training or vocational training;
- place them in the care of a public community institution for the protection of young people in a closed regime;
- place them in a hospital unit;
- place them in a center specialising in alcoholism, drug addiction or other addictions, if a medical report shows that the physical or mental integrity of the minor cannot be protected otherwise;
- place them in a specialised psychiatric center if there is a medical report showing that they suffer from a mental disorder that seriously affects their ability to control their actions.

As mentioned above, under the Act of 13 June 2006, in the case of minors who have reached the age of 12, the court may impose one or more of the following **obligations**:

- attend an educational establishment;
- perform an educational and general interest service of up to 150 hours under the supervision of a specialised service or an individual;
- perform paid work for a maximum of 150 hours for the purpose of compensating the victim, if the victim has reached the age of 16;
- follow the guidelines of an educational guidance or mental health center;
- attend training or awareness-raising modules on the consequences of the acts committed on the victims;
- participate in one or more sporting, social or cultural activities;
- not to frequent certain people or places that have a certain connection with the crime committed;
- not to carry out one or more specified activities;
- the ban on leaving;
- comply with other specified conditions or prohibitions.

Compliance with these measures may be entrusted by the court to a police service.

A prison sentence may be imposed if the minor has reached the age of 16 and the juvenile court considers that an educational measure is insufficient or if the minor is behaving in a socially dangerous manner; the prison sentence is to be served in a special regime.

2.1.2. France

A. The seat of matter

France regulates the criminal liability of minors through a normative deed different from the Criminal Code, namely by Ordinance no. 45-147/02.02.1945[9].

Thus, art. 122-8 of the French Criminal Code[10] refers to the special provisions of Ordinance no. 45-147 to the effect that minors are criminally liable under the aforementioned special law. It also provides that the special law establishes the educational measures that may be imposed on minors between 10 and 18 years of age, as well as the penalties to which minors between 13 and 18 years of age may be sentenced, in relation to the mitigation of liability that they enjoy because of their age.

Ordinance no. 45-147/02.02.1945 is structured in six chapters as follows:

[9] *https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000517521/2021-09-29/?isSuggest=true*, last accessed on 14.02.2024.
[10] *https://pdfcofee.com/codul-penal-francez-pdf-free.html*, last accessed on 14.02.2024.

I. General provisions (art. 1-6-2)
II. Procedure (art. 7-12-3)
III. Juvenile Court and Juvenile Welfare Court (art. 13-24)
IV. Supervised freedom (art. 25-32)
V. Other provisions (art. 33-43)
VI. Provisions applicable in the Overseas Territories and in the Department of Mayotte (art. 44-49)

B. Limits of criminal liability

Art. 122-8 of the French Criminal Code sets the limits of criminal liability, thus dividing minors into two categories, namely minors between 10 and 18 years old and minors between 13 and 18 years old, this division being determined by the sanctions that may be applicable to minors, namely educational sanctions and punishments.

These limits of criminal liability are also reiterated in Ordinance no. 45-147, as follows:

- educational sanctions may be applied to minors between 10 and 13 years of age;
- in the case of minors between 13 and 18 years of age, the court may impose a penalty or educational sanctions.

Furthermore, French law provides that protective measures may be applied to minors under 10 years of age and to minors between 10 and 18 years of age in all cases where the offenses are found to have been committed with discernment and the court considers this measure sufficient.

C. Penalty system

According to Ordinance no. 45-147, the sanctioning system for minors who commit offenses is a mixed system based on educational measures, mediation-reparation measures and punishment.

Thus, according to art. 2 of the Ordinance, the court may order one or more of the following educational sanctions set out in art. 15-1, namely:

1. confiscation of property owned by or belonging to the minor and used in the commission of the offense or which is the proceeds of the offense;

2. prohibition to be present, for a period not exceeding one year, at the place(s) where the offense was committed and which are designated by the court, except for the places where the minor has his/her habitual residence;

3. prohibition, for a period not exceeding one year, from meeting, receiving or coming into contact with the victim(s) of the crime designated by the court;

4. prohibition, for a period not exceeding one year, from meeting or receiving co-offenders or accomplices designated by the court or from coming into contact with them;

5. the assistance or repair measure referred to in art. 12-1;

6. the obligation to attend a civic training course, not exceeding one month in duration, designed to remind the minor of the obligations arising from the law and the deadlines for the implementation of which are set by decree in the Council of State;

7. placement for a maximum period of three months, renewed once, not exceeding one month for minors aged between ten and thirteen years, in an educational institution or public or private institution authorised to provide psychological, educational and social assistance related to the acts committed and located outside the place of habitual residence;

8. execution of school work;

9. solemn warning;

10. placement in a boarding school for a period corresponding to one school year with permission for the minor to return to the family on weekends and school holidays;

11. prohibition for minors to enter and leave public roads between 11 p.m. and 6 a.m. without being accompanied by one of their parents or the holder of parental authority, for a maximum period of three months, renewable once.

Art. 15-1 of the Ordinance also stipulates that the children's court shall designate the youth judicial protection service or the authorised service responsible for ensuring the proper enforcement of the sanction. This service will report to the children's judge on the enforcement of the educational sanction.

Educational sanctions imposed under this article shall be enforced within a period not exceeding three months from the pronouncement.

In the event of non-compliance by the minor with the educational sanctions provided for in this article, the juvenile court may order the placement of the minor in one of the establishments referred to in art. 15 (parents, guardian, custodian or a trusted person, authorised public or private educational or vocational institution or training establishment, authorised medical or medical-pedagogical establishment, child welfare service).

In respect of a minor who has reached the age of 13, the court may order one of the following educational measures governed by art. 15:

1. surrender to his parents, his guardian, the person who had him in custody or a trusted person;
2. placement in an approved public or private educational or training institution or establishment;
3. placement in an approved medical or educational medical facility;
4. delivery to the child welfare service;
5. placement in an appropriate boarding school for delinquent school-age minors;
6. measurement of activity during the day under the conditions defined in art. 16.

The Ordinance provides for fines, imprisonment and life imprisonment **as punishments** for juvenile offenders.

With regard to imprisonment, art. 20-2 of the Ordinance states that a custodial sentence may not be imposed on minors who have reached the age of 13 if it is more than half the penalty prescribed by law for the offense.

Also, if the penalty imposed is life imprisonment or criminal detention, they may not impose a penalty of more than twenty years' imprisonment or criminal detention. However, where the minor is over sixteen years of age, the children's court and the juvenile court may, exceptionally and taking into account the circumstances of the case and the personality of the minor, as well as the minor's situation, decide that there is no reason to apply the first subparagraph. This decision can only be taken by the children's court in a special reasoned order. Where it is decided not to apply the first paragraph and the penalty imposed is life imprisonment or criminal detention, the maximum penalty that may be imposed shall be thirty years' imprisonment or criminal detention. Educational measures or sanctions imposed on a juvenile may not constitute the first term of recidivism. The prison sentence is served by juveniles either in a special section of a penitentiary institution or in a specialised penitentiary unit for juveniles, under the conditions defined by decree of the Council of State.

Also, according to art. 20-3 of the Ordinance, a fine could be imposed on a minor over 13 years of age, in a quantity that is reduced by half, but not exceeding 7,500 euros.

The following penalties cannot be imposed on the minor: a ban on being on French territory, a fine, a ban on civil and family rights and a ban on holding public office or exercising a professional activity (art. 20-4).

The provisions of the Criminal Code on community service, according to art. 20-5 of the Ordinance, are applicable to minors between 16 and 18 years of age, and must be adapted to the specific characteristics of the minor, with the aim of training the minor and reintegrating him/her into society.

According to art. 20-6 of the Ordinance, no prohibition, disqualification or incapacity may be pronounced against a minor.

With regard to the waiver of punishment and deferment of punishment regulated by the Criminal Code, the Ordinance also allows these institutions to be applied to minors aged between 13 and 18. Such orders may be made by the juvenile court when it considers that such measures are appropriate in relation to the personality of the minor, with the proviso that the postponement may be ordered for a maximum of 6 months.

2.1.3. Germany

A. The seat of matter

Liability of minors is governed by the Criminal Code as well as by the Juvenile Court Act of 1953, with further amendments and completions - *Jugendgerichtsgesetz*.

Thus, the German Criminal Code[11] regulates the criminal liability of minors in art. 10 - Special provisions for minors and young adults and in art. 19 - Lack of criminal liability.

[11] *https://www.gesetze-im-internet.de/englisch_stgb/*, last accessed on 17.02.2024.

The Juvenile Court Act 1953[12] is structured in 5 parts as follows: Part 1 - purpose of application (personal and factual scope, purpose of juvenile criminal law and application of general criminal law), Part 2 - juveniles (general regulations, educational measures, amelioration materials, juvenile punishment, suspension of juvenile punishment with probation, suspension of juvenile punishment, multiple crimes, constitution of the Youth Court, liability, juvenile criminal proceedings, enforcement), Part Three - juveniles (application of substantive criminal law, constitution and procedure of the Court, enforcement and removal of criminal sentence, juveniles in courts responsible for general criminal matters), Part Four - special regulations for Bundeswehr soldiers, Part Five - final and transitional provisions.

Germany has attached great importance to holding juveniles criminally responsible long before the Juvenile Court Act of 1953. Thus, special courts were set up in 1908 to deal with cases involving juvenile offenders[13]. Subsequently, the German criminal legislator adopted two special laws applicable to juvenile offenders, namely the Jugendwohlfahrtsgesetz of 1922, published in the RGBI, Part I, p. 633 on 09.07.1922, which entered into force on 01.04.1924, and the Jugendwohlfahrtsgesetz of 1923, published in the RGBI, Part I, p. 135, on 16.02.1923, which entered into force on 13.03.1923.

B. Limits of criminal liability

According to art. 19 of the German Criminal Code, which regulates lack of criminal liability, minors under the age of 14 cannot be held criminally responsible, as there is an absolute lack of discernment.

Art. 10 of the Criminal Code also states that its provisions apply to offenses committed by adolescents and young people, unless the special law for minors provides otherwise.

Art. 3 of the Juvenile Court Act states that *„a young person is criminally responsible if at the time of the commission of the offense he is mature enough to discern the seriousness of the offense and to act accordingly*". Thus, the criminal liability of minors who have reached the age of 14 is relative.

According to the conception of the German criminal legislator - art. 1 para. (2) of the Jugendgerichtsgesetz, a minor is a person who is 14 years of age but not yet 18 years of age at the time of the commission of the offense, and a juvenile is a person who is 18 years of age at the time of the commission of the offense but not yet 21 years of age.

According to art. 105 of the Jugendgerichtsgesetz Act, if a juvenile, *i.e.*, one who has reached the age of 18 but not yet 21, commits an offense punishable under the general regulations, the legislator shall apply the regulations applicable to the juvenile in Sections 4-8, 9 no. 1, Sections 10, 11 and 13-32 if:

a. from the general assessment of the adolescent's personality and taking into account his social environment, it appears that at the time of the offense his moral and psychological development is similar to that of a minor;

b. it is assessed, depending on the nature, circumstances or reasons for the offense, that the act committed is a juvenile offense.

We thus note that juvenile courts also have jurisdiction to try offenses committed by adolescents aged between 18 and 21.

Nota bene, the German doctrine of the field of psychiatry argues that from a practical point of view neither criminal law nor the field of psychiatry can identify objective criteria for the application of the above provisions[14]. However, in about 90% of cases, in relation to adolescents aged 18 to 21, the courts applied the provisions of the Jugendgerichtsgesetz Act[15].

C. Penalty system

According to the Jugendgerichtsgesetz Act of 1953, the punishment regime for minors consists of educational measures, disciplinary measures and imprisonment.

[12] *https://www.gesetze-im-internet.de/jgg/BJNR007510953.html*, last accessed on 17.02.2024.

[13] F. Dunhel, *Juvenile criminal law in Germany; between a system of protection and justice,* in Journal of Deviance and Society no. 3/2002, vol. 26, p. 297.

[14] S. Boyne, *Juvenile Justice in Germany*, Robert H. McKinney School of Law, Indiana University, Legal Studies Research Paper no. 2015-28, Indianapolis.

[15] F. Dunkel, *Sistemul justiției juvenile în Europa,* in Kriminologijos studijos no. 1/2014, p. 47.

D. Educational measures

Thus, Section 2 of the Jugendgerichtsgesetz Act regulates educational measures, *i.e.*, the issuing of instructions, which are obligations on juvenile offenders, and the order to receive educational assistance within the meaning of Section 12.

According to art. 10 para. (1) of the Jugendgerichtsgesetz Act, instructions are commands and prohibitions regulating the lifestyle of the young person and therefore intended to promote and ensure his or her upbringing; these instructions must not be unreasonable on the lifestyle of the young person. Thus, the judge can, in particular, impose on the young person:

a. to follow the instructions concerning his place of residence;

b. to live with a family or in a house;

c. to accept an apprenticeship or a job;

d. to provide labour services;

e. to put oneself under the care and supervision of a certain person (care assistant);

f. to participate in a social training course;

g. to strive to reach an agreement with the injured party (perpetrator-victim resolution);

h. to refrain from contact with certain people or from visiting certain public places;

i. to attend a traffic course.

According to art. 10 para. (2) of the Jugendgerichtsgesetz, the judge may, with the consent of the legal guardian and the legal representative, order the young person to undergo medical treatment. If the young person has reached the age of 16, this obligation is only imposed with his or her consent.

E. Disciplinary measures

According to art. 13 para. (1) of the Jugendgerichtsgesetz Act, the judge applies disciplinary measures if it is not necessary to impose a juvenile punishment, but it is necessary to make the young person aware as a matter of urgency that he must answer for the injustice he has committed.

In the view of the German criminal legislator, the following are considered disciplinary measures:

a. warning;

b. issuing conditions or imposing obligations;

c. juvenile detention.

The purpose of the warning is to make the young offender aware of the injustice of his or her offense (art. 14 of the Jugendgerichtsgesetz Act).

Section 15 of the Jugendgerichtsgesetz lists the **obligations that may be imposed on the young person**, as follows:

- make every effort to repair the damage caused by the act;
- apologise personally to the injured party;
- to do a job;
- pay an amount of money to a charity.

Payment of an amount of money is only ordered if two conditions are met: the young person has committed a crime and can be expected to pay the money from funds he or she is entitled to use independently or the young person is to be deprived of the profit from the crime or the remuneration he or she received for it.

Juvenile detention is carried out on a short-term or permanent basis [art. 15 para. (1) of the Jugendgerichtsgesetz Act]. Detention in free time is carried out during the young person's free time (weekend) and is limited to one or two free periods (one or two weekends) - para. (2). Short-term detention is instead of detention in lieu of time off, which is for a period of two to four days - para. (3). The final detention is for a minimum of one week and a maximum of four weeks - para. (4).

The prison sentence *(Jugendstrafe*) is governed by section four - *Youth Punishment.* Thus, the juvenile punishment, *i.e.*, the custodial sentence, is the deprivation of liberty in a facility intended for its execution [art. 17 para. (1) of Jugendgerichtsgesetz Act]. Imprisonment shall be imposed on juveniles if, due to their harmful tendencies, educational and disciplinary measures are not sufficient to rehabilitate the juvenile offender or if the punishment is necessary in view of the seriousness of the offense [art. 17 para. (2) of Jugendgerichtsgesetz Act]. The prison sentence is therefore ordered taking into account the seriousness of the offense committed and the behaviour of the offender.

As for the length of the juvenile sentence, according to art. 18 of the Jugendgerichtsgesetz Act, the minimum sentence is six months and the maximum sentence is five years. If an offense is committed for which, under general criminal law, the maximum penalty is more than ten years' imprisonment, then the maximum penalty for juveniles is ten years. Penalty limits under general criminal law do not apply. In all cases, youth punishment must be aimed at the necessary educational influence. The sentence is carried out in juvenile prisons, specifically in specially designed holding places in adult prisons.

German case law shows that imprisonment is not imposed on young people under 16. If the length of imprisonment does not exceed 2 years, judges often grant dispensation from the sentence. If the prison sentence is more than one year, this measure is imposed in two thirds of cases[16].

According to German criminal law, sanctions for juvenile offenders between 14 and 18 years of age and young people between 18 and 21 years of age are primarily aimed at their education. Priority is given to educational and disciplinary measures (for juveniles), and only as a subsidiary measure is imprisonment applied (for juveniles), with the possibility of conditional suspension of the execution of the sentence under the conditions of section five of the Jugendgerichtsgesetz Act - *suspension of the sentence for juveniles with probation, which* is also confirmed by the literature in the field[17].

Thus, following the analysis carried out, we note that at the heart of juvenile justice lies the principle of subsidiarity or minimum intervention - *Subsidiaritatsgrundsatz, a* conclusion also highlighted by the doctrine[18], a principle that cannot be separated from the principle of proportionality, whereby criminal sanctions are limited.

2.1.4. Austria

A. The seat of matter

The specifics of criminal liability and criminal sanctions applicable to minors are regulated by the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz.*

B. Limits of criminal liability

According to Section 1 - *Definitions* of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz*: a minor is any person who has not attained the age of 14 years [para. (1) item 1]; juvenile is a person who has reached the age of 14 but who has not reached the age of 18 [para. (1) para. (2)]; young adult is a person who has reached the age of 18 but who has not reached the age of 21 [para. (1) para. (5)]; juvenile offense is an act committed by a young person and punished by the court [para. (1) item 3], and juvenile criminal case is a criminal case involving a juvenile offense [para. (1) item 4]. Para. (2) of art. 1 of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz,* states that if it is doubtful whether a defendant was 18 years old at the time of the offense or at the time of the prosecution, the provisions of the juvenile procedure shall apply.

Section 4 of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz* regulates *impunity for minors and juveniles* in the sense that (1) Minors who commit a punishable offense shall not be punished, (2) A juvenile who commits a punishable offense shall not be liable to prosecution if:

- for some reason, he is not yet mature enough to recognize the injustice of the act or to act on this understanding, or,
- commits an offense before reaching the age of 16, is not guilty of any serious misconduct and there is no need to apply the juvenile criminal law for special reasons relating to deterring the young person from committing criminal offenses.

Case studies in Austria show an increase in crime among minors under the age of 14, which has prompted some state representatives to propose lowering the age of criminal liability from 14 to 12[19]. In the reasoning for this proposal it is argued that „*There is no reason to protect criminals, whether murderers, rapists or robbers, from punishment simply because they have not reached the age of 14. Gang crime of young foreigners is a daily*

[16] *Criminal liability of minors*, *https://www.senat.fr/lc/lc52/lc52.html*, last accessed on 17.02.2024.

[17] J.-M. Jehle, *Criminal Justice in Germany*, p. 35, published by the Federal Ministry of Justice, 4th ed., 2005, *http://www.bmj.bund.de/media/archive/961.pdf*, last accessed on 17.02.2024.

[18] F. Dunkel, *Juvenile Justice in Germany: Between Welfare and Justice, www.esc-eurocrim.org/files/juvjusticegermany_betw_welfar_justice.doc*, last accessed on 17.02.2024.

[19] The FPO leader in Vienna, Dominik Nepp, proposes reducing the age of criminal liability from 14 to 12. *https://ziarulromanesc.at/reducerea-varstei-de-rapundere-penala-in-austria/*, last accessed on 22.02.2024.

growing problem in Vienna and a legal basis is needed to solve this problem"[20]. Opponents of this proposal argue that it has little or no preventive effect, which is not supported by those who promote the proposal to reduce the age of criminal liability, pointing out that dangerous criminal offenders cannot move freely in society. A particularly tragic and unprecedented case in Germany, where two girls aged 12 and 13 killed another girl aged 12[21], is a case in point; the representatives of the Austrian authorities thus cite a landmark case in Germany, where the age of criminal liability is also 14, as a reason for reducing the age of criminal liability. The two girls investigated for the crime, aged under 14, are not criminally responsible, which is why they have been handed over to child welfare services.

C. Penalty system

Art. 5 of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz* provides that the general criminal laws apply to the punishment of juvenile offenses, unless otherwise stated therein.

Next, we point out that the Juvenile Rights Act of 1988 - *Jugendgerichtsgesetz* - provides in art. 51 that the general provisions on prison sentences apply to the enforcement of custodial sentences for juveniles, unless otherwise provided in the provisions of this Federal Act.

Thus, the minors are punished with imprisonment[22], the limits of which are reduced, and this is enforced by the juvenile courts, first introduced on 5 January 1919.

Furthermore, Section 12 - *Guilty verdict without punishment of* the Juvenile Rights Act 1988 - *Jugendgerichtsgesetzi*, states that where only a minor penalty is to be imposed for a minor offense, the court must refrain from imposing a penalty if it can be presumed that the guilty verdict alone is sufficient to deter the offender from committing further criminal offenses and the decision not to impose a penalty must be justified.

Section 13 of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz*, entitled *guilty verdict subject to punishment*, provides that the penalty to be imposed for a juvenile offense is reserved for a probationary period of 1 to 3 years if it is presumed that the guilty verdict and the threat of punishment, alone or together with other measures, will be sufficient to deter the offender from committing further criminal offenses. The probationary period starts from the moment the judgment becomes final. The judgment must include the penalty reserved, the term of probation and the reasons. The court is also obliged to inform the sentenced person of the meaning of the guilty verdict, which provides for the penalty, and as soon as the judgment becomes final to send him a written document which, in simple terms, sets out the content of the judgment, the obligations to be imposed and the reasons why the penalty may be applied retroactively.

We therefore note that juvenile courts, when imposing a sentence, must consider whether it is essential to prevent others from committing criminal offenses (art. 14 of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz*).

Further, art. 15 para. (1) of the Juvenile Rights Act 1988 - *Jugendgerichtsgesetz*, provides that if a person is reconvicted of an offense committed before the expiry of the probation period, the penalty must be imposed if, in view of the conviction, it is necessary to deter the offender from committing further criminal offenses. The penalty may also be imposed if a court instruction is not complied with during the probationary period or if the offender consistently evades supervision by the probation officer.

The Juvenile Rights Act of 1988 - *Jugendgerichtsgesetz*, provides in art. 17 for conditional release. Thus, for conditional release from a prison sentence, the provisions of Section 46 para. (1) to (5) of the StGB apply, but with the proviso that the minimum sentence to be served is one month and that no account is taken of whether the sentence is to be served in order to prevent criminal offenses being committed.

In juvenile prisons, prisoners are trained in a particular profession that corresponds to their previous knowledge, skills, activities and inclinations (art. 53 Juvenile Rights Act 1988 - *Jugendgerichtsgesetz*).

[20] *https://ziarulromanesc.at/reducerea-varstei-de-rapundere-penala-in-austria/*, last accessed on 22.02.2024.
[21] *https://ziarulromanesc.de/stiri/ucigasele-luisei-si-au-recunoscut-fapta-cazul-socheaza-germania/*, last accessed on 22.02.2024.
[22] *https://www.gesetze-im-internet.de/stgb/*, last accessed on 22.02.2024.

2.1.5. Croatia

A. The seat of matter

Criminal liability of minors and court proceedings against juvenile offenders are regulated by the Juvenile Courts Act - *Zakon o sudovima za mladez*. Cases involving juvenile offenders shall be tried as a matter of urgency and must be initiated, conducted and concluded without undue delay (art. 4)[23].

The Juvenile Courts Act - *Zakon o sudovima za mladez* is structured in 5 parts as follows:

- part I - Introductory provisions;
- part II - Other minors: I. Criminal law provisions - general criminal law provisions, educational measures, juvenile imprisonment, security measures, special provisions on the limitation period of criminal proceedings and substantive legal expediency, publication of the judgment; II. Court provisions and criminal procedure provisions - juvenile courts, proceedings against juveniles; III. Provisions on enforcement of sanctions (educational measures, juvenile imprisonment);
- part III - Younger adults: I. Application of criminal law regulations; II. Provisions on criminal procedure; III. Application of penalties;
- part IV - Criminal protection of children;
- part V - Transitional and final provisions.

Art. 1 of the Juvenile Courts Act - *Zakon o sudovima za mladez* regulates its content. Thus, the law provides for provisions applicable to juvenile offenders, *i.e.*, minors and younger adults, in substantive criminal law, provisions on courts, criminal procedure, as well as the enforcement of penalty and provisions on the criminal protection of children.

The provisions of the Juvenile Courts Act - *Zakon o sudovima za mladez* are supplemented by the provisions of the Criminal Code, the Courts Act, the Act on the Protection of Persons with Mental Disorders, the Act on the Execution of Sanctions for Criminal offenses and other general regulations, unless they are contrary to it (art. 3 of the Juvenile Courts Act - *Zakon o sudovima za mladez*).

B. Limits of criminal liability

According to art. 2 of the Juvenile Courts Act - *Zakon o sudovima za mladez,* a minor is a person who has reached the age of 14 but has not reached the age of 18, and a younger adult is a person who has reached the age of 18 at the time of the offense but has not reached the age of 21.

C. Penalty system

The Juvenile Courts Act - *Zakon o sudovima za mladez*, regulates the mixed sanctioning system, based on educational measures and imprisonment.

Minors who commit offenses are subject to educational measures and juvenile imprisonment, as well as security measures in addition to the conditions laid down in this law [art. 5 para. (1)].

Educational and security measures may be applied to a minor who at the time of the offense was 14 years old but not 16 years old (younger minor) [art. 5 para. (2)].

A minor who has reached the age of 16 at the time of the offense and has not yet reached the age of 18 (older minor) may be sentenced to educational and security measures as well as to imprisonment for minors [art. 5 para. (3)].

Thus, we note that art. 6 of the Juvenile Courts Act - *Zakon o sudovima za mladez* regulates the purpose of juvenile sanctions, *i.e.*, influencing the education of minors, developing their personalities and preventing them from committing new crimes. *Nota bene*, this purpose is taken into account both in the application of educational measures and in the application of the prison sentence. With this regulation, we believe that the Croatian criminal legislator, on the one hand, gives priority to the need for education/education of minors by regulating educational measures, thus transposing into national law the provisions issued by the European Parliament and the Council, and, on the other hand, warns minors that if they commit more serious offenses, they will be sentenced to imprisonment, as educational measures are not justified in relation to the nature and seriousness of the offense and the degree of guilt.

[23] *https://www-zakon-hr/z/180/Zakon-o-sudovima-za-mladez*, last accessed on 24.02.2024

D. Educational measures

Art. 7 para. (1) of the Juvenile Courts Act - *Zakon o sudovima za mladez* regulates 7 educational measures that can be applied to minors, as follows: judicial reprimand, special obligations, increased care and supervision, increased care and supervision with day care in an educational institution, referral to a disciplinary center, referral to an educational institution, referral to a special educational institution.

In the process of choosing the educational measure, the court must take into account the age of the juvenile, his development and psychophysical characteristics, the seriousness and nature of the offense committed, the reasons and circumstances in which he committed the offense, his behavior after the offense, the fact that he has tried to prevent the occurrence of harmful consequences or has tried to repair the damage caused, his behavior towards the injured person, his personal and family circumstances, the commission of other criminal penalties, another juvenile sentence, circumstances influencing the choice of such educational measures as best correspond to the purpose of the educational measures.

Judicial caution is applied if it is judged that it alone will achieve the purpose of the educational measure; the assessment is made in relation to the attitude of the juvenile offender to the offense committed and his agreement not to commit further offenses. At the time of sentencing, the court will warn the juvenile that a more severe measure may be imposed if he commits another offense.

The court may impose certain **special obligations on** the minor as follows:

- to apologise to the injured party;
- to make good the damage committed by the offense to the best of its ability;
- to go to school regularly;
- not to miss work;
- to train for a profession that corresponds to their skills and inclinations;
- to take a job;
- to undertake income-generating activities with the supervision and advice of the educational measures' coordinator;
- get involved in the activities of humanitarian organizations or in activities of community or environmental importance;
- not to go to certain public places and not to come into contact with certain people who may negatively influence their behavior;
- with the consent of the legal representative, to undergo medical treatment for the use of drugs or other substances;
- to attend individual or group psychosocial treatment in a youth counselling center;
- to attend vocational training courses;
- not to leave the place of residence or stay without the special permission of the social welfare center;
- to be directed to the competent institution for driver training to check knowledge of traffic rules;
- not to communicate with the victim;
- other obligations necessary in relation to the offense committed, the personal and family circumstances of the minor.

The obligations listed above are for a period of up to one year and may be modified or suspended by the court.

Increased care and supervision are required when the court considers that the parents' education of the minor's behavior and personality development is not sufficient to achieve the purpose of the educational measures, but it is necessary for the minor to undertake more permanent educational measures under the supervision of the competent service (art. 11 of the Juvenile Courts Act - *Zakon o sudovima za mladez*). This measure is ordered for a period of between 6 months and 2 years.

Enhanced care and supervision with day care in an educational institution is regulated by art. 12 of the Juvenile Courts Act - *Zakon o sudovima za mladez*. This is ordered when the court considers that it is necessary to separate the minor from his/her environment for one day, and the measure is carried out by educators and other experts for a period of between 6 months and 2 years.

Referral to the disciplinary center is ordered when the court considers that a short-term separation of the minor from his or her environment, during which time appropriate intensive measures will be carried out, is necessary to achieve the purpose of the educational measures provided for by law (art. 13).

A referral to an educational institution is ordered when the court considers it necessary for the care and supervision of the minor to be carried out by educators and experts, usually in a social welfare institution, for a period of between 6 months and 2 years (art. 15).

A juvenile with psychophysical deficiencies is **sent to a special educational institution** for as long as necessary, but not more than three years (art. 17 of the Juvenile Courts Act - *Zakon o sudovima za mladez*).

E. Security measures

These are regulated by art. 31 of the Juvenile Courts Act - *Zakon o sudovima za mladez*. Security measures are executed in addition to the educational measure or the prison sentence and are imposed in compliance with the provisions of the Criminal Code. Security measures are: psychosocial treatment, prohibition to drive a motor vehicle, prohibition to carry out certain activities, psychiatric treatment.

Imprisonment of minors is regulated by art. 24-30 of the Juvenile Courts Act - *Zakon o sudovima za mladez*. This custodial penalty is characterised by its specific features in terms of its conditions of application, duration, purpose and content. Thus, the prison sentence for juveniles may not be less than 6 months and not more than 5 years, but the court may not impose a prison sentence for a period longer than that prescribed for the offense committed, being bound to the minimum measure prescribed for that sentence.

In determining the sentence of imprisonment for juveniles, the court must take into account the factors affecting the amount of the sentence provided for in the Criminal Code, the degree of maturity of the juvenile, the time required for his or her upbringing, education and vocational training.

The Croatian criminal law provides for the possibility of conditional release of a minor serving a prison sentence if he has served at least one third of the sentence imposed. Probation will be revoked if the offender commits one or more offenses for which a six-month prison sentence was imposed while on probation.

Criminal cases involving juveniles are tried by the juvenile courts and the jurisdiction of the juvenile court ceases when the offender reaches the age of 23 (art. 35 and 36 of the Juvenile Courts Act - *Zakon o sudovima za mladez*).

2.1.6. Spain

A. The seat of matter

As in the case of the French and German criminal legislator, the Spanish legislator has regulated the criminal liability of minors by a special law, which contains provisions derogating from ordinary law, more specifically by Organic Law no. 5/12.01.2000 on the criminal liability of minors.

The provisions of the Spanish Criminal Code are the common law on the matter, and the provisions of art. 19 state that offenders who have not reached the age of 18 will be held liable in accordance with the provisions of Organic Law no. 5/12.01.2000.

B. Limits of criminal liability

According to the Organic Law on the Criminal Liability of Minors of 12 January 2000, for minors who have not reached the age of 14, absolute lack of criminal liability is established, and for minors between 14 and 18, relative lack of discernment is established.

It should be noted that Spanish criminal law defines two categories of minors, namely those aged 14 to 16 and those aged 16 to 18.

The law regulates an aggravating circumstance for minors who have reached the age of 16 if they commit offenses involving violence, intimidation or endangering a person.

Furthermore, the Organic Law on the Criminal Liability of Minors also applies to adults aged between 18 and 21 who have committed offenses, when certain conditions are met, as follows:

- a crime or offense of a less serious nature has been committed without violence or intimidation of a person and without serious danger to life or physical integrity;
- the person has no previous convictions for offenses committed after the age of 18; previous convictions for crimes committed with negligence are not taken into account;
- the offender's personal circumstances and degree of maturity, recommends the application of the juvenile law.

Nor does the age of majority mean that the measure is no longer enforceable.

The execution of the measure is accomplished when its purposes are achieved. When confinement is ordered until the age of 21, it will be served mainly in prison. The same provisions also apply if the sentenced person has reached the age of 18 years in prison and his or her conduct is not in conformity with the purpose of the sentence or if, prior to the commencement of enforcement, the sentenced person has served all or part of another sentence of imprisonment under enforcement or detention in a prison (art. 14).

Priority will be given to the sentence in cases where, during the execution of the measure, a person who has reached the age of 18 is sentenced under the Criminal Code and the simultaneous execution of the sentence and the measure are not possible; thus, the execution of the sentence shall absorb the measures ordered, with the exception of internment and imprisonment measures, where, if the juvenile court orders the execution of the measure, it shall be carried out in prison, accompanied by the sentence of execution of imprisonment.

As regards minors under 14 years of age, the provisions on the protection of minors in the Criminal Code and the Organic Law will apply. According to art. 3 of the Organic Law, the prosecutor sends the prosecution material to the competent authority for the protection of minors, so that this authority can promote the adoption of protective measures that are in the minor's interest.

C. Penalty system

By Law no. 8/2006 new regulations were introduced, in the sense:

- ensuring proportionality between the penalties imposed and the degree of social danger of the offense committed by executing the educational measure of internment in a closed re-education center, similar to custodial sentences, in the case of highly dangerous offenses and transferring minors to a penitentiary when they reach the age of 18;
- the introduction of additional measures, *e.g.*, a ban on contact with the victim, the victim's relatives or other persons;
- recognizing and guaranteeing victims' rights.

Most of the amendments were implemented by Law no. 5/2000, which regulates both substantive and procedural criminal law elements.

Thus, we note that the sanctioning system applicable to minors is a mixed one, based on educational measures and punishments.

According to the law on the criminal liability of minors, the **educational measures** that can be applied to the minor, based on the best interests of the minor, are:

- *confinement*, which involves educational, training and work activities in a center;
- *semi-open admission*, which means that minors are admitted to a center, but their educational, work and leisure activities are carried out outside the center;
- *open admission*;
- *therapeutic detention* involves the provision of special and individualised education for juvenile offenders suffering from certain abnormalities, mental changes, who are dependent on alcohol, drugs, psychotropic substances or changes in their perception of reality; the measure may also be applied in addition to other measures provided for by law; the juvenile will be given another measure appropriate to his/her circumstances by the juvenile court if he/she refuses the measure of therapeutic detention;
- *out-patient treatment*, requires that the persons concerned undergo special and appropriate treatment for alcohol or psychoactive substance dependence in a designated center within the time limits set;
- *day center care* - minors will live at home and go to a fully integrated community center where they will carry out support, educational, work and leisure activities;
- *weekend attendance* - minors will remain in the center from Friday evening until Sunday night for a maximum of 36 hours, except for hours, designated by the judge, that they must devote to homework;
- *supervised liberty* - this measure monitors the activity of the juvenile offender and his or her attendance at school, vocational training center or workplace, as appropriate, thus helping to eliminate the factors that led to the commission of the offense. The juvenile must follow the socio-educational models established by the public entity in charge or the specialist appointed to supervise the juvenile offender, in accordance with the provisions of the juvenile judge. The person is obliged to attend the meetings set by the specialists and to comply with the rules of conduct imposed by the judge:

a. the obligation to report regularly to the appropriate educational center if the person concerned is in compulsory education and to explain any absences to the judge;
b. the obligation to follow certain cultural, educational, vocational, work, sex education, life education, etc. training programmes;
c. prohibition from attending certain places, establishments or performances;
d. prohibition to leave the home without a permission from the judge;
e. obligation to live in a certain place;
f. the obligation to appear in person before the juvenile judge or the specialist designated by the juvenile judge to inform about the activities carried out;
g. any other obligations that the judge or the court of the Fiscal Ministry deems necessary for the social reintegration of the accused, provided that these obligations do not violate his dignity as a person.

- *living with another person, family or educational group* - the minor must live with another person, family or educational group, carefully selected, for a period of time determined by the judge;
- *community benefits* - the minor must consent to this; only benefits that cover the harm caused by the offense will be made;
- *carrying out socio-educational themes* - the person must carry out, without confinement or supervised liberty, specific activities with educational content, designed to facilitate the development of his/her social skills;
- *admonition* - this measure consists of a reprimand of the minor by the judge in order to make the minor understand the seriousness of the acts committed and their consequences or the consequences they could have had, warning the minor not to commit such acts in the future;
- the *revocation of the driving license of mopeds or vehicles or the right to obtain their administrative licenses for hunting or for the use of any weapon* - this measure will be ordered when the offense is committed using a moped, a vehicle or a weapon;
- *absolute disqualification* - this measure entails the permanent deprivation of all public honors, offices and duties to which he or she has had recourse, even though they were elective; and the inability to obtain such public honors, offices or duties in the future or to be elected to public office during the measure. The hospitalisation measures will be carried out in two stages: in the first stage they will be carried out in the corresponding center, and in the second stage they will be carried out under supervised release depending on the period and method chosen by the judge. The duration of each stage will be specified by the court.

As for the **prison sentence,** it applies to young people aged between 18 and 21 who commit a crime by violence, intimidation.

2.2. The criminal liability of minors in England and Wales

2.2.1. The seat of matter

The criminal liability of minors is regulated by the *Crime and Disorder Act*, adopted on 31.07.1998. It removed the presumption of criminal irresponsibility for minors aged between 10 and 14. Until the adoption and entry into force of the above-mentioned Act (30 September 1998), minors between 10 and 14 years of age who committed an offense were presumed to be irresponsible. The presumption was relative, given that it could be overturned by proving that the minor knew the consequences of his act.

The punishments that may be applicable to young offenders are set out in the Police and Criminal Evidence Act 1984.

2.2.2. Limits of criminal liability

According to Section 34 of the *Crime and Disorder Act*, passed on 31.07.1998, the age of criminal liability is 10 years and the age of criminal majority is 18 years.

2.2.3. Penalty system

Young people and adolescents aged 10-17 are subject to educational and disciplinary measures as well as imprisonment.

2.2.4. Educational and disciplinary measures

If it's a first offense and it's a minor one, police officers will give young offenders a warning.

When the seriousness of the offense is greater, the court imposes certain measures as follows:

- *probation*, for a maximum period of 3 years;
- *community* service for a period of 3 months;
- *combined punishment*, which involves probation and community service;
- *compliance with a certain limit,* monitored by an electronic bracelet;
- *supervision order,* for a period of 1-3 years;
- the *obligation to take part in activities organised, in principle in schools*, for a period of 2-3 hours every Saturday; the measure applies to young people aged 10-21;

Thus, if the minors are first offenders, they will receive a warning/reminder, and the next or more serious offense they will receive a warning.

- *compensation order* for the benefit of the victim, if the victim consents, or the community.

2.2.5. Prison sentence

The prison sentence is only applicable if the offenses committed by minors over the age of 12 are so serious that, if committed by a person aged 21 or over, a prison sentence would be justified and the release of the offender is a danger to public order.

Minors over the age of 15 serve their sentences in juvenile institutions or in separate units of adult prisons. Minors under 15 are placed in specialised institutions.

3. Conclusions on the regulation of the criminal liability of minors in comparative law

3.1. How the criminal liability of the minor is regulated

Based on the principles of independence and sovereignty, but also in view of the tradition and evolution of juvenile crime, each state has introduced special legal provisions for juvenile offenders in its legislation. As outlined above, some countries have included these provisions in their Criminal Codes and codes of criminal procedure, while others have considered it appropriate to draw up special legislation to regulate the liability of minors who commit offenses, complementing the provisions of the Criminal Code and the Code of Criminal Procedure.

Thus, like Romania, countries such as Bulgaria, Algeria, Croatia, Czech Republic, Denmark, Finland, Italy, Greece, Iran, Latvia, Lithuania, Poland, Netherlands, Russia, Republic of Moldova, Sweden, Slovenia, Scotland, Hungary, Ukraine, have regulated the liability of minors who commit offenses in the Criminal Code and the Code of Criminal Procedure. By contrast, other countries such as France, Germany, Austria, Belgium, Brazil, the United Kingdom, China, Colombia, Japan and Luxembourg have attached particular importance to the regulation of the criminal liability of minors, by drawing up special laws or regulations on the subject.

Thus, at European level, there is no single model in the area of criminal liability of minors, but on the contrary, this area enjoys a diversity in its approach to the phenomenon of crime among minors. This diversity is characterised by the way in which criminal liability is regulated, the limits of criminal liability, and the treatment of minors as offenders.

Compared to the juvenile justice system in the studied countries, we believe that the adoption of a special law dedicated to the criminal liability of minors in our country is a good omen and in line with European standards.

3.2. Age of criminal liability

According to art. 100 of the Belgian Criminal Code: „Where the term minor is used in the provisions of Book II of the present Code, this term shall mean a person who has not yet reached the age of eighteen years".

According to art. 122-8 of the French Criminal Code: „Minors capable of discernment are criminally liable for crimes, offenses or misdemeanours of which they have been found guilty, under the conditions laid down by a special law which provides for the measures of protection, assistance, supervision and education to which they may be subject. This law also sets out the educational sanctions that may be imposed on minors between the ages of 10 and 18, as well as the penalties to which minors between the ages of 13 and 18 may be sentenced, taking into account the mitigation of liability they enjoy because of their age."

In accordance with art. 74 para. (1) item 1 of the Austrian Criminal Code, a person who has not reached the age of 14 is considered to be an irresponsible minor. Item 2 of art. 74 para. (1) states that a minor is a person who has not reached the age of 18.

Also, Chapter III of the Bulgarian Criminal Code regulates who is criminally liable. Thus, according to art. 31 para. (1), a person who has reached the age of 18 years and has committed the act with discernment is considered criminally liable. Para. (2) states that a minor who has reached the age of 14 and who has not reached the age of 18 is only criminally liable if he or she has been able to understand the nature and significance of his or her act and is able to control his or her own actions. Further Bulgarian criminal legislation, in art. 32 para. (1) that a person who has not attained the age of 14 is not criminally liable.

Section 25 of the Criminal Code of the Czech Republic regulates the minority of the offender, stating that a person who has not reached the age of fifteen at the time of committing the crime is not criminally liable. Section 109 further establishes that the criminal liability of juveniles and the penalties imposed on them are governed by the Juvenile Justice Act, except where the Juvenile Justice Act provides otherwise, when they will be dealt with under the Criminal Code. Section 125 defines a minor as a person who has not attained the age of 18 years, unless the Criminal Code provides otherwise.

The Criminal Code of the Republic of Cyprus states in art. 14 that no person who has not attained the age of fourteen years is criminally liable for any act or omission.

Art. 7 of the Criminal Code of Croatia regulates the application of criminal law to minors. Thus, it provides in para. (1) that the criminal law shall not apply to a child who was under 14 years of age at the time of the offense. And in para. (2) states that in the case of a person who has reached the age of 14 years at the time of the commission of the offense but has not reached the age of 21 years, the Criminal Code shall apply unless otherwise provided by a special law.

Art. 15 of the Danish Criminal Code states that offenses committed by a minor under the age of 15 are not punishable. Art. 33 para. (3) provides that if the offender was under 18 years of age at the time of the offense, he or she may not be sentenced to life imprisonment.

Next we point out that art. 87 of the Estonian Criminal Code regulates the penalties applicable to minors. From the content of this text of the law, we note that persons who have not reached the age of 18 are considered minors, and in the case of persons aged between 14 and 18 years, according to certain criteria, the court has the possibility to release the person from the obligation to execute the sentence and can apply certain sanctions.

Section 4 of the Criminal Code of Finland regulates the age of criminal liability and criminal responsibility. Thus in para. (1) states that the perpetrator must have reached the age of 15 years at the time of the offense and be criminally liable in order to incur criminal liability. The criminal legislation of Finland provides in Chapter 6, Section 1 para. (2) that in the case of persons who have not reached the age of 18 years, they are subject to a special penalty, *i.e.*, the juvenile punishment.

The Criminal Code of Greece defines a minor as a person between 8 and 18 years of age at the time of the offense. Art. 126 of the Criminal Code sets the lower limit of criminal liability for minors at 14 years of age.

The Italian Criminal Code regulates the age of criminal liability of minors in art. 97 and 98. Thus, according to art. 97, if at the time of the offense, the person was under 14 years of age, he or she cannot be held criminally liable. Art. 98 states that a person may be held criminally liable if, at the time of committing the offense, he was 14 years of age but not yet 18 years of age and if he was of sound mind.

The Criminal Code of Lithuania regulates in Chapter XI the peculiarities of criminal liability of minors. Art. 81 para. (1) states that the provisions of this chapter apply to persons who have not reached the age of 18 at the time of the offense.

The criminal legislation of Malta is slightly different from that of other EU countries. Thus, according to art. 37 of the Criminal Code, a minor under the age of 16 is not criminally liable if he or she committed the act without intent. However, if the minor aged between 14 and 16 committed the offense with intent or if he is aged between 16 and 18, he is criminally liable.

According to Section 77a of the Dutch Criminal Code, a person who has reached the age of twelve years and who has not yet reached the age of eighteen years at the time of the offense cannot be punished. It goes on to state in Section 77b para. (1) that in the case of a person who has attained the age of sixteen years but who has not attained the age of eighteen years at the time of the commission of the criminal offense, the court may try the person under subsections 77g to 77gg inclusive (*i.e.*, may impose penalties on the juvenile other than life imprisonment) if it is satisfied that such penalties are necessary having regard to the seriousness of the offense

committed, the character of the offender or the consequences of the offense committed. Section 77c provides that a person who has attained the age of eighteen years but who has not yet attained the age of twenty-one years at the time of the commission of the offense may be judged under the provisions of subsections 77g to 77gg inclusive, if it is deemed necessary in view of the person of the offender or the consequences of the offense committed.

Art. 10 of the Polish Criminal Code states that the rules of the Criminal Code apply to persons who commit a crime after the age of 17. Furthermore, minors over 15 years of age who commit an offense under art. 134, art. 148 art. 1, 2 or 3, art. 156 art. 1 or 3, art. 163 art. 1 or 3, art. 166, art. 173 art. 1 or 3, art. 197 art. 3 or 4, art. 223 art. 2, art. 252 art. 1 or 2 and art. 280, may be criminally liable if the circumstances of the offense and the offender's level of development, personal qualities and conditions justify it, but especially if educational or coercive measures have not been successful. With regard to a minor who committed the offense after reaching the age of 17 but before reaching the age of 18, the court shall not impose punishment but educational, treatment or correctional measures if the circumstances of the case and the offender's development, personal characteristics and personal circumstances justify it.

As for the criminal law of Portugal, it states that minors under 16 are not criminally liable.

The Criminal Code of the Slovak Republic states that a person cannot be criminally liable for sexual abuse if he or she was under the age of 15 at the time of the offense. Also, a person who has not reached the age of 14 at the time of the offense cannot be held criminally liable.

In the criminal law of Slovenia, the criminal liability of minors is regulated by special law. Art. 5 para. (3) of the Slovenian Criminal Code provides that a special law defining the criminal liability of minors may provide that persons who were already adults at the time of the commission of the offense but who have not reached the age of 21 (young adults) may be treated criminally as minors, on the grounds of ensuring their development.

Art. 69 of the Spanish Criminal Code provides that the provisions governing criminal liability may be applied to offenders who are over 18 and under 21.

As we can see, in most countries of the European Union the age of majority has been set at 18 years, from which the perpetrator of an offense is criminally liable as an adult, but the difference is the age from which a person can be criminally liable, of course applying the specific rules on the criminal liability of minors.

In the light of the above, we note the lack of uniformity in European juvenile law on the age of criminal liability. This shows a tendency to reduce this limit: 8 years in Greece, 10 years in France, 12 years in the Netherlands.

Moreover, although the age of criminal liability of minors varies, the distinction between absolute and relative lack of discernment is found in most of the countries studied.

Given this trend of reducing the age limit from which minors can be held criminally responsible, in view of the increase in the phenomenon of crime among minors and in conjunction with the maturation of minors from a younger age, we believe that it is appropriate to reduce the age from which minors can be held criminally responsible in Romanian law, namely reducing the age from 14 years to 12 years.

3.3. Penalty systems

Following the analysis of the sanctioning system in different systems of comparative criminal law, we note that the traditional criminal model has been and remains dominant, resorting both to punishments and to educational measures (*e.g.*, in English law, as a rule, only punishments are applicable to minors, albeit less severe in terms of duration and method of execution).

Thus, most of the countries listed apply a mixed system to minors, mainly characterised by educational measures, but it is not excluded that, as a subsidiary measure, punishments may also be applied, in the cases and under the conditions laid down by law.

We have noted that there are some differences in the system of sanctioning the minor, but a common trend in European countries is highlighted, namely to give priority to restorative measures in favor of the victim, educational measures, the application of custodial sentences intervening only in serious cases of juvenile delinquency, as mentioned by Al. Boroi and Ş.A. Ungureanu[24].

[24] Al. Boroi, G.Ş. Ungureanu, *The sanctioning system for minors in a European vision*, in Revista de drept penal, year IX, no. 2 (April-June), Bucharest, 2002, pp. 30, 31.

It can be seen that educational measures can be found in all the legislation studied, but with different names and forms: the obligation to obey rules of conduct relating to residence, schooling, prohibition to frequent certain persons and places, reprimand, supervision, placement in a foster family or in a specialised center, hospitalisation, medical treatment, assistance, presence at home at weekends, carrying out certain social-educational activities, etc.; the purpose of these measures is to ensure the minor's reintegration into society.

Also, as far as the prison sentence is concerned, we note that it is carried out exceptionally, with suspension under supervision being the rule.

We believe that the reintroduction in Romania of the mixed system of sanctioning minors, based on educational measures and punishments, is one that corresponds to the purpose of criminal sanctions.

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PHYSICAL EXCLUSION OF UNLAWFULLY OBTAINED EVIDENCE

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Abstract

The aim of this study is to highlight some of the latest tendencies in the criminal court decisions ruled in the stage of the preliminary chamber regarding the exclusion of unlawfully obtained evidence, in light of the CCR decisions issued in the last years. The exclusion of unlawfully obtained evidence from criminal proceedings as a legal consequence of annulment of the tainted evidence is merely an elimination of the possibility of the judge to rely on such evidence in the solving of the case, but it does not erase from the magistrate's memory the information he or she has become aware of from the tainted evidence, this being the main argument for the positive trend of judicial practice in this specific area. Consequently, the recent court decisions are a strong emphasis of the CCR arguments that conclude that exclusion by law of evidence that was obtained unlawfully in criminal proceedings, in the absence of physical removal of such evidence from the criminal case file is not enough to actually guarantee compliance with the rule of presumption of innocence and the right to a fair trial. Although the CCR decision seems to be quite explicit, difficulties have arisen in judicial practice regarding application of the aforementioned provisions, therefore the recent court decisions highlight the necessity of complete physical exclusion of any mentioning or reference regarding the unlawfully obtained evidence.

Keywords: *unlawful, physical, exclusion, reference, evidence.*

1. Introduction

Before being reviewed by the competent court called upon to judge on the merits of a case, evidence must be checked for their lawfulness by the judge of the preliminary chamber, with reliability of the evidence brought in the case standing next in line to the rule of their lawfulness.

To safeguard the right to a fair trial, the legislator has imposed, under art. 102 CPP, the prohibition according to which judicial bodies may not rely on evidence that is thought to have been unlawfully obtained, with the said article reading as follows: *„(1) evidence obtained through torture, as well as any evidence derived from such evidence may not be used in criminal proceedings; (2) evidence obtained unlawfully may not be used in criminal proceedings; (3) the annulment of the document ordering or authorizing the production of evidence or based on which evidence was taken (adduced) shall lead to exclusion of that evidence and to removal from the case file of the proof corresponding to the evidence so excluded; (4) proofs that are directly deriving from unlawfully obtained evidence and that could not be obtained by any other means shall also be excluded from criminal proceedings*".

CCR, by its dec. no. 22/18.01.2018, admitted the plea of unconstitutionality regarding the provisions of art. 102 para. (3) CPP, finding that «[the provisions] *may be deemed constitutional only to the extent that the wording „exclusion of evidence" contained therein is understood to also mean the removal of unlawful evidence from the case file*.»

2. Recent tendencies in court decisions highlighting the arguments within the CCR dec. no. 22/18.01.2018

Prior to the delivery of the aforesaid CCR decision, art. 102 para. (3) CPP had read as follows: *„annulment of the document ordering or authorising the production of evidence or based on which evidence has been taken shall lead to exclusion of that evidence".*

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The recitals of the said dec. state that: «The Court holds that the proving beyond any reasonable doubt of the charges brought in criminal matters is an intricate process that requires the courts to carry out a careful and very thorough examination of the evidence produced in the case file and to exclude from the evidence any proof that is deemed to have been obtained unlawfully, so as to allow judges to deliver their unbiased decisions that are based on a legal reasoning that disregards any and all information deriving from tainted evidence that has been declared null and void. Proving the facts of the matter is therefore a cognitive process that is specific to judicial psychology and at the end of which the judge is expected to come to the „intime conviction" that the defendant is guilty beyond any doubt.

Consequently, the cognitive process under consideration unfolds by its own psychological rules, which intrinsically require the judge, amongst other things, to rely on his or her own subjective assessment of the information in the case file he or she is examining. For that reason, the exclusion by law from a criminal case of the evidence that is declared null and void does not imply their automatic exclusion from the reality as it is perceived by the magistrate called upon to settle the case. In other words, exclusion of unlawfully obtained evidence from criminal proceedings as a legal consequence of annulment of the tainted evidence is merely an elimination of the possibility of the judge to rely on such evidence in the solving of the case, but it does not erase from the magistrate's memory the information he or she has become aware of from the tainted evidence.

It is this legal-cognitive mechanism that was taken into account by the legislator when regulating on the annulment of unlawful evidence, as the ideal approach to applying the provisions of art. 103 in conjunction with the provisions of art. 102 CPP. However, the effectiveness of the mechanism is impaired by maintaining in the case file the proofs corresponding to the annulled evidence, such proofs representing, in fact, a way of reproducing on a physical support that evidence, a fact that CCR established by its dec. no. 383/27.05.2015. That being the case, the permanent access of the judge entrusted with the resolution of the criminal case to the material evidence that was declared null and void can only have as an effect the bringing back to the judge's attention and his or her memory of information that is likely to strengthen his or her conviction regarding the defendant's guilt/innocence, but which he may not legally rely on in resolving the case. Hence, each new potential examination of the evidence that was declared null and void by the court would trigger in the mind of the judge a psychological process whereby the information he or she has become aware of comes in conflict with the information he or she is required by law to take into account in judging on the criminal matter he or she is expected to settle. Under these circumstances, where the unlawfully obtained evidence is likely to prove the perpetrator's guilt, the repeated reliance on such evidence by the court increases and even materialises the risk of replacing the evidence, in the line of his or her judicial reasoning, by the mere conviction of the judge, to which he or she has acquired through purely cognitive mechanisms and based precisely on the tainted evidence, an approach that is prohibited under art. 102 and art. 103 CPP. Moreover, such an approach is likely to prevent the application of the *in dubio pro reo* principle enshrined under art. 4 para. (2) CPP, according to which any doubt in the judicial bodies' coming to their conviction should be interpreted in favor of the suspect/defendant, a principle that is meant to safeguard the rule of presumption of innocence and, hence, the right to a fair trial.

Consequently, while exclusion by the law of unlawfully obtained evidence from criminal proceedings appears to be a sufficient safeguard for the aforementioned fundamental rights, such safeguard is a purely theoretical one in the absence of physical removal of unlawful evidence from the case file as such. Moreover, maintaining the unlawful evidence in the case file during the ordinary and extraordinary remedies that may be resorted to in criminal proceedings can only generate the same contradictory cognitive effect, which is likely to taint the process of coming to a conviction, beyond any reasonable doubt, by the panel of judges appointed to settle the case, regarding the guilt or the innocence of the defendant.

Under the circumstances, the Court concludes that exclusion by law of evidence that was obtained unlawfully in criminal proceedings, in the absence of physical removal of such evidence from the criminal case file is not enough to actually guarantee compliance with the rule of presumption of innocence and the right to a fair trial. Art. 102 CPP regulates on exclusion of evidence, yet without stating whether exclusion must be accompanied by the actual removal from the criminal case file of evidence that was annulled by the courts, or whether, on the contrary, the annulled evidence should be maintained in the case file and excluded only from the process of judicial reasoning of the judge who is called upon to establish and motivate his or her judgment as to the guilt or the innocence of the defendant. Such being the facts, the Court finds that it is its task to clarify the aforesaid procedural issue, so that it may effectively safeguard the right to a fair trial and the rule of

presumption of innocence, as enshrined under art. 21 para. (3) and art. 23 para. (11) of the Fundamental Law of Romania.

Analysing the arguments above, the Court finds that maintaining the proofs produced in criminal case files, in spite of the fact that the related evidence was excluded from the proceedings following its annulment by the courts is likely to influence the assessment to be made by the judges called upon to settle the case, with respect to the guilt or the innocence of the defendants, while also prompting the judges to seek to decide one way or the other, even in the absence of the possibility of effectively relying on the evidence in question in the giving of reasons for their judgments, a fact that is likely to infringe the right to a fair trial and the principle of presumption of innocence applicable to any persons being tried.

Unlike the aforesaid legal solution, the physical removal of proofs from criminal case files after exclusion of the related evidence that was declared null and void according to the provisions of art. 102 para. (3) CPP, an exclusion implying the attachment of a double dimension to the meaning of the wording „exclusion of evidence" (the legal dimension and the physical exclusion dimension) is meant to safeguard in an effective manner the fundamental rights specified above, and, at the same time, to render the criticised text of law a higher degree of clarity, precision and predictability. Therefore, the Court considers that it is only under the said conditions that the institution of exclusion of evidence may be able to achieve its purpose, namely that of protecting the judge and the litigants from biassed legal reasoning and from pronouncing judgments that are directly or indirectly influenced by information acquired or from conclusions deriving from the empirical examination or re-examination by the judge of annulled evidence.

The legal issue relied on by the authors of the plea of unconstitutionality was the subject of lawmaking and of checks on constitutionality in other European countries as well. In this vein, the Court notes that the nullity of evidence implies also the physical removal of material evidence from case files in countries such as Austria, Croatia and Slovenia. For example, according to art. 139 (4) of the Austrian Criminal Procedure Code, unlawfully obtained evidence must be physically destroyed ex officio or at the request of the interested party. Also, art. 86 of the Criminal Procedure Code of Croatia stipulates that the evidence that are excluded from the criminal trial following delivery of a final judgment on such matter must be sealed and kept separately from the rest of the case file by the court secretariat and must not be examined or used during the settlement of the criminal case. Likewise, the provisions of art. 83 of the Criminal Procedure Code of Slovenia requires the physical removal from the case file of the evidence excluded from the criminal proceedings. Moreover, art. 39 of the said Code provides an additional safeguard whereby judges who examined the evidence excluded from the criminal trial are forbidden to rule on the criminal liability of the convicted person. This latter aspect is also established by dec. no. U-I-92/96 of the Constitutional Court of Slovenia, whereby the court found that the right to a fair trial was infringed by participation in the settlement of the conflicting criminal relationship of the judge who was aware of the evidence that had been declared inadmissible. According to the aforesaid Decision, the provisions of the Code of Criminal Procedure of Slovenia, which allow the judge to familiarise himself / herself with the information that the law enforcement has gathered in the pre-trial stage (which must be removed from the case file and which must not be relied upon in settling the case), but which do not provide for the exclusion of the judge who became familiar with such information, are infringing the right to a fair trial, established under art. 23 of the Fundamental Law of Slovenia. By its aforementioned Decision, the Constitutional Court of Slovenia did not declare unconstitutional some of the legal provisions contained in the Criminal Procedure Code, but it sanctioned as inconsistent with the right to a fair trial the absence from the criminal procedure legislation of a legal provision prohibiting participation in the judgment on the merits of the criminal case of the judge who is in the situation described above.

For the considerations above and relying on the provisions of art. 21 para. (3) and art. 23 para. (11) of the Fundamental Law of Romania, the Court will admit the plea of unconstitutionality of the provisions of art. 102 (3) CPP and will find that they may be deemed constitutional only to the extent that the wording „exclusion of evidence" contained therein implies also the removal of evidence from the case file.»

Thus, the Constitutional Court of Romania has established that the tainted evidence must be physically eliminated from the evidentiary material, as well as from all the references made to it in the documents of the proceedings and of the subsequent proofs.

Although the CCR decision seems to be quite explicit, difficulties have arisen in judicial practice regarding application of the aforementioned provisions, as for example: i) is the indictment to be amended by removing from its content the reference to the unlawfully obtained evidence, or should a new indictment be issued?; ii)

who is to amend the indictment by eliminating the portions that are based on unlawful evidence?; iii) should the report regarding remediation of irregularities make reference to the excluded evidence?; iv) which procedural documents are to be excluded from the criminal investigation file?, to name but a few…

For a more precise exemplification, we rely on the resolution of December 20, 2023 of the CA Bucharest, 1st crim. s., by which the Court: (i) admitted the plea of annulment of evidence consisting of the recordings made by technical devices by collaborators with real identity; and (ii) ordered, in application of the CCR dec. no. 22/18.01.2018, the removal from the case file of the excluded evidence, the elimination of all the references thereto as well as of the transcription of their content from all the procedural documents (including from the indictment drawn up in the case), as existing in the criminal investigation file, sending the case file to PICCJ - DNA, ordering it to implement the measure and requesting it to reply within 5 days from the receipt of the Court's resolution as to whether the arraignment order is to be maintained or whether the case should be referred back for further investigations.

As a result of the said request, PICCJ - DNA submitted to the case file the order to maintain the arraignment order, accompanied by the report regarding remediation of the irregularities found by the dec. of 20.12.2023. With regard to the content of the order and of the report on remediation of irregularities, and judging in relation with the requirements of the provisions of art. 102 para. (3) CPP, as defined by CCR dec. no. 22/18.01.2018, we believe that the irregularities have not been remedied insofar as the recordings made by technical devices by real identity investigators were not excluded from the procedural documents, and, as such, the only remedy is to send the file to the prosecutor's office.

By dec. no. 115/27.02.2024, CA Bucharest, 1st crim. s., irrevocably ordered that the case be referred back to PICCJ - DNA, on the ground that *„[the] prosecutor has failed to comply with the obligation imposed by the judges of the preliminary chamber by their resolution of 20.12.2023, given that the documents drawn up in the case and in particular the orders to initiate the criminal proceedings are still containing transcriptions (playbacks) of the taped conversations that were excluded as evidence, including references thereto."*

In the giving of the reasons, the judges of the preliminary chamber showed that *„the cognitive process whereby the judge comes to the intime conviction (becomes personally convinced) as to the defendant's guilt must disregard the information deriving from the evidence annulled";* and that, on the other hand*: „the exclusion the unlawfully obtained evidence from the criminal proceedings as a legal consequence of the annulment of evidence/evidentiary procedures is merely an elimination of the possibility for the judge to come up with a legal reasoning based on such evidence in the settlement of the case, and does not erase from the magistrate's mind the information he or she has acquired on the unlawful evidence". Besides, a*ccording to the said decision*: „the permanent access of the judge entrusted with resolving the criminal case to the material evidence that was declared null and void can only have as an effect the bringing back to the judge's attention or to his or her memory the information that is likely to increase his or her convictions as to the defendant's guilt/innocence, but which the judge may not legally use in solving the case. As such, each new potential examination of evidence that was declared null and void by the court would trigger in the judge's mind a psychological process whereby the information he or she has become aware of comes in conflict with the information the judge is required by law to take into account when resolving the conflicting criminal legal relationship that is the subject matter of the case*".

In this vein, the judges of the preliminary chamber held that the physical removal from the case file of the evidence containing information deriving from evidence that was declared null and void is not a sufficient measure and therefore the references to such evidence must also be excluded both from the content of the notification of the court and from all the documents of proceedings contained by the case file.

Regarding the considerations above, ECtHR ruled, in the Case *Dragoş Ioan Rusu v. Romania* (app. no. 22767/08), as follows: «*The Court reiterates the general principles established in its case-law concerning the use in trial of unlawfully obtained evidence (see Bykov v. Russia [GC], no. 4378/02, §§ 88-91, 10 March 2009): „88. The Court reiterates that, in accordance with art. 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. While art. 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see Schenk v. Switzerland, 12 July 1988, § 45, Series A no. 140; Teixeira de Castro v. Portugal, 9 June 1998, § 34, Reports 1998-IV; and Jalloh v. Germany [GC], no. 54810/00, §§ 94-96, ECtHR 2006-IX). 89. It is therefore not the role of the Court to determine,*

as a matter of principle, whether particular types of evidence - for example, evidence obtained unlawfully in terms of domestic law - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where a violation of another Convention right is concerned, the nature of the violation found (see, among other authorities, Khan [v. the United Kingdom, no. 35394/97, § 34, ECtHR 2000-V]; P.G. and J.H. v. the United Kingdom, no. 44787/98, § 76, ECtHR 2001-IX; Heglas v. the Czech Republic, no. 5935/02, §§ 89-92, 1 March 2007; and Allan [v. the United Kingdom, no. 48539/99, § 42, ECtHR 2002-IX]). 90. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, among other authorities, Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43).

In its jurisprudence, the Court has consistently rejected the argument that proceedings leading to a conviction on the basis of evidence collected in breach of art. 8 of the Convention were unfair and, consequently, there had also been a violation of art. 6 § 1 of the Convention. This attitude has been vigorously criticised by dissenting judges in several cases. In Schenk v. Switzerland [2], Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo stressed as follows: "... compliance with the law when taking evidence is not an abstract or formalistic requirement. On the contrary, we consider that it is of the first importance for the fairness of a criminal trial. No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention."»

3. Conclusions

In our opinion, which is in full agreement with the aforesaid judgment, it is imperative to exclude all unlawfully obtained evidence from the criminal investigation file and all the references to such evidence from the documents produced in the carrying out of the procedural steps. The court that is to pronounce a judgment on the merits of the case must not have access to any piece of evidence or to documents of proceedings that deals with a piece of evidence that is deemed to be unlawful.

Therefore, in order to comply with the exigencies imposed by CCR it is necessary to exclude all evidence and to eliminate all the references thereto from the content of the documents of proceedings, so as to allow the judge of first instance to pronounce a judgment that is free of any reminiscence of the preliminary chamber.

References

- CA Bucharest, 1st crim. s., dec. no. 115/27.02.2024;
- CCR dec. no. 22/18.01.2018;
- CPP.

COMPARISON BETWEEN THE CRIME OF DECEPTION AND THE CRIME OF INFLUENCE PEDDLING

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Abstract

The present article aims to analyse and comment on the problems generated both in theory and in judicial practice by the incidence of the crime of fraud or the crime of influence peddling. As it follows from the cited examples, the contradictory solutions pronounced before the new Criminal Code regarding the choice of the appropriate legal classification, between the two crimes analysed, did not disappear even after 2014. In this sense, we consider that this work is useful for theorists and practitioners, our aim is not only to present and analyse the controversial solutions, but also to propose solutions that, even if they are not fully taken up, can constitute a basis for discussion for future cases. As I have shown in the article, the establishment of the correct legal framework between the two facts provided for by the criminal law is essential, both for the legal order and for the repercussions it may have regarding the main procedural parties and subjects within the criminal process.

Keywords: *crime of deception, influence peddling, patrimony, corruption, fraud, misleading.*

1. Introduction

This paper tries to analyse and comment on the problems generated both in theory and in judicial practice by the incidence of the crime of fraud or the crime of influence peddling. As it follows from the cited examples, the contradictory solutions pronounced before the new Criminal Code regarding the choice of the appropriate legal classification, between the two crimes analysed, did not disappear even after 2014. In this sense, we consider that this work is useful for theorists and practitioners, our aim is not only to present and analyse the controversial solutions, but also to propose solutions that, even if they are not fully taken up, can constitute a basis for discussion for future cases. As I will prove in the article, the establishment of the correct legal framework between the two facts provided for by the criminal law is essential, both for the legal order and for the repercussions it may have regarding the main procedural parties and subjects within the criminal process.

It is essential to emphasise that, without pretending to have a categorical answer to the controversies related to the interpretation of the two crimes in the specialised literature, we aimed to express our opinion on any aspect that generated these opposite interpretations, both in criminal law courses and treaties, as well as in the practice, by the judicial bodies.

2. Paper content

Deception consists in misleading a person by presenting as true a false fact or as false a true fact, in order to obtain for himself or another an unjust patrimonial benefit and if damage has been caused. The aggravated variant involves committing the act by using false names or qualities or other fraudulent means.

According to art. 291 CP influence peddling consists in claiming, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or is believed to have influence over a public official and who promises that he will make him perform, not perform, expedite or delay the performance of an act that falls within his official duties or to perform an act contrary to these duties.

Fraud is a crime against patrimony, while influence peddling is a crime of corruption, there are other elements that differentiate them, some of them deriving from the specified classification itself:

- the person whose patrimony is harmed by the author of the fraud is a passive subject of this crime, having the status of an injured person, while the person who promises or hands money or other benefits to the trafficker of influence thus becomes an active subject of the crime provided by art. 292 CP (buying influence), since in the case of influence peddling, the passive subject can only be the state body or the institution within

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which the official works, for whose influence the money or other benefits were promised or paid;

- in the case of the offense provided for by art. 244 CP, causing damage to the property of the injured person is mandatory for the retention of the consumed form, while for the crime provided by art. 291 CP the buyer voluntarily reduces his patrimony in exchange for the service offered or accepted[1];
- if with regard to deception, misleading the injured party is an intrinsic condition for the realisation of the objective side of the crime, influence peddling does not exclude the possibility that the statements of the author of the act are real, that is, that he has influence on the public official, or even to use this influence to induce him to perform or not to perform the act falling within his official duties;
- the material object of the crime of fraud is represented by a movable or immovable asset, or a document with patrimonial value, while in the crime of influence peddling the material object is missing;
- the immediate follow-up of the crime of influence peddling consists in creating a state of danger with regard to trust in public institutions or legal entities within which the official referred to by the perpetrator carries out his activity, while in the case of the crime of fraud the immediate follow-up consists in creating damage;
- in the current regulations, deception is punished more mildly than influence peddling [2], the legislator also providing for the possibility of removing criminal liability by reconciling the parties, which, obviously, in the crime provided by art. 291 CP is not possible.

Although, in relation to the arguments presented above, there are criteria by which the two crimes can be differentiated, both in the older and the recent judicial practice there were many situations in which the magistrates were put in the situation of choosing between the apprehension of the crime of fraud or influence peddling, establishing the legal framework not being an easy operation, especially since there are also common elements of the two acts provided for by the criminal law:

- both the perpetrator of the crime of influence peddling and that of the crime of fraud seek to obtain a patrimonial advantage through the action prohibited by the criminal law;
- in the hypothesis in which the author of the deed unrealistically claims to have influence over a public official and requests money or other benefits to intervene on his behalf, we are in the presence of a misrepresentation, which can also take on the form of deception in the conditions where the amount of money or unjustly obtained benefit constitutes, at the same time, a damage to the patrimony of the person to whom intervention was promised. It should be noted that, in both situations described, the person who enters a relationship with the perpetrator of the crime is tricked by him;
- in both crimes the active subject is not qualified, it can be any person. Even if the active subject of the crime of influence peddling is an official, or public official, he appears as a third party in relation to the official concerned to perform the official act [3];
- both in the case of the offense provided for by art. 244 CP, as well as that regulated by art. 291 CP, the active subject of the crime comes into possession of a sum of money or other improper benefits by dispossessing another person.

In fact, the main similarity between the two crimes is that the perpetrator aims for an undeserved gain, which is the reason why, at the time of supporting the proposal to criminalise influence peddling in the French Senate, the lawyer Jules M. Bozerian mentioned that „*Without a doubt, influence peddlers are not crooks, they are still in the same family*."[4]

It should be mentioned that the analysis of the two crimes, in the context of the need to establish the legal framework, has been a preoccupation of the courts since the time of the application of the Charles II Code. In a case from 1961[5] the Supreme Court considered that the offense of influence peddling committed by presenting as true a false fact (respectively the invocation by the author of the fact of the unreal influence he would have with an official), although it contains, obviously, elements of deception, will not be held in competition with deception, since, in this case, misleading is limited to the constitutive content of the crime of influence peddling.

[1] C. Duvac, *Similarities and differences between fraud and other crimes in the new Criminal Code*, in Law no. 2/2012, p. 87.

[2] The penalty for cheating is 6 months to 3 years in prison for the simple version and 1 year to 5 years in prison for the aggravated version, while for influence peddling the punishment is 2 to 7 years in prison.

[3] V. Dobrinoiu, *Corruption in Romanian criminal law*, Atlas Lex Publishing House, 1995, p. 278.

[4] The proposal before the French Senate for the criminalization of influence peddling formulated in 1889 by lawyer Jules M. Bozarian *apud* V. Dobrinoiu, *Corruption in Romanian criminal law, op. cit.*, p. 275.

[5] Supreme Court, dec. no. 1244/1961, in the New Justice no. 5/1962, p. 157.

After the entry into force of the Criminal Code of 1969, in a case before the Supreme Court [6], the issue of the retention of the crime of influence peddling was raised, in the conditions that the promise of influence peddling would have taken place after the performance of the act falling within the attributions of the official, noting, in this case, that the constitutive elements of the offense of fraud are met, and not influence peddling.

On the contrary, in a case tried after the entry into force of the new Criminal Code[7], HCCJ assessed that, although the defendant requested money from the whistleblower to „*solve*" some already resolved cases, she will be sentenced for the crime of influence peddling and not of deception. It was noted that between February 2013 and April 2014 the defendant JRE, a lawyer in the Bucharest Bar (suspended at that time), requested and received several sums of money from the whistleblower SA, promising to use her influence on some judges and prosecutors for the favorable resolution of civil and criminal cases pending before the court or at the prosecutor's office in Timiș. In the first instance, CA Timișoara changed the legal classification from the crime of influence peddling to fraud. The arguments that were the basis of this solution concerned the fact that, at the time of the defendant's request and receipt of the sums of money, the files on which she was going to use her influence had already been resolved, and the defendant informed the reporting witness that the files resolved would have been in a "special procedure" and an intervention was necessary with the president of the Timișoara Court so that the magistrate would not use the prerogatives he had to resume judicial activity regarding them. Referring to all these elements, the first instance judged that the misleading did not only concern the influence peddling, but even the existence of the procedure and certain acts that the people who were said to be influenced could not even carry out. In addition, in relation to the exposed factual situation, it can be noted that, at the time of handing over the sums of money to the defendant, the reporting witness did not have any real, legitimate interest in relation to the duties of the official who was to be corrupted. The Supreme Court considered that the provisions of art. 291 CP, in relation to the following considerations:

- the crime of influence peddling is a crime with anticipated and instantaneous consummation, in the case file there is an SMS from the defendant from May 2013, from which it appears that she claimed sums of money from the informant, at which time not all the files that were the subject influence traffic had been resolved. Even if, at the time of the remittance of the sums of money, none of the respective files were pending before the judicial bodies, the consummation of the deed had already been accomplished, the remittance of the money representing only the final phase of the crime;
- the lawyer never communicated to the whistleblower that the influence peddling cases were already resolved;
- the defendant concretely showed that it is necessary to pay some sums of money to obtain favorable solutions, which would end up in the hands of the magistrates who were to decide on these disputes;
- there was an interest of the whistleblower witness, as long as the files that were the subject of influence peddling were before the judicial bodies, there being - at least theoretically - the possibility that the favorable solutions obtained would be changed, as a result of the exercise of appeals.

The cited case is an extremely interesting one - in our opinion - as it analyses the essence of the crimes that are the subject of our comparison. We consider that, beyond the justice of all the reasons that were the basis for the admission of the appeal and the return to the original legal classification, the decisive argument to retain the crime of influence peddling is the fact that, at the time of the request for the sums of money by the author of the act, there were no definitively settled all the files pending before the prosecutor's offices and courts. The supreme court appreciated that, no matter how much the people's trust in justice would be affected, the statement of a lawyer (even suspended from the profession) that he can facilitate the favorable resolution of some cases, by bribing some magistrates, as long as the cases had already been resolved, and the fact that the indicated magistrate did not have the possibility (even theoretically) to determine the modification of these solutions (even more so as he had no powers in this regard) cannot be considered a crime of corruption. If the victim's credulity is not relevant for the existence of the crime of deception, influence peddling assumes that, at the time of requesting the money to carry out an „intervention", this is possible, at least theoretically.

In judicial practice, the problem of delimiting the two crimes was raised and in the event that the person who requested money or other benefits, promising an intervention for the favorable solution of some problems,

[6] Supreme Court, dec. no. 309/1970, in the Romanian Journal of Law no. 12/1970, p. 181.
[7] HCCJ, crim. s., dec. no. 353/2014, *www.iccj.ro*.

either did not indicate the officials with whom he would trade his influence, or they (although indicated) they did not have the resolution of the respective situation among their job duties.

In a decision from 1970 [8], the Supreme Court considered that the act of requesting money and other benefits for influence peddling in the presence of officials other than the competent ones, constitutes the crime of deception and not of influence peddling. Thus, the defendant requested money and food for the enforcement of a non-definitive court decision, stating that they would be handed over to police officers and prosecutors to enforce a court decision in civil matters. Since the civil servants indicated by the perpetrator do not have, among their duties, the execution of court decisions, and the respective sentence was not even final (therefore, it could not be executed), the supreme court judges came to the conclusion that the constitutive elements of the offense of fraud, and not of the offense of influence peddling were met. In the same sense, it was also stated in the doctrine that in the situation where the activity for which influence peddling is promised does not fall within the duties of the official indicated by the perpetrator, we are not in the presence of the crime of influence peddling but, depending on the meeting of the other elements constitutive, the offense of fraud can be retained [9].

In another case [10], it was held that the act of the defendant, who stated that, through the intervention of some of his acquaintances, he would cause a university professor to declare more students passed in a certain subject, constitutes the crime of deception, and not that of influence peddling, as long as it did not specify that it would cause the teacher in question to give favorable grades through the use of personal influence, but through other people who were not nominated.

Similar to the previous examples, in another case it was judged that in the situation where the defendant promised to intervene with an official to get him to assign a house to a person, asking him for a sum of money in exchange for this service, the act will not constitute influence peddling, since the official in question, although he had the capacity of director, did not have the assignment of housing as his duties. In consideration of these arguments, the court admitted the stated appeal and ordered the change of legal classification in the offense of fraud [11].

On the contrary, through a decision of the supreme court pronounced in an appeal for annulment [12], it was established that, in order to apprehend the offense of influence peddling, it is not necessary to nominate the official who is to be influenced, as long as the institution is specified or the authority within which he carries out his activity. More than that, it is not relevant if the official in question cannot solve, personally, all the problems for which the influence was trafficked, as long as he has the necessary powers to contribute to the solution of the case in question. Thus, the courts held that, between 1994 and 1995, the defendant allegedly promised several people that he would intervene with his police friends to help them register older cars, to return their license suspended as a result of committing some contraventions, not to be sent to court or to be released [13]. After the final conviction of the defendant for influence peddling [14], the general prosecutor declared an appeal for annulment, reasoning that the conviction for fraud would have been imposed in the case, citing the circumstance that the defendant would not have referred to any official with specific duties in the field in which he promised to solve the problems of those who paid him, but he made certain statements of a general nature regarding the respective officials, and the policemen would not have jurisdiction over sending to court or releasing those under investigation. The panel of 9 judges rejected the annulment appeal, considering that, in the case, the provisions on influence peddling are relevant, since:

- the defendant's reference to people from the Police was not only of a general nature, being situations in which he also referred, punctually, to two police officers whom he knew;
- the defendant was seen (by one of the people who paid him for influence peddling) entering the Police headquarters and leaving accompanied by an officer, an aspect that confirmed his statements related to the

[8] Supreme Court, dec. no. 40/1970, in the Romanian Law Review no. 7 of 1990, p. 167.

[9] Gh. Mateuț, *Theoretical and practical syntheses regarding the repression of influence peddling in the current regulation and in perspective*, in Law no. 5/2002, p. 174; V. Dabu, *The new Criminal Code, Influence Peddling*, in Law no. 2/2005, pp. 112-113.

[10] CA Bucharest, 2nd crim. s., dec. no. 36/1996, in the Journal of Criminal Law, Judicial Practice Studies (1994-2006), p. 451.

[11] CA Cluj. crim. s., dec. no. 213/1997, in the Journal of Criminal Law, Judicial Practice Studies (1994-2006), p. 453.

[12] Decision no. 15 of 2001, pronounced in an annulment appeal by the Supreme Court of Justice, Panel of 9 judges - Lex Expert.

[13] In the last two cases, we are talking about people who were being investigated for committing crimes and who were in preventive detention, or were to be sent to court by drawing up the indictment, by the competent judicial body.

[14] It should be noted that, initially, the Brașov Court ordered the change of the legal classification from influence peddling to deception, reasoning that the defendant's simple statement that he had relations with the police, without indicating the service he was going to call, is not likely to create certainty to the people to whom he promised the intervention that he is able to achieve it. Later, both The Court of Appeal and the Court of Appeal returned to the original legal classification, respectively that of influence peddling.

knowledge he had within this institution, thus strengthening the belief that he can solve the problems that were the responsibility of the Police;

- the lack of material competence of the police workers cannot be invoked regarding the release of the arrested persons or the prosecution of those under investigation, since certain acts of criminal investigation carried out by them can influence both the maintenance of preventive measures and solutions for sending or not sending the investigated persons to court.

In support of this opinion, the considerations of a decision pronounced by the CA Craiova in a case[15] in which several crimes of fraud were found (among other facts provided by the criminal law), consisting of the following actions:

- during March 2012, the defendant ACG proposed to the injured person CDI that, in exchange for a sum of money, he would facilitate his employment as an operative officer within the General Directorate of Intelligence and Internal Protection, the victim being misled by the position of chief commissioner within the central structure of the Ministry of the Interior;
- the defendant requested and received the sum of 250 Euros from the injured person CLM to facilitate his transfer from the Balta Police Station to the Drobeta Turnu Severin Municipal Police;
- in March 2013, the defendant demanded the sum of 200 EURO from the injured person MIM, to help him transfer from the National Anti-Drug Agency - Mehedinti Anti-Drug Prevention, Evaluation and Counseling Center to a structure within the Mehedinti Police. The "help" consisted in guiding the victim in relation to drawing up the relocation report, but also the promise of approving this report.

Although the defendant was tried [16]and convicted of fraud on all the facts alleged in the indictment, the Court of Appeal found, at least with respect to the three facts described above, that we are in the presence of the crime of influence peddling, ordering the change of legal framework [17]. In justifying this solution, the judges of the CA Craiova specified that, for the arrest of the offense of influence peddling, it is not relevant whether the defendant had a real influence on the officials, nor if he actually intervened on them. Moreover, for meeting the objective side of the offense provided for by art. 291 it is not even important to indicate the person on whom the influence would be trafficked, as long as the act that was to be drawn up as a result of the exercise of influence by the defendant was clearly indicated. A final aspect that was considered in the motivation of the solution to change the legal framework is the fact that claiming the existence of an influence on an official, even if it was not actually exercised or did not even exist in reality, although it represents a presentation as true of false facts, constitute the material element of influence peddling, as the social relations related to the proper development of service relationships were affected, and not those related to patrimony.

Even if the cases presented and subject to our analysis are not identical, we support the last cited solutions, both regarding the resolution of the legal issue and regarding the reasons for the decision. We appreciate that, as long as the solution of legal problems is invoked by paying sums of money to some officials, even if they are indicated only generically, we are in the presence of a crime of corruption and not against patrimony. It cannot be asserted that a person who pays to solve a legal problem and who knows that this money will reach some public officials could be in good faith, respectively deceived, it being obvious that, by accepting their remuneration (even if the final operation is, in reality, fictitious), the one who hands the money to the criminal who promises to trade his influence, has the belief that he will contribute to the commission of a corruption offence.

Regarding the invocation of a non-existent influence by the author of the act provided for by art. 291 CP, both the doctrine and the judicial bodies are unanimous in appreciating that this is limited to the crime of influence peddling, even more so since the very text of the law provides for the possibility for the perpetrator to let it be understood *that* he has influence . Even if there is a misrepresentation exercised by the perpetrator, it will not attract the incidence of art. 244 CP, the deception being absorbed by the crime of influence peddling, a

[15] CA Craiova, crim. s., dec. no. 739/2014, Jurisprudence of the CA Craiova, *www.portal.just.ro*.

[16] The defendant ACG was sent to court by the indictment of the Prosecutor's Office attached to the Strehaia Court for several crimes of fraud, including two in attempted form.

[17] It should be noted that, as a result of the change in the legal framework, CA Craiova found – quite rightly – that the sentence handed down on the merits by the Strehaia Court is struck by absolute nullity, as it was pronounced by a materially incompetent court, for the offense of drug trafficking influences the competence for the resolution of the case on the merits belonging to the Tribunal, according to art. 36 para. (1) CPP, by reference to art. 291 CP. The natural solution was the full annulment of the decision appealed by the defendant and the prosecutor, and the referral of the case to the Mehedinți Court, for a competent resolution on the merits.

fact through the regulation of which the aim was (first of all) to protect the prestige of public authorities, persons of interest public and the officials who carry out their activity within them [18], the objective side of the crime being realised even in the situation where the perpetrator does not deny the statements made by another person regarding his influence [19].

In another case, it was held by the Supreme Court[20] that, in order to retain the offense of influence peddling, it is sufficient to nominate the official with respect to whom the existence of influence is claimed, and it is sufficient for the author to refer, generically, to officials from the service that is responsible for solving the problem that is the subject of the criminal resolution. Thus, it was held that the defendant requested and received several sums of money in order to influence officials from the Bucharest, Dolj and Pitești branches of the Romanian Auto Registry, in order to induce them to register cars purchased from outside the country, which were more than 8 years old. After the conviction by the trial court for influence peddling, CA Pitești ordered the change of the legal classification, from the original crime to that of fraud, reasoning that the defendant did not nominate the officials with respect to whom he was going to trade influence, but only did statements of a generic nature, from which it follows that he has knowledge of the Romanian Auto Registry [21]. The Court of Appeal accepted the appeal of the prosecutor's office and found that the constitutive elements of the crime of influence peddling are met in the case because, by his act, the criminal affected the prestige of the officials in the exercise of their duties, which is sufficient for the retention of the act of corruption refers to an official, even an unnamed official, as long as the institution (service) where he works could solve the request of the interested person.

In the same sense, the Supreme Court of Justice considered that, even in the situation where the criminal indicates a fictitious name of the official to whom he is going to intervene, the crime of influence peddling will be retained, as long as the duties of the respective employee are indicated, and these are able to solve the interests of the influence buyer[22].

We consider that, following the amendment of the text of art. 257 CP 1969, the additional condition provided by the new text (art. 291 CP), namely that the perpetrator of the act *„promises*" (emphasis added) that he will cause an official to act in the interest of the buyer of influence, it is likely to facilitate the delimitation between the crime of fraud and that provided by art. 291 CP. Moreover, the opinion of the Constitutional Court expressed in the considerations of a decision rejecting [23]an exception formulated with regard to the cited article, confirms this claim, stating in the justification that, through the new description of the methods of criminalization, the legislator had in mind the avoidance of arbitrariness in the application the criminal law, even more since in practice such ways of committing the act were retained, which could have generated several interpretations. This opinion was also confirmed by HCCJ in a case decision[24], in which it assessed that: «*The expression that promises from art. 291 C up to now has the meaning, in addition to the clearer delimitation in judicial practice of the crime „influence peddling" by the crime of „cheating", to remove any ambiguity regarding characterization of the influence trafficker's activity in the sense of carrying out an act of corruption (…)*».

It should be noted here that there are situations where the two crimes can coexist, even in the form of a formal contest of crimes. Thus, it was held by the Bucharest Court that the act of a defendant promising the injured person that he would trade his influence with an official in order to facilitate the purchase of a car and that, later, he would have shared the money with that official, represents an ideal competition of crimes between influence peddling and deception[25].

In the specialised literature[26], it was argued that even in the situation where the perpetrator of the crime would mislead the buyer of influence (having the initial intention to keep the money requested for mediation) there would be solid arguments for holding the crimes of deception and influence peddling in competition. In this context, the cited authors do not agree with the opinion of the practice and the majority of the doctrine,

[18] G. Antoniu, T. Toader, *Explanations of the new Criminal Code,* vol. III, Universul Juridic Publishing House, Bucharest, 2015, p. 542.

[19] V. Dobrinoiu, I. Pascu, M.A. Hotca, I. Chiș, M. Gorunescu, C. Păun, M. Dobrinoiu, N. Neagu, M.C. Sinescu, *New Criminal Code Annotated, Special Part,* Universul Juridic Publishing House, Bucharest, 2016, p. 536.

[20] Supreme Court of Justice, crim. s., dec. no. 1040/1998, in Lex Expert.

[21] Argeș Court, sent. no. 23/1997 and CA Pitești dec. no. 57/1997, cited in the decision of the Supreme Court of Justice indicated above.

[22] Supreme Court of Justice, crim. s., dec. no. 5438/2001, in Criminal Law Review, Judicial Practice Studies (1994-2006), p. 451.

[23] CCR dec. no. 489/30.06.2016, published in the Official Gazette of Romania no. 661/29.08.2016.

[24] HCCJ, crim. s., dec. no. 213/09.06.2015, *www.scj.ro*.

[25] Bucharest Court, crim. s., crim. dec. no. 222/1991, in Collection of Judicial Practice for 1991, Șansa Publishing House 1992, p. 258.

[26] S. Bogdan, D.-A. Șerban, *Is the bribing intermediary an influence dealer?*, in Jurisprudence no. 2/2012, available on Babes Bolyai University website - *arhiva-studia.law.ubbcluj.ro*.

according to which the traffic of influence would absorb the deception, as they consider that, by operating the absorption, the damage to one of the two legal objects would not be given criminal significance, respectively that of heritage. We do not agree with this theory because:

- it is obvious that in the situation where the criminal misleads the one to whom he promises to solve his problems by corrupting an official, it is more important to damage the social value of the prestige of public organisations or public officials than to protect the patrimony of a person who accepts to participate in committing a crime;
- if we accept that the deception could be retained, in this case, in formal competition with the crime of influence peddling, we would arrive at the absurd hypothesis in which, through the same action, the payer of influence peddling would acquire a double quality: defendant for the crime foreseen of art. 292 CP and injured person for the crime provided by art. 244 CP.

In this regard, it was ruled by The Supreme Court[27] that the act of the defendants to interfere with high officials, even if in reality they misled the interested person, constitutes the unique crime of influence peddling. Thus, it was held that the defendant F. (at that time a member of the Romanian Parliament) claimed and received the sum of 185,000 Euro from the defendant J, in order to use his influence on some members of the Romanian Government, with the result that they would allocate the amounts of money needed to pay for the 5.6 million lei works at City Hall E., executed by the company whose administrator and sole partner was the defendant J. Even if, from the description of the facts, it emerged that there was an action to mislead the defendant J (since, from the moment of the promise, the defendant F. did not intend to intervene, in real terms, with the members of the executive, for the allocation of the amount of money indicated), having as a consequence the reduction of his patrimony, this is part of the constitutive content of the traffic offense of influence, not being incidents and the provisions of art. 244 CP.

On the other hand, we do not deny the possibility of retaining the two acts provided for by the criminal law in the competition, in the situation where influence peddling would constitute the crime of means for the achievement of the crime of purpose - deception, an opinion expressed, moreover, also by the specialised literature[28]. In this sense, it was held by the judges of the CA Bucharest[29] that the claim of sums of money by the trafficker of influence in order to, in turn, offer a part of these benefits to the public official, to induce him to act in the interest to the buyer of influence, constitutes a competition between the two facts provided by the criminal law.

The High Court of Cassation and Justice also held a contest between the two crimes[30]in the situation where the defendant misled the injured persons that he would support them in obtaining visas for the Schengen area, cancelling the suspension of the driver's license, exemption from military service, sponsoring a place of worship or transferring students from one educational institution to another. For all the activities impossible to be carried out by the defendant, through his influence, it was assessed that he should be punished for the crime of fraud, while for the promises that targeted the activity of certain officials, the crime of influence peddling was retained.

The problems related to the similarities between the two crimes have not only concerned theorists and courts. Noticing the existence of a non-unitary practice, the General Prosecutor of Romania notified the High Court of Cassation with an appeal in the interest of the law, by which he requested the supreme court to establish the difference between deception and influence peddling, in relation to several criteria of distinction. Even if the appeal was rejected[31]on the grounds that the conditions related to the existence of non-unitary solutions of the courts are not met[32], elements that can be taken into account by both practitioners and theoreticians were indicated in the considerations of the decision. In the sense of what we also indicated in this comparison, the judges of the supreme court specified, among other things, that „(…) *between the two crimes there are essential*

[27] HCCJ, crim. s., dec. no. 434/2017, *www.scj.ro*.

[28] V. Dobrinoiu, *Trafficking in office and influence in criminal law*, Scientific and Encyclopedic Publishing House, 1983, p. 229; D. Ciuncan, *Trafficking in influence and deception*, in the PNA Documentary Bulletin no. 2/2003, *www.dorin.ciucan.com*.

[29] CA Bucharest, crim. s., dec. no. 106/1994, in Collection of criminal judicial practice from 1994, Continent Publishing House, 1994, p. 228.

[30] HCCJ, crim. s., dec. no. 1048/2004, *www.scj.ro*.

[31] HCCJ, dec. no. 35/2007, pronounced on appeal in the interest of the law.

[32] The Supreme Court considered that, although several court decisions were invoked in which different solutions were pronounced, the condition provided for in art . 414^2 para. (1) CPP 1868 is not fulfilled since the respective solutions concerned situations - different premises.

differences, both regarding the legal object and their objective side, and especially regarding the specific features that characterise their subjective side."

3. Conclusions

The importance of this distinction lies not only in relation to the different punishment limits or for determining the competence of judicial bodies in the criminal process, but especially for establishing the procedural quality of the person who interacts with the perpetrator of the crime: if, in the crime of fraud, the person who is induced in error has the status of a civil party/injured person in the criminal process, the one who is the „victim" of influence peddling will, in turn, be held criminally liable for committing the offense provided for in art. 292 CP.

If we accept that offering money to a person who lets it be believed that he has influence over an official, to solve some problems does not constitute a crime - in the situation where, for example, neither the position nor the institution where he works is specified, or if the problem was already solved - it would mean encouraging (from a certain point of view) such practices. It is obvious that, in the situation in which both the buyer and the trafficker of influence would be investigated for committing the crime provided by art. 291 CP, it would have every interest to recognize a factual situation that would attract the incidence of art. 244 CP so that the person who bought the influence becomes a victim of the crime, and the trafficker of influence is accused of fraud - a situation in which he could benefit from a possible reconciliation with his victim, and thus take advantage of the removal of criminal liability.

We are aware of the fact that there are certain situations in which the influence peddler's proposal is impossible to achieve, a situation in which it would not be necessary to hold a crime of corruption, but only deception, but we believe that such legal treatment should be applied only in situations exceptionally, in extreme cases. Otherwise, there is a risk that people who accept that they can settle their claims by paying public officials will be considered mere victims, or those who question the prestige of the authorities by asking for money to bribe them can benefit from a cause of removal of liability criminal charges, a risk society should not take.

In this context, it is up to both authors of criminal law and the judicial bodies, to interpret, respectively to apply the cited texts in such a way that there are no situations in that persons who commit the crime of influence peddling can evade criminal responsibility by presenting the fact as a fraud, by collusion with the buyer of influence who would thus become an aggrieved person with respect to the offense provided for by art. 244 CP.

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OFFENSES AGAINST LIFE AND BODILY INTEGRITY COMMITTED AS RESULT OF DRIVING A VEHICLE WITHOUT A DRIVING LICENSE OR UNDER THE INFLUENCE OF ALCOHOL OR OTHER SUBSTANCES, OR BY EXCEEDING THE SPEED LIMIT: INDIRECT INTENT OR RECKLESSNESS?

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Abstract

Nowadays, driving a vehicle without a driving license, by exceeding speed limits or being under the influence of alcohol or other substances, seems to become a routine. More and more drivers use alcohol or psychoactive substances before getting behind the wheel. More and more people are losing their lives as a result of these facts. How can this situation be improved, since most of the time, driving a vehicle on public roads without a driving license, by exceeding the speed limits, or being under the influence of alcohol or other substances ends tragically, resulting in the death of other people participating in traffic. I can say such a situation is equivalent to ruined lives, not only regarding the injured victim, but also, regarding the defendant, too.

The determination of the subjective side of the offenses resulting in death or personal injury of a person in the above-mentioned contexts divided legal specialists into two camps: those who think it is talked about indirect intent and those who think it is talked about recklessness.

This paper aims to analyse what is the correct legal classification in such situations, starting from the current legal regulations and the analysis of some concrete examples from the judicial practice, emphasising the aspects meant to influence the retention of the form of guilt of the indirect intent, respectively of the recklessness.

Keywords: *indirect intent, recklessness, murder, manslaughter, bodily harm.*

1. Introduction

This paper covers the criteria to be taken into account regarding the proper legal classification by correctly identifying the form of guilt of offenses against life and bodily integrity caused by driving a vehicle without a driving license, by exceeding the speed limits, or being under the influence of alcohol and/or psychoactive substances.

The studied matter is important because, as it can be seen, in the judicial practice there is a tendency to consider that all these contexts are the factors that favors the retention of recklessness as form of guilt.

In this paper, there are presented cases from judicial practice, being indicated the concrete aspects meant to correctly delimit these two forms of guilt: indirect intent and recklessness.

In the already existing specialised literature, there was also debated the problem of delimiting the form of guilt of the indirect intent from that of the recklessness. This paper brings in addition, by reference to the given examples, an advanced analysis and identification of the concrete aspects and factors meant to lead to the correct identification of the form of guilt.

2. Paper content

2.1. Driving a vehicle without a driving license

Art. 335 CP provides as follows:

„(1) Driving a vehicle or a tramway, on public roads, without having a driving license shall be punishable by no less than 1 and no more than 5 years of imprisonment.

(2) Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which was issued for a different category or subcategory than the one in which the vehicle is included, or whose license has been withdrawn or rescinded or who is not entitled to drive vehicles in Romania shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.

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(3) The same penalty shall apply to the person who knowingly entrusts a vehicle for which the law requires a license for driving on public roads, to an individual who they know is in one of the situations referred to in para. (1) or para. (2) or under the influence of alcohol or of psychoactive substances[1]*."*

The subjective side of this offense is represented by direct or indirect intent.

2.2. Driving a vehicle under the influence of alcohol or other substances

According to art. 336 CP:

„(1) Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who, at the time when biological samples were taken, has a blood alcohol concentration exceeding 0.80 g/l shall be punishable by no less than 1 and no more than 5 years of imprisonment or by a fine.

(2) The same penalty shall be applied to an individual who, while under the influence of psychoactive substances, drives a vehicle for which a driving license is required by law.

(3) If the individual who is in one of the situations set out in para. (1) and para. (2) carries out activities such as public passenger transportation, transportation of hazardous substances or products or is imparting practical training to candidates wishing to obtain a driving license or during the practical tests of the examination sit to obtain the driving license, they shall be punishable by no less than 2 and no more than 7 years of imprisonment[2]*."*

The subjective side of this offense is represented by direct or indirect intent.

2.3. Murder

Art. 188 CP provides as follows:

„(1) Murdering an individual shall be punishable by no less than 10 and no more than 20 years of imprisonment and a ban on the exercise of certain rights.

(2) The attempt shall be also punishable[3]*."*

Direct or indirect intent represents the subjective side of this offense.

2.4. Manslaughter

According to art. 192 CP:

„(1) Manslaughter of an individual shall be punishable by no less than 1 and no more than 5 years of imprisonment.

(2) Manslaughter as a result of failure to observe the legal stipulations or precautionary measures established for the practice of a profession or of a craft or for the performance of a specific activity shall be punishable by no less than 2 and no more than 7 years of imprisonment. When a breach of the legal stipulations or of precautionary measures represents an offense in itself, the rules on multiple offenses shall apply.

(3) If a committed act caused the death of two or more individuals, the special limits of the penalty set under para. (1) and para. (2) shall be increased by one-half[4]*."*

The subjective side of this offense is represented by the basic intent (recklessness or negligence).

2.5. Bodily harm

The art. 194 CP provides as follows:

„(1) The act set by art. 193, which caused any of the following consequences:

a) an impairment;

b) traumatic injuries or health impairment of an individual the healing of which required more than 90 medical care days;

c) a serious and permanent aesthetic injury;

d) miscarriage;

e) endangering of an individual's life,

shall be punishable by no less than 2 and no more than 7 years of imprisonment.

[1] The source of the translated paragraph: *https://www.just.ro/wp-content/uploads/2021/11/Noul-cod-penal-EN.doc*.

[2] *Ibidem*.

[3] *Ibidem*.

[4] *Ibidem*.

(2) When such an act was committed for the purpose of causing any of the consequences listed under para. (1) letter a), letter b) and letter c), it shall be punishable by no less than 3 and no more than 10 years of imprisonment.

(3) The attempt to commit the offense set under para. (2) shall be punishable[5]*."*

The subjective side for this offense is represented by indirect intent or oblique in the case of para. (1) and direct intent in the case of para. (2).

2.6. Bodily harm with basic intent

According to art. 196 CP:

„(1) The act set by art. 193 para. (2) committed with basic intent by a person under the influence of alcohol or of a psychoactive substance or during the performance of an activity that represents an offense in itself shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine.

(2) The act set by art. 194 para. (1) committed with basic intent shall be punishable by no less than 6 months and no more than 2 years of imprisonment or by a fine.

(3) When the act set by para. (2) was committed as a result of failure to observe the legal stipulations or precautionary measures established for the practice of a profession or of a craft or for the performance of a specific activity, the penalty shall be no less than 6 months and no more than 3 years of imprisonment.

(4) If the consequences listed under para. (1)-(3) were caused against two or more individuals, the special limits of the penalty shall be increased by one-third.

(5) If failure to observe the legal stipulations or precautionary measures or the performance of an activity that resulted in the commission of the acts set by para. (1) and para. (3) represents an offense in itself, the rules on multiple offenses shall apply.

(6) Criminal action shall be initiated based on a prior complaint filed by the victim[6]*."*

The subjective side of this offense is represented by basic intent (recklessness or negligence).

2.7. Indirect intent versus recklessness

Art. 16 para. (3) CP provides that an act is committed intentionally in the following contexts:

- the perpetrator foresees the result of his act and seeks its occurrence (direct intent);
- the perpetrator foresees the result of his act, and although he does not pursue it, accepts the possibility of its occurrence (indirect intent).

At the same time, according to para. (4) of the same article, it can be talked about basic intent in situations where:

- the perpetrator foresees the result of his act, but does not accept it, reckoning without reason that it will not occur (recklessness);
- the perpetrator does not foresee the result of his act, although he had to or could have foreseen it (negligence).

2.8. Intention

As for the structure of intention, there are two elements that can be identified: the intellectual and the volitional element.

The intellectual element is related to the pursuing the final result of the act and requires the author to know that his actions related to the objective side from the moment of committing the offense fall within the specific pattern of the related offense.

As regards the volitional element, it concerns the subjective side of the offense and requires the perpetrator to pursue or accept the result of its action.

[5] *Ibidem*.
[6] *Ibidem*.

2.9. Indirect intent

As previously mentioned, the retention of indirect intent is conditional on the acceptance by the perpetrator of the possibility of the occurrence of the result. It can be noticed an indifference of the author regarding the consequences that his actions may have, consequences that he considered, being able to foresee them.

Thus, if a person fires a house without making sure that there is no one inside the building, having as purpose the destruction of the house in order to take revenge on the owner of the house with whom he has had a conflicting relationship for years, and at the time of the arson, there were people inside the house whose physical integrity was damaged or who lost their lives, it will be taken into account that the perpetrator has accepted the possibility that, at that time, there were persons inside the house, and therefore this result will be produced, which resonates with indirect intent.

This is justified by the fact that in such a context, although the perpetrator's purpose was only to cause material damage by destroying the house and not to kill or cause bodily harm to any other person, he could have foreseen the possibility that persons were inside the house at the time of the arson and, however, he did not take the necessary measures to ensure regarding this aspect, which is equivalent to accepting the final result.

2.10. Basic intent

Basic intent implies both the violation of an obligation of diligence and the possibility to foresee and avoid, from a subjective point of view, the produced result.

Diligence obligations have a preventive role in creating the social dangers. Basically, it can be said that the violation of such an obligation is the essential feature of the basic intent.

As regards the possibility of foreseeing and avoiding the danger, the basic intent will not be retained if the author could not prevent the result, either because this result was unpredictable, or either because this, though predictable, was inevitable.

2.11.Recklessness

This implies the awareness by the perpetrator of the violation of an obligation of diligence, the provision of a possible consequence meant to create a social danger, and the fact that he considers, without reason, that the result will not occur.

Recklessness assumes that the author is aware of the fact that his actions violate an obligation of diligence and that it is possible to create a state of danger and considers, without reason, that the final result will not occur.

An example for this, is the situation when a surgeon, feeling that he is very tired and cannot concentrate, enters into the operation, without requesting his replacement, and, following a wrong medical procedure, causes the injury or death of the patient in cause.

Thus, although the surgeon in question foresees the possibility of causing harm to the patient because of his increased fatigue and lack of ability to concentrate, he mistakenly considers that this result will not occur.

We can notice a great similarity between indirect intent and recklessness by the fact that the author foresees the result, but in the case of recklessness, he does not accept the final result, while, in the case of indirect intent, although the author does not aim to produce it, he accepts it, showing indifference to its eventuality.

It is important to note that regarding the recklessness, it can be said that this conviction of the author that the result will not occur is wrongly based on certain objective and insufficient considerations, such as professional experience, age, fatigue resistance, etc.

On the other side, if there is no objective ground meant to create the false impression regarding the possibility, including the ability, to avoid the occurrence of the result, and this possibility to avoid the occurrence of the result is rather something that is only based on hope, left to chance, we are talking about indirect intent.

2.12. Driving a vehicle under the influence of alcohol and the retention of offenses of manslaughter and bodily harm with basic intent

An example worth mentioning is the crim. dec. no. 670/25.09.2018 of CA Alba Iulia[7].

In the present case, it is talked about the prosecution of the defendant, who had driven a vehicle under the influence of alcohol and fatally injured one person and injured another, victims who were crossing at the level of pedestrian crossing.

By the criminal sentence of the first court was rejected, as unfounded, the request of the civil parties to change the legal classification from manslaughter to murder and from bodily harm with basic intent to bodily harm, considering that, from all the data in the case file, the possibility of the occurrence of the final result was not really accepted by the defendant. It was considered that, without a doubt, like any other driver who violates the traffic rules in one form or another, the defendant has accepted a risk intrinsically associated with the violation of the established rules regarding the safety and protection of the road, but the nature of that risk is taken as virtual.

It is taken into account that the defendant, in his condition, had in mind, most likely, the „demonstration" that he was doing to his fellow passenger in the car and perhaps, to himself too, that he can drive in that state, with high speed, without producing any consequences, in other words, that he is a very good driver - objective circumstances, but wrongly appreciated. Paradoxically and somewhat cynically, it is precisely the high degree of alcohol that the defendant presented at the time of the accident that seems to lead to the same conclusion, a failure to accept a serious result as a consequence of his action. The fact that the defendant was mentally seriously affected by alcohol - this undeniable thing is resulting from the defendant's behavior immediately after the accident (at first, he did not even realise that he hit someone) - made it impossible for the defendant to become aware of the reasoning process implied by the phrase „accepts the possibility of the occurrence of the result". In this regard, it is also interpreted as the answer given by the defendant to the question of his friend if he was driving under the influence of alcohol: „So what?". This is precisely the proof that he did not accept at mental level the occurrence of any traffic accident, which occurred precisely because his assessment was totally wrong.

In those circumstances, the court found that the legal classification given to the facts in the indictment is the correct one by analysing the following aspects:

In law, the deeds of the defendant who on 27.11.2017 drove the car with an alcoholic imbibition in the blood above the legal limit (1, 40‰) and, around 17.24 o'clock in the noon, violated the rules regarding the speed regime, adaptation to traffic conditions, road signalling, priority to pedestrian crossing, etc. He has injured people, following the accident resulted the death of the first injured person and injuries that required 100-110 days of medical care, for healing to the other victim. In the court's opinion, these facts meet the constituent elements of the offenses of driving a vehicle under the influence of alcohol, manslaughter and bodily harm with basic intent.

Thus, on the one hand, the court took into account the high degree of social danger of the facts materialised in the specificity and multitude of the violated social values - the life of the person, the physical and mental integrity of the person, the road safety, but also the context and manner of committing the facts (the defendant drove the car after drinking alcohol in several locations, even while driving the car on the streets heavily circulated from the city center, he did not follow the traffic rules and hit two persons who were crossing the pedestrian crossing), that had irreversible consequences (the death of a person, the serious injuries of a child, the trauma of a family).

The appeal court, noting of reliability the legal classification of the offenses, admits the appeal of the defendant and of the civil parties, reducing the amount of punishment applied to the defendant and increasing the number of moral damages.

[7] *http://www.rolii.ro/hotarari/5bbd5ab9e49009a40a000052*.

2.13. Exceeding the speed limits and the retention of the offense of murder committed with indirect intent

An example regarding the retention of the offense of murder committed with indirect intent in such a context is the crim. sent. no. 40/22.01.2020 of the Cluj-Napoca Court[8].

In the present case, it is talked about the prosecution of the defendant who was sent to court as a result of causing a traffic accident (he lost the control over the direction of travel, by not adapting the speed to road conditions, by exceeding the legal speed limits and irregularly overtaking on the continuous marking and colliding with a metal pillar located on the green space and then stopping in the rainwater collection ditch related to his direction of travel), resulting in the death of the victim, who was passenger in the car driven by the defendant, and in the serious bodily harm of the defendant himself.

The lawyer of the civil parties requested the change of the legal classification of the offense, from manslaughter to murder, invoking the fact that the indictment retains that the defendant had considered without reason that the result would not occur.

On the other hand, the court does not agree with the factual reasons invoked by the defender of the civil parties, since considering, without reason, that the foreseen result will not occur is specific to recklessness, not to the indirect intent. But the court considers that it is necessary to change the legal classification due to the context of the accident. More specifically, it is considered that it cannot be talked about the existence of objective grounds on that the defendant, who drove at a speed of 156 km/h, had based, determining him to believe that the final result will not occur, but it is considered that he had left to chance the way things will go and, therefore, accepted the final result, that he initially did not seek, the acceptance resulting from the following aspects:

- driving at a speed of 156 km/h, exceeding by 60 km/h the maximum speed limit allowed on the road sector related;
- retention of the fact that the defendant made a prohibited overtaking manoeuvre in the moments prior to the accident (loss of the control over the car);
- road conditions retained as wet roadway and roadside snow (if in the case of wet roadway, the driver may not notice such an aspect, roadside snow is an element that would indicate certain road conditions that would have involved increased caution);
- the defendant obtained the driving license about 1 year and a half before the date of the accident, period during he was punished by applying of contraventional sanctions 10 times (this may attract the attention of the defendant to not having sufficient experience in driving vehicles that allow him to control a powerful car at a very high speed in performing prohibited overtaking manoeuvres on a wet road on a day of a winter month);
- the possibility of lack of experience of the defendant in driving the victim's car.

The lawyer of the defendant requests the rejection of the request for changing the legal classification from manslaughter to murder, invoking the fact that it cannot be talked about acceptance of the result, respectively indirect intent, in the context that defendant himself suffered serious injuries.

The court, taking into account the young age of the defendant and his lack of experience in driving vehicles, appreciates that there is a suspicion that the defendant had based his assessment that the final result will not occur on hazard. It also disagrees with the defendant's lawyer's statement that the defendant's own personal injuries should exclude the acceptance of the result, which is why it disposes the changing of the legal classification from manslaughter to murder.

2.14. Driving a vehicle under the influence of psychoactive substances and by exceeding the speed limit and the retention of the offense of murder

An example of the retention of the offense of murder committed by exceeding the limits of legal speed and driving a vehicle under the influence of psychoactive substances is related in the crim. sent. no. 1051/14.09.2018 of the Constanța Court[9] .

In this case, it is about the prosecution of the defendant for committing the offense of manslaughter and driving a vehicle under the influence of alcohol and psychoactive substances.

[8] *http://www.rolii.ro/hotarari/5e7c1775e49009481000002b*.
[9] *http://www.rolii.ro/hotarari/5bac9818e49009941f00004b*.

Thus, the defendant, on 20.08.2017, around 06:55 o'clock in the morning, although he was under the influence of alcohol and psychoactive substances, he had driven the car and when he reached a pedestrian crossing, injured the victim, who was crossing the public road on the pedestrian marking, from the right side of the driver. The victim died as a result of the bodily injuries suffered.

The court, ex officio, questions the change of legal classification of the facts from manslaughter to murder, produced with indirect intent analysing the following aspects:

- in the case of indirect intent, it is talked about a passive, indifferent, expectant attitude regarding the occurrence of the result that appears to be possible, while, in the case of recklessness, it is talked about a reckless assessment of the possibility to avoid this result and adopting an attitude in order to actively prevent its occurrence, recklessness consisting precisely in misappraisal of the aptitude of some objective and subjective factors on which it relies;

Where the hope of not producing a harmful or dangerous result is left on chance, on an event that might occur, but which in reality does not take place, in other words, hazard, we no longer find ourselves in the face of recklessness, but of indirect intent, representing the acceptance by the perpetrator of the risk of the result;

- in the case of traffic accidents, as a rule, such objective circumstances are based on the author's belief that the result will not occur, the vehicle's performance, the experience and driving ability of the driver, and the traffic conditions, etc., even if they are insufficiently revealed in an objective analysis;
- in some situations, due to the high-risk activity, these objective circumstances on which the author's belief regarding the non-occurrence of the result could be based, are considered *ab initio* as insufficient, whereas the created risk is manifestly too great to be reasonably covered by those circumstances.

By reference to the factual situation, the court, in order to establish the form of guilt, will mainly consider the moment immediately preceding the final result, in which the defendant triggered a state of imminent danger, analysing whether objective circumstances were sufficient to allow the defendant to appreciate that the accident may not occur.

It is noted that the defendant drove the car on August 20, the peak month of the summer season in Mamaia resort, at about 7.00 o'clock, time when the road and pedestrian traffic in this resort are crowded. It was found from the witness statement that there were people in the area of the accident, which strengthens the conclusion that at that time, the pedestrian traffic was crowded, too, being well known that at such a moment, the persons staying in the resort are heading towards the beach, or they leave the night spots or head for work, as it was in the case of the victim.

Regarding the driving ability of the defendant, who, although obtained a driving license, it is found that he was extremely affected, given the increased fatigue caused by the lack of sleep as well as alcohol and drug use that preceded the accident.

Thus, the court considers that in relation to the occurrence of the accident and the time, the speed with that the defendant was driving, as well as his physical condition couldn't have led to the conviction that the accident can be avoided and the defendant is guilty of committing the offense of murder and not the offence of manslaughter.

Having regard to these, the court changes the legal classification from manslaughter to murder.

2.15. Reflections on contexts that influence legal framing or changing it

In the following, I propose the following contexts in order to analyse the corresponding legal classification.

2.15.1. The exceeding of the legal speed limit followed by the victim's bodily injury or death

In such a context, a first aspect to consider is how far the legal speed limit has been exceeded. Thus, if we talk about an exceeding of the legal speed limit by a maximum of 10 km/h, and this results in the bodily injury of a person or the death of a person, I consider that, the legal classification of these facts as bodily harm with basic intent or manslaughter is reasoned, regardless of whether the person who caused this is a professional driver or not.

The exceeding of the legal speed limit by a maximum of 10 km/h may determine, even a beginner driver, to wrongly believe that he can easily master the vehicle, considering, without a concrete reason, that the final result will not occur, which is equivalent to retaining the offenses of bodily harm with basic intent or

manslaughter, except when the driver leaves the scene of the accident, that is equal with leaving the victims' rescue to chance.

If the legal speed is exceeded by more than 10 km/h, but not more than 20 km/h, a distinction must be made between the quality of the driver: professional or beginner driver and the behavior subsequent to the occurrence of the result.

Thus, in the case of a professional driver, having driving experience and never being punished by applying of contraventional sanctions, it can be more easily retained the offense of bodily harm with basic intent or manslaughter, given that his experience is a factor that favors the establishment of objective grounds in terms of considering, without reason, that the final result will not occur.

In the case of beginner drivers who exceeded the legal speed limit by more than 10 km/h, but not more than 20 km/h, it is necessary to analyse the context of the accident much more detailed than in the case of the professional drivers, by reference to visibility conditions, weather conditions, the history of contraventional sanctions, the date of obtaining the driving license etc.

Exceeding the speed limit by more than 20 km/h, I think it equates, both for professional drivers and for beginners, with creating a state of high danger that exceeds any objective ground to lead the driver in question to believe, without reason, that the final result will not occur. Therefore, in such a situation, I believe that indirect intent, and not recklessness, should be retained.

2.15.2. Driving a vehicle without a driving license followed by bodily injury or death of the victim

In such a context, driving a vehicle without a driving license, whether the driver has never obtained a driving license or whether the driving license has been suspended, it's the same with creating a state of high danger and the dismantling of any objective ground that leads the driver to believe that the foreseen final result will not occur, implicitly with the form of guilt of the indirect intent, especially if to this context is added the exceeding of the speed limits.

Thus, the fact that the person in case has never attended the courses of an accredited instructor in order to acquire the theoretical and practical notions for driving a vehicle, or, even if he attended these courses, but he has never passed the exam for obtaining the driving license, leads to the removal of the objective grounds that would determine him to erroneously think, the final result will not occur.

This is also available for those who have caused an accident with victims, and who at that time they have driven the vehicle with a suspended or withheld license.

The suspension or withholding of a driving license should be an alarm signal for drivers regarding their own behaviour on public roads, including the reflection of the need to improve their theoretical and practical knowledges to drive safely. Such behavior indicates indifference, a disregard for the occurrence of the final result, reflecting indirect intent as form of guilt.

2.15.3. Driving a vehicle under the influence of alcohol and/or other substances, followed by bodily injury or death of the victim.

Both driving a vehicle under the influence of alcohol, and driving a vehicle under the influence of psychoactive substances, are offenses, which regarding the subjective side, involve direct or indirect intent. Therefore, I believe that the statement according to the high degree of alcohol or the state of disorder caused by psychoactive substances would impede a correct assessment of the circumstances and, implicitly, would exclude the possibility of accepting the occurrence of the final result is not founded, since the driver, knowingly and in perfect lucidity, consumed alcohol or psychoactive substances before driving a vehicle. To consider that being under the influence of alcohol or psychoactive substances excludes the possibility of retaining the indirect intent as form of guilt is equivalent to considering these as a mitigating circumstance for the use of alcohol or psychoactive substances before getting behind the wheel and even with the encouragement of such behaviors. The acceptance of the occurrence of the final result materialised by the injury or death of a person is reflected precisely in the intention that was the basis of the consumption of alcohol or psychoactive substances preceding the moment of driving the vehicle. Moreover, the higher the concentration of alcohol in the blood is, or the more types of psychoactive substances in the blood are (including in this context the combination of alcohol and psychoactive substances, too), the greater the created state of danger is. As a result, these equates to dismantling the objective grounds designed to lead the driver to believe, without reason, that the final result will not occur.

I appreciate that it can be talked about the retaining of the offense of bodily injury or murder on the background of indirect intent, in the above-mentioned context, even in the case of professional drivers, a driver, it does not matter professional or not, having the responsibility to become conscious about the way alcohol or psychoactive substances affect the reaction capacity and the perception mode. This idea is demonstrated by the simple fact that, regarding the consumption of alcohol or psychoactive substances that the driver knows clearly that these will affect his reaction capacity in a way that he cannot control, the prevention of the final result being left to chance.

3. Conclusions

With regard to the correct legal classification of offenses against life and bodily integrity committed as a result of driving a vehicle without a driving license or under the influence of alcohol or other substances, or by exceeding the speed limits, it is essential to correctly define the form of guilt with which they were committed, respectively indirect intent or recklessness.

This delimitation is done by analysing the factors meant to create an objective ground that will lead the driver to erroneously believe that the final result will not occur.

I believe that we can talk about recklessness as form of guilt in situations where the driver caused the victim's injuries or death by exceeding the speed limits by no more than 10 km/h. However, this contour of reckless can be erased by the context in which, the author of the act leaves the scene of the accident, without showing any interest in alerting the competent authorities in order the victim to be rescued, showing that he leaves the victim's rescue to hazard, this aspect tilting the balance in the favor of indirect intent.

In case of exceeding the speed limits by more than 10 km/h, but not by more than 20 km/h, it is necessary to report in detail on all circumstances of the accident, especially on those that favor the shaping of objective grounds that would lead the driver to erroneously think that the final result will not occur. If there are enough elements meant to support these objective grounds, we can talk about recklessness as form of guilt.

Exceeding the speed limit by more than 20 km/h is equivalent to increasing the danger level, taking into account that such a speed delays the driver's reaction time. Therefore, in this context, denotes that only chance can prevent the occurrence of results as serios injuries or victim's death, and not the driver's experience in driving a car or his history of contraventions without deviations.

Driving a vehicle without a driving license also removes the objective grounds for determining the driver to erroneously think that the final result will not occur, respectively the retention of recklessness as form of guilt, since we are talking about a total lack of training or insufficient preparation for safe driving.

And, finally, driving a vehicle under the influence of alcohol and/or psychoactive substances, offenses that are committed from the subjective side with direct or indirect intent, have the effect of delaying the reaction capacity and influence negatively the perception, excluding the existence of an objective ground that could determine the erroneous assessment of the driver that the final result will not occur, given that the driving experience of a driver or the lack of contraventional sanctions cannot prevent the effects of alcohol or psychoactive substances and their intensity on his own body.

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DISCIPLINARY PRACTICE IN PRISONS. REWARDS AND SANCTIONS THAT MAY BE APPLIED TO PERSONS DEPRIVED OF THEIR LIBERTY

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Abstract

Disciplinary practice in prisons is an essential element of the proper administration of correctional institutions and the maintenance of a safe and orderly environment in these facilities. In this paper, we aim to examine the crucial role of rewards and sanctions within the prison system and how they influence the behaviour of prisoners. Rewards and sanctions play a crucial role in shaping prisoners' behaviour and promoting compliance with institutional rules and norms. The main aim of this study is to assess how these disciplinary tools influence prisoners' behaviour and to examine their effectiveness in reducing delinquent and deviant behaviour in prisons.

The findings of this analysis highlight the importance of a balanced approach between rewards and sanctions within the prison system. The right balance between these two aspects is essential for promoting a safe prison environment and facilitating the social reintegration of prisoners.

A balanced approach can contribute to improving disciplinary practices in prisons and to the effective management of prisoners' behaviour.

This research provides an insight into how rewards and sanctions are used within the prison system and suggests that a balanced approach between them is essential for maintaining order and safety in prisons and promoting the social reintegration of prisoners.

Keywords: *penitentiary, rewards, sanctions, practice, discipline.*

1. Introduction

In the prison system, ensuring order and security is a key priority for the authorities, with disciplinary enforcement being a fundamental pillar in achieving this objective.

This paper aims to present a comparative approach to the rewards and sanctions that can be applied to prisoners.

Detained persons are under the power of the state and it is imperative that there is a transparent and impartial framework for the management of their behaviour within prison institutions.

Disciplinary practice in prisons involves a diverse range of measures, from rewards for positive behaviour to sanctions for breaking institutional rules.

Within the prison system, ensuring order and security is fundamental to the authorities, and disciplinary enforcement is an essential pillar in achieving this objective. This paper proposes a comparative approach to rewards and sanctions applicable to prisoners, with a focus on their impact on prisoners' behaviour and social reintegration.

Proper management of prisoners' behaviour can make a significant contribution to maintaining a safe and orderly environment in prisons. In this context, it is imperative to have a transparent and impartial framework for the administration of rewards and sanctions, given the vulnerability of persons in custody and the importance of their reintegration into society.

Disciplinary practice in prisons involves a diverse range of measures, from rewards for positive behaviour to sanctions for breaking institutional rules. Understanding how these mechanisms are implemented and operate can provide insight into the internal dynamics of the prison system and their impact on people in detention.

Understanding how these mechanisms are implemented and function can provide insight into the internal dynamics of the prison system and their impact on people in detention.

„The disciplinary system applied in places of detention must meet the objectives of effective control and the maintenance of normal order. Most of the time, life in prison is carried out in a normal way, all actions, relations

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between the administration and convicts are carried out in compliance with the regulations and rules of criminal law, voluntarily, without the need for correction."[1]

„The purpose of the disciplinary system is to fulfil the requirements of the law on the execution of sentences, i.e., to find ways and means to re-socialise prisoners."[2]

Law no. 254/2013 provides, in art. 3, the purpose of the execution of sentences and measures of deprivation of liberty, namely, the pursuit of the formation of a correct attitude towards the legal order, towards the rules of social coexistence and towards work, in order to reintegrate prisoners or internees into society.

There are numerous comparative studies in the literature on the need for a well-structured system to achieve the educational purpose of punishment, *i.e.*, the reintegration of the sentenced person into society.

In national legislation, the rewards that can be granted to persons deprived of liberty are provided for in various normative acts, such as, Regulation for the application of Law no. 254/2013, dec. no. 443/2016 of the Director General of ANP on the approval of the Working Procedure for the granting of rewards based on the System for crediting participation in educational activities and programmes, psychological and social assistance, gainful activities, and the prevention of risk situations, as well as in the contents of Law no. 254/2013;

As regards the sanctions that may be applied to persons deprived of their liberty, they are regulated in art. 101 of Law no. 254/2013, in the Regulation implementing Law no. 254/2013, the Regulation on the security of places of detention under ANP, approved by Order of the Minister of Justice no. 4800/C/2018, and also in art. 61 and 73 of the Instructions on the nominal and statistical record of persons deprived of liberty in subordinate units, Regulation on the security of places of detention under ANP, approved by Order of the Minister of Justice no. 432/C/2010.

The aim of this paper is to investigate the various forms of rewards available to prisoners and how they can stimulate positive behaviour and contribute to the social reintegration process of prisoners. At the same time, we will analyse the disciplinary sanctions used in prisons, including their application procedures and their impact on the individual and the climate in the prison.

In the light of these aspects, the paper will contribute to the development of knowledge in the field of prison disciplinary practice and provide a useful perspective for improving the behaviour management of prisoners in order to ensure a safe prison environment and facilitate social reintegration.

Thus, in the course of this paper, we will investigate the various forms of rewards available to prisoners and how they can stimulate positive behaviour and contribute to the process of social reintegration of prisoners. We will also look at disciplinary sanctions used in prisons, including their application procedures and their impact on the individual and the climate in the prison.

2. Paper content

„Discipline in places of detention is one of the contradictory problems of the system of execution of custodial sentences, because it tries with coercive means to achieve re-socialization through imprisonment, which is from the outset the failure of the action".

Disciplinary practice in Romanian prisons is an essential element in the administration of the penitentiary system, with the main objective of maintaining order and safety in detention institutions. According to national legislation and international standards, disciplinary rules and procedures are designed to ensure a safe and secure detention environment and to promote respect for the rights and dignity of persons deprived of their liberty.

The rules of conduct and behaviour are defined in the internal order regulations of Romanian prisons. These regulations include details of prohibited behaviour, applicable disciplinary sanctions and procedures for dealing with breaches. The disciplinary procedures are in accordance with the Law on the Execution of Punishments and Deprivation of Liberty Measures and the Internal Order Regulations specific to each penitentiary establishment, thus ensuring respect for the procedural rights of prisoners and guaranteeing a fair process in the application of disciplinary sanctions.

Disciplinary sanctions are based on the seriousness of the violation and may include written warnings, restriction of privileges, transfer to other correctional facilities, disciplinary segregation or reduction of the length

[1] I. Chiș, Al.B. Chiș, *Execution of criminal sanctions*, 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2021, p. 485.

[2] *Ibidem.*

of probation. These sanctions are applied in accordance with legal procedures and following a fair and equitable disciplinary process.

Prison staff monitor the implementation of disciplinary practice, ensuring compliance with the rules and the application of sanctions in a fair and just manner. Disciplinary processes are documented and recorded to ensure transparency and accountability within the prison system.

Within a hierarchical reporting framework, persons deprived of their liberty are obliged to comply not only with the provisions of normative acts, such as Law no. 254/2013 on the execution of custodial sentences and the Regulation implementing this law, but also with the rules laid down in the internal rules or provisions issued by the prison administration through decisions, written or verbal orders in the exercise of its managerial powers.

There is an essential requirement for prison discipline rules to be in writing, as this is a safeguard both for those deprived of their liberty - who, in the absence of written rules, may claim that they have not been informed of their obligations and to the facts considered disciplinary violations - as well as for the prison administration, which could be accused of arbitrary application of sanctions. Arbitrariness derives not only from the absence of rules, but also from the presence of rules that do not meet legal standards or are outdated. According to Principle 30(1) of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted at the 76th plenary session of the UN General Assembly on 9 December 1988, the regulations must specify the following aspects: i) the types of conduct that constitute a disciplinary offense during detention or imprisonment; ii) the description and duration of the disciplinary penalty that may be applied; iii) the competent authorities for imposing such sanctions. It is also essential that the rules identify or define the means of appeal and review available to prisoners who wish to challenge the preliminary proceedings. Therefore, the most important sources related to discipline in penitentiaries are Law no. 254/2013, which contains two chapters on offenses and disciplinary sanctions applied to persons deprived of their liberty, and the Internal Order Regulation for detainees. Internal order regulation, according to art. 44 of GD no. 157/2016 implementing Law no. 254/2013, is the document by which the prison administration establishes the rules that the prisoners and the prison staff must follow in order to properly apply the execution regime. This is a unilateral act of the administration of the place of detention, the structure of which cannot be negotiated and which does not allow clauses left to the discretion of persons deprived of their liberty. The administration can base its disciplinary decisions on the basis of this internal normative act, while persons deprived of their liberty can use the internal order regulation to their advantage. The internal order regulation is approved by the director of the penitentiary, and compliance with it is an obligation for all inmates throughout their detention. The prison administration is obliged to display the internal order regulation in visible places or to make available information about its content by various means, according to the provisions of the Regulation for the implementation of Law no. 254/2013.[3]

Rewards for persons deprived of their liberty. Rewards play a crucial role in improving social life, as they are an effective tool to motivate and encourage the embracing of positive behaviours in society.

The American poet and essayist, Ralph Waldo Emerson, stated in his essay, entitled *„Reward”*, that *„A reward is the best motivation. However, everyone must understand that the reward is not the end; it is the result.”* Thus, Emerson suggests that the greatest benefit of an action is not the external reward but the very inner satisfaction that the individual feels for having done something correctly and successfully. This quote highlights that in some cases, the very act of accomplishing something itself is a sufficient reward for the human, thus highlighting the importance of internal motivation and personal satisfaction in influencing human behaviour, in addition to external rewards or social recognition.

Rewards help to strengthen social relationships and reinforce bonds between individuals and communities. When people are rewarded for their contributions to the community or for helping others, a sense of mutual recognition and appreciation is created, thus strengthening social cohesion and solidarity.

In addition, rewards can provide opportunities for individuals' personal and professional development, contributing to improved quality of life and increased personal satisfaction. By recognising and rewarding individual or collective achievements, people feel encouraged to go beyond their limits and reach their full potential in various areas of social life.

The system of awarding rewards to people deprived of their liberty is fundamentally different from the system practised in economic or budgetary organisations. It is based solely on the enhancement of certain

[3], S.C. Oprişan (Nedelcu), *Disciplinary practice in applying sanctions to persons deprived of liberty*, Universul Juridic Premium Magazine no. 2/26.02.2020.

recognised rights, such as the possibility to receive visits and food parcels, to conduct online or intimate visits and to obtain permission to leave. All these rewards are granted without financial involvement of the detention institution, the only moral reward being the lifting of the previously imposed sanction, while the others impose material and financial costs on the families of the detainees. The system of rewards is limited in the modalities and types of rewards available. Although package and visiting entitlements are relatively sufficient in number and duration for all categories of prisoners, the most desired rewards are those related to intimate visits and permission to leave. These rewards are a means of individualisation of the custodial sentence and are granted to prisoners who adopt a correct attitude towards work, respect the legal order and the rules of social coexistence, show a consistently positive conduct and are actively involved in productive, educational, cultural or therapeutic activities, as well as in risk situations.[4]

„The system of recording and the procedure for granting rewards are strictly regulated both in the law and in the Regulation implementing Law no. 254/2013, as well as in tertiary legislation, in particular dec. no. 443/2016 of the Director General of the ANP, and rewards may be granted, where appropriate, by a specific commission established in para. 1. (2) of art. 98 or by the Director General of the ANP (in the case of exit permits for more than one day).”[5]

In art. 98 of Law no. 254/2013, the legislator has retained 5 types of rewards that persons deprived of their liberty can benefit from.

Thus, para. (1) of art. 98 of Law no. 254/2013 provides that convicted persons who are of good conduct and who have made the necessary efforts within the framework of work performed or within the framework of educational, moral-religious, cultural, therapeutic, psychological counselling and social assistance activities, school education and vocational training shall be granted, by the procedure established by the decision of the Director General of the National Administration of Penitentiaries, the following rewards:

a) the lifting of a disciplinary penalty previously imposed;

b) the addition to the number of on-line conversations;

c) additional entitlements to packages and/or visits;

d) supplementing rights to private visits, subject to the conditions laid down in art. 69, with the exception of para. 1. (1)(d);

e) permission to leave the prison for one day, but not more than 15 days per year;

f) permission to leave the prison for a maximum of 5 days, but not more than 25 days per year;

g) permission to leave the prison for a maximum of 10 days, but not more than 30 days per year.

Reward with the lifting of a previously imposed disciplinary sanction. Reward with the lifting of a previously imposed disciplinary sanction is a crucial element in managing behaviour in prisons. This reward is offered when the person in custody shows evidence of correction and significant improvement in their behaviour, even if they have previously committed another disciplinary offence.

This form of reward brings with it multiple benefits. Firstly, it serves as a strong incentive for prisoners or those under strict supervision to improve their behaviour and comply with institutional rules. The prospect of the removal of a disciplinary sanction can motivate individuals to adopt more positive behaviour and avoid further rule violations.

Secondly, the reward of having a previous disciplinary sanction removed may help to improve relations between management and prisoners. This can generate a sense of recognition of the individual's efforts to comply with the rules and to improve themselves, thus building trust and mutual respect between the parties.

„The lifting of the sanction implies that after this reward the convicted person will be able to receive other rewards, only if he has not committed more offences which must be lifted in turn. If the prisoner has committed more than one misconduct, the lifting of disciplinary sanctions will start with the oldest, and if there are more than one misconduct in a month, the sanctions will be lifted in relation to the severity, starting with the lightest sanction.”[6]

According to Article 209 of the Regulation implementing Law 254/2013, the lifting of a previously imposed disciplinary sanction may be granted to prisoners who:

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[4] I. Chiș, Al.B. Chiș, *op. cit.*, p. 485.

[5] A. Barbu, R.F. Geamănu, *Law no. 254/2013 regarding the execution of punishments and custodial measures ordered by judicial bodies during the criminal process: comments and jurisprudence*, Universul Juridic Publishing House, Bucharest, 2021, p. 636.

[6] I. Chiș, Al.B. Chiș, *op. cit.*, p. 485.

a) for at least two months from the date of application of the disciplinary sanction referred to in art. 101 para. (1) letter a) of the Law have not committed any further disciplinary offences and have behaved in a lawful manner;

b) for at least 3 months from the date of application of the disciplinary sanction referred to in art. 101 para. (1) (b) and (c) of the Law have not committed disciplinary offences and have behaved in a lawful manner;

c) for at least 4 months from the date of application of the disciplinary sanction referred to in art. 101 para. (1) (d) and (e) of the Law have not committed any disciplinary offences and have behaved in a lawful manner;

d) for at least 5 months from the date of application of the disciplinary sanction referred to in art. 101 para. (1) letter f) of the Law, they have not committed any disciplinary offences and have shown a regular conduct.

Reward with more online calls. Rewarding extra online conversations is a practice used in some prisons or detention centres to encourage positive behaviour and to maintain social links between prisoners and their families and loved ones. This reward consists of offering prisoners more opportunities to have online conversations with their family members or significant others.

The additional online conversations can serve as a strong incentive for prisoners to maintain appropriate behaviour and respect the rules of the institution. The prospect of being able to communicate more often with loved ones can motivate individuals to engage in constructive activities and avoid rule violations.

Online conversations provide a way for prisoners to maintain links with their families and friends outside the detention facility. These chats can help improve prisoners' emotional well-being and reduce feelings of isolation or loneliness.

By providing more opportunities to communicate with people outside prison, the reward of additional online conversations can facilitate the social reintegration process of prisoners after release. Maintaining social connections and positive relationships can help them adapt to life in the community and avoid reoffending.

It is important to note that these online conversations are usually supervised and monitored by prison authorities to ensure compliance with the rules and to prevent abuse or misuse.

The additional number of online calls is provided for in art. 210 of the Regulation implementing Law 254/2013 and is granted under the same conditions as the right to online calls. The reward is calculated by adding two such calls per month.

Persons deprived of their liberty are entitled to additional online calls from the month immediately following the month in which they were granted the reward.

Reward with additional entitlement to packages and/or visits. The reward with additional entitlement to packages and/or visits is provided for in art. 211 of the Regulation implementing Law no. 254/2013, and involves the additional granting of a package or a visit within a maximum of 3 months from the date of granting the reward.

Reward with additional right to private access. In order to be eligible for the reward of additional private access, persons deprived of their liberty must meet the criteria set out in art. 69(2). (1) of Law no. 254/2013, namely:

a) they are definitively sentenced and are assigned to a regime for the execution of custodial sentences, i.e., they are remanded in custody during the course of the trial;

b) there is a marriage relationship, proven by a certified copy of the marriage certificate, or, where applicable, a partnership relationship similar to the relationship established between the spouses;

c) they have not been granted permission to leave the prison during the three months preceding the request for an intimate visit, in the case of convicted persons;

d) they have not been disciplined within a period of 6 months prior to the request for an intimate visit, or the sanction has been lifted in the case of convicted persons, and in the case of persons remanded in custody during the course of a trial, within the last 30 days prior to the request;

e) actively participate in educational, psychological and social assistance activities and programmes or work.

The person deprived of liberty will benefit from the reward of the supplement to the right of private access from the month immediately following the granting of the reward. At the same time, art. 212 para. (1) of the Regulation implementing Law no. 254/2013, provides that persons deprived of liberty who have benefited in the previous 3 months of an intimate visit, will not be rewarded with this reward.

Permission to leave prison. Permission to leave the penitentiary is regulated by art. 99 of Law no. 254/2013 and requires that the prisoner has a consistently positive conduct and actively participates in educational, cultural, therapeutic, psychological counselling and social assistance activities, education and training. [7]

„Prison release permits are regulated separately, depending on the enforcement regimes, with different durations and procedures for granting them, as follows:

One-day permits - regulated by para. 1 (e), specific to the closed regime, granted by a commission (composed of the director, who is also the chairman of the commission, the deputy director for detention security and prison regime, the deputy director for education and psychological assistance), not more than 15 days per year;

Permits for a maximum of 5 days - regulated in para. (1) (f), specific to the semi-open regime, granted by the Director General of the ANP, not more than 25 days per year;

Permits for a maximum of 10 days - covered by para. (1) (g), specific to the open regime, granted by the Director General of the ANP, not more than 30 days per year."[8]

Sanctions that can be applied to persons deprived of liberty. In Romania, the sanctions applied to persons deprived of liberty are regulated in accordance with the Law on Execution of Sentences and Measures Depriving of Liberty, as well as with the internal order regulations specific to each penitentiary unit. These sanctions are applied in case of violation of institutional rules and are aimed at maintaining order and safety within detention institutions, as well as promoting respect for the rights and dignity of persons deprived of liberty.

Sanctions may vary depending on the severity of the rule violation and may include written warnings, restriction of privileges, or disciplinary isolation.

The disciplinary process is overseen by prison staff and must follow legal procedures to ensure a fair and transparent process.

It is important to note that the sanctions applied must be proportionate and justified, and prisoners have the right to appeal and review the decisions taken against them. Transparency and accountability in the application of sanctions are crucial to maintaining trust in the prison system and respecting individual rights.

The disciplinary sanctions that can be applied to persons deprived of liberty, in the case of committing disciplinary violations, are provided in the content of art. 101 para. (1) of Law no. 254/2013 and there are 6 of them:

a) the warning;

b) suspension of the right to participate in cultural, artistic and sports activities, for a period of at most one month;

c) suspension of the right to work, for a period of at most one month;

d) suspension of the right to receive and purchase goods, except for those necessary for personal hygiene or exercising the rights to defense, petition, correspondence and medical assistance, for a period of no more than two months;

e) suspension of the right to receive visits, for a period of no more than 3 months;

f) isolation for a maximum of 10 days.

Within the penitentiary system, the application of sanctions is a crucial aspect of the behavioral management of persons deprived of liberty. This practice is not only a response to rule violations, but is a tool for regulating behavior and maintaining order in detention facilities. The history of these sanctions illustrates not just a functional necessity but a reflection of the delicate relationship between institutional power and human individualism.

The application of sanctions primarily promotes individual responsibility and discipline. They give prisoners the opportunity to internalise the consequences of their actions and take responsibility for their behavior within the prison community. This not only reinforces respect for the rules, but also encourages deep reflection on the consequences of individual actions.

In addition to disciplinary issues, the application of sanctions has a direct impact on stability and security within prison institutions. By imposing clear consequences for breaking the rules, a framework is created in which antisocial behavior is discouraged and social norms are reinforced. Thus, sanctions serve not only control purposes, but also to promote a safe environment and stability within the institution.

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[7] *Ibidem*.

[8] A. Barbu, R.F. Geamănu, *op. cit.*, p. 638.

Also, the application of sanctions can serve as a tool for the rehabilitation and social reintegration of prisoners. By including educational or counselling activities as part of the sanctions, opportunities for personal development and growth are provided, preparing prisoners for reintegration into society after release.

Thus, the application of sanctions in penitentiary institutions is an essential practice for maintaining order and discipline, strengthening social norms and promoting individual responsibility. This reflects not only a functional aspect of the penal system, but also an aspect of the complex dynamics between institutional power and personal autonomy within restrictive environments.

Disciplinary sanctions have an immediate and subsequent effect on the situation of the convict, which influences the entire execution of the custodial sentence.

First of all, the immediate effect of a disciplinary sanction consists in restricting for a period the exercise of the rights conferred according to Law no. 254/2013, including the right to packages, shopping, participation in cultural-educational and sports activities, as well as the right to family visits. This restriction results in an intensification of the usual detention regime, where prison staff are more rigorous in granting facilities or responsibilities, and other inmates distance themselves from the sanctioned one to avoid negative influences. According to the Methodology of April 30, 2013 regarding the awarding of rewards, art. 10 provides that, in case of application.[9]

3. Conclusions

Disciplinary practice in prisons is a vital aspect in the management of the prison system and in ensuring security for both prison staff and prisoners. It involves the application of both sanctions and rewards to influence inmate behavior and maintain order and discipline in institutions.

The existence of sanctions in the prison system is justified by several fundamental reasons. First, sanctions serve as a means of enforcing compliance with institutional rules and norms. By establishing clear consequences for breaking these rules, a framework is created in which inmates are motivated to adjust their behavior and avoid problem behaviors. This is essential to maintaining a safe and orderly environment within prisons.

Secondly, sanctions have an educational and pedagogical role. They provide the opportunity to learn from mistakes and promote individual responsibility. By experiencing the consequences of their actions, inmates can come to a deeper understanding of the impact of their behavior and be encouraged to adopt more positive and rule-compliant behavior in the future.

Sanctions can also play a role in managing risk and preventing problem behaviour. They can deter anti-social or violent behavior and help maintain security within prisons. By consistently applying sanctions, a clear message can be sent that certain behaviors will not be tolerated and that there are consequences for their actions.

On the other hand, rewards for people deprived of their liberty are also essential within the prison system. They can serve as an incentive for positive behavior and compliance. By offering additional benefits and privileges in exchange for appropriate behavior, inmates can be motivated to engage in constructive activities and behave in accordance with the institution's rules.

Rewards can also help improve relationships between prison staff and inmates. By recognizing and rewarding positive behavior, trust and mutual respect can be built between parties, which can help create a more stable and cooperative environment within prison institutions.

In addition, rewards can play an important role in the process of rehabilitation and social reintegration of persons deprived of their liberty. They can provide opportunities for personal development and education, as well as the development of social and professional skills. Providing rewards for participating in educational programs or engaging in constructive activities can prepare prisoners for reintegration into society and prevent recidivism.

In conclusion, the existence of both sanctions and rewards in the prison system is justified by multiple reasons and needs. These practices are essential for maintaining order and security within penitentiary institutions, as well as for promoting positive behavior and facilitating the process of rehabilitation and social reintegration of persons deprived of liberty. Through the balanced application of sanctions and rewards, a safer, more responsible and more conducive prison environment for the personal and social development of prisoners can be promoted.

[9] I. Chiș, Al.B. Chiș, *op. cit.*, p. 526.

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AUTOMATED DECISION-MAKING: IS THE EU CONSUMER LAW FIT FOR THE EMERGING TECHNOLOGY?

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Abstract

The concept of „automated decision making" (ADM) is currently a key vector reshaping industries in the era of technology-based decision making, and the use of artificial intelligence (AI) in this process is a hot topic worldwide with the adoption of generative AI tools like ChatGPT. ADM enables companies to use technology for tasks that were not long ago the domain of human judgment. AI is essential in financial services, such as credit worthiness assessment, automated investment advice (often called robo-advice) or insurance. The regulation of activities related to ADM is contained in various acts and regulations, including the Sale of Goods Directive 2019/771, the Digital Contracts Directives 2019/770 and the EU General Regulation on Data Protection. However, these directives do not contain special rules for new technologies such as Artificial Intelligence (AI). Although recently, the EU has moved forward with regulations on product liability laws affecting digital products and services, with the EU Data Act, the EU Cyber Resilience Act and the highly publicized EU AI Act - regulations with a transition period of two years for compliance, the speed with which in practice the ADM tools are developed and trained make the legislative efforts slow and incomprehensible. In light of this issue, this article explores the relationship between AI, ADM and discusses whether existing EU consumer law is equipped to deal with situations where AI systems are either used for internal purposes by companies or offered to consumers as the main subject of the contract. The paper will reveal a number of gaps in current EU consumer law and briefly discuss future legislation. This article also reviews the efficiency of key EU consumer law directives for the conclusion of contracts with consumers through the use of AI, with recommendations for clarifications and additions to improve the use of ADM.

Keywords: *ADM, AI, financial services, EU consumer law, consumer contracts.*

1. Introduction

It has already become common practice for merchants to use automated decision-making processes in a variety of ways for advertisers when marketing their products to consumers online. Likewise, merchant websites rely on automated decision-making processes to receive and process orders placed by consumers and to enter into contracts. Superior access to information, along with progress made in programming and advanced computing power using fast technologies to process such information produce advantages in decision making, having the potential to improve the quality and efficiency of decisions. In the case of ADM processes, these systems analyse large data sets and can provide insights that humans may not be able to see. However, the integration of technological solutions in decision-making procedures are not without risks of potential dysfunctions, the limiting of individual rights and the reduction of liability. Using AI for decision-making also raises challenges, including access to accurate and unbiased data, ethical concerns related to consent and data confidentiality, the need for complaint solving and resolution of appeals control by the human factor, the need for qualified professionals to develop and maintain AI systems.

The concerns of legislators but also of consumers are related to how we can ensure that, following the prior consent given for the use of personal data, consumers will still be able to control their use and that the data collected for a certain purpose is not used for something completely different? How can discriminatory and arbitrary treatment be prevented and how do we ensure that there is no bias built into ADM algorithms? How do we ensure that AI only uses data that is lawfully obtained, appropriate, relevant and limited to what is necessary for the intended purpose? And, in the case of ADM processes in financial industry, can the core consumer credit rights and duties be automated?

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EU recently adopted a comprehensive regulation governing corporations and the business environment regarding AI. The world's first legislation of its kind, the EU Law on AI, aims to impose legal and ethical standards on companies that develop and use AI.

The EU's AI act is the first ever law on AI, a regulatory framework that aims to make sure AI systems are safe, and that they respect the law and the EU's fundamental rights and values.

2. Definitions and related concepts

According to Council of the European Union, „artificial intelligence (AI) is the use of digital technology to create systems capable of performing tasks commonly thought to require human intelligence"[1]. OECD, in the Recommendation of the Council on Artificial Intelligence, the term of should be understood as follows:

AI system: An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment[2].

Automated contracts and smart contracts. OECD showed that the term „smart contract" was first introduced by Nick Szabo in 1994 who defines it as „a set of promises, specified in digital form, including protocols within which the parties perform on these promises".

What are automated contracts? Contract automation enables businesses to build and execute repeatable contract workflows that require minimal manual work. Automating this work means contracts reach signature faster, enabling teams to get to revenue faster and focus on higher-value tasks instead. Contract automation is a process in which software empowers internal teams within businesses and organizations to standardize the stages and tasks associated with the contract lifecycle, allowing for consistency and reliability in contracting processes (Szabo, 1994[3]). (…) (Szabo, 1997[4]) further specified that a smart contract is a „computerised transaction protocol that executes the terms of a contract. The general objectives are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimise exceptions both malicious and accidental, and minimise the need for trusted intermediaries.

Miguel Amaral in OECD „Case 3. Blockchain and smart contracts: regulatory challenges and regulatory approaches", concludes: „in other words smart contracts deployed on a blockchain are a set of predefined terms agreed by contracting parties and executed by the Digital Ledger Technology itself when a predefined contingency occurs. As such, they are not a contract in the strict legal sense but rather self-executing and self-enforcing code-based rules".

The use of artificial intelligence in automatic decision-making subsequently contributes to the automation of some or all phases of a typical contracting process.

In the present research, we consider a „**digital assistant**" to be an integral AI system, which can be used by a consumer to perform one or more steps, which were usually undertaken together with a human operator representing the merchant for the conclusion or execution of a contract. In the virtual world, such digital assistants are present as independent applications, but also as built-in functions of smart goods and services.

3. The fitness of EU consumer law directives in ADM

The next challenge for consumer law arises from the gradual implementation of the automation of contracting through digital technologies that use the automation of decision-making processes. This in turn leads to the question of how well the current EU consumer legislation is prepared for the potential use of ADM.

Regarding the contracts concluded by automatic means, the e-Commerce Directive (2000/31/EC) is currently the reference base of the European Union's legal framework for electronic commerce, but with the passage of time since its adoption, many aspects are being overtaken by the accelerated implementation of digitization in most economic sectors, so that updates are needed to ensure that its provisions can work in the new circumstances, and its framework to cover contracting made exclusively through the use of artificial

[1] *https://www.consilium.europa.eu/en/policies/artificial-intelligence/*.

[2] *https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449*.

[3] N. Szabo, *Smart Contracts: Building Blocks for Digital Markets*, EXTROPY: The Journal of Transhumanist Thought, 1994.

[4] N. Szabo, *Formalizing and Securing Relationships on Public Networks*, First Monday, vol. 2/9, 1997, *https://doi.org/10.5210/fm.v2i9.548*.

intelligence systems, those based on algorithms and ADM. Strictly speaking, the Electronic Commerce Directive is not a consumer law directive, but it applies to many consumer contracts. Currently, art. 9 „Treatment of contracts" does not refer to contracts concluded by automated means, but simply to contracts concluded by electronic means. It is necessary to adapt the provisions of art. 9 to cover contracts concluded through the use of digital assistants and ADM. Regarding the scope of this directive, by amending Article 9 it could be extended by including to „electronic contract" to encompass contracts concluded through the use of algorithms, digital assistants and ADM systems.

As far as we are concerned, we identify on the one hand the contractual relationship that is concluded through the digital assistant. Separately, there is the contract between the digital assistant provider and a consumer, for the provision of a digital assistant to the consumer.

The European regulation on unfair commercial practices, the Unfair Contract Terms Directive (UCTD 93/13/EEC), is based on the concept that, in order to make an informed decision, consumers must be provided with essential information.

UCTD applies to all contracts concluded between a consumer and a seller or supplier of goods or services, but the current rules are formulated in a general and abstract way, without regard to how the retailer interacts with consumer, the way in which the data is processed, by the use of algorithms or Big Data, and the references to the consumer in the UCTD should also include a consumer who uses a digital assistant.

The terms of the current form of UCTD could be applied to evaluate the correctness of the contractual conditions, including when the conclusion is made with the use of algorithms, for a contract concluded through ADM, as well as from the contract for the provision of the digital assistant, similar to how it would be applied for non-algorithmic contracts.

Depending on how the algorithms work, the price ranking can be opaque, which makes it very difficult for consumers to compare offers, but deploying of a digital assistant by a consumer does not change the conditions for assessing the fairness of non-negotiated clauses through the control mechanisms provided in the UCTD.

The Consumer Sales Directive (2019/771/EU - CSD) also contains provisions applicable to digital assistants integrated into physical goods, regardless of whether the digital element forms part of the initial contract or a subsequent contract. For example, if in a sales contract for an electrical appliance or an electric car, it is agreed that an application will be downloaded after the purchase of the good, this application will also fall within the scope of the CSD.

Regarding the treatment of non-conformity of a digital assistant incorporated into physical goods, one of the main reasons why the CSD is relevant for the use of digital assistants is that the provisions of Directive 2019/771/EU can be relied upon when the performance of the digital assistant does not meet the reasonable expectations of the consumer[5], *i.e.*, when the digital assistant does not comply with those in the contract and any problem with the performance of the digital content is considered a possible non-conformity of the goods themselves. Where a digital assistant is pre-installed in physical goods, the relevant compliance provisions are those referred to in art. 6 and 7 CSD. CSD provides a set of remedies for cases of non-compliance. However, the remedies for a lack of compliance under the CSD are not sufficient for many problems specific to digital assistants, such as degradation of the AI element. The remedies available under art. 13 CSD are for example not adapted to the situation where a digital assistant makes a decision that causes physical damage or financial loss to the consumer. For this, actions in damages would be the appropriate remedy, but these are left to the Member States in the CSD. Therefore, in these cases the consumer should be granted the right to compensation in an easily accessible way, and in order to guarantee this right, the Directive should provide that Member States may be required to provide that compensation claims are allowed in relation to digital assistants where a digital assistant has acted beyond anticipated limits.

Another key issue is how will consumers be protected when faced with discriminatory AI-based ADM results? Consumers, based on their profile obtained through data processing, through machine learning, are divided into market segments with an increasing degree of precision. Such a classification can prove problematic in several situations. For example, there is a problem if the profiling process reaches the wrong result and the wrong profile is applied. This could be due to inherent errors in the statistical analysis calculation technique or biassed databases that can cause the system to reach false positives or false negatives. Discrimination can occur

[5] *https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Interim_Report_on_EU_Consumer_Law_and_Automated_Decision-Making.pdf*, p. 46.

when the data entered on the consumer is not relevant enough to reach a correct conclusion. The consequences of such automated decisions can be serious: the user may be deprived of a service or denied access to information.

Algorithms may also be designed to intentionally produce biassed, unfair or discriminatory results or to exclude certain groups of people, such as when consumer profile analysis indicates that a person has a high degree of probability to belong to a certain group in society and, therefore, they are not offered to contract a service or the offers from that person are automatically rejected, with severe economic and social effects for that individual[6]. Therefore, guidelines should be developed on AI and ADM, focusing on the repercussions of AI on fundamental human rights, anti-discrimination, transparency, data protection and consumer protection.

The General Data Protection Regulation (GDPR) applies whenever personal data is used within systems based on artificial intelligence. In this context, questions arise related to the meaning, practical application and limits of some of the fundamental principles of the GDPR, such as the fairness and transparency of personal data processing, data minimization, purpose limitation and liability.

In Case C-634/21, the CJEU examined the practices of the German company SCHUFA Holding AG, in the context in which a consumer was refused credit based on a score determined by the evaluator. The SCHUFA credit bureau provides lenders with credit information about individuals using a probability-based scoring system.

In recital 71 of the decision, the CJEU noted that adequate measures must always be taken to protect the rights and freedoms of individuals. These measures include the right to human intervention, the right to express one's point of view and the right to challenge the decision. The right to appeal the decision is mentioned in art. 22 GDPR, in a broad interpretation of art. 22 GDPR, where the decisions are necessary for the conclusion of a contract or taken with the consent of the data subject.

The CJEU said, where art. 22 is applicable, it prohibits decisions from being taken on an automated basis unless an exception applies. The exceptions allow automated individual decision-making solely where:

- the decision is necessary to enter into or perform a contract between the data subject and a controller;
- it is authorised by EU or member state law, meeting certain requirements;
- the data subject gave explicit consent.

In the CJEU ruling, there are considerations related to consumer rights, and it is in line with the CJEU's approach of interpreting the GDPR as broadly as possible, in favor of the people whose personal data are processed. This solution refers to contractual relations in general, and not necessarily to the specifics of the loan contract process. Therefore, the CJEU ruling will have implications beyond processes such as creditworthiness assessment, affecting sectors such as recruitment, healthcare and insurance, which frequently rely on AI decision-making.

There are, for example, such approaches, such as in the Mortgage Credit Directive 2014/17/EU, which in art. 18 contains an information requirement, obliging the creditor to notify the consumer without delay of the rejection and if the decision is based on automatic data processing[7].

New forms of potentially unfair advertising and other deceptive practices must also be addressed. Consumers will often not be aware when it comes to commercial offers that the price of a product is personalised, *i.e.*, determined according to their user profile.

The European Commission's new rules presented in its Digital Finance Package at the 24 September 2020 introduce much-needed improvements for the online retail financial services market which will strengthen consumer protection. However, additional new rules are needed in some key areas. On 11th May 2022, the EU Commission published a directive proposal amending Directive 2011/83/EU on consumer rights (the „Consumer Rights Directive"-CRD) and repealing Directive 2002/65/EC concerning the distance marketing of consumer financial services. The European Commission's legislative proposals are a very welcome step in the right direction to better protect consumers in the increasingly digital financial services market. While digitalization brings

[6] CJEU (Case C634/2) ruled that a German credit agency engaged solely in 'automated individual decision-making' under art. 22 by using automated processing to create credit scores linked to individuals, in circumstances where third-party lenders „drew strongly" on these scores to make lending decisions. The case arose from a complaint made by a person who was refused a bank loan on the basis of a low credit score that the agency, SCHUFA, supplied to the bank concerned.

[7] Directive 2014/17/EU, Chapter 6, Creditworthiness assessment, in art. 18, Obligation to assess the creditworthiness of the consumer: (c) where the credit application is rejected, the creditor informs the consumer without delay of the rejection and, where applicable, that the decision is based on automated processing of data. Where the rejection is based on the result of the database consultation, the creditor shall inform the consumer of the result of such consultation and of the particulars of the database consulted.

opportunities for suppliers and consumers alike, it also brings a number of risks, making a proper regulation of the market necessary not only by updating it but strengthening consumers 'rights, by filling existing regulatory gaps in the online financial services market. Financial services are very different from other consumer goods and services covered by the CRD and therefore creating a specific chapter and rules for financial services is crucial. At the European level, there are numerous regulations across this area. The regulatory failure results first and foremost from the lack of adequate consumer protection standards and enforcement failings at Member State level. While the Commission's proposal brings key improvements, some much-needed measures are missing and their absence represents real challenges for effective consumer protection.

In conditions of transparency and secure communication between the parties, prior to the completion of the contract concluded at a distance, this represents a safe and advantageous means of obtaining credit by consumers. The introduction of appropriate provisions to ensure that consumers receive the necessary and appropriate explanations regarding financial services and products before purchasing them through online tools, rob advisors, live chat, Q&A, chatbots and other similar tools are requirements that must be met. Also, the proposals should include a right for consumers to request human intervention in cases where online tools such as rob advisors are used by providers. At this stage there are concerns about whether these chatbots will be able to properly manage all aspects of the consumer protection law to the given context, without providing customers inaccurate information.

What is missing at the moment in DMFSD[8] is the regulation of the activity of influences in the Financial Services marketing, known as FinFluencers. A *financial influencer* or *„FinFluencer*", is a person who gives information and advice to investors on financial topics, usually on stock market trading, personal investments like mutual funds and insurance, primarily on various social media platforms. The project to review DMFSD has failed to cover the protection of consumers against the risks that social media and FinFluencers pose to consumers[9] and financial stability.

Influencer marketing in financial services is widespread across Europe. According to research by the International Organization of Securities Commissions (IOSCO), 43% of European firms plan to increase use of influencers as a marketing tool[10]. Moreover, due to the digital environment in which they operate, fintech companies are less constrained by geographical barriers. But right now, this practice is not regulated at EU level, leaving consumers unprotected. There are documented cases when EU citizens have lost a lot of money due to aggressive social media advertising by social media influencers of crypto assets[11].

It should be noted that the Commission's proposal addresses online fairness. Increasingly, financial service providers are using techniques such as „dark patterns" that take advantage of consumer behavioural biases. Dark patterns are some deceptive methods of using the online interface, such as, for example, the colouring of the decision buttons or the position and order in which the options are placed on the page, which have the role of tricking consumers into making decisions that are in the interest of the online business, but at the expense of the user. These practices must be properly regulated to protect consumers against mis-selling and the new proposal for the directive must cover all these aspects of consumer protection of financial services contracted through distance means.

In the area of financial services, the use of AI creates risks and complex problems, including legal and ethical ones, and these challenges must be adequately addressed. It is time for society and the law-makers to discuss the opportunities and challenges arising from the use of AI in relation to consumers of financial services and to focus on AI governance and risk management methods that the financial industry could use to ensure the use of AI systems in ethical and reliable coordinates for consumers. Also, it is necessary a proper analyse from the perspective of protection of consumer rights of the Regulation on Artificial Intelligence (AI Act) which directly targets the use of AI systems in the financial industry, the pluses and minuses of this act and the aspects that should be improved, so as to grant consumers basic rights when they are subject to automated decisions or interact with an AI system in financial services. In consideration of these imperatives, the risks and liability are to be covered by the regulations on digital services, data protection, consumer protection to guarantee that natural

[8] The Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC („DMFSD").

[9] M. Calu, *The challenges of protecting consumer in the Distance Marketing Of Financial Services Directive*, *http://cks.univnt.ro/cks_2023.html*, May 19th 2023, p. 122.

[10] *https://lnkd.in/e9jJVXY7*.

[11] *https://www.reuters.com/investigates/section/binance-a-crypto-black-hole/*.

persons are properly informed and that they have the freedom to choose not to be the object of the creation of profiles or other practices that could affect their behaviour or exploit the vulnerabilities of a certain group of consumers.

4. Conclusions

Digitalisation facilitates and speeds up innovations creating an emerging global industry, and regulators recognize the need for international cooperation to address cross-border issues. However, the regulatory environment is still developing, and regulations vary widely across the world.

AI and ADM present significant opportunities such as improving consumer service, to cut costs, increasing competition and facilitating economic growth, among many others. Consumers expect that using ADM will be safe and this can be ensured through regulation. The recently passed AI Act will enable greater innovation, market competition and bring legal certainty, which will facilitate the adoption of AI by society.

The volume and dynamics of consumer protection laws, plus their tendency to change over time, almost precludes the possibility of codifying smart contracts so that they correspond ex-ante to the regulations in a permanent way. Moreover, the legislation on consumer protection within the EU means the establishment of rules and a multitude of obligations that are provided in a layered manner in several levels of jurisdictions and regulatory authorities. Added to this is the fact that traditional industries, which cannot use smart contracts and which cannot have the same access to data as Big Data, will oppose efforts to exempt smart contracts from the control of compliance with consumer protection provisions with which they currently must face. From the perspective of using smart contracts in consumer financial services, these contracts will need to be modifiable ex-post, and these changes will need to be easily implemented by the service provider's human-interacting customer service representatives. The test of time will show whether smart contracts can accommodate this type of change process and still be more efficient than traditional contracts.

However, the legislative changes necessary to adapt the consumer protection framework to the new reality of the market must be made, and these should be established as soon as possible as a key priority of the next European Commission. To fully exploit the opportunities these technologies present, EU consumer protection's regulation and regulatory systems must remain fit for purpose and updated.

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CIVIL LIABILITY FOR PUBLIC COMMUNICATION UNDER CURRENT ROMANIAN REGULATIONS

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Abstract

Freedom of the press does not exclude the obligation of journalists to cover the damages created by their materials, especially by exceeding the freedom of speech.

Nevertheless, holding someone liable for exercising a fundamental right is not always as simple as mere tort liability. Under Romanian regulations, the journalist will have to cover the damages only if his work can be qualified as an illicit act, or an illegal content.

Alongside an introduction, the paper will consist of three parts: 1. general provisions for the liability of the journalist under national provision, 2. special provisions regarding liability according to Romanian law, by reference to International law, namely, the European Convention on Human Rights and 3. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act - DSA).

This article aims to identify the particularities of journalist liability or of another person who makes a public communication, in order to remedy the deficiencies of the current regulation.

Keywords: *journalist liability, freedom of speech, public communication, freedom of expression, defamation.*

1. Introduction

Freedom of expression, starting with the first regulations from the time of the French Revolution, until now, has not had the nature of an absolute right, being constantly limited to protect the rights and legitimate interests of other people. For this reason, in most national and international regulations, freedom of expression knows limits both in terms of the message transmitted and in terms of the effects of the communication.

If the limits are exceeded, the material made public may harm other people. Unlike other categories of illegal acts, press crimes produce irreversible effects, which cannot be completely removed from society.

Under these conditions, the injured person cannot benefit from a return to the previous situation, but possibly from a compensation for the damage suffered, under the conditions of tortious civil liability.

The present work will be structured in three substantial parts, of which the first concerns the general conditions for attracting the responsibility of the journalist in the national legislation, and the second will relate to the limits of freedom of expression as derived from the European Convention on Human Rights, and the third will identify the journalist's liability criteria under the terms of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Regulation on digital services).

The first part involves the analysis of the provisions of art. 30 of the Romanian Constitution, together with the provisions of the Romanian Civil Code that regulate both the limits of public communication and the legal regime of civil liability.

The second part will involve the identification of the limits of freedom of expression according to the two normative acts that regulate fundamental rights, the criteria for classifying an act as illegal will be analysed starting from the content of art. 10 ECHR. Beyond the analysed doctrine, decisions will also be used of the Romanian courts and the ECtHR, relevant for this topic.

The third part assumes an increased degree of actuality, as the Regulation on digital services entered into force on 16th of February 2024. In this sense, the general conditions under which media platforms and, implicitly, journalists, are responsible for the content brought to the public's attention will be analysed.

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2. The general conditions for incurring the responsibility of the journalist in the national legislation

In national law, civil liability for criminal acts is regulated by art. 1349 para. 1 and 2 CC[1]: „(1) Every person has the duty to comply with the rules of conduct imposed by the law or local custom and not to harm, through his actions or inactions, the rights or legitimate interests of other people. (2) Whoever, having discernment, violates this duty is responsible for all the damages caused, being obliged to repair them in full". The previously rendered provision must be correlated with the provisions of art. 1357 para. 1 CC: „He who causes damage to another through an illegal act, committed with guilt, is obliged to repair it".

Corroborating these texts, we note that the author of an illegal act, by which damage was caused to another person, is obliged to compensate the person whose legitimate rights or interests were harmed. Since the Romanian legislator established subjective tort liability[2], the illegal act must be committed with guilt, including in the form of the slightest fault.

The classification as illegal of an act committed through public communication implies its reporting to the limits of freedom of expression as regulated in national law, respectively in international law. To the extent that they have been violated, simply bringing the message to the public's attention constitutes an illegal act in the sense contemplated by art. 1357 CC.

At the national level, the relevant limits of freedom of expression are found in art. 30 para. 6 and 7 of the Constitution: „(6) Freedom of expression cannot prejudice the dignity, honor, private life of the person, nor the right to one's own image. (7) Defamation of the country and the nation, incitement to war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene manifestations contrary to good morals, are prohibited by law."

The previously rendered provisions are relevant in considering the corroboration with art. 75 para. 1 and 2 CC, which stipulates: „(1) It does not constitute a violation of the rights provided for in this section the infringements that are allowed by law or by international conventions and pacts regarding human rights to which Romania is a party. (2) Exercising constitutional rights and freedoms in good faith and in compliance with international pacts and conventions to which Romania is a party does not constitute a violation of the rights provided for in this section". This last provision constitutes a criterion for analysing the proportionality of the limitation of the fundamental right[3].

Analysing the limits provided by art. 30 para. 6 of the Constitution, we note that any public communication is prohibited to the extent that it damages: a) a person's dignity, b) a person's honor, c) their private life and d) the right to their own image. The four limitations strictly target the persons injured by the publicly communicated material and refer to the effects produced on them. Concretely, regardless of the content of the message, the deed will have an illegal nature only in the hypothesis where a concrete injury has occurred to one of the four values protected by the Constitution.[4]

In the specialised literature[5], these were called limitations *in personam*, as they relate to the injured person. Correlatively, the other limitations have an *in rem* nature, that is, they depend only on the content of the transmitted message, their effects not being relevant to the illegal nature of the deed.

Reconciling respect for private life with the right to information is sometimes difficult to achieve, but information becomes legitimate even if it affects private life, if it is useful to the general interest, provided that it does not harm human dignity.[6] It was thus considered that information is always illegal when it is not justified by a general interest.[7]

We note that civil liability acts as a sanction directed against the author of the illegal act[8], being, at the same time, a means of repairing the damage caused to another person.

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[1] Law no. 287/2009, published in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

[2] L. Pop, I.F. Popa, S.I. Vidu, *Civil law course – Obligations*, Universul Juridic Publishing House, Bucharest, 2015, p. 327.

[3] S.Al. Vernea, *Privacy and the press. A practical approach to art.74 of the Romanian Civil Code*, Fiat Iustitia, no. 1/2021, p. 188.

[4] T. Toader, M. Safta, *The Constitution of Romania, with related legislation and jurisprudence*, Hamangiu Publishing House, Bucharest, 2015, p. 148-149.

[5] S.Al. Vernea, *Communication Law*, Hamangiu Publishing House, Bucharest, 2021, p. 39.

[6] C. Jugastru, *Classic and modern in the field of private life*, in Acta Universitaris Lucian Blaga no. 1-2/2003, p. 61.

[7] M. Nicolae, V. Bîcu, G.Al. Ilie, R. Rizoiu, *Civil law. The persons*, Universul Juridic Publishing House, 2016, p. 58.

[8] G. Boroi, L. Stănciulescu, *Institutions of civil law*, Hamangiu Publishing House, Bucharest, 2012, p. 238.

If the *in rem* or *in personam* limits of freedom of expression are violated, the provisions of art. 30 para. 8 of the Constitution will become applicable, according to which: „Civil liability for the information or for the creation brought to public knowledge rests with the publisher or creator, the author, the organiser of the artistic manifestation, the owner of the means of multiplication, of the radio or television station, under the law. Press offenses are established by law".

In judicial practice, it was appreciated that the statement of a journalist of the type „policeman with the IQ of a boar" has a character of mockery, with the sole purpose of offending, without transmitting any information of interest to the interlocutor, thus exceeding the admissible limits of the exercise of the law to free expression, enshrined in art. 10 ECHR. Thus, even within the limits allowed by the literary genre used by the journalist, the use of this appellation damages the plaintiff's right to image, representing an interference in the right to private life, incompatible with freedom of expression and journalistic ethics.[9]

When assessing the actual moral damage caused to the plaintiff, the court took into account the negative consequences and implications that the defamatory materials had on the plaintiff's professional and family level, the mental discomfort experienced by the plaintiff, being indisputable even if he was considered psychologically fit for the exercise the position held.

Also, when assessing the proportionality of the pecuniary sanction, account was taken of the position held by the plaintiff, as well as the quality of the defendants as journalists, opinion makers and the means by which the derogatory statements were propagated to the public. It was considered that the illegal act was committed through the written media, in the online environment where information spreads much faster, being easily accessed by the public through search engines.

In another case[10], it was ruled that the simple finding of the illegal nature of the way in which the defendants exercised their right to free expression, to the extent that it only aims to repair the damage caused to the reputation by disseminating defamatory information unsupported by a relevant factual basis, cannot be likely to contribute to preventing the mass media from fulfilling its task of information and control, but possibly only to draw attention to the importance of respecting ethical rules in the exercise of the essential role that the press has in a democratic society.

In judicial practice[11], it was held that, in order to be a passive procedural subject within the legal relationship related to public communication, it is necessary from a legal point of view for the party to have achieved or to have contributed, in any way, to the achievement of the facts of which they are accused by the plaintiffs, respectively the facts consisting in the „making and publishing", on the website, of photos, video recordings and comments in which the plaintiffs are presented in private activities - more precisely the 20 articles incriminated by them.

Also, in order to have passive procedural quality against the second claim of the plaintiffs regarding the obligation to prohibit the publication, „on the website of the magazine or on other partner sites" of any photos or video recordings in which the plaintiffs are presented in the framework of private activities, the defendant should be able to make or determine such publications.

With regard to the claim of the plaintiffs regarding the obligation to prohibit the remittance for broadcasting in some TV shows of these materials, the defendant should also be able to carry out or determine these operations, finding that it cannot be forced to fulfil the claims plaintiffs, because it is not related to the editorial content of the website.

We note that the Romanian legislator, at the constitutional level, stipulated rules regarding liability incurred by public communication carried out outside the limits allowed by law. The order of liability is not accidental[12], since the illegal act is not strictly limited to the drafting of material with an illegal content, but to its dissemination to the receiving public. Thus, in order, the publisher of the publication or the creator of the show or broadcast will be held liable for the first time. In concrete terms, the constitutional legislator considered that the editor and the producer have the vocation to control the content of the material and to disseminate it, respectively bring it to the public's attention only to the extent that it corresponds to the editorial policies of the publication. Under

[9] Arad Court, 1st civ. s., civ. dec. no. 33/15.02.2024 of the unpublished.

[10] Bucharest Court of Sector 5, 2nd civ. s., civ. dec. no. 6769/26.09.2023, unpublished.

[11] Bucharest Court, 4th civ. s., civ. dec. no. 77/21.01.2016, unpublished.

[12] I. Muraru, E.S. Tănăsescu (coord.), *The Constitution of Romania, Commentary on articles*, C.H. Beck Publishing House, Bucharest, 2008, p. 293.

these conditions, once the editorial control has been carried out, and the material has received the necessary approval for publication, the responsibility will fall, first of all, on the publisher, respectively the creator.

In the event that they do not exist, for example in the case of publishing materials on a blog, or on a personal page accessible on social networks, the responsibility can only fall to the author. We appreciate that a possible control of a technical nature, carried out by the administrator of the online platform on the content of the posted material (for example the automatic search for offensive words, or inciting hatred, discrimination, etc.) is not equivalent to an editorial control, but to a measure of filtering of illegal content, which does not imply the existence of an agreement on the part of the online platform to the hosted material.

As a rule, the author is determined or determinable starting from the authentication criteria on the respective platform.

In the situation where the author cannot be identified, since the material was posted by an unauthenticated person or who used an obviously unreal identity, according to the Constitution, the responsibility will fall on the event organiser. In our opinion, the liability has, in this situation, the nature of a guarantee, based on the fault of the organiser who did not allow the traceability of the author of the publicly communicated work. In essence, it is a responsibility for one's own act, since the public communication was made on the occasion of a social event (scientific, cultural, etc.), and the organiser of the event is responsible for his act of bringing the anonymous work to the public's attention.

Finally, for the hypothesis in which there is no organiser of the event, the responsibility will fall, for identity of reason, on the owner of the means of multiplication, of the radio or television station. In our opinion, an interesting problem arises in the case of online publications, since they do not presuppose the existence of a means of multiplication or a radio or television station. For the current understanding of the constitutional regulation, we consider it necessary to report it at the time of drafting. In 1991, when the Romanian Constitution was adopted, the only mass media were represented by the written press, radio and television. Under these conditions, the constituent legislator sought to ensure the existence of an entity that would bear subsidiary responsibility for public communication, in whatever form it was carried out, especially through the mass media. Currently, with the development of online media, we appreciate that the situation of the owner of the means of multiplication is taken over by the online platform that allows the dissemination of the communication made by the author to any interested person.

Based on this finding, we are of the opinion that in the absence of any possibility of identifying the author of a post, the responsibility for its content, in a subsidiary way, belongs to the person who manages the online platform that hosts the post.

3. The journalist's liability under Romanian law by reference to the ECHR

As a preliminary note, we note that freedom of expression enjoys a substantial regulation in art. 10 ECHR: „(1) Every person has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and regardless of borders. This article does not prevent states from subjecting broadcasting, cinematography or television companies to an authorization regime. (2) The exercise of these freedoms, which entail duties and responsibilities, may be subject to formalities, conditions, restrictions or sanctions provided for by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public safety, the defence of order and the prevention crimes, the protection of health or morals, the protection of the reputation or the rights of others, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary".

Starting from the previously reproduced regulation, we note that the limitations of the fundamental right are allowed only under the conditions of para. 2, respectively in the case of their provision in internal normative acts, only to the extent that they are necessary in a democratic society for the expressly listed objectives, and insofar as they are proportionate to the intended purpose. We note that, in addition to the national regulation, art. 10 ECHR also recognizes a right to receive information, equivalent to art. 31 of the Romanian Constitution[13]. In certain areas of regulation, the right of access to information assumes a distinct regime from freedom of

[13] S.Al. Vernea, *The legal nature of the right to information under Romanian regulations*, in the collective volume Challenges of the Knowledge Society 2021, „Nicolae Titulescu" University, Bucharest, 2021, p. 690.

expression[14], having a derogatory regime from the general rules common to these rights. In the present situation, we will limit our analysis strictly to the freedom of expression itself.

The guarantee that art. 10 ECHR offers it specifically to journalists with regard to reporting on issues of general interest, it is subject to the condition that they act in good faith, based on accurate facts, and provide reliable and accurate information, respecting journalistic ethics.[15] Another criterion evaluated in the case consists in the extent of the dissemination of information which can also be important, depending on the type of newspaper in question, with national or local circulation, important or not important.[16]

At the same time, the court will take into account the quality of the person targeted by the incriminated articles, since the status of the person who is the target of the slanderous statements is a criterion of the examination carried out by the Court in cases related to slander. In this sense, the Court considered that the „limits of admissible criticism" are much more extended in the case of persons with public status than in the case of simple persons under private law.[17]

The Court ruled that it is necessary to distinguish between persons under private law and persons acting in a public context, as political figures or public figures. Thus, while a person under private law unknown to the public can claim special protection of his right to private life, this is not valid for public persons as well.[18]

ECtHR established with principle value that art. 10 para. 2 ECHR implies duties and responsibilities, applicable equally to journalists, even when it comes to matters of significant general interest. These duties and responsibilities can be of particular importance if there is a risk of harm to a person's reputation.[19]

Moreover, in the case of *Axel Springer AG v. Germany*[20], ECtHR established to what extent a balance can be maintained between freedom of expression (art. 10 ECHR), its limits and respect for the right to a good reputation (art. 8 ECHR), in apparent conflict.

The exercise of freedom of expression includes obligations and responsibilities, the extent of which depends on the situation and the technical procedure used, and that the guarantee offered by art. 10 to journalists is subject to the condition that those concerned act in good faith, so as to provide accurate and worthy information trustworthy with respect for journalistic ethics.

Under these conditions, the role of the press as an opinion maker and the particular impact of the information and opinions published implies the exercise of freedom of expression under certain deontological conditions that guarantee the natural exercise of the role of the press in a democratic society.[21]

If, by virtue of its role, the press has the duty to alert the public when it is informed of alleged embezzlement by local elected officials and public officials, the fact of directly pointing to specific persons, indicating their names and functions, implies for the plaintiffs the obligation to provide a sufficient factual basis.

In its practice, the Court decided that, in the absence of good faith and factual basis, and although the disputed article was part of a wider and very current debate for society - the corruption of officials - the claimants' claims are not the expression of a „dose of exaggeration" or „provocation" which is allowed in the exercise of journalistic freedom.[22]

Specialising, the pamphlet was confirmed as a journalistic style recognized and protected by the freedom of expression included in art. 10 ECHR. It is also revealing in this sense that the Council of the European Union, in the meeting of May 12, 2014, adopted, *inter alia*, the following guidelines under the title „EU Human Rights Guidelines on Freedom of Expression Online and Offline": «The expression can take any form including the language spoken, written and sign language, as well as non-verbal expressions such as images and art objects, all of which are protected. The means of expression may include books, magazines, pamphlets (...).» The Court has emphasised on several occasions that satire is a form of artistic expression and social commentary which, by

[14] See, in this sense, S.Al. Vernea, *The Romanian legal regime of access to information in environmental matters*, Fiat Iustitia, no. 1/2022, p. 116.

[15] Case *Bédat v. Switzerland*, app. no. 56925/08, judgment from 29.03.2016, para. 60.

[16] Case *Karhuvaara et Iltalehti v. Finland*, app. no. 53678/00, judgment from 16.11.2004, para. 47.

[17] Case *Palomo Sánchez and others v. Spain (GC)*, app. no. 28955/06, 28957/06, 28959/06 and 28964/06, judgment from 12.09.2011, para. 71.

[18] Case *Minelli v. Switzerland* (dec.), app. no. 14991/02, judgment from 14.06.2005.

[19] Case *Tănăsoaica v. Romania*, app. no. 3490/03, judgment from 19.06.2012, also Case *Tammer v. Estonia*, app. no. 41205/98, judgment from 06.02.2001.

[20] Case *Axel Springer AG v. Germany*, app. no. 39954/08, judgment from 07.02.2012.

[21] R. Chiriță, *European Convention on Human Rights. Commentaries and Explanations*, 2nd ed., CH Beck Publishing House, Bucharest, 2008, p. 562.

[22] Case *Stângu and Scutelnicu v. Romania*, app. no. 53899/00, judgment from 31.01.2006.

exaggerating and distorting the reality that characterises it, aims naturally to provoke and agitate it is for this reason that any interference with the right of an artist or any other person to express himself in this way needs to be scrutinised very carefully.

ECtHR showed that art. 10 includes the artistic freedom to participate in the public exchange of cultural, political and social information and ideas of all kinds. Consequently, those who create, interpret, disseminate or exhibit a work of art contribute to the exchange of ideas and opinions indispensable to a democratic society.[23]

In order to establish whether the exercise of the right to free expression of the defendants, journalists, constituted an interference with the right to private life of the plaintiff, respectively whether their sanctioning is necessary in a democratic society and pursues a legitimate purpose, in accordance with the ECHR principles revealed in the Case *Lingens v. Austria*, it was held that it is necessary to make a careful distinction between facts, on the one hand, and value judgments, on the other. If the material aspect of the former can be proven, those in the second category do not lend themselves to demonstrating their accuracy.[24] The obligation of proof is therefore impossible for value judgments and violates the very freedom of opinion, a fundamental element of the right guaranteed by art. 10.[25]

Although freedom of expression is recognized internationally, both in terms of content and limits, we note that in the ECHR there are no provisions regarding liability for exceeding its limits.

Consequently, we will take into account that any overstepping of the limits of freedom of expression, as recognized by the Convention, is likely to attract the liability of the author of the public communication, however, under the conditions of national law, respectively starting from art. 30 para. (8) from the Constitution and from art. 1357 para. (1) CC.

An interesting problem arises when there is a conflict between national (even constitutional) norms and international norms regarding the same right. In this regard, according to art. 20 para. (2) of the Constitution, „If there are inconsistencies between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations have priority, except in the case in which the Constitution or internal laws contain more favourable provisions". In this hypothesis, the limits of freedom of expression will be determined starting from the most favourable incident treatment for the right holder. Correlatively, his liability will be incurred only if by exercising the freedom of expression both the limits regulated at the internal level and those resulting from the Convention have been violated.

4. The responsibility of the journalist under the terms of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 (DSA)

With the entry into force on February 16, 2024 of the DSA Regulation, the liability of online platforms has entered a new regulatory stage.

Beyond the previous regulations in the e-commerce directive, there are currently directly applicable rules in national law regarding the liability of any online platform for the posting of illegal content.

With priority, we note that the regulation does not consider the responsibility of the journalist, but the responsibility of the online platform, as it expressly results from the content of art. 3 letter g) DSA, but this appears as relevant in public communication as it represents the equivalent of „multiplication means" referred to in art. 30 para. (8) of the Romanian Constitution, previously analysed.

As a rule, starting from the provisions of art. 6 DSA, we note that the provider of the information service, in this case the person who is responsible for the administration of the platform, is responsible for the posting of „illegal content". The definition of the notion can be found in art. 3 letter h) DSA, as „any information which, in itself or by reference to an activity, including the sale of products or the provision of services, does not comply with the law of the Union or the law of any state member that complies with Union law, regardless of the object or exact nature of that right".

We note that illegal content refers to any information that does not comply with the law of the Union or of any member state, regardless of the object or nature of that law. Under these conditions, according to our

[23] Case *Müller and Others v. Switzerland*, app. no. 10737/84, judgment from 24.05.1988, para. 27 *et seq.*; Case *Lindon, Otchakovsky-Laurens and July v. France (GC)*, judgment from 22.10.2007, para. 47.

[24] Case *McVicar v. the United Kingdom*, app. no. 46311/99, judgment from 07.05.2002, para. 83; Case *Lingens v. Austria*, app. no. 9815/82, judgment from 08.07.1986, para. 46.

[25] Case *Morice v. France (GC)*, app. no. 29369/10, judgment from 23.04.2015, para. 126; Case *Dalban v. Romania (GC)*, app. no. 28114/95, judgment from 09.09.1999, para. 49; Case *Oberschlick v. Austria (no. 1)*, app. no. 11662/85, judgment from 23.05.1991, para. 63.

assessment, both what exceeds the limits provided by art. 30 para. (6) and (7) of the Romanian Constitution and art. 10 para. 2 ECHR, has the nature of illegal content.

The regulation does not expressly stipulate the obligation of providers to compensate the injured persons, however, it contains in art. 6 a clause of exemption from liability, which leads to the conclusion that every posting of illegal content attracts the responsibility of the provider, with the expressly mentioned exceptions. Art. 6 para. 1 DSA stipulates: „If an information society service is provided that consists in storing information provided by a recipient of the service, the service provider is not responsible for the information stored at the request of a recipient of the service , provided that the provider: (a) has no actual knowledge of the illegal activity or illegal content, and with respect to actions for damages, has no knowledge of facts or circumstances from which the illegality of the activity or content results; or (b) upon becoming aware of such matters, act promptly to remove the illegal content or to block access to it."

In such a situation, the obligation to compensate rests with the service provider, less in the situation where he does not know the content of the posted information, and, from the moment he became aware of it, acted promptly to eliminate or restrict access to the material qualified as „content illegal".

At first glance, this provision presents a slight contradiction with the constitutional provisions, but, in reality, we consider that the European legislator has validated our interpretation in the sense of attracting the subsidiary liability of the administrator of the online platform on which materials with illegal content are posted, as a way of updating of the provisions of art. 30 para. (8) of the Constitution.

5. Conclusions

Since freedom of expression has never been an absolute right, it is natural that its limits should be strengthened by establishing sanctions for holders who abuse their right. Even so, the sanctions must present a degree of rigor specific to legal liability, and their effects must be predictable for society.

Essentially, we consider that the current national regulation is mostly reliable, but it has a high number of shortcomings regarding online media, for which there is no clear legal framework.

With the entry into force of the DSA, a new framework was established for the liability of online service providers, including news platforms or social media platforms, which requires the adjustment of the current tortious civil liability mechanisms so that they can respond to the new challenges arising from online public communication.

In these conditions, given the unprecedented technological evolution and the way it has affected the mass media, we appreciate that the adoption of a law regarding the legal regime of public communications carried out in the online space appears to be necessary, while the DSA has an extreme object of limited regulation.

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MARKETS IN CRYPTO-ASSETS AND CAPITAL MARKET

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Abstract

Crypto-assets are defined as digital representations of value or of rights, applications of distributed ledger technology (DLT), including blockchain technology. DLT means an information repository that keeps records of transactions and that repository is shared across, and synchronised between, a set of DLT network nodes.

Representations of value regarding crypto asset include a value attributed to a crypto-asset by the parties concerned or by market participants. That means the value is based on the interest of the purchaser of the crypto-asset only.

Digital assets that cannot be transferred to other holders do not fall within the definition of crypto-assets. Therefore, digital assets that are technically impossible to transfer directly to other holders should be excluded from the scope of the European Regulation [Regulation (EU) 2023/1114].

Some crypto-assets qualify as financial instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council[1] (MiFID II) and fall within the scope of existing Union legislative acts on financial services. Therefore, a set of rules already applies to issuers of such crypto-assets and to firms conducting activities related to such crypto-assets. But other crypto-assets fall outside of the scope of Union legislative acts on financial services. European legislator chooses to regulate crypto assets that not fall within the regulation of financial instruments outside of this regulation. The new regulation [Regulation (EU) 2023/1114][2] intended to legislate in the field of crypto-assets, not interfering with financial instruments.

Somehow similar to financial instruments market architecture the new regulation defines crypto assets types (e-money tokens, 'asset-referenced tokens' and third type outside the two defined types), admission to trading of crypto-assets and offer to the public of crypto assets, crypto-asset services and application for authorization as a crypto-asset service provider or operation of a trading platform for crypto-assets, prevention and prohibition of market abuse involving crypto-assets.

Similar to capital market domain, Member States shall designate the competent authorities responsible for carrying out the functions and duties provided for in the regulation on crypto assets market. Member States shall notify those competent authorities to EBA (European Banking Authority) and ESMA (European Securities and Markets Authority).

Keywords: *crypto-assets, distributed ledger technology (DLT), blockchain technology, crypto-assets services, trading platform for crypto-assets.*

1. Introduction

Markets in crypto-assets based on DLT, including blockchain technology, are global and require a special and harmonised regulation framework. Markets in crypto-assets regulation is therefore necessary at Union level in order to provide specific rules for crypto-assets and related services and activities.

The EU legislator declares its attachment to innovation in the financial field and supports for new technologies, including the usage of DLT. It is expected that many applications of blockchain technology will continue to create new types of business activity that, together with the crypto-asset sector itself, will lead to economic growth and prosperity for Union citizens.

Still, the absence of an overall European framework for markets in crypto-assets is likely to lead to a lack of users' confidence in these assets, which could slow down the development of such a market. Furthermore, companies using crypto-assets would have no reasonable certainty on how their assets would be treated in the other Member States, which would demoralise their energies to digital innovation. The lack of an overall

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[1] Directive 2014/65/EU of the European Parliament and of the Council of 15.05.2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173/12.06.2014, p. 349).

[2] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31.05.2023 on markets in crypto-assets (MiCA).

European framework for markets in crypto-assets could also outcome in regulatory fragmentation, which would distort competition in the internal market, make it more difficult for crypto-asset service providers to unify their activities on a cross-border basis[3].

This is the framework in which the EU legislator decided a harmonised regulation of crypto-assets through an European Regulation.

2. Paper content

2.1. Crypto-assets at a glance

Crypto-assets refer to a large range of diverse assets whose common feature is that they are a digital representation of value or of a right that is able to be transferred and stored electronically[4]. But there are other digital assets already in circulation. In contrast with those assets, crypto-assets rely on DLT to be transferred and stored. In addition, crypto assets are not backed by a central bank or any other public authority. Summarising the crypto assets features, we can stress what is important as follows: a decentralised ledger and protocols (consensus mechanism) that allow to execute different types of transactions.

2.2. Crypto assets taxonomy

One main approach is to classify crypto-assets in accordance with their declared main purpose. In this line of thought, three different groups are distinguished.

The first group comprises those assets whose primary objective is to serve as a medium of payment or exchange. These are usually named „virtual currencies"[5].

The second group covers instruments designed for raising capital from investors. Specific procedures are organised to this end, known as Initial Coin Offerings. Investors receive tokens justifying their legal claim to participate in any potential increase in the future value of, or returns on, businesses or specific projects. These tokens may be structured to confer rights equivalent to those of other financial instruments. As they largely overlap with capital market securities, these sectorial regulations apply.

The third group comprises utility tokens, which act as value coupons that can be exchanged for future services, products or benefits marketed through the issuer's own platform. Such tokens will be subject to regulations on consumer protection, online trading, data protection and business operations, but not financial regulations.

Another classification criteria of the crypto-assets system have to do with the primary nature of each token. Tokens are understood to be a specific unit of digital value, as assembled by an issuing organisation. In some cases, these are named native tokens since they are created with no underlying asset. They are further linked to a specific ledger. This is the case of bitcoin and its blockchain network. The value of these tokens leans on their users' expectations as to how they may be used in future transactions, rather than a potential cash flow or their issuer's performance.

In other cases, these tokens are connected to actual real-world assets, real estate for example. This situation allows real estate assets to be broken down into fractions which, in turn, can bear ownership rights and ultimately render such properties more liquid.

An alternative taxonomy distinguishes between traditional crypto-assets and „stablecoins". In an attempt to stabilise crypto assets value, they are usually backed by other real or virtual assets as a means of collateral. For example, some stablecoins are fixed to legal tender, while others are anchored to commodities, bonds or even other digital assets.

MiCA Regulation defines crypto assets types: *e-money tokens*, *asset-referenced tokens* and third type outside the two defined types[6].

[3] Regulation (EU) 2023/1114 (MiCA), Preamble (5).
[4] Regulation (EU) 2023/1114 (MiCA), art. 1 (5).
[5] Bitcoin is the most notable example.
[6] Regulation (EU) 2023/1114 (MiCA), art. 3 para.1 pt. 5, 6.

Asset-referenced token means a type of crypto-asset (that is not an electronic money token) that proclaims to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies[7].

Electronic money token or „e-money token" means a type of crypto-asset that proclaims to maintain a stable value by referencing the value of one official currency.

2.3. Capital market pre-eminence

Some crypto-assets qualify as financial instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council[8] (MiFID II) and fall within the scope of existing Union legislative acts on financial services. Therefore, a set of rules already applies to issuers of such crypto-assets and to firms conducting activities related to such crypto-assets. But other crypto-assets fall outside of the scope of Union legislative acts on financial services.

The EU legislator chooses to regulate crypto assets that do not fall within the regulation of financial instruments but outside of this regulation. The new Regulation[9] intended to regulate in the field of crypto-assets, not interfering with financial instruments. This means that the field of the capital market keeps its regulatory limits intact. What falls between these escapes MiCA Regulation. But the regulation of the capital market somewhat remains a blueprint for crypto assets regulation. To clarify: MiCA spends articles to define crypto assets, to implement crypto asset services and crypto asset services providers. The regulation obliges providers to obtain the necessary authorisation, as well as also sets out various prudential, organisational and transparency requirements, as well as others relating to the safekeeping of clients' funds, conflicts of interest and outsourcing, depending on the service provider's characteristics. Market abuse, competent authorities and penalties are also present under the MiCA regime.

The legislator of the European Union considered that MiFID on the capital market was a success that should be replicated on crypto assets market in MiCA Regulation.

2.4. Crypto asset services and crypto asset services providers

Crypto-asset services include any of the services and activities relating to any crypto-asset as follows[10].

Providing custody and administration of crypto-assets on behalf of clients means the safekeeping, on behalf of clients, of crypto-assets or of the means of access to such crypto-assets (in the form of private cryptographic keys).

Operation of a trading platform for crypto-assets means the administration of a multilateral systems, which bring together of multiple third-party purchasing and selling interests in crypto-assets, in the system and in accordance with its rules, in a way that results in a contract, by exchanging crypto-assets either for funds or for other crypto-assets. The similarities with the regulated market of financial instruments are not unintended. That market represents the pattern followed.

Exchange of crypto-assets for funds or for other crypto-assets. Exchange of crypto-assets for funds involves the concluding of purchase or sale contracts regarding crypto-assets with clients for funds by using their capital and exchange of crypto-assets for other crypto-assets means the conclusion of purchase or sale contracts concerning crypto-assets with clients for other crypto-assets.

Execution of orders for crypto-assets on behalf of clients means the conclusion of agreements, on behalf of clients, to purchase or sell one or more crypto-assets or the subscription on behalf of clients for one or more crypto- assets.

Placing crypto-assets means the marketing, on behalf of or for the account of the offeror of crypto-assets to purchasers.

Reception and transmission of orders for crypto-assets on behalf of clients means the reception from a person of an order to purchase or sell one or more crypto-assets or to subscribe for one or more crypto-assets and the transmission of that order to a third party for execution.

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[7] Regulation (EU) 2023/1114 (MiCA), art. 1 (6).

[8] Directive 2014/65/EU of the European Parliament and of the Council of 15.05.2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173/12.06.2014, p. 349).

[9] Regulation (EU) 2023/1114 (MiCA).

[10] Regulation (EU) 2023/1114 (MiCA), art. 3 para. 1 pt. 16.

Providing advice on crypto-assets means offering recommendations to a client, either at the client's request or on the initiative of the crypto-asset service provider providing the advice, in respect of one or more transactions relating to crypto-assets, or the use of crypto-asset services.

Providing portfolio management on crypto-assets means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more crypto-assets.

Providing transfer services for crypto-assets on behalf of clients means providing services of transfer, on behalf of a natural or legal person, of crypto-assets from one distributed ledger address or account to another.

Crypto-asset service provider means an undertaking whose business is the delivery of one or more crypto-asset services to clients on a professional basis (and that is allowed to provide crypto-asset services in accordance with MiCA Regulation). A person shall not provide crypto-asset services, within the Union, unless that person is a legal person or other undertaking that has been authorised as crypto-asset service provider after submitting their application for an authorisation as a crypto-asset service provider to the competent authority of their home Member State[11]. Still, some exception, following a notification are granted to credit institution , central securities depository (for custody and administration of crypto-assets on behalf of clients), investment firm (for crypto-asset services in the Union equivalent to the investment services and activities for which it is specifically authorised), market operator, electronic money institution, UCITS management company or an alternative investment fund manager (for crypto-asset services equivalent to the management of portfolios of investment and non-core services for which it is authorised under Directive 2009/65/EC or Directive 2011/61/EU).

Crypto-asset service providers are subject to certain organisational requirements. The members of the management body of crypto-asset service providers should not have been convicted of any offence in the field of money laundering or terrorist financing or of any other offence that would affect their good repute. The shareholders or members to should be of sufficiently good repute and should, in particular, not have been convicted of any offence in the field of money laundering or terrorist[12]

Crypto-asset service providers should employ management and staff with adequate knowledge and expertise and should take all reasonable steps to perform their functions[13]. They should have sound internal control and risk assessment mechanisms as well as adequate systems and procedures to ensure the integrity and confidentiality of the information received. Crypto-asset service providers should have appropriate arrangements to keep records of all transactions, orders and services related to the crypto-asset services that they provide. They should also have systems in place to detect potential market abuse committed by clients[14].

2.5. Competent authority

For the purposes of ensuring a clear delineation between crypto-assets covered by this regulation and financial instruments, ESMA should issue guidelines on the criteria and conditions for the qualification of crypto-assets as financial instruments. In order to promote a common approach towards the classification of crypto-assets, the European Supervisory Authorities (EBA, ESMA and EIOPA) should promote discussions on such classification.

Besides known European authorities, EBA and ESMA, Member States shall designate the competent authorities responsible for carrying out the functions and duties provided for in MiCA Regulation. In fact, Member States shall notify those competent authorities to EBA and ESMA.

Competent authority regarding crypto assets means one or more authorities designated by each Member State concerning offerors, persons seeking admission to trading of crypto-assets, issuers of crypto-asset and service providers or designated by each Member State concerning issuers of e-money tokens[15]. Such authorities shall have the extensive powers laid down by European regulation[16].

[11] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31.05.2023 (MiCA), art. 62.

[12] Directive (EU) 2015/849 of the European Parliament and of the Council of 20.05.2015 on the prevention of the use of the financial system for the purposes 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 (OJ L 141/05.06.2015, p. 73).

[13] Regulation (EU) 2023/1114 (MiCA), art. 68.

[14] Title VI, Regulation (EU) 2023/1114 (MiCA).

[15] Directive 2009/110/EC.

[16] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31.05.2023 (MiCA), art. 94.

3. Conclusions

At the European level, MiCA Regulation is a regulatory initiative that offers a set of uniform rules and a supervisory architecture to provide legal certainty and appropriate legal protection for crypto-assets users.

As a declared principle, any European legislative act adopted in the field of crypto-assets should be „specific and future-proof", be able to keep pace with innovation and technological developments and be founded on an incentive-based approach. Therefore, the terms „crypto-assets" and „distributed ledger technology" should be defined as widely as possible to capture all types of crypto-assets that currently fall outside the scope of Union legislative acts on financial services.

MiCA Regulation has much in common with capital market architecture. EU choose to treat crypto-assets separately from financial instruments but kept their infrastructure architecture pattern. MiCA turns out to be a pendant for MiFID. MiCA covers multiple types of crypto-assets, service for crypto assets, regulated market for crypto assets and crypto asset service providers rules. The regulation obliges providers to obtain the necessary authorisation, as well as also sets out various prudential, organisational and transparency requirements, as well as others relating to the safekeeping of clients' funds, conflicts of interest and outsourcing, depending on the service provider's characteristics.

Thereby facilitating the orderly development of this crypto system, EU is in the vanguard of crypto world.

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SPECIFICITY AND EFFECTIVENESS OF REPRESENTATION BY LAWYERS OF THIRD PARTIES

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Abstract

This study seeks to deepen the institution of the representation by lawyer of third parties, combining in this sense the provisions of the current Code of Civil Procedure in the matter of representation as well as the provisions of Law no. 51/1995, the State of the lawyer profession as well as the Code of Ethics regarding the actual activity of the lawyer provided under the legal assistance contract in the case of representing a third party intervening in a legal proceeding. In order to carry out this study, we will analyse the legislation in force, treaties, courses, commentary codes such as monographs published by established authors in the field of civil procedural law, but also decisions pronounced by national and European courts with relevance and impact in the analysis of the institutions addressed.

Keywords: *representation, lawyer, intervening third party, assistance contract, judicial procedure.*

1. Introduction

The study addresses an important and current topic, both under the legislative dimension and from the perspective of the practical situations encountered, essentially aiming at an objective presentation of the issue of conventional representation by a lawyer of third parties involved. In the current civil procedural dimension, third parties are either legal subjects who have nothing to do with the civil process, being strangers to it, or persons who intervene voluntarily or are forcibly introduced into a process that has already started. In order for the third parties who intervene in the process to become parties, certain conditions must be met, namely: the existence of an ongoing process (the third parties intervene or are forcibly introduced through incidental requests made by those who are already parties to the process or are introduced ex officio by court or at its request, in the cases provided for by art. 78 CPC), the existence of a connection with the main claim is also necessary, which requires that they be tried together, but last but not least, the existence of an interest in being tried in a process initiated by other people.

2. Third party participation and legal representation

Depending on the method of participation, third parties intervene voluntarily or at the request of the parties in the process or because of the court's order. The forms of intervention are classified into voluntary intervention, which can be main (when the intervener formulates his own claims against the parties in the process) or accessory (when the intervener does not formulate his own claims, but only intervenes to support the defense of one of the parties to the process) or forced intervention which, in turn, has several forms: summoning another person to court (art. 68-71 CPC), summoning in guarantee (art. 72-74 CPC), showing the right holder (art. 75-77 CPC) and the *ex officio* introduction of other persons into the case (art. 78-79 CPC)[1].

The institution of procedural representation can be defined as that form of civil representation that highlights the circumstance in which a person, as a representative, empowered in this sense - conventionally or by law, concludes or completes procedural acts in the name and in the interest part of a process[2].

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[1] I. Deleanu, *Noul Cod de procedură civilă. Comentarii pe articole, vol. I (art. 1-612),* Universul Juridic Publishing House, Bucharest, 2013, pp. 120 *et seq*.; I. Leș, D. Ghiță (coord.), *Tratat de drept procesual civil, vol. I*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2020, pp. 101-103; G. Boroi, M. Stancu, *Drept procesual civil*, 6th ed., Hamangiu Publishing House, Bucharest, 2023, pp. 136-138; M. Dinu, *Drept procesual civil,* Hamangiu Publishing House, Bucharest, 2020, p. 93.

[2] M. Tăbârcă, *Drept procesual civil. Vol. I – Teoria general*, 2nd ed., Solomon Publishing House, Bucharest, 2017, p. 457. We recommend consulting the article, V. Stoica, *Despre puterea de reprezentare*, in Revista de Drept Privat no. 2/2019; the article can be accessed in its entirety at *https://sintact.ro/#/publication/151014688?keyword=reprezentarea&cm=SREST*.

The procedural acts performed by the representative produce effects vis-à-vis the party they represent, within the limits of the power of attorney granted[3].

The parties may appear in court through an elected representative, in accordance with the law, unless the law requires their personal presence before the court. Thus, by way of example, the law requires that the procedural documents be completed personally by the parties in the divorce procedure, according to art. 921 para. (1) CPC, before the substantive courts, the parties will appear in person, outside only if one of the spouses is serving a custodial sentence, is prevented by a serious illness, benefits from special guardianship[4], resides abroad or is in another such situation, which prevents him from presenting himself. In such cases, the person in question could appear to you through a lawyer, trustee or through a guardian or curator[5].

Legal representation intervenes in the case of natural persons lacking procedural capacity, in the case of legal entities as well as in other cases expressly provided by law. The legal representatives of natural persons can be the parents (one parent being sufficient for a valid representation of the minor party) and the guardian. Although art. 80 para. (2) CPC refers exclusively to natural persons; legal representation also intervenes in the case of legal persons. Thus, according to art. 209 CC, the legal entity exercises its rights and fulfills its obligations through its administrative bodies, from the date of their establishment. As such, the legal representatives of legal entities are their administrators. In the absence of administrative bodies, art. 210 para. (1) CC provides that until the date of establishment of the administrative bodies, the exercise of the rights and the fulfillment of the obligations concerning the legal person are done by the founders or by the natural persons or legal persons designated for this purpose[6].

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[3] Gh. Durac, *Drept procesual civil, Principii și instituții fundamentale, Procedura necontencioasă*, Hamangiu Publishing House, Bucharest, 2014, p. 158.

[4] Following the deliberations, the Constitutional Court, by dec. no. 601/2020, with unanimity of votes, admitted the exception of unconstitutionality and found that the provisions of art. 164 para. (1) CC are unconstitutional. The Court held the violation of the provisions of art. 1 para. (3), art. 16 and art. 50 of the Constitution, as interpreted according to art. 20 of the Basic Law and through the prism of art. 12 of the Convention on the Rights of Persons with Disabilities. In justifying the admission solution pronounced, the Constitutional Court held, in essence, that the protective measure of placing under judicial prohibition provided by art. 164 para. (1) CC is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms. It does not consider the fact that there may be different degrees of incapacity, nor the diversity of a person's interests, it is not ordered for a fixed period of time and is not subject to periodic review. Therefore, the Court held that any measure of protection must be proportional to the degree of capacity, be adapted to the person's life, apply for the shortest period, be reviewed periodically and take into account the will and preferences of the persons with disabilities. Also, when regulating a protective measure, the legislator must consider the fact that there can be different degrees of incapacity, and mental deficiency can vary over time. The lack of mental capacity or discernment can take different forms, for example, total/partial or reversible/irreversible, a situation that calls for the establishment of protective measures appropriate to reality and which, however, are not found in the regulation of the judicial interdiction measure. Therefore, the different degrees of disability must be assigned corresponding degrees of protection, the legislator in the regulation of legal measures having to identify proportional solutions. An incapacity must not lead to the loss of the exercise of all civil rights but must be analysed in each individual case. Every person must be free to act in order to develop his personality, the state, by virtue of its social character, having the obligation to regulate a normative framework that ensures the respect of the individual, the full expression of the personality of the citizens, their rights and freedoms, the chances equal, resulting in respect for human dignity. Law no. 140/2022 establishes three forms of protection: assistance for the conclusion of legal acts, judicial counselling and special guardianship. See C. Roșu, S. Stănilă, P*rocedura punerii sub interdicțiecție judecătorească în „haine" noi,* in Dreptul no. 11/2022; the article can be accessed in full format at *https://sintact.ro/#/publication/151025673?cm=URELATIONS*.

[5] G. Boroi (coord.), *Noul Cod de procedură civilă. Comentariu pe articole*, vol. I, art. 1-455, 2nd ed., Hamangiu Publishing House, Bucharest, 2016, p. 265.

In the jurisprudence of the Constitutional Court, it was noted that „para. (1) of art. 918 CPC is precisely the expression of the strictly personal character of the action in the dissolution of the marriage, in consideration of the respect of the spouses' right to private life and their personal determination regarding the continuation or termination of the marriage. The explicit provision of para. (1) of art. 918 CPC cannot receive an interpretation – like the one developed by the author of the exception - that would overturn its meaning and be used to divert the norm from its purpose. On the other hand, art. 921 para. (1) CPC establishes some exceptions to the rule of the personal presence of the spouses at the court of first instance, exceptions which are of strict interpretation, and which allow the court to resolve the divorce application in some precisely determined situations in which the personal presence of one of spouses is not possible. This is also an application of the recognized right of any of the spouses to obtain the termination of the marriage, without certain objective circumstances constituting an obstacle to this approach, but also an expression of free access to justice, which must allow any of the spouses, regardless of the procedural capacity in the divorce process, to exercise his procedural rights, by formulating defences, supporting the request, without the impossibility of presentation constituting an absolute obstacle in obtaining the dissolution of the marriage. Nor the provision of art. 922 CPC does not violate, in the opinion of the Government, any constitutional principle, the provision regarding the rejection of the request as unsupported, in case of unjustified absence of the plaintiff, representing a presumption of lack of interest in supporting the request and an application of the principle of availability of the parties". To consult, in this sense, CCR dec. no. 642/2018 published in Official Gazette of Romania, no. 70/29.01.2019; the decision can be accessed in its entirety at *https://sintact.ro/#/act/16910520/82?directHit=true&directHitQuery=cod%20procedura%20civila*.

[6] S. Bodu, *Organul administrativ și reprezentarea legală a societății comerciale*, in Revista Română de Drept al Afacerilor no. 6/2017; the article can be accessed in full format at *https://sintact.ro/#/publication/151012506?keyword=reprezentarea%20legala&cm=SREST*.

Regarding judicial representation, according to art. 80 para. (4) CPC, when the circumstances of the case require it to ensure the right to a fair trial, the judge may appoint a representative for any part of the trial under the terms of art. 58 para. (3) CPC, finally showing the limits and duration of the representation[7]. In contrast of the curators from the field of civil law, special curators provided for by art. 58 CPC are appointed by the trial court (and not by the guardianship court) and are lawyers specifically appointed for this purpose by the bar for each court (and they cannot be any natural person with full legal capacity and able to fulfill this task). To appoint the special curator and to the extent that the corresponding bar has not previously submitted to the court the list of lawyers appointed to carry out the task of special curator, the court will issue an address to him to appoint a lawyer until the next court term in the sense indicated[8].

About conventional representation, as previously stated, the parties may appear in court through an elected representative, under the law, unless the law requires their personal presence before the court. Conventional representation involves the conclusion between the represented party and the representative of a mandate contract[9] (in the case of the non-lawyer representative-mandatory), of an employment contract or service relationship (in the case of the legal advisor representative) or of a legal assistance contract (in the case of the representative-lawyer), each of which essentially provides the right and, at the same time, the obligation to represent the party[10]. Therefore, in the civil process, the natural person can be represented not only by a lawyer, but also by a person who does not have this capacity. As a rule, legal entities can be conventionally represented before the courts only by a legal advisor or lawyer, under the law. Therefore, unlike natural persons, in the case of legal persons, conventional legal representation by a representative who does not have the capacity of either a lawyer or a legal advisor is excluded. Therefore, the legal persons and entities cannot be conventionally represented by a representative who is not a lawyer or who does not exercise the function of legal advisor. In the same light, it was established that a legal person cannot be judicially represented by another legal person[11].

3. Special provisions regarding the representation of third parties by a lawyer

Regarding the representation by a lawyer of the intervening third parties, it can intervene both in the admissibility procedure in principle and after the admissibility, in the actual judgment of the request for intervention. According to art. 28 para. (1) from Law no. 51/1995 for the organisation and exercise of the profession of lawyer, republished[12], *„the lawyer registered in the bar, has the right to assist and represent any natural or legal person, based on a contract concluded in written form, which acquires a certain date by registration in the register record official".*

In the content of the specific activity provided by the lawyer, in the case of the representation of third parties, there are activities such as consultations and the formulation of requests of a legal nature (as a rule, even the formulation of intervention requests)[13]. Legal consultations can be granted in writing or verbally in areas of interest for the third party involved and can include: the drafting and/or provision to him, by any means of legal opinions and information on the issue requested to be analysed, drafting legal opinions as well as assisting him in the negotiations related to them or any other consultations in the legal field[14]. The lawyer can draw up and formulate on behalf and/or in the interest of the third party, requests, notifications, memos or

[7] V.M. Ciobanu, M. Nicolae (coord.), *Noul Cod de procedură civilă. Comentat și adnotat*, vol. I, art. 1-526, Universul Juridic Publishing House, Bucharest, 2016, pp. 286-287.

[8] For further developments, see: M. Dinu, *Aspecte teoretice și practice cu privire la curatela specială ca formă de reprezentare în cadrul procesului civil*, in Pandectele Române no. 5/2018; the article can be accessed in full format at *https://sintact.ro/#/publication/151012836?keyword=curatela%20speciala&cm=STOP*; Șt. Naubauer, *Curatela specială – monopol judiciar al avocaților,* in Revista Română de Jurisprudență no. 5/2017 (the article can be accessed in full format at *https://sintact.ro/#/publication/151012080?keyword=curatela%20speciala&cm=SFIRST*).

[9] See also: D.-Al. Sitaru, *Considerații privind reprezentare în noul cod civil român*, in Revista Română de Drept Privat no. 5/2010; the article can be accessed in full format at *https://sintact.ro/#/publication/151006556?keyword=mandat%20reprezentare&cm=SREST*; D. Chirică, *Condițiile de validitate, proba și durata reprezentării convenționale*, in Revista Română de Drept Privat no. 2/2019 (the article can be accessed in full format at *https://sintact.ro/#/publication/151014692?keyword=mandat%20reprezentare&cm=SREST*).

[10] V.M. Ciobanu, T.C. Ciobanu, C.C. Dinu, *Drept procesual civil*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2023, pp. 128-132.

[11] M. Fodor, *Drept procesual civil. Teoria generală. Judecata în primă instanță. Căile de atac*, Universul Juridic Publishing House, Bucharest, 2014, pp. 200-202.

[12] Published in the Official Gazette of Romania, no. 440/24.05.2018.

[13] See art. 3 para. (1) letter a) from Law no. 51/1995 and art. 89 of the Statute of the lawyer profession.

[14] See art. 90 of the Statute of the lawyer profession.

petitions to the authorities, institutions and other persons, in order to protect and defend his rights and legitimate interests. Therefore, the lawyer has the right to introduce a request for intervention (depending on the type of intervention that will be made before the court), to assist the intervening third party (when he is present in the courtroom), to represent the third-party intervener (when he is not present in the courtroom), to draw up any procedural documents, to make conclusions on any litigious matter, including procedural exceptions or on the merits of the case, etc. Under the same conditions, the lawyer provides legal assistance and representation before the courts, criminal investigation bodies, authorities with jurisdictional powers, public notaries and bailiffs, public administration bodies and other legal entities for the defense and representation with means specific legal rights, freedoms, and legitimate interests of individuals. The assistance and representation of the intervening third party includes all acts, means and operations permitted by law and necessary for the protection and defense of its interests[15].

The power of representation of the intervening third party by the lawyer is based on the legal assistance contract, concluded in written form[16]. Moreover, the lawyer's right to assist, represent or exercise any other activities specific to the profession arises from the legal assistance contract[17]. Consequently, the lawyer can only act within the limits of the contract concluded with his client, except in cases provided by law. The exceptions are of strict interpretation, provided exclusively by law and refer to cases of legal assistance and public judicial aid, respectively the appointment of a special curator lawyer[18], with the legal regime imposed by the normative act where they are provided and regulated[19]. The form, content and effects of the legal assistance contract are established by the Statute of the profession[20]. The relationship between the lawyer and the client-intervening third party is based on honesty, probity, fairness, sincerity, loyalty, and confidentiality[21]. The contact between the lawyer and his client cannot be embarrassed or controlled, directly or indirectly, by any body of the state. If the lawyer and the client agree, a third person may be the beneficiary of the legal services established by the contract, if the third party accepts, even tacitly, the conclusion of the contract under such conditions. As a rule, the lawyer will keep a strict record of the contracts entered into in a special register and will keep in his archive a copy of each contract and a duplicate or copy of any power of attorney received in the execution of the contracts. The legal assistance contract can also be concluded in electronic format, under the condition of obtaining the prior approval of the bar of which the form of practising the profession is a part[22].

The legal assistance contract expressly provides for the extent of the powers that the client confers on the lawyer. For the activities expressly provided for in the scope of the legal assistance contract, it represents a special mandate, under the power of which the lawyer can conclude, under private signature or in authentic

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[15] See art. 91 of the Statute of the lawyer profession.

[16] R. Viorescu, *Aspecte practice privind încheierea și comunicarea contractelor de asistență juridică (și, nu numai...) prin mijloace electronice*, in Revista Română de Drept al Afacerilor no. 4/2023; the article can be accessed in full format at *https://sintact.ro/#/publication/151029402?keyword=contractul%20de%20asisten%C8%9B%C4%83%20juridic%C4%83&cm=SREST*.

[17] See art. 108 para. (1) of the Statute of the lawyer profession.

[18] According to the art. 58 CPC.

[19] The existence of exceptions does not remove the general and mandatory nature of the rule of conclusion of the legal assistance contract.

[20] The legal assistance contract is called, expressly regulated by law, which gives rise to rights and obligations specific to the lawyer profession. depending on the concrete object of the legal assistance contract, it may have other named contracts, expressly regulated by the Civil Code (mandate, fiduciary, etc.) as a proximate type. The legal assistance contract is concluded in written form, required *ad probationem*. It must meet all the conditions required by law for the valid conclusion of an agreement and acquires a certain date by its registration in the official record book of the lawyer, regardless of the way in which it was concluded.

[21] C.C. Dinu, *Fișe de procedură civilă pentru admiterea în magistratură și avocatură*, 6th ed., Hamangiu Publishing House, Bucharest, 2019, pp. 71-74.

[22] The legal assistance contract can also be concluded by any means of distance communication. In this case, the date of conclusion of the contract is the date on which the agreement of will between the lawyer and the client took place. It is assumed that the lawyer became aware of the conclusion of the contract on one of the following dates:

- the date on which the contract arrived by fax or e-mail (electronic signature) at the professional office of the lawyer;
- if the transmission by fax takes place after 19:00, it is assumed that the lawyer became aware of it on the working day following the day of the transmission;
- the date of receipt of the signed contract by registered letter with confirmation of receipt;

The legal assistance agreement may take the form of a letter of engagement indicating the legal relationship between the lawyer and the recipient of the letter, including legal services and fees, signed by the lawyer, and delivered to the client. If the client signs the letter under any express acceptance of the contents of the letter, it acquires the value of a legal assistance contract;

The legal assistance contract is considered to have been tacitly concluded if the client has paid the fee mentioned therein, the payment of this fee signifying the acceptance of the contract by the client, in which case the date of conclusion of the contract is the date mentioned in the contract.

form, acts of preservation, administration, or disposal in the name and on behalf of the client[23]. The client's signature must be inserted on the legal assistance contract, proving the birth of the respective legal relationship. Regarding the power of attorney, it is not necessary to be signed by the client in the situation where the form of exercise of the lawyer profession certifies the identity of the parties, the content and the date of the legal assistance contract based on which the power of attorney was issued, an aspect included in the model of power of attorney established by the Statute of the lawyer profession[24].

Also based on the legal assistance contract, the lawyer legitimises himself vis-à-vis third parties through the power of attorney drawn up according to Annex no. II of the Statute, on a typed and serialised form, with the related logos, identical to the legal provisions of the legal assistance contract (typed and serialised forms that will contain the UNBR logo, that of the issuing bar, the name „National Union of Romanian Bar Associations" and the of the issuing bar)[25]. The activities of the lawyer aimed at the exercise of procedural acts of disposition, assistance and representation must be expressly mentioned in the content of the legal assistance contract and in the power of attorney, the content of the latter having to be in accordance with the rights stipulated in the contract. As such, for the exercise of the acts disposition procedures, it is not necessary for the lawyer to present a special authentic power of attorney, the mention inserted in the content of the legal assistance contract in this sense being sufficient, also taken over in the power of attorney[26].

According to art. 221 para. (1) and (2) of the Statute of the lawyer profession, the contract expressly provides for the object and limits of the mandate received, as well as the established fee, and, in the absence of any contrary provisions, the lawyer can perform any act specific to the profession that he considers necessary to promote the legitimate rights and interests of the client. In this sense, the lawyer must assist and represent the client with professional competence, by using appropriate legal knowledge, specific practical skills and through the reasonable training necessary for the concrete assistance or representation of the client[27].

From the moment of signing the legal assistance contract, the lawyer will act tactfully and patiently to present and explain to the intervening third party all aspects of the case in which he is assisting and/or representing him. In such a situation, the lawyer will seek to use the most appropriate language in relation to the client's condition and experience, so that he has a fair and complete representation of his legal situation. Likewise, the lawyer will consult appropriately with the client to establish the purpose, methods, and finality of the advice, as well as the technical solutions he will follow to achieve, when necessary, the assistance and representation of the client, he will respect the client's options in terms of regards the purpose and finality of the assistance and representation, without abdicating his independence and his professional creed. At the same time, the lawyer is obliged to refrain from engaging whenever he cannot provide competent assistance and representation. Assisting and representing the client requires adequate professional diligence, thorough preparation of cases, files, and projects, promptly, according to the nature of the case, experience, and professional creed[28]. Moreover, the lawyer must have the appropriate professional competence for the case in which he represents the third-party intervener, which implies the careful analysis and research of the factual circumstances, of the legal aspects of the legal issues incident to the factual situation, adequate preparation and permanent adaptation of the strategy, tactics, specific techniques and methods in relation to the evolution of the case, the file or the work in which the lawyer is employed[29].

In the activity performed, the lawyer will limit himself only to what is reasonably necessary according to the circumstances and the legal provisions. In this case, the lawyer will refrain from intentionally ignoring the objectives and goals of the representation established by the intervening third party, so as to fail to achieve them by reasonable means, permitted by the Law and the Statute of the profession and prejudice a client during the professional relations.

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[23] See art. 126 para. (2) and (3) of the Statute of the lawyer profession.

[24] If the existence of the mandate is disputed, the court will ask the lawyer to submit the legal assistance contract to the file, in a certified photocopy for compliance with the original, the confidential sections may be covered.

[25] L. Criștiu-Ninu, *Organizarea profesiei de avocat. Note de curs*, Universul Juridic Publishing House, Bucharest, 2023, pp. 63-65.

[26] T.C. Briciu, C.C. Dinu, P. Pop, *Instituții judiciare*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2016, pp. 400 *et seq*.

[27] See also I. Leș, D. Ghiță, *Instituții judiciare contemporane*. 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, pp. 311-313.

[28] D. Oancea (Coord.), *Legea privind organizarea și exercitarea profesiei de avocat. Comentariu pe articole,* C.H. Beck Publishing House, Bucharest, 2015, pp. 130-132.

[29] As it follows from the legal provisions in the matter, only by way of exception, the possibility to assist and employ the client is recognized even to the extent that at that moment he does not possess a professional competence appropriate to the nature of the case, if due to delay violation of the client's rights and interests (in situations and circumstances that are urgent to safeguard and/or protect the client's rights and interests).

Equally, the lawyer will act promptly in the representation of the intervening third party, according to the nature of the case. The lawyer is not bound to act exclusively in obtaining advantages for his client in the confrontation with the adversaries. The strategies and tactics established by the lawyer must lead his activity on the principle of using professional approaches in favour of the third party.

One of the most important obligations of the lawyer is related to the observance of professional secrecy regarding the strategies, tactics and actions expected and carried out for the client[30].

The lawyer who, for various reasons, cannot fulfil his mandate towards the party at a certain moment, has the right and, at the same time, the obligation to ensure his substitution by another lawyer, if this right is expressly provided for in the contract of legal assistance or if the client's consent is obtained after the conclusion of the contract, by reference to art. 226 para. (5) and art. 234 para. (2) of the Statute. Substitution covers only those professional activities that do not suffer delay or those in connection with which delaying the process damages the client's interests. At the respective court term, the substitute lawyer will attach the delegation of substitution to the file, having the right to the fee corresponding to the submitted activity, according to the terms of the agreement between the lawyers. The insurance of substitution will be done only through another lawyer, and not through any other person.

Regarding the obligations of the intervening third party towards the lawyer, he has the obligation to provide the lawyer with accurate and honest information in order for him to carry out the steps necessary for the execution of the entrusted mandate, in this case the third-party intervening is the only one who bears the responsibility for the accuracy and sincerity the information provided to the lawyer.

Equally, he owes the lawyer the payment of the fee and the coverage of all expenses incurred in his interest[31]. The intervening third party has the right to renounce the legal assistance contract or to modify it in agreement with the lawyer, under the conditions provided by the Law and the Statute. At the same time, the third party has the right to unilaterally renounce the mandate granted to the lawyer, this circumstance not constituting grounds for exoneration for the payment of the due fee for the legal services rendered, as well as for covering the expenses incurred by the lawyer in the procedural interest of the client[32].

Finally, the third party has an obligation not to use the lawyer's opinions and advice for illegal purposes without the knowledge of the lawyer who provided the opinion or advice. Otherwise, the lawyer is not responsible for the illegal action and purposes of the third party.

From the perspective of Law no. 51/1995, the termination of representation relations, as a rule, is carried out with the fulfilment of the obligations assumed by the form of exercise of the profession. The previous termination can be done by unilateral denunciation, by the third party or, as the case may be, by the lawyer, but this fact, as I mentioned before, does not exempt the client from paying the due fee for the services rendered, nor does it exempt him from covering the expenses incurred by the lawyer in his interest[33].

Upon termination of the legal assistance contract, the lawyer of the third-party intervening has the obligation to take appropriate measures in a timely and reasonable manner to protect the interests of the client, in the sense of notifying him, giving him sufficient time to hire another lawyer, handing over documents and assets to which the customer is entitled such as notification of judicial bodies. The lawyer has the right of retention on the entrusted assets, except for the original documents that have been made available to him in case the client owes the lawyer arrears from the fees and expenses incurred in his interest.

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[30] See: D. Oancea, *Legea privind organizarea și exercitarea profesiei de avocat. Comentariu pe articole*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, pp. 188-200; S. Tiberiu, *Noțiunea și conținutul secretului profesional al avocatului în lumina dreptului comunitar,* in Revista de Drept European (Comunitar) no. 6/2007 (the article can be accessed in its entirety at *https://sintact.ro/#/publication/151000449?keyword=respectarea%20secretului%20profesional%20avocat&cm=SREST*); D. Cherteș, *Infracțiunea de divulgare a secretului profesional de către avocat prevăzută în Legea nr. 51/1995. Scurte considerații*, in Journal Penalmente Relevant no. 1/2017 (the article can be accessed in its entirety at *https://sintact.ro/#/publication/151022348?keyword=respectarea%20secretului%20profesional%20avocat&cm=SREST*).

[31] C.C. Dinu, *Considerații asupra caracterului de titlu executoriu al contractului de asistență juridică și formalitățile necesare în vederea punerii în executare silită a acestuia,* in Revista Română de Drept Privat no. 5/2009; the article can be accessed in its entirety at *https://sintact.ro/#/publication/151006697?keyword=contractul%20de%20asisten%C8%9B%C4%83%20juridic%C4%83&cm=SREST*.

[32] L. Săuleanu, *Limitarea caracterului de titlu executoriu al contractului de asistenţă juridică la onorariu şi la cheltuielile efectuate de avocat în interesul clientului,* in Dreptul no. 12/2018; the article can be accessed in its entirety at *https://sintact.ro/#/publication/151020869?keyword=contractul%20de%20asisten%C8%9B%C4%83%20juridic%C4%83&cm=SREST*.

[33] The contract can also be terminated by the agreement of the parties or the loss of the lawyer's capacity.

Finally, the lawyer has the obligation to return to the client the sums advanced by the latter if, until the termination of the contract, the lawyer has not performed the activities for which the fee was paid in advance or has not recorded expenses covered by the sums advanced by the third party in this regard.

4. Conclusions

The participation of third parties intervening in the judgment is a natural thing since in relation to them the litigious legal report deduced from the judgment can produce effects both directly and indirectly, and by way of consequence, both the old regulation and especially in the New Code of Procedure civil, gives them increased attention through the possibility of becoming parties to a process.

Regarding procedural representation, this is a frequently used approach, as a rule, the parties resorting to representation by a lawyer, whether they are natural or legal persons.

Probably the main reason why third parties choose to be represented by a lawyer is his legal training, as a specialist in law. In this sense, the lawyer can be employed based on the legal assistance contract and can represent the third-party intervener, both in the case of the voluntary formulation of a request for intervention and in the case of being forcibly brought to court. In these two scenarios, the representation consists, as a rule, both in the phase of admissibility in principle (where applicable), and after this moment, when the intervening third party participates as a party in the judgment of the contentious report brought to the judgment.

Analysing the conventional representation by a lawyer, it is found that the existing provisions in the Civil Procedure Code are usefully combined with the existing regulations in Law no. 51/1995, the Statute of the lawyer profession as well as in the Code of Ethics of the lawyer profession, creating in this context certain particularities.

A first feature is the legal assistance contract, *i.e.*, the agreement between the intervening third party and the lawyer, based on which the lawyer undertakes to represent the legitimate and legal interests of his client. What differs from a simple representation mandate results from the specialised form of the contract whose clauses are regulated by the legislation specific to the lawyer profession and based on which the party's representation activity is carried out.

A second particularity is given by the legal delegation (power of attorney), the content of which is special compared to a simple power of attorney, having a specialised regime subject to the legal guarantees of the legal profession.

Finally, what differs substantially from common law representation is the extremely broad scope of action of the mandate granted to the lawyer. He has the possibility to carry out a variety of procedural acts in accordance with the legal situation established in relation to the case, to carry out the mandate granted by the client.

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AWARDING COSTS IN COURT PROCEEDINGS FOR APPEALING REFUSALS OF REQUESTED ENTRIES IN THE COMMERCIAL REGISTER

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Abstract

The ultimate goal of the commercial registration is to serve the interests of private individuals and entities, so that they could take full advantage of the legal effects of the commercial register entries.

To achieve this aim, sufficient control mechanisms should be in place to ensure that registry official rulings meet all legal requirements. The law therefore establishes a court procedure for contesting such refusals by the applicants. This procedure, although focused at the appealed refusal, calls for the protection of a broader range of civil rights, among which the compensation of the procedural costs incurred as a result of the faulty refusal and its contesting. The present paper explores the obstacles hindering the rightful course of the registry refusal litigation proceedings, with focus on awarding the appellant's expenses within the said court procedure. Despite the fact that these hindrances followed the legal amendments to the Law on the Commercial Register at the end of 2020, the shortcomings in the legal practice are not the result of imperfect lawmaking, but of the way the law is interpreted in recent case-law. The latter is analysed in detail further in this report, in order to identify the key misinterpretations which led to malpractice. This report also suggests ways forward to address the subject and to find solutions to the mentioned shortcomings.

Keywords: *commercial registration, refusal, appeal costs obstacles, case-law.*

1. Introduction

The procedure on granting entries in the commercial register (registry procedure) is essentially assistance by the State to achieve private interests so that the interested parties could benefit from the legal opportunities arising from commercial registration. Where achieving these interests is impeded by the refusal of a registration officer to make the requested entry, those affected by the refusal should be able to rely on an independent and effective mechanism for reviewing registry decisions. Such a mechanism is provided for in art. 25 of the Law on the Commercial Register and the Register of Non-Profit Legal Entities („Law on the Commercial Register") by means of the possibility to appeal the refusal in court. The court proceedings set out for this purpose, although special in view of their purpose, bear the hallmarks of classical court proceedings and as such presuppose the protection of fundamental civil rights. Compliance with those rights is jeopardized by a misinterpretation of certain rules in the court proceedings against refusals concerning the powers of the Registry Agency in the proceedings and the award of costs to the applicant in the event of a refusal being annulled.

This report will first address the specifics of the judicial proceedings against a registry refusal, before focusing on the obstacles in these proceedings, their origin, interpretation and their impact on the rights of the registrants.

The subject matter of this report has not been previously discussed in legal literature.

2. Contents

2.1. Review of the appeal procedure against refusals of registration

The statutory framework of appeals against refusals by registration officers is contained in section 25 of the Law on the Commercial Register. The appeals are judicial proceedings which are specific in relation to the general civil and administrative court proceedings. This is because the registry procedure is itself a special administrative procedure and as such is regulated in a separate law.

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Jurisdiction to hear appeals against refusals by registration officials lies with the district courts where the registry subjects have their official address. The registry subjects are merchants and branches of foreign merchants, non-profit legal persons and branches of non-profit legal persons.

In practice, it is accepted that applicants and persons authorised to submit applications on behalf of registry subjects have the right to appeal refusals. This right may be exercised within 7 days of the notification for the refusal.

Appeals against refusals are lodged through the Registry Agency - the structure in charge of administering the commercial register within which the refusal was issued. The submission of the appeal may be made either on paper [art. 16 para. (1) of the Law on the Registration of Companies] or electronically [art. 17 para. (1) of the Law on the Registration of Companies]. The Registry Agency is obliged to immediately send to the court the complaint, the refusal, the refused application and the annexes thereto.

The Law on the Commercial Register does not expressly provide rules for the content of the appeal, but insofar as in the judicial proceedings against refusals the court examines the appeal the same way as it does for the rulings under the Bulgarian Civil Procedure Code (BCPC), the mandatory requisites of the appeal are also thus determined [art. 275 para. (2), in conjunction with art. 260 BCPC]. In that sense, the appeal must contain the name and address of the registrant, the UIC, an indication of the refusal appealed against, an indication of the defect of the refusal, the nature of the claim and the signature of the appellant. The notice of appeal should also set out the new facts and evidence which the applicant wishes the court to consider. In any event, however, evidence which by law should have been submitted with the application for registration but for whatever reason was not submitted is not admissible.

Amendments to the Law on the Commercial Register in December 2020 introduced the possibility for the Registry Agency to file a response to the complaint, accompanied by documentary evidence. The right thus conferred became an occasion to unjustifiably extend the interpretation of the Agency's powers in appeal proceedings against refusals. This flawed practice will be commented on a little later in this report.

The appeal against the registry refusal is examined by a single judge in closed session.

In the appeal proceedings against refusals, the court shall consider whether the rules on pronouncing the refusal of art. 24 para. (1) of the Law on the Commercial Register have been complied with. The court shall examine whether the refusal was made in accordance with the provisions of other laws governing the circumstances to be registered.

As already stated above, the appeal shall be dealt with in accordance with the procedure for appeals against court rulings under the BCPC, to which procedure art. 25 para. (4) of the Law on the Commercial Register refers to. This circumstance is significant in several respects. For example, the court has the power to collect evidence if it deems it necessary [art. 278 para. (2) BCPC]. An exception is made for evidence which must have been initially attached to the application for registration. Omissions in the application for registration cannot be remedied by the court.

Another important consequence of the reference to the BCPC in art. 25 para. (4) of the Law on the Commercial Register relates to the awarding of costs in court proceedings against refusals. Issues relating to the awarding of costs in appeals against refusals will be dealt with separately in this report.

In the appeal proceedings against registry refusals, the court shall rule either by confirming the refusal or annulling it.

The decision by which the court confirms the refusal shall be subject to appeal by the appellant within seven days of its notification before the relevant Court of Appeal, whose decision shall be final.

Where the refusal is revoked, the court shall give binding instructions to the Registry Agency to make the requested entry in the commercial register.

In case of revoked refusal, the Registry Agency has no legal possibility to appeal the court decision.

There is also no possibility for the appellant to appeal against the revocation of a refusal, in so far as the revocation is the result sought by the appellant in relation to which he initiated the proceedings.

The Law on the Commercial Register does not set a specific time limit for the court to rule on the appeal. In the absence of such a specific provision, the general rule of art. 235 para. (5) BCPC applies, according to which the court shall announce its decision together with motives within one month from the hearing. However, this term is instructive and does not bind the court to strict compliance with it.

2.2. Problems in the appeal procedure against refusals of registration after the legislative changes of December 2020

In December 2020, three amendments were made to the statutory framework for appeal proceedings against refusals[1]:

1) Art. 25 para. (2) of the Law on the Commercial Register has been supplemented to give the Registry Agency the right to file a response to the appeal against the refusal accompanied by written evidence. This change is only intended to provide the Registry Agency with an opportunity to give its opinion on the arguments set out in the appeal and to present its arguments in support of the contested refusal.

2) Art. 25 para. (4) of the Law on the Commercial Register clarifies the persons to whom the court decision should be communicated, namely the appellant and the Registry Agency. The amended text literally reads: „the court decision may be appealed within 7-days of notification to the appellant and the agency before the relevant court of appeal, whose decision is final."

3) A new paragraph (6) of art. 25 of the Law on the Commercial Register was adopted which allows for expenses to be awarded in the appeal proceedings against refusals. This new provision reads as follows: „In proceedings, the court shall award expenses to the parties in accordance with the Civil Procedure Code (BCPC)". The amendment is dictated by the need to explicitly regulate the issue of expenses in these proceedings in order to resolve the long-standing controversy on this issue between legal practitioners and in case-law.

None of these amendments is intended to alter the substance of the appeal proceedings, but the practical application of the amendments has raised a number of issues and hindered the applicants' rights in the court proceedings.

The explanatory notes accompanying the amendments do not comment on the first two changes and, in relation to the third, merely state that a change in the law is necessary to regulate the award of expenses in appeal proceedings against refusals.

Prior to the adoption of the said amendments, there was a general agreement that only the appellant had the right to appeal a court decision on registry refusal case, and to claim expenses, albeit in the form of compensation in separate court proceedings.

However, the statutory amendments have been interpreted by the Registry Agency in a way that would allow it to extend its powers in court proceedings against refusals. The agency began appealing court decisions revoking refusals, arguing the newly introduced legal option to provide an answer appeals. The Agency also referred to the recent addition to para. (4) on art. 25 of the Law on the Commercial Register, according to which the court decision shall be communicated to the Agency as well as the appellant, pointing out that this also gives the right to the agency to appeal the decision in the specified 7-day term from the notification.

It is worth explaining here that the mere sending of the decision to the Registry Agency is not a new legal addition.

This rule is derived from para. (5) of art. 25 of the Law on the Commercial Register, according to which in case of revocation of the refusal, the court shall give binding instructions to the Registry Agency to make the requested entry by sending the decision and the documents relating to the entry.

Based on the understanding thus formed as to the extension of its possibilities to participate in the proceedings, the agency began to claim expenses before the court, on the pretext that it could benefit from the new text for awarding expenses in the refusal proceedings.

The above conclusions of the Registry Agency are unfounded, insofar as the legal provisions must be interpreted in accordance with the purpose of the law and the fundamental principles of Bulgarian law [art. 46 para. (1) of the Law on Statutory Instruments]. The option for the agency to submit an opinion on the appeal and the fact that the decision is communicated to the agency cannot be interpreted broadly as creating new procedural rules for the Registry Agency which are expressly laid down in the law. The purpose of the Law on the Commercial Register is to regulate entries in the commercial register, and the main role of that register is to serve the interests of the registrants. The Registry Agency itself is subordinated to this role as a state structure responsible for commercial registration. As such, the Agency does not oppose its own rights and interests to those of the registry subjects, but on the contrary - it is intended to serve the registrants.

[1] Published in the Bulgarian State Gazette no. 105/11.12.2020.

In this sense, the agency is not justified in extending its procedural capabilities in court proceedings designed to protect the interests of registrants. Moreover, if the interpretations of the Registry Agency were to be adopted, the very essence of the procedure for appealing against refusals would be altered, which is not the meaning of the legislative amendments in question.

Notwithstanding the above, a number of courts have allowed appeals by the Registry Agency against decisions in court proceedings against refusals, thus creating flawed case law. As a consequence of such appeals, the period for the final resolution of cases was substantially extended, discouraging registrants from appealing refusals at all, and instead filing new applications for registration. This situation essentially thwarted the refusal appeal procedure itself: instead of providing protection against unlawful registry refusals, the court procedure significantly delayed the requested entries, which consequently hampered the applicants' activities and discouraged them from appealing the refusals. This led to the violation of the fundamental right to defense guaranteed by Article 56 of the Constitution of the Republic of Bulgaria.

Notwithstanding some contradictory court rulings, the current case-law does not allow the Registry Agency to appeal and does not award expenses to the agency in proceedings against registry refusals. This practice should be upheld, since in proceedings against refusals the legal interest of the registrant who suffers the consequences of the refusal shall be primarily defended. The Registry Agency (through the registration officers) is only obliged to rule lawfully on applications for registration, but its legal sphere is not affected either by the refusal or by the proceedings against its ruling.

The Supreme Court of Cassation has taken a similar view, stating in its judgments that „the amendments to art. 25 of the Law on the Commercial Register (promulgated in the Official Gazette no. 105/2020) are aimed only at an attempt by the legislator to resolve the issue of expenses in the appeal proceedings against registry refusals, but not to redefine the legal characteristics of the registration proceedings."[2]

For the reasons set out above, the Registry Agency should not be allowed to exceed its powers in court proceedings against refusals, as this would create dangerous precedents and distort the purpose of these proceedings and of the commercial registration procedure itself, which is subordinate to the interests of the registrants.

2.3. Awarding expenses in appeal proceedings against registry refusals

The issue of the expenses made by the appellants in court proceedings against refusals has long been controversial due to the incompleteness of the legal framework and the practical difficulties of its application. The amendments to the Law on the Commercial Register from December 2020 aimed to regulate the issue by explicitly creating the possibility of awarding expenses in the proceedings against registry refusals. However, instead of resolving the existing problems, the interpretation of the new legal amendment created new obstacles and made it virtually impossible to recover these expenses.

Prior to the amendments to the Law on the Commercial Register, the law did not contain a legal basis on which appellants could claim expenses in appeal proceedings against refusals. The recovery of the pecuniary damage caused to the applicant by an unlawful revoked refusal was achieved in a separate court proceeding under art. 1 of the Law on Liability of the State and Municipalities for Damages (LLSMD).

A special reference to this law exists in art. 28 para. (2) of the Law on the Commercial Register, stating that the Registry Agency is liable for the damages caused to natural and legal persons by unlawful acts, actions and omissions of the registration officials under the procedure of the LLSMD. Expenses, therefore, were not awarded directly as such in a single proceeding, but had to be sought separately in the form of damages suffered in a second lawsuit. In order to pursue this separate lawsuit, the persons affected by unlawful refusals not only had to invest additional time, but also incurred further expenses for fees and for legal defense. In this manifestly unfair situation, the persons concerned in effect suffer twice from the unlawful action of a public authority. A legal solution to the problem was demanded both by legal practitioners and by the directly affected economic and social groups.

The stakeholders united around the proposal to introduce an explicit wording in the Law on the Commercial Register regulating the awarding of expenses in court proceedings against registry refusals.

[2] Extract from Court Ruling in commercial case no. 1250/2021 of the Bulgarian Supreme Court of Cassation.

As a result, art. 25 of the Law on the Commercial Register was supplemented by a new paragraph (6) with the following text: „In proceedings [on appeal against refusals] the court shall award expenses in accordance with the Civil Procedure Code (BCPC)."

It is obvious that in the context of the requested legal amendment the text refers to the general procedure for awarding expenses in civil proceedings, regulated under art. 78 and 81 BCPC.

This simple and equitable legal amendment was expected to put an end to a long-existing but resolvable controversy.

However, a number of district courts, rather than awarding the applicants the expenses in the proceedings of revoked refusals, rejected their expenditure claims, reasoning on the basis of art. 541 BCPC, which states that „The expenses of non-contentious proceedings shall be borne by the applicant". These courts maintain that the proceedings under art. 25 of the Law on the Commercial Register are non-contentious in nature, and in so far as the new para. (6) of art. 25 of the Law on the Commercial Register (concerning the expenses in appeals against refusals) refers to rules for awarding expenses under the BCPC, art. 541 BCPC on the expenses in non-contentious proceedings should be applicable. Other courts did not even consider the applicants' claims for an awarding expense.

The said reasoning of the District Courts has been repeated in several rulings of the Supreme Court of Cassation[3], thus turning these arguments into binding case-law.

Thus, instead of facilitating the recovery of the appellants' property unlawfully diminished by the annulled refusal, the appellants' situation is further aggravated - the case-law of the courts inherently denies the appellants' right to expenses against registry refusals.

In this situation, is the option for material compensation of the expenses under the procedure of the Law on Compensation for Damages (which was in force before the discussed legal amendments) still applicable? The answer to this question is also in the negative. Such a conclusion follows from the interpretation of the provisions of the Law on the Compensation for Damages, in the context of the special procedure for awarding expenses under art. 25 para. (6) of the Law on the Commercial Register. Art. 8 para. (1) of the Law on Compensation for Damages provides that damages caused by unlawful acts of public authorities may be compensated under this law, but only if no special method of compensation is provided for. Such a special method was put in place with the amendments to art. 25 of the Law on the Commercial Register.

The administrative courts have passed decisions in that sense since the amendments to the Law on the Commercial Register, refuting the claims for expenses made under the Law on Compensation for Damages.

As a result, the right of the applicants to be awarded the expenses according the special provisions of the Law on the Commercial Register is barred, but at the same time the procedure for compensation under the Law on Compensation for Damages is also unavailable to the applicants due to the existence of a special statutory procedure for recovering expenses.

The practice for not awarding expenses thus created by case-law not only contradicts the basic principles of Bulgarian law, but is in the exact opposite direction to the objectives set by the discussed legal amendments.

- In the first place, in court cases against registry refusals, where those refusals have been revoked by the court, the wrongful act of the registry official has compelled the appellant to incur expenses in defending his interests. These costs generally include State fees and attorney's charges. The payment of a State fee is a prerequisite for judicial procedure against registry refusals, and it is precisely this procedure, regulated under art. 25 of the Law on the Commercial Register, which guarantees the possibility for the applicants to defend their violated legal rights. This payment is in direct relation to the revoked refusal, which was issued as a result of unlawful actions of the registration officer. The hiring of a lawyer in an appeal against a refusal is a normal decision of the persons concerned for their impaired rights and interests, and the remuneration of that lawyer is peremptorily payable under section 36 of the Advocates Act. Since the applicant is entitled to counsel in appealing the refusal and has at the same time paid a fee for that counsel, it is for the purpose of properly defending himself against the registry refusal that he has expended the funds. If the unlawful refusal had not been issued, there would have been no judicial appeal against it, in which the applicant may exercise his right to defend himself as he sees fit, including by hiring a lawyer to whom he owes remuneration;
- In spite of the optional nature of the lawyer's defense, the funds paid for it are subject to

[3] In this sense, see Bulgarian Supreme Court of Cassation, Court Ruling in commercial cases no. 2742/2021, no. 585/2022, no. 768/2022, no. 2297/2022 and no. 1573/2023.

reimbursement, because the right to defense, including that provided by a lawyer, is a fundamental right, guaranteed by art. 56 of the Constitution of the Republic of Bulgaria. This right shall not be restricted in any way, including under the threat of non-recovery of the lawyer's fees paid, despite a successful outcome of the case for the applicant, who benefited from the defense. The fact that the use of counsel in this type of case is not mandatory does not lead to the conclusion that the applicant is not entitled to retain counsel.[4] In support of the above conclusion, additional arguments can be sought in the reasoning of the Supreme Administrative Court.[5] In the court rulings rejecting the requests for expenses in appeals against unlawful registry refusals, it is argued that in this case the proceedings are non-contentious. In this regard, it is suggested that the provision of art. 25 para. (6) of the Law on the Commercial Register, according to which expenses are to be awarded in accordance with the BCPC, refers to the regulation of non-contentious proceedings in the BCPC and, in particular, art. 541 BCPC, according to which expenses in non-contentious proceedings are to be borne by the applicant.

This suggestion is entirely wrong: both as regards the nature of the proceedings and as regards the provisions of the BCPC to which art. 25 para. (6) of the Law on the Commercial Register refers.

Bulgarian jurisprudence has traditionally held that the proceedings for entries in the commercial register are non-contentious in nature, insofar as they serve the interests of the registrants, affect only their private sphere and do not concern a legal dispute.

The rulings of the registry officials, whether to grant the registry entry or to refuse it, belong precisely to the procedure of registration in the commercial register. These proceedings are designed to ensure that the interested party is able to achieve its objectives by means of the requested registry entry, where legal prerequisites for such entry exist. In cases where registration is refused, the applicants are prevented from achieving their legitimate interest.

In the event of a refusal, the applicants shall have the right to initiate judicial control of the correctness of the refusal, which impedes their interest. This right, however, is different from the right to apply for registration entry and is exercised in special court proceedings - the judicial control proceedings under art. 25 of the Law on the Commercial Register. The latter is distinguished from the procedure for entry in the commercial register both by reason and purpose. The judicial control proceedings examine whether there have been unlawful actions by the registration officer in the registry entry procedure. There is no doubt that these are two different proceedings which, moreover, cannot be placed under the same denominator as non-contentious proceedings. While the registry entry procedure involves the State and the applicant in the provision of a public service, the judicial control proceedings against a refusal involve the court as well, acting as arbiter for an appealed act of a State official. The fact of the appeal and the claim for restitution of the applicant's violated rights in the judicial proceedings against the registry refusal distinguish these proceedings substantially from the registry entry procedure designed to serve the interests of the applicant - it is this purpose that gives the registry entry procedure its non-contentious character.

In this sense is the ruling of the Supreme Administrative Court, concerning the awarding of expenses in a proceeding before a district court against a registry refusal[6]:

„In view of the subject-matter of the appeal, the proceedings before the district court are not non-contentious, because they do not arise from a defense due and ordered by a court, but from contesting the correctness of an act rendered by a non-judicial body to which, by virtue of a special law, the rights and duties to perform an administrative service are attributed."

In view of the foregoing, it is unreasonable and erroneous to equate the appeal proceedings against a registry refusal to non-contentious procedures. Such notions in case-law do not rest on any legal arguments, but mechanically reproduce the understanding of the non-contentious nature of a registry entry procedure, which is definitely not analogous to judicial proceedings on appeal against registry refusals.

Hence art. 541 BCPC, according to which the costs are at the expense of the applicant, is inapplicable in court proceedings against refusals. This provision applies to non-contentious proceedings only, but the cases of contesting registration refusals are not non-contentious in nature.

Regardless of the above, there is another consideration that the rules of the Bulgarian Code of Civil Procedure, to which art. 25 para. (6) of the Law on the Commercial Register refers, does not involve non-

[4] In this sense: Court Decision in administrative case no. 6208/2018 of Sofia Administrative Court.

[5] Interpretative Decision no. 1/15.03.2017 in commercial case no. 2/2016 of the Supreme Administrative Court.

[6] Court Ruling in administrative case no. 9198/2023 of the Supreme Administrative Court.

contentious proceedings. Para. (4) of art. 25 of the Law on the Commercial Register, regulating the procedure for appealing registration refusals, stipulates that the court examines the appeal in accordance with Chapter XXI „Appeal of court rulings" of the Bulgarian Civil Procedure Code. From the systematic place of para. (6) of art. 25 of the Law on the Commercial Register, according to which expenses in proceedings against refusals are awarded according to the rules of the Bulgarian Civil Procedure Code, it logically follows that the reference to the Civil Procedure Code concerns specifically Chapter XXI „Appeals of court rulings" - according this chapter, the court shall rule on the claims in the appeal against the refusal, including requests for expenses.

Chapter „Appeals of court rulings" does not specifically deal with expenses incurred in these proceedings. Art. 278 para. (4) BCPC from the mentioned chapter, however, contains a reference to the rules for appealing court decisions. These rules include art. 273 BCPC, which in turn refers to the proceedings before the first instance court. In art. 236 BCPC, related to the proceedings before the first instance court, in para. (1) item 6, it is expressly stated that the decision shall also contain a ruling on the issue of awarding expenses, such as state fees and attorney`s remuneration.

Apart from that, art. 81 BCPC provides that in each court decision the court shall also rule on the claim for expenses, and art. 78 BCPC regulates the manner in which expenses are awarded - proportionally to the awarded part of the claim [art. 78 para. (1) BCPC]. The legal framework traced in this way undoubtedly leads the conclusion that the applicable procedure under the Bulgarian Civil Procedure Code for awarding expenses in proceedings on appeals against registry refusals is the one ensuing from Chapter XXI „Appeals of court rulings", and not the regulation of non-contentious proceedings. Art. 541 BCPC, regarding the applicant's bearing the expenses in non-contentious proceedings, is therefore irrelevant. There is also no doubt that the expenses include both State fees and attorney's remuneration due and paid by the appellant in the proceedings. The revoking of the refusal as a result of the appeal provides grounds for awarding the full amount of expenses claimed by the appellant.[7]

From what has been stated so far, an indisputable conclusion can be drawn that the problems with the implementation of the amendments to the Law on the Commercial Register are not due to defects in the law, but to its wrong interpretation and practical application. These erroneous practices lead to violation of the basic civil right of defense, guaranteed by art. 56 of the Constitution of the Republic of Bulgaria.

3. Conclusions

The Bulgarian legislation provides a control mechanism over registry refusals in the form of a special court proceeding initiated on the applicant's claim. Judicial control aims to guarantee the rights and legitimate interests of the applicants in case of illegal actions of the State through the registration officials, insofar as the registration procedure itself is intended to benefit and serve the registrants and their business.

The current regulatory framework is tailored to the specifics of the appeal proceedings against refusals. The legal amendments in the Law on Commercial Register from December 2020 were aimed to supplement and clarify the existing rules, without fundamentally changing the essence of the proceedings. Of particular importance was the creation of a legal basis for awarding costs to the appellant in the overturned refusal proceedings.

Despite the intentions to improve the law, unexpected and contradictory interpretations of the new provisions appeared in case-law, which worsened the situation of the appellants and violated their fundamental rights. These vicious practices are related to the unjustified broad interpretation of the powers of the Registration Agency in the appeal proceedings, and above all, to the obstruction of the appellant' right to recover the expenses incurred as a result of the illegal registry refusal.

This report traces which legal provisions are subject to incorrect application, what constitutes the incorrectness of case-law interpretations and how these erroneous practices damage the rights of the applicants. A focus is placed on the fact that the contradictions are not a consequence of imperfections in the law, but in the vicious interpretations and legal practices, which urgently need to be reconsidered.

This report aims to give publicity to the presented problems, as it needs to be discussed on a broader scale by legal practitioners, business professionals, public and private representative bodies and civil right activists alike.

As until this moment the issues stated above have not been the subject of academic research, another purpose of this paper is to provoke further studies of the matter in question and its implications.

[7] In this sense: Court Decision in administrative case no. 8854/2021 of Sofia Administrative Court.

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- Sofia Administrative Court, Court dec. in administrative cases no. 6208/2018 and no. 8854/2021.

ASSISTED REPRODUCTIVE TECHNOLOGY BETWEEN MEDICINE, RELIGION AND LAW

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Abstract

The new, the engine that allows us to evolve. That is what we do by nature: we figure out how things work and we make new steps, over and over. We created vaccines to help prevent diseases and, in the future, maybe we are about to create a human being outside the womb. It is a sin, it is a legal thing, it is moral? Are we guilty of considering ourselves gods? Medically assisted human reproduction is a piece of a puzzle, of an engine that can separate us or bring us together, that can raise or erase family boundaries, give us rights or put us on the wall of morality. Assisted reproductive technologies are medical procedures and their role is, first of all, to help people who experience some difficulties or who suffer an inability to have biological children of their own. But the access to the experience of pregnancy is expanded by the big new development to the potential of those reproductive technologies. And, as always, there is a price for that, for everything that we create or update, and those challenges go far beyond medicine, science or pure technique and we are forced to wonder about moral, religious or legal limitations.

Keywords: *artificial insemination (AIns.), assisted reproductive technology/ies (ART/s), cross-border reproductive care (CBRC), embryo donation, filiation, family law, gestation for another, intracytoplasmic sperm injection (ICSI), intrauterine insemination (IUI), in vitro fertilisation (IVF), maternity of substitution, medically assisted reproduction (MAR), principle of the best interests of the child, posthumous reproduction, right to private and family life, selective foetal reduction (SFR), surrogacy, third donor*.

„Dare! I have conquered the world!"[1]

1. Introduction

The evolution of man and the relationship between man and society are elements that have made and continue to make scientific progress possible, and everything is raised to power in growing need, natural or wilful, to overcome the old and to pass scientific, medical, but also moral and legal barriers. Our times propel us, whether we want or not, on the road of knowledge, a path that sometimes makes us move away from prudence, from rules and to cross the traditional borders of existence. The new man, the new society, constantly expanding ideas and horizons, wants to overthrow the natural order. This also happens when conceiving a child. People have strayed from the natural path, which makes it, nowadays, to talk about conceiving a child in the absence of any sexual bond, that is, the use of various medical laboratory techniques designed to help human reproduction. Medical technology and inventions which have an impact on humans, family relations and the existence of people are constantly developing. These inventions and the development of medical knowledge may bring huge advantages to people, but they are also changing and modifying the society in larger ways, and, at the same time, they are full of medical, social, political, legal, religious, ethical and economical questions and also issues which have many connections to human rights (right to life, right to private and family life) and principles (the best interests of the child). The field of biotechnology is constantly evolving and providing us new ways to treat, modify, and cure people, even if differences exist around the world, among other reasons, because of different kinds of legislative decisions, historical events which have affected the legislative decisions, and differently evolving national laws. Legal norm exists in the cultural and social settings, and not in some isolated entity.[2] At

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[1] *The Gospel of John (16,33)*.

[2] M. Deflem, *Sociology of Law: Visions of a Scholarly Tradition,* Cambridge University Press, 2010, pp. 6, 199, *https://file.hukum.uns.ac.id/data/PDIH%20File/e-book/Mathieu%20Deflem%2C%20Sociology%20of%20Law.%20Visions%20of%20a%20Scholarly.pdf*, last consulted on 20.03.2024.

present, Europe is the only region in the world where most countries have ART/MAR[3] regulations, but these remain characterised by large variation regarding available treatments and public funding, being restrictive in many countries, especially in Central and Eastern Europe.[4] AIns., IVF, ICSI[5] with donor sperm are now considered standard treatments, while access to donor eggs and pre-implantation genetic testing are limited in a larger number of countries. Regarding access to ART, differentiated by sex, heterosexual couples have access to a wide range of treatments, followed by a single woman and couples formed only by women. Some individuals seeking to become parents and unable to access ART in their country of residence travel abroad to obtain it in another country[6], a phenomenon known as CBRC, which may also refer to cases in which gametes and embryos are imported or exported across national borders.

Louise Brown was the first so-called „test tube baby". It happened in England, in 1978, and it marked only the beginning of the last years of continuous and successful use of ART in humans and the availability of an increasingly wider range of specific techniques.[7] The second successful birth of a „test tube baby" was registered in India[8] just 67 days after Louise Brown was born. In Romania, a woman held the record as the oldest woman to give birth using IVF and a donor egg, when she gave birth, in 2004, at the age of 66, a record passed in 2006. In 2017, American researchers managed to create an animal foetus, a lamb, in an artificial uterus (a type of bag - biobag - filled with amniotic fluid), successfully implementing the process of ectogenesis (embryonic development outside the maternal body, *in vitro*), keeping this foetus alive, outside the body, for 4 weeks, using advanced medical techniques and specific equipment. This event came shortly after the attempt, in 2016, by a team of Cambridge researchers, to sustain an embryo in an artificial uterus for 13 days.

Beyond the undeniable advantages of such a procedure (of great help: in premature births, for couples who cannot procreate or for same-sex couples who want their own child, in the case of uterine malformations, and even in the case of families with transmissible genetic diseases), shall we talk about a kind of „form without substance", applied *mutatis mutandis*? Will we be in danger of abandoning the inside and focus only on the outside, absolutizing it, implicitly contesting the role of the internal structure that is represented by motherhood? What will be the implications for the filiation of this pregnancy of the future? What are the present limits, but also the potential ones, legal and religious, beyond which we must stop? Here are just a few questions that we intend to outline an answer in this paper.

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[3] ART includes all fertility treatments in which either eggs or embryos are handled. The main type of ART is IVF. MAR covers a broad set of interventions to treat infertility, including treatments such as ovulation inducing drugs and assisted insemination, while ART is limited to interventions occurring outside of the patients' body. In practice, however, the two terms are sometimes used interchangeably in non-technical debates. See M. Seiz, T. Eremenko, L. Salazar (European Commission), *Socioeconomic differences in access to and use of Medically Assisted Reproduction (MAR) in a context of increasing childlessness*, Joint Research Centre Working Papers Series on Social Classes in the Digital Age 2023/03, *https://joint-research-centre.ec.europa.eu/system/files/2023-01/JRC132097_socioeconomic_differences_in_access_to_and_use_of_medically_assisted_reproduction.pdf*, last consulted on 21.03.2024.

[4] See M. Seiz, T. Eremenko, L. Salazar, *op. cit., loc. cit.,* p. 5 *et seq.*, points 16-21. Norway was the first country to establish ART legislation in 1987. In the most recent years ART legislation has been passed in Cyprus (2015), Poland (2015) and Malta (2018). However, there are still countries in which there is no specific ART legislation, such as Ireland and Romania.

[5] ICSI is a technique used during IVF, where a single sperm is injected directly into the egg for the purpose of fertilisation. The first successful birth by ICSI took place on 14.01.1992, developed by Gianpiero D. Palermo at the Centre for Reproductive Medicine in Brussels (actually, the discovery was made by a mistake). See *https://en.wikipedia.org/wiki/Assisted_reproductive_technology*, last consulted on 21.03.2024.

[6] *Ibidem.* Four broad sets of factors that underlie this phenomenon have been identified: resource constraints, legal and religious prohibitions, quality and safety concerns, and socio-cultural barriers. Surrogacy is available in a limited number of countries in Europe and therefore involves individuals moving outside of the region. This form of CBRC has received the most attention due to the important ethical debates it raises, with many of the surrogate mothers coming from low resource countries and/or groups, and controversies such as the abandonment of children with disabilities.

[7] 25.07.1978, the first successful birth of a child after IVF. The procedure took place at Dr Kershaw's Cottage Hospital in England. Patrick Steptoe (gynaecologist) and Robert Edwards (physiologist) worked together to develop the IVF technique. Steptoe described a new method of egg extraction and Edwards was carrying out a way to fertilise eggs in the lab. See, for details, G. Sharma, *Assisted reproductive technology: Definition, Benefits*, *https://www.cloudninefertility.com/blog/assisted-reproductive-technology-definition-benefits*, and also *https://en.wikipedia.org/wiki/Assisted_reproductive_technology*, last consulted on 21.03.2024.

[8] A girl (Durga) was conceived *in vitro* using a method developed independently by Subhash Mukhopadhyay, a physician and researcher from Hazaribagh, who had been performing experiments on his own with primitive instruments and a household refrigerator. State authorities prevented him from presenting his work at scientific conferences, and it was many years before Mukhopadhyay's contribution was acknowledged in works dealing with the subject.

2. Religion and ART

As it was held in the doctrine[9], when we talk about human reproduction, the combination of genes is not a game, and the danger of the present world is represented by the tendency to overturn the natural order through genetic selection and, therefore, to create a new man through eugenic genetic engineering. And the biggest concern will have to be the clear identification of the purpose and limits of the intervention of science in the act of human conception. Conception and birth are interesting from multiple perspectives, which intertwine and somehow complement each other, or, in some cases, are generators of the most uncomfortable discussions: psychological, biological and genetic, legal (personality rights and filiation), but also moral and religious. We wonder how much religion or ethics can intervene in various medical procedures or techniques - ART with a third donor, gestation for another or surrogacy? What is the line crossed into the realm of immorality and even illegality when it comes to a medical intervention designed to bring emotional comfort? Can we ignore the fact that, in reality, we are also discussing the disposal of one's own body or self? This is why, we agree[10] that it seems that ART can raise bigger problems, such as the lack of transparency regarding the genetic origin, with the consequence of a high risk of extrinsic kinship of children conceived with the same anonymous biological father or even the fate of the embryos resulting from these medical techniques.

We would be tempted to think that the problems related to infertility and surrogacy would not be as old as the world. Testimonies appeared from ancient times. Researching the Old Testament (Genesis, 16 and 30), we observe such situations, *e.g.*: Abram and Sarai and her maid, Hagar; Jacob and Rachel and her maid, Bilhah; Jacob and Leah and her maid Zilpah. Hagar, Bilhah and Zilpah represent neither more nor less than early forms of surrogate mothers.[11] It is interesting to note that, according to the ancient legal norms enshrined in the Code of Hammurabi, an infertile wife could give her maidservant to her husband in order for her to give birth to an heir, who then was to become the adopted son of the lawful wife. If a father calls his sons, born from a slave, „my sons", then after his death, they were equated with his sons by blood (para. 170 of the Hammurabi Code).

Religion plays a major role in people's attitudes towards ART and various religions have reacted to this treatment in different ways. These range from total acceptance to total rejection of all ARTs, with many shades of grey in between. People will continue debating the issue as long as more advanced ARTs will be. So, let's see how religion respond to ART[12], because many religious communities have strong opinions and religious legislation regarding marriage, sex and reproduction (CRBC, the motivations of gamete donors, posthumous reproduction or gamete retrieval, *inter alia*). Beliefs about the moral status of fertilised eggs (if a human embryo can be regarded as a human being right after fertilisation) are also important and, in countries where this belief is less widespread, there is a greater recourse to these technologies. The same importance also has the beliefs regarding whether individuals have a right to have children, or even whether it is moral to discard healthy embryos or create embryos with abnormalities. Many of the considerations regarding the right to reproduction, the use of third-party gametes, or the status of embryos are shaped by religious norms and beliefs[13].

Eastern Orthodox Churches[14]. The Eastern (Greek) Orthodox Church is not as strict as the Roman (Latin) Catholic Church regarding ART. It allows the medical and surgical treatment of infertility including IUI using the husband's sperm but cannot accept IVF and other ARTs, surrogate motherhood, donor insemination and embryo donation, and suggests adoption as an alternative to those couples unable to accept their sterility problem. If this is not possible, then the Church could accept fertilisation techniques that do not involve surplus embryos, or include any form of donation or embryo destruction. Also, the Church could accept ARTs by using only the parents' gametes and fertilising as many embryos as will be implanted.

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[9] See S. Guțan, *Reproducerea umană asistată medical și filiația*, Hamangiu Publishing House, Bucharest, 2011, p. 2 *et seq.*

[10] See also L. Tec, *Filiația – între adevăr (biologic) și minciună (legală) sau între știință și ficțiune*, 12.03.2014, *https://www.juridice.ro/313293/filiatia-intre-adevar-biologic-si-minciuna-legala-sau-intre-stiinta-si-fictiune.html*, last consulted on 21.03.2024.

[11] See, for details, Reader John Nichiporuk, *Did Abraham Live by the Hammurabi Code?*, 18.12.2020, *https://catalog.obitel-minsk.com/blog/2020/12/did-abraham-live-by-the-hammurabi-code*, last consulted on 21.03.2024.

[12] For details, see *https://en.wikipedia.org/wiki/Religious_response_to_assisted_reproductive_technology#cite_note-2*, last consulted on 12.03.2024.

[13] See M. Seiz, T. Eremenko, L. Salazar, *op. cit., loc. cit.*, p. 43 *et seq.*

[14] See H.N. Sallam, N.H. Sallam, *Religious aspects of assisted reproduction*, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5096425/*, 2016, and *https://en.wikipedia.org/wiki/Religious_response_to_assisted_reproductive_technology*, last consulted on 12.03.2024.

Catholicism. The Catholic Church opposes[15] certain ARTs and artificial birth control since they separate the procreative goal of marital sex from the goal of uniting married couples, allowing the use of a small number of ARTs and pregnancy postponement methods like natural family planning. The church allows forms that permit conception to take place from normative sexual intercourse, such as the use of hormonal injections to grow follicles and assist in ovulation, and IUI with sperm collected using the approved method of collection during intercourse. Pope Benedict XVI claimed that IVF separates the unitive procreative actions that characterise the sexual embrace. In addition, the church opposes IVF because it might cause disposal of embryos. Catholics believe an embryo is an individual with a soul who must be treated as such. In addition, when it comes to the embryos, cryo-freezing them for later use is considered immoral. Techniques involving only the married couple (homologous AIns. and fertilisation) are perhaps less reprehensible, yet remain morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one that „entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children."[16] According to the Catholic Church, it is not objectively evil to be infertile, and adoption is seen as an option for those who still wish to have children.

Lutheranism. The Evangelical Lutheran Church in America produced an authoritative document and unanimously concluded that IVF does not *in and of itself* violate the will of God as reflected in the Bible, when the wife's egg and husband's sperm are used. The Lutheran Churches approve of AIns. by a husband, though representatives from the Lutheran Church-Missouri Synod hold that such IVF is only unobjectionable if the sperm and egg come from husband and wife and all of the fertilised eggs are implanted in the wife's uterus. With regard to AIns. by a donor, the Evangelical Lutheran Church in America teaches that it is a „cause for moral concern"[17], while the Lutheran Church-Missouri Synod rejects it.

Hinduism[18] is generally tolerant of ART, but with the expectation that sperm cells and eggs should come from a married couple, or from close relatives in cases of infertility. In fact, the Hindu religion agrees with most of the ARTs, but it demands that the oocyte and the sperm used in the procedure to (better) come from a married couple. However, Hinduism also accepts sperm donation but the donor has to be a close relative of the infertile husband. In addition, abortion is not prohibited and the adoption of a child, which usually comes from a numerous family, is also practised. This liberal attitude has made India an important destination for reproductive tourism and many couples travel to India for ART, including members of the LGBT communities.

Islam[19]**.** The Islamic community largely accepted ART. IVF and similar technologies are permissible as long as they do not involve any form of third donor (of sperm, eggs, embryos, or uteruses - the use of a third party is considered an adultery). AIns. with the husband's semen is allowed, and the resulting child is the legal offspring of the couple. It is allowed the IVF of an egg from the wife with the sperm of her husband and the transfer of the fertilised egg back to the uterus of the wife, only if the procedure is indicated for a medical reason and is carried out by an expert physician. Adoption of a child from an illegitimate form of ART is not allowed (the child who results from a forbidden method belongs to the mother who delivered him/her and he/she is considered to be an illegitimate child). If the marriage contract has come to an end because of divorce or death of the husband, ART cannot be performed on the ex-wife even if the sperm comes from the former husband. An excess number of embryos can be preserved by cryopreservation and the frozen embryos are the property of the couple alone and may be transferred to the same wife in a successive cycle, but only during the duration of the marriage contract (embryo donation is prohibited). SFR is only allowed if the prospect of carrying the pregnancy to viability is very small or if the health or life of the mother is in jeopardy. All forms of surrogacy are forbidden; establishment of sperm banks with „selective" semen threatens the existence of the family and the „race" and should be prevented. The physician is the only qualified person to practise ART in all its permitted varieties and,

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[15] See *https://web.archive.org/web/20081229164506/http://www.medicalnewstoday.com/articles/38686.php*, last consulted on 20.03.2024.

[16] See Catechism of the Catholic Church, *https://www.vatican.va/archive/ENG0015/__P86.HTM*, last consulted on 20.03.2024.

[17] See *https://www.advocatehealth.com/assets/documents/faith/lutheranfinal.pdf*, last consulted on 20.03.2024.

[18] See H.N. Sallam, N.H. Sallam, *Religious aspects of assisted reproduction*, *op. cit., loc. cit.*

[19] *Ibidem*. See also M.C. Inhorn, *Making muslim babies: IVF and gamete donation in Sunni versus Shi'a Islam*, 2006, Cult Med Psychiatry , no. 30, p. 427-450, *https://doi.org/10.1007/s11013-006-9027-x*, last consulted on 20.03.2024.

if he performs any of the forbidden techniques, he is guilty, his earnings are forbidden, and he must be stopped from his morally illicit practice.

Orthodox Judaism[20]. In Orthodox Judaism, AIns. with the husband's sperm is allowed if the wife cannot become pregnant in any other way. An additional major issue is that of establishing paternity. For a baby conceived naturally, the father is determined by a legal presumption: a woman's sexual relations are assumed to be with her husband. Regarding an IVF child, this assumption does not exist and requires an outside supervisor to positively identify the father (but doctors or laboratory workers present at the time of the fertility treatment are not considered supervisors due to a conflict of interest and their pre-occupation with their work; as such, supervisory services are required for all treatments involving lab manipulation or cryopreservation of sperm, ovum or embryos). According to many Orthodox decision makers, egg donation and surrogacy are allowed pending religious fertility supervision.

Conservative Judaism[21]. AIns. is not typically allowed because it brings up the issue of a variety of Jewish Laws regarding incest, adultery, and lineage. In fact, there are some Rabbis who work closely with fertilisation clinics so that they can supervise all genetic material. The use of anonymous donors is strongly discouraged. Regarding adultery, a man may have made multiple sperm donations, and that would cause problems for half-siblings to potentially meet and marry (and that violates the Jewish incest laws). While some consider adultery if a woman uses sperm from a man that is not her husband, others, however, don't see this as an issue because both members of the couple consent to the use of third-party sperm donation. Surrogacy and egg donation are permissible and the birth mother, rather than the genetic mother, is considered the mother of the child, therefore conversion may be necessary if a non-Jewish woman acts as a gestational surrogate. A maximum of 3 embryos may be implanted at a time. Freezing and donation of embryos is permitted.

Buddhism[22]. Buddhism is also a very liberal religion regarding ART. It is allowed IVF (without restricting the access to this medical procedure only to the married couples) and also sperm donation. In this tradition, a child conceived from donated genetic material has the right to meet his genetic parents as he reaches maturity.

Japanese culture[23]. IUI, IVF, ICSI, and donor insemination is permitted (the first sperm bank in Japan was established in Tokyo in 1965). However, oocyte donation and surrogacy are prohibited by law, and also IVF if both partners have an HIV infection.

Chinese culture[24]. As in Japanese religions, Chinese religions are family-oriented and the practice of IUI, IVF, ICSI, cryopreservation and Preimplantation Genetic Diagnosis (PGD) are allowed. However, the following procedures are prohibited: sex selection without medical indication, surrogacy, embryo donation, gamete donation and human reproductive cloning.

3. Legal considerations about ART around the world

3.1. Generalities

Spain[25] and Israel[26] are among the most advanced and active ART industries in the world, having very pro-IVF legislation compared to most other European countries.[27] Both countries can be considered as early adopters

[20] See *https://en.wikipedia.org/wiki/Religious_response_to_assisted_reproductive_technology*, *op. cit., loc. cit.*

[21] See *https://en.wikipedia.org/wiki/Religious_response_to_assisted_reproductive_technology*, *op. cit. loc. cit.*

[22] See H.N. Sallam, N.H. Sallam, *Religious aspects of assisted reproduction*, *op. cit., loc. cit.*

[23] *Ibidem*.

[24] *Ibidem*.

[25] Spain has a national health service covering all citizens with wide-ranging benefits and high-quality services mostly free of charge, where regional authorities are entirely responsible for healthcare management. The prevalence of single-parent families is particularly high in Spain compared with other European countries. The Spanish ART industry has become the largest European IVF provider. See also Law no. 35/1988 on Assisted Reproduction Techniques, revised by Law no. 10/1995 of the Penal Code and Law no. 45/2003, reformed by Law no. 14/2006 on Assisted Reproduction Techniques and partially revised by Law no. 19/2015 of administrative reform measures in the field of the Administration of Justice and the Civil Registry.

[26] In Israel, a combination of historical, religious and other cultural factors, in addition to ongoing military conflict, form a very pro-fertility society where reproduction plays a central role in family structure and individual's life. Strong economic and technological development, full public funding of ART as well as a tendency to want large families yet begin childbearing years at an advanced age (which often necessitates the use of ART) help to explain the expansion of the ART industry in Israel. See also Public Health Regulations (IFV), 1987, revised by National Health Insurance Law, 1994; revised again by Health Ministry guidelines, 2014.

[27] The main similarity between Israel and Spain is the increasing use of ART due to age-related infertility. Socio-financial conditions and techno-scientific expectations are leading many women and men to postpone parenthood, which has been described as „structural infertility". For details, see I. Alon, J. Guimon, R. Urbanos-Garrido, *Regulatory responses to assisted reproductive technology: a comparative*

of ART, although for different reasons. Funding policies, market structures, and some restrictions mainly differ, and each country faces different debates arising from the increased use of ART.

In Europe, there are major differences in ART legislation. A European directive[28] fixes standards concerning the use of human tissue and cells, but all ethical and legal questions on ART remain the prerogative of EU member states. In 11 countries all women may benefit; in 8 others, only heterosexual couples are concerned; in 7 only single women; and in 2 (Austria and Germany) only lesbian couples. Spain was the first European country to open ART to all women, in 1977, the year the first sperm bank was opened there[29]. In France[30], the right to ART is accorded to all women. In the last 15 years, legislation has evolved quickly. *E.g.*, Portugal made ART available in 2006 with conditions very similar to those in France, before amending the law in 2016 to allow lesbian couples and single women to benefit. Italy[31] clarified its uncertain legal situation in 2004 by adopting Europe's strictest laws: ART is only available to heterosexual couples, married or otherwise, and sperm donation is prohibited. Today, 21 countries provide partial public funding for ART treatment[32]. The seven others, which do not, are Ireland, Cyprus, Estonia, Latvia, Luxembourg, Malta, and Romania. Such subsidies are subject to conditions, however. In Belgium, a fixed payment of €1,073 is made for each full cycle of the IVF process. The woman must be aged under 43 and may not carry out more than six cycles of ART, and there is also a limit on the number of transferable embryos, which varies according to age and the number of cycles completed. Germany tightened its conditions for public funding in 2004, which caused a sharp drop in the number of ART cycles carried out, from more than 102,000 in 2003 to fewer than 57,000 the following year. Since then, the figure has remained stable. Most European countries allow donations of gametes by third parties. But the situations vary depending on whether sperm or eggs are concerned. Sperm donations are authorised in 20 EU member states; in 11 of them anonymity is allowed. Egg donations are possible in 17 states, including 8 under anonymous conditions.[33] On 12 April, the Council of Europe adopted a Recommendation[34] which encourages an end to anonymity. 17 countries limit access to ART according to the age of the woman. 10 countries have established an upper age limit, varying from 40 (Finland, Netherlands) to 50 (including Spain, Greece and Estonia). Since 1994, France is one of a number of countries (including Germany, Spain) which use the somewhat vague notion of „natural age of procreation”[35].

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analysis of Spain and Israel, in Journal of Assisted Reproduction and Genetics, vol. 36, 2019, pp. 1665–1681, *https://doi.org/10.1007/s10815-019-01525-7*, last consulted on 22.03.2024.

[28] See Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, OJ L 102/07.04.2004, pp. 0048-0058, *https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32004L0023*, last consulted on 08.03.2024.

[29] See O. Jézéquélou, *How does assisted reproductive technology work in Europe?*, 2019, *https://www.europeandatajournalism.eu/cp_data_news/How-does-assisted-reproductive-technology-work-in-Europe/*, last consulted on 22.03.2024.

[30] France allows ART also for lesbian couples and single women (Law no. 2021-1017 of 2 august 2021 on bioethics). See *https://www.legifrance.gouv.fr/loda/id/JORFTEXT000043884384/*, last consulted on 15.03.2024. Anonymity, gratuity and volunteerism are the main principles on which the donation of gametes and the reception of embryos. The bioethics law provides that from September 1, 2022, all donors consent to access to their non-identifying data and their identity before making a donation. The person resulting from a donation may, upon reaching the age of majority and if they wish, have access to the donor's non-identifying data and/or identity by making a request. As part of the bioethics law, frozen embryos from people who no longer have parental plans and who consent to reception may be offered to couples composed of a man and a woman or to couples of women of childbearing age, but also to a single woman of childbearing age. For recipients, this is an intrauterine embryo transfer after thawing. For people who wish it, it is possible, during IVF, to fertilise all or part of the oocytes collected. Oocytes or extra-embryos are then frozen in view for further use. People are then consulted each year in writing on the future of their frozen embryos (continuation of preservation for later transfer, reception of one's embryos by another couple or single woman, looking for scientific or cessation of their conservation). Consent to embryo donation is collected in writing and can be revoked in a reflection period of 3 months. After this period, consent is confirmed. Furthermore, the cessation of conservation embryos is also planned in very specific conditions. It is, for example, if the people consulted repeatedly do not give an opinion on the fate of their embryos kept for at least five years. See, for details, *https://www.agence-biomedecine.fr/IMG/pdf/bd_stc_biomed23-1_guide_amp_pds_170x245_8p.pdf*, last consulted on 22.03.2024.

[31] Access to ART is regulated in Italy by Law no. 40/2004. On December 18, 2023, Italy's Scientific Advisory approved an „Update to the Guidelines Comprising the Indications for Procedures and Techniques Related to Medically Assisted Reproduction”, a document showing how to apply Law no. 40/2004 considering changes made in recent years by the rulings. Despite its title, this document is not a set of clinical guidelines for diagnosing and treating infertility. Italy's body for clinical practice and public health guidelines (the *Sistema Nazionale Linee Guida*) has not accredited any guidelines for the clinical management of infertility. See M.C. Valsecchi, *Guidance on Medically Assisted Reproduction Coming in Italy?*, *https://www.medscape.com/viewarticle/guidance-medically-assisted-reproduction-coming-italy-2024a100014e?form=fpf*, 17.01.2024, last consulted on 20.03.2024.

[32] See O. Jézéquélou, *op. cit., loc. cit.*

[33] *Ibidem*.

[34] See *https://pace.coe.int/pdf/a1b29a06632a0d2f52ecb035e0209db36a6dd0b567d6055cb1de31bca2033b71/doc.%2014995.pdf*, last consulted on 15.03.2024.

[35] See O. Jézéquélou, *op. cit., loc. cit.*

In 2017, the steering council of France's Agency of Biomedicine established an age limit of 43 for women using ART. 10 countries have no age limit for ART. These include Austria, Hungary, Italy and Poland.

Despite different national laws, human rights should secure the very basic rights which would agree everyone should have. ECHR and ECtHR were created to provide effective control mechanism for human rights[36] and the development and flexibility of the ECHR interpretation provides a fertile ground to analyse ART in the context of the ECHR. The ECtHR case-law shows that „the right to become a parent", even „parent genetically", is legally protected. The right to become a parent can be translated into the right to have children. The right of a couple to conceive a child and to make use of ART for that purpose is protected by art. 8 ECHR[37], as such a choice is a form of expression of private and family life (Case *S.H. and others v. Austria*[38], para. 82; Case *Knecht v. Romania*[39], para. 54). According to the ECtHR, the same applies for preimplantation diagnosis when artificial procreation and termination of pregnancy on medical grounds are allowed (Case *Costa and Pavan v. Italy*[40]). Like the notion of private life, the notion of family life incorporates the right to respect for decisions to become a parent in the genetic sense (Case *Dickson v. the United Kingdom*[41], para. 66; Case *Evans v. the United Kingdom*[42], para. 72). However, the provisions of art. 8 taken alone do not guarantee either the right to found a family or the right to adopt (Case *E.B. v. France*[43], para. 41; Case *Petithory Lanzmann v. France*[44], para. 18). In addition, however worthy an applicant's personal aspiration to continue the family line, art. 8 does not encompass the right to become a grandparent (Case *Petithory Lanzmann v. France*, para. 20). ECtHR considered that concerns based on moral considerations or on social acceptability must be taken seriously in a sensitive domain like artificial procreation (Case *S.H. and others v. Austria*, para. 100). ECtHR found no violation of art. 8 where domestic law permitted the applicant's former partner to withdraw his consent to the storage and use by her of embryos created jointly by them, preventing her from ever having a child to whom she would be genetically related (Case *Evans v. the United Kingdom*, para. 82). Art. 8 ECHR does not require States to legalise surrogacy. Therefore, the refusal to recognise a legal relationship between a child born through a surrogacy arrangement abroad and the intended parents does not violate the parents' and children's right to family life if this inability to obtain recognition of the legal parent-child relationship does not prevent them from enjoying their family life together. In particular, there is no violation of their right to family life if the family is able to settle in the respective member State shortly after the birth of their children born abroad and if there is nothing to suggest that the family is at risk of being separated by the authorities on account of their situation (Case *Mennesson v.*

[36] See: I. Cameron, *An Introduction to the European Convention on Human Rights,* Iustus Förlag, 2006, p. 38; R.K.M. Smith, *International Human Rights,* 5th ed., Oxford University Press, 2012, p. 96-97.

[37] See *Guide on Article 8 of the Convention – Right to respect for private and family life*, points 127, 317-321, p. 37, 81-82, at *https://www.echr.coe.int/documents/d/echr/guide_art_8_eng*, last consulted on 22.03.2024.

[38] App. no. 57813/00, judgment from 03.11.2011, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-107325%22]}*, last consulted on 10.04.2024.

[39] App. no. 10048/10, final judgment from 11.02.2013, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-113291%22]}*, last consulted on 10.04.2024.

[40] The case concerned an Italian couple who were healthy carriers of cystic fibrosis and wanted, with the help of medically-assisted procreation and genetic screening, to avoid transmitting the disease to their offspring. In finding a violation of art. 8, ECtHR noted the inconsistency in Italian law that denied the couple access to embryo screening but authorized medically assisted termination of pregnancy if the foetus showed symptoms of the same disease, and concluded that the interference with the applicants' right to respect for their private life and family life had been disproportionate. App. no. 54270/10, final judgment from 11.02.2013, *https://hudoc.echr.coe.int/eng#{%22appno%22:[%2254270/10%22],%22itemid%22:[%22001-112993%22]}*, last consulted on 10.04.2024.

[41] App. no. 44362/04, judgment from 04.12.2007, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-73360%22]}*, last consulted on 10.04.2024.

[42] App. no. 6339/05, judgment from 10.04.2007, *https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evans%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-72684%22]}*, last consulted on 10.04.2024.

[43] App. no. 43546/02, judgment from 22.01.2008, *https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Case%20E.B.%20c.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-84571%22]}*, last consulted on 10.04.2024.

[44] App. no. 23038/09, judgment from 12.11.2019, at *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-199287%22]}*, last consulted on 10.04.2024.

France[45], 2014, para. 92-94; Case *Labassee v. France*[46], para. 71-73; Case *Foulon and Bouvet v. France*[47], para. 58). ECtHR also rejected a complaint concerning the refusal to grant Polish citizenship to two children born by way of a surrogacy arrangement in the United States (the parents were a same-sex couple who lived in Israel and who both held Israeli citizenship, although one also had Polish citizenship) and found that art. 8 was not applicable as the family lived together in Israel, where their family ties were legally recognised (Case *S.-H. v. Poland*[48]).

ECtHR state that a same-sex couple living in a stable relationship falls within the notion of family life, as well as private life, in the same way as a heterosexual couple (Case *Vallianatos and Others v. Greece*, para. 73-74; Case *X and others v. Austria*, para. 95; Case *P.B. and J.S. v. Austria*, para. 30; Case *Schalk and Kopf v. Austria*, para. 92-94)[49].

ART has been regulated in the UK[50] for over 25 years. There are three main laws: the „Surrogacy Arrangement Act" (1985), the „Human Embryology & Fertilisation Act" (1990) and the „Human Reproductive Cloning Act" (2001). In 1991, the Human Fertilisation and Embryology Authority (HFEA) was founded. Clinics require a licence from the HFEA in order to operate and all treatment and results must be reported to the HFEA. The laws prohibit cloning, cross-species embryo transfer, gene modification. Sex selection (for non-medical purposes), surrogacy, egg donations, sperm donation and the development of an embryo outside the human body for more than 14 days. The number of embryos that can be transferred in a single cycle is limited to two for women under 40 years old and increases to three for women over 40. Embryo cryopreservation is permissible, but the embryos must be destroyed after ten years. New laws have been passed in the UK removing the anonymity of gamete donors. Once over 18 years old, a child conceived by egg, sperm or embryo donations now has the right to information about their genetic parents. IVF is free in the UK for women who are under forty but not for over forties which has led to UK women over 40 travelling abroad for access to cheaper ART treatments.

USA[51] regulate ART at a federal and state level. In 1992, the „Fertility Clinic Success Rate and Certification Act" was introduced to legislate ART at a federal level. The Centres for Disease Control and Prevention, the Food and Drug Administration and the Centres for Medicare and Medicaid Services are responsible for enforcing the Act. At the individual state level, the regulations vary. Some states have very limited regulations, while others are more comprehensive. Cloning is prohibited in some states; surrogacy is prohibited in others. Thirteen states have no ART regulations. The code of Federal Regulations-21 CFR Part 1271 sets standards for human tissue and tissue-based products but does not cover reproductive tissue. There is, therefore, a wide range of variations in sperm banks, genetic screens and other reproductive tissue treatments across clinics. The „Good Tissue Practice" regulations contain minimal sections relatable to reproductive establishments. Additionally, there are professional guidelines and good practice protocols developed by The American Society of Reproductive Medicine and the Society for Assisted Reproductive Technology that some clinics follow. The guidelines include limitations on age and embryo transfer numbers (one for women under 35 and no more than two per cycle).

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[45] App. no. 65192/11, final judgment from 26.09.2014, *https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2265192/11%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-145389%22]}*, last consulted on 10.04.2024.

[46] App. no. 65941/11, final judgment from 26.09.2014, *https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22FRE%22],%22appno%22:[%2265941/11%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-145180%22]}*, last consulted on 10.04.2024.

[47] App. no. 9063/14 and no. 10410/14, final judgment from 21.10.2016, *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-164968%22]}*, last consulted on 10.04.2024.

[48] App. no. 56846/15 and no. 56849/15, judgment from 26.02.2019, *https://hudoc.echr.coe.int/eng/#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2256846/15%22,%2256849/15%22],%22documentcollectionid2%22:[%22COMMUNICATEDCASES%22],%22itemid%22:[%22001-192050%22]}*, last consulted on 10.04.2024.

[49] For a detailed analysis of the Court's case-law on this topic, see the *Case-law Guide on the Rights of LGBTI persons*, *https://www.echr.coe.int/documents/d/echr/Guide_LGBTI_rights_ENG*, last consulted on 22.03.2024.

[50] See O. McDermott, L. Ronan, M. Butler, *A comparison of assisted human reproduction (AHR) regulation in Ireland with other developed countries*, *https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-022-01359-0*, last consulted on 20.03.2024.

[51] *Ibidem*.

3.2. ART and the International Federation of Fertility Societies (IFFS) Surveillance`s[52] (2022)

The IFFS „Surveillance 2022" showed that, the ongoing SARS-CoV-2 (COVID-19) pandemic had a profound impact on all aspects of reproductive care:

- no significant overall increase in *the number of ART centres* for most countries; the total increase of 776 ART centres cited was attributed to four countries (China, India, the Russian Federation, and Spain) each recording an increase of more than 100 centres;
- some form of *ART regulation*, usually conveyed by federal or national laws or statutes, existed in 69% of the responding countries; however, fewer countries have maintained legislation or professional organisational guidelines for determining the appropriate number of embryos to transfer per cycle and imposed penalties for failure to comply with such guidance; of the 27% of countries (24) that did report regulatory changes since 2018, new legislation was primarily directed at providing increased access to donated gametes and embryos together with more limited access to surrogacy and CBRC services;
- although no specific trends were identified that directly limited *access to infertility services* by single women and men, male and female same-sex couples, and transgender or intersex individuals, for the first time, most countries (54%) required a couple to be in a recognized and/or stable relationship to gain access to ART services; likewise, treatments provided to single women remain more widely accepted and allowed than treatments provided to single men;
- currently, no countries are posing global statutory obstacles to ART; thus, access continues to expand in many countries, and almost all aspects of ART are widely available in nearly all countries surveyed;
- little change was reported since 2018 with respect to *the statutory or other forms of oversight that facilitate the protection of the welfare of the future child* based on assessments of individuals seeking infertility treatment; few countries formally address and monitor the mental and physical health or the socio-cultural environment of prospective parents and their offspring[53];
- *ICSI* is offered universally;
- other micro manipulation procedures (*e.g.*, *PGT-M*[54]) are considered as essential technologies and are available in all comprehensive ART centres;
- *cryopreservation of gametes and embryos* is also regarded as an essential service,
- no significant changes in the *number of countries that allowed or permitted cryopreservation of sperm, oocytes, and/or pre-implantation embryos for fertility treatments for medical and non-medical indications* were found over the three years since the 2018 study;
- *the utilisation of donated sperm and/or oocytes with donor compensation* appears to be expanding; the use of these materials relies on MAR/ART treatments that are subject to regulations in nearly 50% of countries that responded to the survey (these activities are usually controlled by federal regulations, but others report regional and local laws and a role for guidelines from professional organisations);
- more countries have reported *the existence of guidelines or laws pertaining to cryopreservation of sperm, oocytes, and preimplantation embryos* for fertility treatments or medical indications compared to information collected in 2019;
- *embryo donation* is also in more frequent use (these embryos are often donated from a previous IVF cycle, but they can also be generated *de novo* from donated gametes; this latter option is not permitted in many countries); donor anonymity that has historically been offered and maintained for gamete donation is currently being reassessed - approximately 20 countries reported changes in relevant guidelines that expanded the amount of information provided to donors and offspring;

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[52] A survey initiated in 1998 by Dr. Howard Jones, Jr. and Dr. Jean Cohen, assessing practices of ART at the global level, IFFS invites representatives from the global ART community to forward the details of reproductive policy and practice in their home country *via* an electronic platform, responses analysed by an appointed Surveillance Committee and published in Global Reproductive Health. For details, see IFFS „Surveillance 2022", *https://www.iffsreproduction.org/wp-content/uploads/2022/10/IFFS-Surveillance-2022-Published.pdf*, last consulted on 24.03.2024.

[53] In countries that do have child welfare provisions in place (federal or local regulation and so on), such as: Greece, Australia, Colombia, France, Paraguay, United Kingdom, Sweden, clinics often have the option to deny treatment when there is evidence or suspicion of domestic violence, drugs and/or alcohol abuse, or serious mental health or disabilities that might impair appropriate childcare.

[54] Pre-implantation genetic testing for monogenic disorders (PGT-M) / Pre-implantation genetic testing for chromosomal structural rearrangements (PGT-SR) / Preimplantation genetic testing for aneuploidy (PGT-A). Pre-implantation genetic testing can be used by people who have a serious inherited disease in their family to avoid passing it onto their children. PGT-A provides information about the embryo's chromosomes whereas PGT-M looks for the presence of a specific, disease-causing gene.

- ongoing experiences with *cytoplasmic transfer, mitochondrial transfer, and CRISPR-Cas9 technology*[55] continue to be encouraging; however, these applications remain investigative at this time, with benefits, risks, and limitations that have yet to be determined; some countries have adopted a more cautious approach to mitochondrial transfer and CRISPR-Cas9 over the past three years;
- other topics still regarded as controversial include *human pre implantation embryo research, SFR and sex selection, surrogacy, CBRC, and posthumous reproduction*: the most recent questionnaire revealed a modest increase in research activity focused on *human pre-implantation embryos*, using donated unused embryos, most often with specific restrictions in place; there is also a small but expanding number of countries that are actively pursuing *embryonic stem cell research* (existing oversight in the countries that have established guidelines for this practice is typically based on the Common Rule); *SFR* is allowed in 61% of responding countries - SFR is unconditionally allowed in 33% of the responding countries, while 28% permit it with conditions; with the increased availability of *PGT-A*, which is currently permitted in 23 countries, access to sex selection methodologies is expanding; *SFR for sex selection* is permitted in very few countries; patients continued to seek *CBRC services* primarily for lower cost, perceived higher quality, and greater access (fewer respondents reported patients using CBRC services for sperm, egg, or embryo donation, and even fewer for any type of surrogacy; CBRC services were usually sought for specific therapies that were unavailable in their home countries; more respondents felt that the proportion of patients that travelled elsewhere for oocyte, sperm, and embryo donation was greater than the fraction of those coming into their countries seeking these services, a change perhaps created by the COVID-19 pandemic shut-downs[56]); *posthumous reproduction* remains a contentious topic and not much progress has been made toward resolving some of the ongoing ethical and legal issues;
- *human reproductive cloning* is almost universally prohibited;
- *surrogacy* continues to provoke intense international debate regarding legitimate indications for its use, concerns regarding the potential for exploitation, and how to go about handling requested anonymity; these issues intensified in 2020 and 2021 when the COVID-19 pandemic prevented some intended parents from travelling to their surrogates' domicile once their babies had been born; where allowed, surrogacy is usually regulated by a variety of federal and state laws or statutes with other mechanisms in place to ensure legislative enforcement; gestational surrogacy is more often permitted and practised than traditional surrogacy;
- *in Romania*, the survey stated that Romanian people travel from Romania in order to seek ART (due to the unavailable ART services) for lower cost or higher quality ART in another country.

3.3. The children's filiation in ART

The legal issues raised by ART bring to light, *inter alia*, questions about the human species, the future of humanity or the respect and dignity of the human being. Thus, for the most part, these issues raise questions of (non-)existence of regulations or of any legal protection or of the application of relevant principles in the field, regarding the right to have children or to have access to ART and a priority application of the principle of the best interests of the child, a principle to be linked to a number of child's rights (to have a clear filiation; to preserve his identity, including citizenship, name and family relations; its priority interest to be raised by its natural parents, to be maintained in its family of origin and to know its biological origins, as a component of the right to identity and personal development; to know the aspects/circumstances related to its birth).

Spain[57]. According to art. 7.1. from Law no. 14/2006 (assisted reproduction law), regarding to filiation: „The filiation of those born with assisted reproduction techniques will be regulated by civil laws, except for the specifications established in the following (…)" (legal determination of filiation, posthumous reproduction and surrogate motherhood). In the *heterosexual couples*, depending on the familiar situation of the woman, the filiation rules are different. In the case of a married heterosexual couple, there is a presumption of filiation that the children the wife has during the marriage are from her husband (art. 116 Civil Code). Because of that, the

[55] Clustered regularly interspaced palindromic repeats (CRISPR/Cas9) is a gene-editing technology causing a major upheaval in biomedical research. It makes it possible to correct errors in the genome and turn on or off genes in cells and organisms quickly, cheaply and with relative ease.

[56] More than half of the respondents noted the absence of regulations addressing patients coming to (59% – in countries like: Australia, Austria, Brazil, Canada, France, Germany, Italy, Romania, Russia, Sweden, Turkey) or leaving (67% – in countries like: Australia, Austria, Argentina, Canada, China, Germany, Romania, Russia, Sweden) their country in search of CBRC services.

[57] See G. Muñoz Rodrigo, *Filiation derived from assisted reproduction*, 2020, *https://eventi.nservizi.it/upload/278/altro/slides_munoz%20rodrigo_rev2.pdf*, last consulted on 21.03.2024.

consent of the husband is needed when his wife starts the treatment. Once they have agreed, it is impossible to refuse the filiation (art. 8.1. from Law no. 14/2006). When it comes to non-married heterosexual couples, there is not a presumption, but her partner will be able to become the father of the child if he agrees in a document before the treatment (art. 8.2. from Law no. 14/2006). In the case of *same sex couples of women*, the question is how to determine the filiation of the non-pregnant woman, due to the fact that the pregnant woman always will be a mother (*mater semper certa est*). So, there is a special rule in art. 7.3. from Law no. 14/2006, which allows, as long as they were a married couple, to „declare (…) that she consents that the filiation be determined in her favour with respect to the child born of her spouse". The non-requiring a proof about the ART treatment might be[58] a huge mistake because it easily allows to avoid the law principles, so lesbian women can buy reproductive material online and do homemade inseminations. In case of *non-married women*, the law does not include that possibility. *Surrogate motherhood* is an illegal practice, but at the same time it is not punished or expressly prohibited. According to art. 10 from Law no. 14/2006: „The contract by which the pregnancy is agreed, with or without price, by a woman who renounces her maternal filiation in favour of the contractor or a third party will be null and void" (so, the substitute woman will be the mother). However, some people try to avoid the law by going to other countries in which it is legal (like Russia, Georgia and Ukraine). But, if the father is biological, he will be able to recognize the filiation in Spain, and after that, his wife can adopt the child.[59]

France. *Principle of filiation unmodified*: the possibility of having access to origins for people who have received a donation does not modify the rules of filiation; so, the anonymity of the donor is promoted and no filiation can be established between the donor and the children and no liability action can be exercised against the donor. *A secure filiation*: securing the filiation in case of ARTs with third donors (donation of gametes or embryos) by signing a consent mandatory and prior to the donation, by the receivers (notarial deed). *For couples of women*: when obtaining consent by the notary, the couple of women recognizes jointly with the child. This recognition early surrender to the register at the birth of the child and is indicated in the birth certificate.

Italy. Children born following an ART, being blood relatives of their parents, are subject to the rules of common law for establishing filiation, and the action to deny paternity is prohibited in this case.

Germany. Consent of ART is required, as this has the direct effect of establishing filiation to the child. Embryos are considered human persons from the moment of conception; they can only be created for the purpose of being used for reproduction. The identity of the donor is not protected, due to the constitutional enshrinement of the right to know his origin. The filiation is established towards the intended parents (who have expressed their consent). There is the possibility of establishing filiation towards the donor, as biological parent, as he is not protected by the law, but the parental obligations remain linked to the man who expressed his consent for the conception of the child.

Romania. For the first time in our legislation, the Civil Code provides a series of norms regarding ART (art. 441-447 CC), expressly stipulating in art. 447 that (*only*) the legal regime of medically assisted human reproduction with a third donor (and no other ARTs!) is established[60]. According to art. 443 CC, „no one may contest the filiation of the child on grounds related to medically assisted reproduction, nor may the child born thus contest his filiation. The mother's husband may deny the paternity of the child, under the law, if he has not consented to medically assisted reproduction with the help of a third donor, the legal provisions on action in denial of paternity being applicable". This provision reinforces the thesis that the status of being parent is acquired on the basis of the legal will, and this, and not the biological link, is the foundation of filiation. The third donor does not establish any filiation with the child. Thus, the „intended parents" become the legal parents of the child conceived through ART, the biological filiation of the third donor being definitively replaced by legal fiction by filiation towards the intended parents. Any filiation between the child and the donor being excluded, that ensures the confidentiality of information on donors. With regard to the mother filiation`s contesting, the provisions of art. 411 CC are based exclusively on the absolute presumption - *iuris et de iure*, according to which the fact of birth it is crucial for establishing filiation to the mother, and the filiation to a woman (other than the one who gave birth to the child) can only be done by way of adoption. So, we have to deal with the fact that the

[58] *Ibidem*. Two women made a deal with one friend and he donated his sperm, but, in the end, he regretted it and filed a lawsuit claiming his parenthood. The Court declared the contract null and determined the filiation in his favour (decision from 27.11.2017).

[59] *Ibidem*.

[60] See also L. Barac, *Câteva considerații privind implicațiile juridice ale tehnicilor de reproducere umană asistată medical (RUAM)*, *https://www.juridice.ro/311847/cateva-consideratii-privind-implicatiile-juridice-ale-tehnicilor-de-reproducere-umana-asistata-medical-ruam.html*, last consulted on 09.03.2024.

Romanian law is silent on ways of human reproduction with a third donor and the special law promised has not yet appeared. Therefore, we don't know what techniques will be allowed by law[61]. Art. 142 letter u) of Law no. 95/2006[62] stipulates that the regulations regarding transplantation are applicable, including IVF. But IVF is insufficient for the birth of a child because we still need a uterus in which the embryo has to be implanted: the uterus of the woman who had the genetic contribution to *in vitro* conception (in this case, the genetic/biological mother is also the carrier mother) or the uterus of another woman, with no any genetic contribution (in this case, only a psychological mother or carrier mother). Anyway, if our reasoning is that the law allows only IVF, not supported by an embryo transfer, then art. 441-447 CC is absolutely useless.

We can conclude that the law allows what science has been doing in Romania for a long time- insemination from third donors, IVF from third donors and embryo transfer -, but it does not regulate medical contracts, the convention of gestation for another, of maternity of substitution, nor the legal effects in matters of filiation in all these cases. That is why we agree, with other opinions[63], that this non-regulation may cause at least the following problems regarding: filiation and the execution of contracts; access to the biological or genetic origins of children resulting from ART; lack of control over reproductive service providers, thus preventing gametes from being trafficked, embryos and „uterus". And, in the absence of a regulation, and a *de lege ferenda* issue, we have to deal with many questions: what kind of contracts are concluded in the fertilisation clinics authorised in Romania? / what kind of insurance contracts conclude fertilisation clinics that provide storage and cryopreservation of unused extra-embryos? / if such contracts are concluded, are they licit (taking into consideration the absence of a regulation expressly prohibiting or expressly allowing them)? / these contracts cannot be negotiated; therefore they are some kind of adhesion contracts? / what the clinics in Romania do with the extra frozen human embryos abandoned by those who appeal to ART („intended parents/parent")? / how to manage disputes over gametes and embryos in case of divorce or death of one or both parent/s? At the same time and also a *de lege ferenda* issue, the classification of frozen human embryos in the category of goods or of persons causes serious problems regarding the civil and/or the criminal liability, such as: in the event of intentional destruction of containers in which human embryos are cryopreserved within a fertilisation clinic, we will talk about criminal liability for destruction of goods or about murder? / if the cryopreserved embryos in a clinic will be damaged, due to non-compliance with the conditions required for preservation, the clinic will respond civilly to the intended parents for simple non-performance of the contract or will be criminally liable for murder? / in cases of embryo trafficking, how will be solved the problems regarding parent-child filiation?

4. Conclusions. Pros and cons about ART

Pros about ART:

- from a psychological point of view, in so many cases, IVF mothers show *greater emotional involvement* with their child, and they enjoy motherhood more than mothers by natural conception; similarly, studies [64]have indicated that IVF fathers express more warmth and emotional involvement than fathers by adoption and natural conception and enjoy fatherhood more (some IVF parents become overly involved with their children);
- *anyone can make use of* - it allows a wider spectrum of people to become parents and share in the pregnancy and childbirth process (this includes same-sex couples, women who are physically unable to carry a baby to term, and single women);
- *a control over the timing - e.g.*, IVF help patients who are focused on their job or who have a unique life scenario that influences when they want their baby to be born, by allowing them greater overall control (embryos or eggs that have been cryopreserved can be utilised in the future); when previous infertility treatments have failed, IVF can help;
- *giving birth to a healthy child* and *reducing the risks of having a miscarriage* - genetic testing/screening

[61] See A.R. Motica, L.M. Tec, *Familia prin contract (II)*, 19.03.2023, *https://buletinulnotarilor.ro/familia-prin-contract-partea-a-ii-a-continuare-din-numarul-trecut/*, last consulted on 22.03.2024.

[62] Published in the Official Gazette of Romania, Part I, no. 372/28.04.2006, republished in the Official Gazette of Romania, Part I, no. 652/28.08.2015.

[63] See L. Barac, *op. cit., loc. cit.*

[64] See: *https://www.researchgate.net/publication/259418507_IVF-Conceiving_Fathers'_Experiences_of_Early_Parenthood; https://www.researchgate.net/publication/227835814_The_Mother-Child_Relationship_Following_In_Vitro_Fertilisation_IVF_Infant_Attachment_Responsivity_and_Maternal_Sensitivity*, last consulted on 24.02.2024.

(also known as preimplantation genetic testing - PGT - these have been related to life-threatening diseases such Down syndrome, sickle cell anaemia) is an important tool for ensuring that.

- *Cons about ART:*
- *risks targeting mother and child*, such as: multiple or ectopic pregnancies; high mortality of the embryo or foetus; premature births; risk of transmission of diseases (unknown at the time of procedures - hepatitis B, HIV); or damage to blood vessels; increased risk of ovarian cysts; the negative effect of multiple pregnancies that can also manifest itself in the health of children who may be born dystrophic or with malformations;
- *ethical and legal issues that accompany ART*, generated also by:
    - the possibility of using embryos thus created for research, experiments, with the possibility of cloning human beings;
    - the possibility of using non-human genetic material in procedures; boycott of natural selection, because in these techniques the natural selection of the strongest male gamete no longer takes place, but a random one, made by the doctor;
    - the possibility of fertilising a female egg with another female egg, in the case of lesbian couples, (without male intervention, a process possible and proven by IVF - experimentally performed on mice since 1977);
    - children born with emotional problems, autism, sensory impairments, low immunity, genetic diseases;
    - some couples must travel to other states to find the best help; all of these stressors can take a serious financial, physical, and emotional issues on couples;
    - the child's right to find out how he was born is violated; depriving the child of a normal family environment, the number of single women who conceived through IVF is increasing;
    - the possibility of extending/practising posthumous reproduction (appearance of the child after one of the donor parents is deceased, using its cryopreserved gametes);
    - separation of sexuality from procreation;
    - affecting the status of the embryo (human being) and its rights, because through ARTs a large reserve of frozen embryos is produced, not all of them being transferred to a woman's uterus; problems related to embryo trafficking;
    - allows the „medicine of desire" - we can choose the sex of the child, skin colour, eye colour;
    - dissociating genetic filiation (motherhood and fatherhood) from social motherhood, with the upheaval of the notion of mother, because surrogacy differs from genetic mother and even legal mother;
    - overturning genealogies, as the surrogate mother can be the sister or mother of the genetic mother;
    - creation of identical twins or same-sex children;
    - affecting the child's personality in the case of ART with surrogate mother, being medically demonstrated the connection that arises during pregnancy between the carrier mother and the child, a relationship brutally broken by handing over the child after birth, based on gestation conventions;
    - aspects related to the human species, its quality, respect and dignity of the human being (human rights), the future of humanity; protection of human rights by means of domestic law, imprinting also on the relationship between domestic law and international human rights law;
    - in some cases, laboratory mix-ups (misidentified gametes, transfer of wrong embryos) have occurred, leading to legal actions against the IVF provider and complex paternity suits;
    - ectogenesis - in Japan research in the field of is quite advanced; this allows the creation of a synthetic, artificial uterus in which the baby can fully develop, rendering the maternal uterus useless;
    - in other countries, AIns. is allowed for lesbians, even gay groups, and not only by insemination of embryos fertilised with their own gametes in the uterus of the surrogate mother, but research is even being carried out to be able to carry the pregnancy themselves, technically possible, because a male pregnancy would be no different from an ectopic pregnancy (such research is being done lately in Australian and American laboratories, so that the father can become the mother of his own child, and the woman can also be the mother and father of her own child by fertilising an egg with another egg);
    - religious issues, some religions assimilating such techniques of ART to adultery.

Most of these issues remain unsolved as no worldwide consensus exists in science, religion, and philosophy on when a human embryo should be recognized as a person. For those who believe that this is at the moment

of conception, IVF for instance becomes a moral question when multiple eggs are fertilised, begin development, and only a few are chosen for uterus transfer. As a result, what about these extra embryos? What should we do with them: keep them frozen, donate them to other infertile couples, thaw them, or donate them to medical research?

That is why *a few „unsettling silences" are claiming their right to speak*: we need a unitary regulation and clear terms (*e.g.:* age, presence/absence of a pathology) on ART access and concrete ways of its application; the same medically permitted and prohibited ARTs must be specified and also the effects on filiation and inheritance. *Remember to solve*: the fate of the embryos conceived, but not yet used, if the death of one or both of the intended parent/s occurs, divorce or separation in fact, and the time limit within options may be exercised (*e.g.*: use only by a spouse, or, only with the consent of the spouses, *post-mortem* use, donation to another couple, revocation of consent); the fate of the embryos in the event of their total abandonment in the clinic, or the surplus of embryos left after use by the intended parent/s and the liability for abandonment; the liability of the clinic in case of destruction/disappearance of cryopreserved embryos or in case of medical errors at implantation; the lack of transparency regarding the genetic origin, with the consequence of a high risk of extrinsic kinship of children conceived with the same anonymous biological father. *Remember to avoid*: embryos traffic - settle a limit on the number of embryos that can be conceived, and maybe stipulating the obligation to use all the embryos conceived, otherwise criminal or civil liability may arise; the violation of human rights (the right to have children, even with malformations), of the principles guiding the rights of the person and of the children (best interests of the child). *The right to privacy and family life should not remain just a story to be told at night when we put our children to sleep. And, sometimes, maybe it's better for us just to remain humans… not God(s)!*

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RESTRICTING THE RIGHT OF SECOND APPEAL ON UNFAIR TERMS LAWSUITS. AN EUROPEAN MEASURE?

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Abstract

In Romanian civil procedural law, since the regulation of unfair terms, there have been several changes regarding the remedy of second appeal in respect of claims based on the provisions of Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers. Without distinguishing between claims brought by natural persons or other bodies recognised by law as having standing in such disputes, the extraordinary remedy of second appeal is currently restricted to unfair terms.

In the course of this paper we aim to identify whether this measure is in line with European law on unfair terms and whether the measure is appropriate at national level in relation to the aims pursued by the European and national legislator when enacting legislation protecting the consumer. Also, we will analyse from a teleological point of view the regulatory changes and we will also study the way in which other European countries legislate in this area. Thus, at national level, it is necessary to identify what the legislator had in mind when taking this measure, both with regard to consumers who are natural persons and with regard to the bodies to which the law grants legal standing in such cases.

Internationally, we believe that the identification of the policies adopted on the matter will be serious grounds for validating or invalidating domestic policy. Moreover, in this way we will identify whether other European citizens have more, less or equal opportunities to remove unfair terms from the practices of sellers or suppliers.

Keywords: *second appeal, procedural remedy, unfair terms, opportunity, compliance.*

1. Introduction

With this study we intend to analyse whether or not restricting access to the procedural remedy of second appeal in Romanian civil procedural law is a measure in line with European law and whether by this measure the legislator has fulfilled the objectives pursued by the European legislator, which sought to ensure the most effective protection of consumers against unfair terms used by professionals.

The importance of the study is particularly significant in relation to the fact that such a legislative measure has had, and continues to have, a great impact on consumers, given the risk that court judgments in which the law has been misapplied will remain irrevocable. In this way, the consumer risks becoming the victim of a non-uniform practice caused by the lack of the most effective verification mechanisms recognised by the state.

With the present study we also intend to verify whether the level of importance given by the Romanian legislator to the correct and efficient application of the regulatory mechanism developed by the European Union is sufficient.

We will try to answer this question by analysing the normative process followed by the Romanian legislator, the jurisprudence of the Romanian Constitutional Court and by analysing European states legislations and their jurisprudence.

So far the problem has not been analysed by the Romanian academic literature, so the result of this study is, we believe, of major importance and can improve the existing legal situation.

2. General aspects of the architecture of the Romanian civil procedure

In the Romanian legal procedural system, the civil process, as a rule, takes place in two main stages[1].

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[1] For the distinction made between the term „phase" (in original – *fază*) of the civil process and „stage" (in original – *etapă*), see G. Boroi, M. Stancu, *Drept procesual civil*, 5th ed., Hamangiu Publishing House, Bucharest, 2020, p. 397.

The first stage is represented by the trial at first instance governed by the provisions of art. 192 *et seq.* CPC, book II, title I[2].

Once the case has been decided at first instance by a civil decision, it may be appealed to a higher court on grounds of legality or merits, because it being obvious that errors of procedure (error in procedendo) or of judgment (*error in iudicando*) must be possible to correct.

With regard to remedies, art. 456 CPC states that an appeal is an ordinary remedy, while a second appeal, an appeal for annulment and a revision are extraordinary remedies.

The difference between ordinary and extraordinary remedies is that the latter *„may be exercised only under the conditions and on the grounds expressly and exhaustively provided for by law*"[3].

As regards the ordinary appeal, the appeal provides a new trial of the case from both a merits and procedural perspective. In other words, the party concerned has the opportunity to have the judgment reviewed by a higher court with a panel of two judges[4].

Subsequent to the decision on appeal, the legislator also provided for the extraordinary remedy of second appeal. It is worth mentioning here the difference between appeal, appeal for annulment and revision. Thus, although all these appeals have in common their extraordinary nature, only the second appeal is a remedy of reformation, whereas the appeal for annulment and the revision are of a retractive nature. In other words, the second appeal falls within the jurisdiction of a higher court than the court which delivered a judgment in appeal, whereas in the case of the other extraordinary remedies the jurisdiction falls to the courts which delivered those judgments. These being in fact means regulated by the legislator to give the courts which have made mistakes the possibility of revising the case for reasons expressly and restrictively provided for by law.

2.1. The procedural remedy of second appeal in domestic law

The second appeal is an extraordinary remedy of appeal and of reformation, which the Romanian legislator offers the possibility of control of the solution pronounced, as a general rule, in appeal and by way of exception in the first instance.

With regard to the remedy of second appeal, the grounds for appeal are set out in art. 488 CPC. These grounds for the illegality of the contested judgment are: the composition of the court in violation of the legal provisions; the judgment was delivered by a judge other than the one who took part in the debate on the merits of the case or by a panel of judges other than the one randomly selected to decide the case or whose composition was changed in violation of the law; the judgment was delivered in violation of the public policy jurisdiction of the court, an exception raised during the proceedings under the conditions provided for by law; the judgment was delivered in excess of the court's jurisdiction; the court's judgment was delivered in breach of procedural rules, the breach of which entails the sanction of nullity; the failure to state in the grounds of the judgment the reasons on which the court based its decision or when the judgment contains contradictory reasons or only reasons extraneous to the nature of the case; the judgment was delivered in breach of the authority of *res judicata* and perhaps, the most important reason from the point of view of our analysis, the judgment was delivered in breach or misapplication of the rules of substantive law.

In fact, the ultimate purpose of the second appeal is to be found in the provisions of art. 483 para. (3) CPC, according to which the purpose of the appeal is to have the competent court examine, in accordance with the law, the conformity of the contested judgment with the applicable rules of law. We shall see in the course of the proceedings that this procedural remedy has, in principle, the same aim in the laws of foreign countries.

2.2. A brief history of the permission of second appeal in unfair terms matters

First of all, it should be noted that Law no. 193/2000[5] on unfair terms in contracts concluded between sellers and suppliers and consumers recognises the capacity to initiate legal proceedings not only for consumers

[2] Law no. 134/2010 republished in the Official Gazette of Romania no. 247/10.04.2015, available at *https://legislatie.just.ro/Public/DetaliiDocument/140271*.

[3] G. Boroi, M. Stancu, *op. cit*., p. 714.

[4] According to art. 59 para. (3) of the Law no. 304/2022 on the Judicial Organization (published in the Official Gazette of Romania no. 1104/16.11.2022), „appeals shall be heard by a panel of 2 judges and appeals by a panel of 3 judges, unless otherwise provided by law".

[5] The Law no. 193/2000 (republished in the Official Gazette of Romania, no. 543/2012) is the transposition of the Council Directive 93/13/EEC of 05.04.1993 on unfair terms in consumer contracts (OJ L 95/21.04.1993).

who are individuals but also for authorised representatives of the National Authority for Consumer Protection (ANPC) and authorised specialists of other public administration bodies or consumer associations.

The two applications, different from the perspective of their holders, have established a different regime of jurisdiction by the legislator. Thus, under art. 12 para. (1) of Law no. 193/2000, the Tribunal has jurisdiction in respect of civil actions brought by legally recognised supervisory bodies, whereas in respect of civil actions brought by natural persons, jurisdiction is determined by reference to art. 2 para. (1) CPC, which is common law in civil matters, and art. 14 of Law no. 193/2000.

In the same way, the second appeal procedure has been regulated with regard to the two access routes to court. Thus, Law no. 193/2000 imposed restrictions on the exercise of the right of appeal in cases involving legally recognised supervisory bodies or consumer associations, and CPC imposed restrictions on the exercise of the civil action by consumers.

It should also be noted that for the analysis of the history of the restrictions of the right of second appeal in the field of unfair terms that Law no. 193 of 6 November 2000 on unfair terms in contracts concluded between professionals and consumers[6] entered into force, by reference to the provisions of art. 17 of the law[7] and art. 12 para. (1) of Law no. 24/2000, on 09.12.2000[8]. As such, at that time civil proceedings were governed by CPC 1865[9].

At the time of the coming into force of Law no. 193/2000, CPC 1865 provided for largely the same grounds of second appeal as the new regulation[10], but the second appeal was an ordinary remedy and could also be formulated in matters of unfair terms[11].

With regard to the civil actions belonging to the inspection bodies and consumer associations, between 09.12.2000[12] and 01.09.2012[13] the remedy of appeal was admitted.

With regard to claims belonging to individual consumers, initially, when CPC came into force, the legislator restricted the possibility to second appeal by reference to a value of the subject matter of the claim up to 500,000 lei. Therefore, where the value of the subject matter of the contract containing unfair terms exceeded 500,000 lei, the consumer also had the right of second appeal.

Subsequently, the value threshold was increased by art. VXIII of Law no. 2/2013[14] to the amount of 1,000,000 lei[15].

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[6] Published in the Official Gazette of Romania no. 543/03.08.2022.

[7] Art. 17 of Law no. 193/2000 states: „This Law shall enter into force 30 days after its publication in the Official Gazette of Romania, Part I. On the same date, any provisions to the contrary shall be abrogated".

[8] Law no. 23/27.03.2000 on the rules of legislative technique for the elaboration of normative acts (republished in the Official Gazette of Romania no. 260/21.04.2010).

[9] CPC of 9 September 1865 (published in the Official Gazette of Romania no. 200/11.09.1865).

[10] Art. 304 CPC 1865 provided as follows: „The quashing of a judgment may be requested: 1. when the court was not constituted in accordance with the legal provisions; 2. when the judgment was given by judges other than those who took part in the debate on the merits of the case; 3. when the judgment was given in violation of the competence of another court; 4. when the court exceeded the powers of the judiciary; 5. when, by the judgment given, the court violated the procedural forms provided for under the penalty of nullity in article 105 al. (2); 6. when the court has not ruled on a claim, has granted more than what was requested or what was not requested; 7. when the judgment does not contain the grounds on which it is based or when it contains contradictory grounds or grounds extraneous to the nature of the case; 8. when the court, by misinterpreting the legal act under judgment, has changed its nature or its clear and unquestionable meaning; 9. where the judgment is based on a legal groundlessness or was given in violation or misapplication of the law; 10. where the court did not rule on a defence or on evidence which was decisive for the outcome of the case; 11. where the judgment is based on a serious error of fact resulting from an erroneous assessment of the evidence."

[11] Through the *rejust.ro app*, an application through which citizens have access to all judgments handed down by the courts from 01.01.2011 to date, we consulted for the period 01.01.2011 - 15.02.2013 (the date on which the new CPC came into force) the number of appeals decided on unfair terms at the level of the Courts of Appeal and we found a number of 121 appeals, of which 41 were admitted. Also, as the *rejust* application does not include the decisions of the High Court of Cassation and Justice, we consulted on the Supreme Court's website, *www.scj.ro*, on 02.02.2024, the number of cases registered between 26.02.2002 (the first case registered on this subject) and 15.02.2013. We identified 72 cases.

[12] Date of coming into force of Law no. 193/2000.

[13] Law no. 193 of 6 November 2000 on unfair terms in contracts concluded between sellers or suppliers and consumers (republished in the Official Gazette of Romania no. 543/03.08.2012), provided for its entry into force within 30 days of publication in the Official Gazette. At the same time, by art. 13 para. (4) of the Law, for the first time, the second appeal procedure was restricted, the text requiring that the decision of the first instance be subject only to appeal.

[14] Published in the Official Gazette of Romania no. 89/12.02.2023.

[15] For a detailed analysis of the changes to the value threshold in the field of appeal, see: G. Boroi, M. Stancu, *op. cit*., pp. 787-789; A. Dumitrescu, *Recursul în materia clauzelor abuzive*, Juridice.ro, *https://www.juridice.ro/631011/recursul-in-materia-clauzelor-abuzive.html*, last accessed on 06.02.2024.

The value threshold was subject to an exception of unconstitutionality so that, by dec. no. 369/30.05.2017[16], CCR found that the existence of a value threshold for the exercise of second appeal is incompatible with the fundamental law of the country.

In so deciding, CCR held that the establishment of a value threshold is an artificial criterion lacking objective and reasonable justification, which infringes the equality of citizens before the law.

Finally, CCR has also laid down rules regarding the freedom of the legislator to regulate in the exercise of remedies, rules from the perspective of which we will now examine the correlation of the measure we are analysing.

Thus, it has been established that the difficulty of a question of law must be determined by reference to its nature and not by reference to the value of the subject-matter of the claim and that the measure regulated must be objective and rational. Finally, the Court held that the only reason for establishing this value threshold was to relieve the congestion of the High Court of Cassation and Justice. At the same time, it was held that by restricting access to the remedy of appeal by introducing a value threshold, the provisions of art. 126 para. (3) of the Constitution[17] were infringed in cases where the second appeal falls within the jurisdiction of the Supreme Court.

Following the decision of the Constitutional Court, the Romanian legislator has chosen to completely restrict the right of second appeal in consumer protection matters, which also includes the provisions of Law no. 193/2000, through para. 49, art. I of Law no. 310 of 17 December 2018[18].

2.3. Examination of the compatibility of the measure restricting the right of second appeal in the field of unfair terms with the guidelines laid down by the Constitutional Court

As we have shown, according to the considerations of the CCR dec. no. 369/2017, considerations which according to Romanian law are binding for the future both for the legislator and for the Romanian courts, the determination of the judgments subject to second appeal must take into account the nature of the remedy of extraordinary and retraction of second appeal which has as its main object, according to art. 483 para. (3) CPC, to require the competent court to examine, in accordance with the law, the conformity of the contested judgment with the applicable rules of law. At the same time, the exclusion from this procedural remedy can be made by the legislator only by using an *objective* and *rational* justification.

We also note that, according to the Constitutional Court, the state must ensure equal protection of the rights and legitimate interests of individuals, which is similar to the principle of equivalence established in its judgments by the CJEU, a principle to which we will return in the course of this paper.

The Constitutional Court held that the only reason for establishing the value threshold was to reduce the congestion of the High Court of Cassation and Justice.

We have examined the legislative process of the Law no. 310/2018, which restricted the right of second appeal in the field of unfair terms for consumers who are individuals, but we could not identify a reasoning for the measure established by the legislator. On the contrary, during the meeting of the Chamber of Deputies on 06.06.2018[19], one member objected in the sense that an amendment was proposed, in relation to the initial proposal, to remove from the cases that cannot be subject to second appeal those relating to consumer protection claims, insurance claims, and those arising from the application of the Law no. 77/2016 on payment. The MEP said that he sees no reason why these types of lawsuits should not be subject to second appeal. He said that this was a restriction to which he had asked for clarification during the legislative process to see why this exemption had been introduced, but had not received a reply.

Therefore, the Romanian legislator has not indicated any justification for choosing to exclude the remedy of second appeal in a matter so broad, complex and of enormous interest to the European consumer.

The Constitutional Court has not defined what should be understood by objective and rational justification for the measures taken by the legislator in relation to the remedies available to litigants.

Thus, the words objective and rational have the usual meaning. We therefore consider that the measure introduced by the legislator must be determined by a specific situation that leads to its adoption and that the

[16] Published in the Official Gazette of Romania no. 582/20.07.2017.

[17] Art. 126 para. (3) of the Constitution of Romania of 21 November 1991 (republished in the Official Gazette of Romania no. 767/31.10.2003) provides that „*The High Court of Cassation and Justice shall ensure the uniform interpretation and application of the law by the other courts, according to its jurisdiction*."

[18] Published in the Official Gazette of Romania no. 1074/18.12.2018.

[19] The session is available at *https://www.cdep.ro/pls/steno/steno2015.stenograma?ids=7940&idm=6*, last accessed on 06.02.2024.

measure must be thought of in relation to its effects. More specifically, we consider that, depending on the situation that arises, for example congestion in a court, the legislator may justify restricting the possibility of filing a second appeal, an extraordinary remedy whose main role is to verify the correct application of the law in the resolution of a case, only by identifying rational causes that ultimately appear to be necessary and proportionate in relation to the restriction of the right of access to this remedy.

Unfortunately, we note that the legislator did not respect the transparency requirements for the regulation of the appeal remedy which will inevitably affect consumers who have brought civil actions based on Law no. 193/2000 after the change of the appeal architecture.

Further we can only speculate that the reason for restricting the procedural remedy of second appeal on unfair terms was due to the excessive burden on the Supreme Court.

In this regard, as we have shown in the content of this paper, during approximately 11 years (from 26.02.2002 to 15.02.2013) we have identified only 72 cases on the Supreme Court's docket. Of course, it is possible that our way of obtaining data is not the most accurate, but we believe that if this reason was considered by the legislator, he should have obtained accurate data on this situation. However, as we have shown, the measure was taken, in the light of the guidelines laid down by the Constitutional Court, in a totally arbitrary manner.

It should also be said that in the former second appeal architecture (since the entry into force of the new CPC), a very limited number of cases reached the Supreme Court, since in order for the High Court of Cassation and Justice to hear an appeal, the case had to have been registered with the Tribunal, since this instance heard disputes exceeding 200,000 lei, the rest of the cases falling under the jurisdiction of the district court. Therefore, the Tribunal judged at first instance, the Court of Appeal judged the ordinary appeal and finally, if the value of the claim exceeded the amount of 500,000 lei (later 1,000,000 lei) the case would be heard by the High Court of Cassation and Justice[20]. Under these circumstances, it seems that even the devolution of the supreme court was not a reason to restrict the unfair terms appeal. Moreover, it should be noted that the majority of second appeals in these matters were heard by the Courts of Appeal.

Certainly, the legislator can and should restrict the applicability of the procedural remedy of second appeal as not all cases are sufficiently important to society as a whole to go to an extraordinary remedy. In some cases it is sufficient for the litigant to have a double jurisdiction, thus ensuring judicial control of the judgment which he considers unfounded or unlawful. It should also be borne in mind that there are not enough resources to provide a third level of jurisdiction for all cases.

However, when taking a legislative measure, the legislator must carry out an objective and rational examination taking into account the necessity and consequences of the measure and determine whether the interest of the state prevails over the interest of the individual. In the case of unfair terms, we believe that this examination should be careful and transparent and should take account of the importance of the new regulatory mechanisms introduced on the European market, the interpretation and application of which raise major difficulties and require careful examination by the legislator and the judiciary, especially given that the Court of Justice of the European Union is giving new meaning to their applicability.

2.4. Examination of the compatibility of the measure under European law

CJEU has concluded in its jurisprudence[21] that it is for the domestic legal order of each Member State to lay down the procedural rules applicable to legal proceedings for the protection of the rights of citizens of the Union.

At the same time, it is particularly relevant to the present examination that the rules of national law must take account of the *principle of equivalence*, meaning that the procedural means made available to the litigant must not be less favourable in matters of unfair terms by comparison with similar domestic actions.

Therefore, we consider that the principle of equivalence will be violated if the consumer in a contract concluded with sellers or suppliers has the possibility to second appeal for violation of a legal rule of common law but this procedural remedy is restricted if his action is based on the provisions of Law no. 193/2000.

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[20] Please note that in Romania there are several courts which in order of importance are: the Courts (*Judecătorii)*, the Tribunals (*Tribunale*), the Courts of Appeal (*Curți de Apel*) and the High Court Of Cassation and Justice (*Înalta Curte de Casație și Justiție*).

[21] See para. 57 of the CJEU judgment of 09.07.2020, *Raiffeisen Bank and BRD Groupe Societé Générale* (C-698/18 and C-699/18, EU:C:2020:537) and para. 35 of the Judgment of 21.04.2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283).

However, given that in Romanian law the rule is represented by the possibility of second appeal and the exception is represented by art. 483 para. (2) CPC, which restricts the possibility of second appeal in certain matters, we consider that the measure imposed by the legislator is at odds with the rules of European Union law.

In this regard, we note that the High Court of Cassation and Justice is currently deciding a question of law on whether a claim for freezing (stabilisation) of the exchange rate at its value at the date of conclusion of contracts between sellers and suppliers and consumers, based on the provisions of art. 970 CC 1864[22] and the CCR dec. no. 623/2016, falls within the scope of consumer protection claims and is or is not subject to second appeal[23].

Thus, depending on how the legal cause of action is established, the case may or may not be subject to second appeal depending on whether it falls under the common law or unfair terms provisions.

Further, given the purpose of this paper, we also considered it necessary to examine the legislation of other Member States of the EU in order to analyse their domestic policy on the issue under analysis.

As it has a rich history of domestic courts seeking the intervention of the CJEU in the application of the law of abusive cases, we will begin our comparative law study with the Kingdom of Spain.

In this regard, we would like to point out that our analysis will be made from the perspective of the common law on the use of remedies[24].

Thus, the civil procedural law of the Kingdom of Spain is similar to ours as regards the remedies provided by law. According to art. 455 para. 1 of Law no. 1/2000 on Civil Procedure of the Kingdom of Spain[25], as a rule, judgments handed down in all types of proceedings, final judgments and those in respect of which the law expressly provides for this remedy may be appealed. Therefore, in this legal system we also find an ordinary appeal such as the appeal which is regulated in our law system.

The third remedy is governed by the provisions of art. 477 of Law no. 1/2000[26] on Civil Procedure of the Kingdom of Spain. According to para. 1 of that article, an appeal in cassation may be brought against judgments terminating proceedings in second instance delivered by the provincial courts when, according to the law, they are required to act as a collegiate body, and against orders and judgments delivered on appeal in proceedings concerning the recognition and enforcement of foreign judgments in civil and commercial matters under international treaties and conventions, as well as under EU regulations or other international rules, when the power to appeal is recognised in the act in question.

From an interpretation of the text, it might appear that an appeal in cassation is not allowed in respect of legislation enacted on the basis of EU law unless the transposing legislation provides for an appeal in cassation.

With regard to Law no. 7/1998 of the Kingdom of Spain[27] on general conditions of contract, there is no provision for allowing the remedy of appeal in cassation.

It would therefore seem that the appeal in cassation on unfair terms would be restricted.

[22] Published in the Official Gazette of Romania no. 271/04.12.1864.

[23] See the decision initiating proceedings before the High Court of Cassation and Justice with a request for a preliminary ruling on a point of law at *https://www.scj.ro/CMS/0/PublicMedia/GetIncludedFile?id=25289*, last accessed on 07.02.2024.

[24] I have made this clarification since the judgment of 17.07.2014 in *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099) was delivered on the special procedure of mortgage enforcement involving, *inter alia*, the issue of the exercise of the right of appeal against the consumer's opposition to enforcement. The Court stated that *„Article 7 para. (1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a system of enforcement such as that at issue in the main proceedings, which provides that a mortgage foreclosure procedure may not be stayed by the court of first instance, which may, in its final decision, at most, award compensation for the loss suffered by the consumer, in so far as the consumer, as the debtor pursued, cannot appeal against the decision rejecting his opposition to that enforcement, whereas the seller or supplier, as the creditor pursuing the enforcement, can bring such an appeal against the decision terminating the proceedings or declaring an unfair term unenforceable."*

[25] In original „Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil", available at *https://www.boe.es/buscar/act.php?id=BOE-A-2000-323*, last accessed on 10.02.2024.

[26] The marginal name of the text in the original is „Motivo del recurso de casación y resoluciones recurribles en casación", while the marginal title of the remedy regulated by art. 455 of the law is „Resoluciones recurribles en apelación. Competencia y tramitación preferente".

[27] In original „Law no. 7/1998 of 13 April 1998 on general conditions of contract", available at *https://www.boe.es/eli/es/l/1998/04/13/7/con*, last accessed on 10.01.2024.

However, the Tribunal Supremo of the Spanish Republic accepts in principle the appeal in cassation in the matter of unfair terms[28] as it results from the judgments of this court no. 20/10.01.2024[29], no. 16/09.01.2024[30] and no. 1797/20.12.2023[31].

In Spanish civil procedural law, too, the main role of the appeal in cassation is to ensure compliance with the rules of substantive and procedural law and the formation of a unified jurisprudence.

In conclusion, the Spanish legislator has understood to allow the third cycle of verification of the judgment on unfair terms to be carried out regardless of the actions available to consumers who are individuals or other bodies recognised by law as having this prerogative.

As far as French law is concerned, the French Republic has a rich history of unfair terms[32]. Thus, the concept of unfair terms has its origin in the Law no. 78-23/10.01.1978 on the protection and information of consumers of products and services[33]. The concept was subsequently incorporated into Community law by Council Directive 93/13/EEC of 5 April 1993. The transposition of this Directive is now included in the Consumer Code[34]. There are no special rules restricting the remedies provided for by the French legislator in the Consumer Code.

In terms of civil procedure, according to art. 527 of the French Civil Procedure Code[35], the ordinary remedies are appeal and opposition[36] and the extraordinary remedies are third-party opposition[37], appeal for revision[38] and appeal in cassation.

According to art. 580 of the French Civil Procedure Code, extraordinary remedies are admissible only in the cases provided for by law.

The extraordinary remedy similar to the second appeal in Romanian civil procedural law is found in the French Civil Procedure Code in art. 604 *et seq.*[39]. According to art. 604, in French law, an appeal to the Court of Cassation is aimed at censuring the non-compliance of the contested judgment with the rules of law.

In this regard, we note that the aim pursued by the French legislator is the same as regards the regulation of this legal provision. Also, according to art. 605 of the French Civil Procedure Code, an appeal in cassation is available only against judgments given at last instance.

The French legislator did not restrict the procedural remedy of second appeal[40] as our legislator did, but it established a rather serious fine of up to 10,000 euros for abusive exercise of the appeal[41], as opposed to the fine of up to 1,000 lei that can be imposed by the Romanian judge in accordance with art. 187 para. (1) point 1 CPC.

In conclusion, the Romanian legislator's vision on second appeal is not shared by some of other European states.

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[28] The case law of the Spanish Supreme Court can be consulted at *https://www.poderjudicial.es/*.

[29] Available at *https://www.poderjudicial.es/search/sentencias/Clausulas%20abusivas/21/AN#*, last consulted on 10.02.2024.

[30] Available at *https://www.poderjudicial.es/search/documento/AN/10763674/Clausulas%20abusivas/20240118*, last consulted on 10.02.2024.

[31] Available at *https://www.poderjudicial.es/search/sentencias/Clausulas%20abusivas/21/AN#*, last consulted on 10.02.2024.

[32] See M. Samuel Vitse, *Contentieux des clauses abusives: illustration d'un dialogue des juges*, in Recueil annuel des Études 2022, p. 9, *https://www.courdecassation.fr/files/files/Publications/Etude%20annuelle/2022_06_24_CCAS_RecueilEtude2022_web.pdf#page=8&zoom=100,0,0*, last consulted on 17.02.2024.

[33] In original - Loi nº 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services.

[34] For the matter of unfair terms in French law, see the provisions of art. L. 212-1, L 212-2, R212-1, R 212-2, R 212-3, R212-4, R 212-5, R 822-18, R822-19, R822-20, R822-21 R822-28 R822-29 R822-30 R822-31, R822-32, L241-1, L 241-1-1,L 241-2, L241-2-1 of the Consumer Code, *https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069565/2024-02-17/*, last accessed on 17.02.2024.

[35] *https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA000006117240/#LEGISCTA000006117240*, last accessed on 17.02.2024.

[36] The opposition is governed by art. 571 of the French Civil Procedure Code, which states that it seeks the withdrawal of a default judgment, and is therefore a remedy for procedural defects.

[37] According to art. 582 of the French Civil Procedure Code, the opposition of a third party aims at retracting or reforming a judgment against the third party.

[38] This procedural remedy is governed by art. 593 and art. 594 of the French Civil Procedure Code and appears as an appeal similar to the extraordinary remedy of revision provided for in art. 509 CPC.

[39] The appeal is called „le pourvoi en cassation".

[40] See the analysis of the appeals lodged by the French Court of Cassation - of 12 July 2023, no. 22-17.030 (*https://www.legifrance.gouv.fr/juri/id/JURITEXT000047852589?init=true&page=1&query=22-17.030&searchField=ALL&tab_selection=all*) and the decision of 28.06.2023, no. 21-24.720 (*https://www.legifrance.gouv.fr/juri/id/JURITEXT000047781156?init=true&page=1&query=21-24.720&searchField=ALL&tab_selection=all*), last accessed on 17.02.2024.

[41] See art. 623, section 628 of the French Civil Procedure Code.

3. Conclusions

In conclusion, in our opinion, the measure restricting the right of second appeal in the field of unfair terms is at odds with the national constitutional standards of the state and does not appear to be in line with the policies implemented by other EU countries in this field. Thus, European consumers who are citizens of Romania are disadvantaged in relation to European citizens of other states, and there is a possibility that, as far as the former are concerned, their cases will be definitively settled by misapplying the provisions of consumer protection legislation.

Therefore, *de lege ferenda*, we believe that the Romanian legislator should allow, once again, the right of second appeal in cases based on the rules set out in Law no. 193/2000 on unfair terms in contracts concluded between sellers or suppliers and consumers, a measure that would help increase their level of protection. It should be borne in mind that, in the case of actions brought by ANPC or other bodies recognised by law as having standing in such cases, the stakes are even higher as the impact of the actions is much more widespread, affecting other contracts to which consumers are party and in which they have not taken legal action.

Future research activities in this area should include the study of the legislation of other member states, in order to reinforce or invalidate some of the conclusions drawn from the present study. Analysis of these laws and their case law would also lead to the identification of other objectives that should be pursued in order to reinforce the ultimate aim of establishing rules on unfair terms, namely to remove unfair terms and prevent their occurrence in contracts between sellers or suppliers and consumers.

Finally, we would like to point out that in an area where the principles of Romanian procedural law and even of substantive law have been partially rewritten, the importance of sanctioning and preventing the use of unfair terms in consumer contracts has been emphasised, in which there have been dozens of referrals to the CJEU, the High Court of Cassation and Justice to issue preliminary rulings and appeals in the interest of the law, referrals to the Constitutional Court to verify the conformity of national rules and court practices with the fundamental law, given that a large number of these cases were due to a lack of understanding of the purpose of the national and/or European legislator, or to the need to fill in legislative gaps and to remove the non-uniform practices that had arisen, the restriction of the right of appeal in this area is, in our view, inappropriate.

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PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL HARMONISING CERTAIN ASPECTS OF INSOLVENCY LAW - INTRODUCTORY ASPECTS

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Abstract

Insolvency is an area inextricably linked to the evolution of investment, capital markets and the single market, the convergence of insolvency regimes at Member State level being a major concern of the European legislator.

However, given that existing EU legislation only covers pre-insolvency and debt relief measures as well as the rules on applicable law in cross-border insolvency cases, disparities between national rules remain in the substantive regulation of this area, which creates difficulties for stakeholders and discourages cross-border investment.

The new legislative proposal, which opts for targeted intervention, aims to ensure economic benefits for investors, creditors, businesses (including micro-enterprises) by reducing legal uncertainty in the case of insolvent debtors. Clearly action at European level is more appropriate to ensure convergence of specific elements of Member States' insolvency rules. EU level measures would ensure a level playing field, facilitating cross-border investment and contributing to the achievement of a robust Capital Markets Union.

Without wishing to give an exhaustive presentation of the proposal, we will try to focus on some of the novelties, in particular pre-pack procedures, avoidance actions and the simplified procedure for the winding-up of micro-enterprises, while also referring to the provisions of the relevant national rules (Law no. 85 of 25 June 2014 on pre insolvency and insolvency proceedings).

Keywords: *convergence of insolvency rules, pre-pack proceedings, avoidance actions, liquidation of micro-enterprises, role of the insolvency practitioner.*

1. Introduction

The Proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of insolvency law, launched by the European Commission on 7 December 2022 (hereinafter „the Directive") is, as stated in the Explanatory Memorandum of this legislative initiative, part of the European Commission's line of action to promote the Capital Markets Union[1], a project that is essential for further financial and economic integration in the EU. Although the Restructuring and Insolvency Directive (EU) 2019/1023 was also the fruit of a strategy to accelerate reforms dedicated to the Capital Markets Union, it appears that, according to ECB[2] or IMF analyses, there was an additional need to address the deficiencies and divergences in insolvency rules beyond the framework of the first Directive, this time aiming at targeted harmonisation of certain aspects of substantive insolvency law.

As a first general comment, we note that, in estimating the chances of success of such an exercise to reduce the differences between national procedures, the European legislator reasonably proposes minimum harmonisation requirements selecting only those areas of substantive law that can support an intervention accepted by the Member States. The proposal for a Directive aims to reduce differences between insolvency

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Capital Markets Union for Citizens and Business - A New Action Plan*, COM(2020) 590 final, *eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0590*.

[2] ECB, *Financial integration in Europe*, May 2018, *https://www.ecb.europa.eu/pub/pdf/fie/ecb.financialintegrationineurope201805.en.pdf*, and *Financial Integration and Structure in the Euro Area*, April 2022, *https://www.ecb.europa.eu/pub/pdf/fie/ecb.fie202204~4c4f5f572f.en.pdf*.

laws and thus address the problem of less effective insolvency rules in certain Member States, increase the predictability of insolvency proceedings in general and reduce obstacles to the free movement of capital. By harmonising specific aspects of insolvency law, the proposal aims in particular at facilitating cross-border investment by reducing costs for investors. The Directive complements the relevant Union framework, namely Directive (EU) 2019/1023 of the European Parliament and of the Council[3] and Regulation (EU) 2015/848 of the European Parliament and of the Council[4], by addressing issues not regulated by them.

2. Structure of the legislative proposal and first reactions

The proposed Directive is structured in nine titles: Title I - General provisions - under this title the scope and definitions are included; Title II - Avoidance actions - both general and specific conditions for bringing actions for annulment and their consequences are set out; Title III - Tracing of assets belonging to the debtor's estate - the Title includes provisions concerning access to bank information by certain designated courts, access to the register of beneficial owners and national asset registers by insolvency practitioners; Title IV - *Pre-pack* proceedings - includes general provisions, the preparatory stage, the liquidation stage; Title V - Duty of directors to request the opening of insolvency proceedings and civil liability; Title VI - Winding-up proceedings for micro-enterprises - this title contains general rules, opening of simplified winding-up proceedings, list of claims and determination of the mass of assets subject to insolvency, valuation of assets and distribution of proceeds, remittance of debts of entrepreneurs in simplified winding-up proceedings; Title VII - Creditors' committee - rules are laid down for the establishment of the creditors' committee, its members and its functioning; Title VIII - Measures to increase transparency in national insolvency laws; Title IX - Final provisions. The key dimensions of the proposal, also derived from art. 1 of the proposal (Subject matter and scope) are: (i) recovery of assets from the liquidated estate; (ii) efficiency of proceedings; and (iii) predictable and fair distribution of the value recovered among creditors.

It should be noted that immediately after the Proposal appeared, EESC expressed doubts as to whether the proposal would be a significant step towards closing the relevant gaps for the improvement of the European capital market Union, given that the Directive fails to provide a harmonised definition of the grounds for insolvency and the ranking of claims, both of which are essential for achieving greater efficiency and limiting the fragmentation of national insolvency rules[5]. Recently, the Eurogroup Inclusive Statement on the Future of the Capital Markets Union called on the European Commission to assess the need for further measures to facilitate greater convergence on specific features of insolvency frameworks that could discourage cross-border capital markets/investment, in particular the ranking of claims and triggers of insolvency or rules on financial collateral and settlement[6].

3. Introductory considerations about some of the policy options

We present below some considerations on some of the preferred policy options of the proposal, following some key elements of their architecture. It should be noted that the Directive is currently under consideration by the preparatory bodies of the Council of the EU.

3.1. Title II - Avoidance actions

Title II on actions for voidness provides for minimum harmonisation rules designed to protect the estate subject to insolvency proceedings against unlawful disposal of assets prior to the opening of insolvency proceedings. The objective is to ensure that the national rules of Member States on insolvency proceedings provide a minimum standard of protection as regards the voidness, voidability or unenforceability of legal acts

[3] 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 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) (OJ L 172/26.06.2019.

[4] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141/05.06.2015.

[5] Opinion of the European Economic and Social Committee on the „Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law", OJ L C 184/34/25.05.2023), Opinion of the European Economic and Social Committee on the „Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law" (COM(2022)702 final – 2022/0408 (COD)) (*europa.eu*).

[6] Statement of the Eurogroup in inclusive format on the future of Capital Markets Union – Consilium (*europa.eu*).

detrimental to the estate. At the same time, Member States may introduce or maintain rules ensuring a higher level of protection for creditors, for example by providing for more grounds for avoidance. In the context of the proposed framing of art. 6(1) supara. 1, it is important to determine objectively the limits of the suspect period, as the proposed rule is perfectible („*the submission of a request for the opening of insolvency proceedings, provided that the debtor has been unable to pay his debts as they fall due*"). In national law, according to art. 5 point 29 of Law no. 85/2014 on insolvency proceedings and insolvency proceedings, both manifest and presumed insolvency are taken into account, but art. 66 of Law no. 85/2014 operates separately both with the debtor's obligation to submit an application for the opening of proceedings if the debtor is in a state of insolvency and with the debtor's right to submit an application for the opening of proceedings if the debtor is in a state of imminent insolvency. Art. 6(1)(2) of the Directive retains the criterion of admissibility of the first application filed, which, by reference to art. 66(7) of Law no. 85/2014[7] (debtor's application and several creditors' applications) and art. 70(3) of the same national rule (several creditors' claims) generates a process of reflection. With regard to the derogations proposed by art. 6(3) of the Directive, the phrase *fair consideration* present in point (a) would be a potential candidate to increase the level of clarity, *fairness for the benefit of the mass of assets subject to insolvency*, allowing a wide range of interpretation. With reference to the general preconditions for actions for annulment, the sentence of art. 4 of the Directive indicates the possibility of declaring void legal acts „*completed*" before the opening of the procedure, *verbum regens* implying the conclusion/perfection, therefore an action. However, the definition proposed in art. 2(f) for legal act refers to *any human conduct, including an omission, which produces a legal effect*. Looking at the explanations provided by the recitals, we note in recital 6 some reasoning designed to give consistency to the option of including omissions within the scope of legal acts, based on the idea that *„it makes no significant difference whether creditors suffer damage as a result of an action or as a result of the passivity of the party concerned. For example, it makes no difference whether a debtor actively waives a claim against his debtor or whether he remains passive and accepts the statute of limitations. Other examples of omissions that may be subject to actions for annulment include failure to challenge a disadvantageous court judgment or other decisions of courts or public authorities or failure to register an intellectual property right*". We limit ourselves to observing, in the light of the above references, that a legal act cannot exist in the absence of a manifestation of will, being impossible to conclude it by omission. Human acts (whether committed or omitted), committed without the intention of producing legal effects although they produce effects by the will of the law, fall within the category of legal facts *stricto sensu* which constitute the source of legal relationships under private law. Last but not least, in order to draw attention to the vulnerability of art. 16 (former art. 13) of Regulation (EC) 1346/2000 on insolvency proceedings, we recall in the discussion of actions for annulment, the case law of the CJEU which upholds the protection afforded to the expectations of third parties concluding a contract with the insolvent debtor. We exemplify these concerns by two landmark judgments, namely the judgment in Vinyls (C-54/16[8]) which held that *„art. 13 of Regulation no. 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine*" and the judgment in Frerichs[9] (C-73/20) in which the Court concluded that *„Art. 13 of Council Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings and art. 12(1)(b) of Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) must be interpreted as meaning that the law applicable to the contract under the latter regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors".* Another novelty compared to national law in this area is that actions for annulment do not only concern acts of the debtor to the detriment of creditors, but also of the co-contracting party or a third party.

[7] Law no. 85/2014 on pre insolvency and insolvency proceedings, published in the Official Gazette of Romania no. 466/25.06.2014.
[8] Case *Vinyls Italia SpA v. Mediterranea di Navigazione SpA*, C-54/16, ECLI:EU:C:2017:433.
[9] Case *ZM v. E.A.Frerichs*, C-73/20, judgment of the Court (First Chamber) of 22.04.2021, ECLI:EU:C:2021:315.

3.2. Title III - Tracing assets belonging to the insolvency estate

The proposed rules aim to give insolvency practitioners access to various registers containing relevant information on assets belonging or supposed to belong to the insolvency estate. Some national electronic registers are public or accessible through single interconnection platforms set up by the EU, such as the Insolvency Registers Interconnection (IRI) system. The provisions of the Directive extend the scope of registers accessible to insolvency practitioners to registers originally established under the EU anti-money laundering framework (central national registers of bank accounts or trust information in Member States' beneficial ownership registers).Title III also obliges Member States to provide foreign insolvency practitioners with direct and rapid access to the registers listed in the Annex (as long as they are already available in the Member State). We also note the developments proposed in recital 16 concerning the organisation of access to these registers *„In order to respect the right to the protection of personal data and the right to privacy, direct and immediate access to bank account registries should be granted only to courts with jurisdiction in insolvency proceedings that are designated by the Member States for that purpose. Insolvency practitioners should therefore be allowed to access information held in the bank account registries only indirectly by requesting the designated courts in their Member State to access and run the searches".* We consider that the way in which access to these registers will be materialised, without challenging the proposed circulation circuit, should not affect the speed of the procedure. In this respect, the provisions of art. 15 of the Directive, which regulates the conditions for accessing and consulting information and provides for a case-by-case analysis, must be reconciled with circumstances such as those set out in art. 14(4), „access and consultation shall be deemed to be direct and immediate", which refers only to the hit back provided by the automated register of bank accounts accessed, without imposing deadlines for making the request. In the context of the discussions on access of insolvency practitioners to registers in other Member States, we also recall the provisions of art. 33 of Regulation (EU) 2015/848 (recast) which stipulates that *„Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual".* This provision may imply that „the power of pursuit and recovery of assets" enjoyed by the insolvency practitioner under the *lex concursus* is diminished when it conflicts with the public policy of the requested State. Therefore, if the pursuit and recovery measures were not known to the State in which the assets are located because they are incompatible with its public policy, they would not be enforced. We also mention the imperative of aligning access to beneficial ownership registers with the safeguards listed in the CJEU judgment of 22 November 2022 in Joined Cases C-37/20 and C-601/20[10] and of monitoring, in parallel with the analysis of the text of the proposal, the discussions taking place at UNCITRAL level, Working Group V (Insolvency) on possible developments in the field of asset tracing.

3.3. Title IV - Pre-pack proceedings

Title IV on pre-pack procedures aims to ensure that these procedures, which are generally considered to be effective in recovering value for creditors, are available in a structured manner in the insolvency regimes of all Member States. *Pre-pack* procedures consist of a preparation phase and a liquidation phase. The sale of all or part of the debtor's business is prepared and negotiated prior to the opening of insolvency proceedings. The debtor in financial difficulty, under the supervision of a person monitoring the process („*monitor*"), identifies potential buyers by preparing the sale. In order to ensure that the sale is made at the best market price, the Member States must either implement high standards of competitiveness, transparency and fairness in the *pre-pack* preparation phase or provide that the competent court will conduct a public auction after the start of the liquidation phase. This allows the sale to be executed and the proceeds collected shortly after the opening of formal insolvency proceedings for the winding-up of a company. This proposal includes a number of safeguards to ensure that potential buyers are contacted and that the best possible market value is obtained, such safeguards being formulated in such a way as to give Member States a choice between ensuring the competitiveness, transparency and fairness of the sale process in the (usually confidential) „preparation phase" and holding a prompt public auction after the opening of the formal procedure in the „liquidation phase". The major advantage of pre-pack proceedings is that a recovery plan can be drawn up in advance and implemented

[10] Judgment from 22/11/2022 - *Luxembourg Business Registers*, Case C-37/20 (Joined Cases C-37/20, C-601/20) ECLI:EU:C:2022:912.

at the opening of proceedings in standard proceedings, with the insolvency practitioner's efforts to save the business starting after a series of formalities that can lead to missed opportunities. The sale of the business allows the company to operate, maintaining its good reputation even if it is practically preparing for insolvency proceedings (according to art. 23 of the Directive, the preparation stage occurs when the debtor is in a situation of likelihood of insolvency or is insolvent under national law). These systems, even if not regulated at the level of all Member States, are known in practice, being even assumed at the level of CJEU judgments (C-126/16[11]). We note in the context of the case in question the reasoning of the Advocate General, para. 57 *et seq.*, which states that *„it may be considered that a transfer takes place as part of a procedure the aim of which is the continuation of the undertaking where that procedure is designed or applied specifically in order to preserve the operational character of the undertaking (or of its viable units) in such a way as to make it possible to retain the value which stems from the uninterrupted continuation of its operations".* It can be assumed that the role of *„monitor"* would, at national level, as indicated in art. 20(1)(2) of the Directive, fall to insolvency practitioners *[Monitors referred to in art. 22 may be considered to be insolvency practitioners as defined in art. 2(5) of Regulation (EU) 2015/848*]. The reference to the test of the best interest of creditors may give rise to some reflections given that, according to art. 5 para. (1) point 71 of Law no. 85/2014, such a test is aimed at a comparative analysis of the degree of indebtedness of the budgetary claim by reference to an average diligent creditor, in the context of insolvency prevention or reorganisation proceedings, compared to bankruptcy proceedings or, in the context of the Directive, the reference factor seems ambiguous (liquidation v. continued activity). Another potential problem is the proposed suspension of individual enforcement actions during the preparation phase, or, as preparation is intended to be confidential (footnote 13 of the Directive's Explanatory Memorandum indicating that, „in pre-pack proceedings, the debtor's business or part thereof is sold as a going concern under a contract that is negotiated confidentially prior to the commencement of an insolvency proceeding under the supervision of a monitor appointed by a court and followed by a brief insolvency proceeding, in which the pre-negotiated sale is formally authorised and executed"), it is difficult to anticipate how a stay of individual enforcement actions could be implemented without the intervention of a court order, and it is difficult to see how it could be negotiated with all creditors. The argument in favor of such a decision is also to be found in the final sentence of art. 23, which states that „the monitor shall be heard prior to the decision on the stay of individual enforcement actions". As a general preliminary remark, we note some deviations from the objective of ensuring the protection of creditors' interests, which is specific to insolvency proceedings.

3.4. Title VI Winding - up of insolvent microenterprises

Title VI contains rules on simplified winding-up procedures for micro-enterprises, an intervention motivated by the inadequacy of national frameworks. Micro-enterprises rarely file applications to open standard insolvency proceedings and, when they do, it is often too late to preserve their value. In many Member States standard insolvency proceedings are not available to this type of business or the opening of such proceedings is rejected. This is the case if there are no assets in the insolvency estate or if the value of the assets does not cover the administrative costs of the proceedings. The objective of the proposed Directive is therefore to ensure that micro-enterprises, even those without assets, are liquidated through a rapid and cost-effective procedure. Although the need to simplify the procedure for micro-enterprises is obvious, its implementation could be problematic from a practical point of view. For most Member States, it is a completely new procedure, which requires re-engineering the architecture at national level. In addition, responsibilities previously exercised by the insolvency practitioner will be transferred to the court and the debtor. As the insolvency practitioner has an important role in the tracing of assets and the initiation of actions for annulment, his removal could lead to a decrease in the value of recoverable assets (creditors would have to initiate these actions themselves, but often do not have access to the relevant information and documents necessary for these claims). In addition, the tradition of the domestic insolvency mechanism, also confirmed by consultations with stakeholders in insolvency proceedings in the context of the proposed Directive, is for the proceedings to be managed by a liquidator, appointed in all cases, rather than on a case-by-case basis .It is also necessary to note, by reference to national law, the provisions of art. 47(c) of the Directive, which states that the competent authority may convert the simplified winding-up proceedings into standard insolvency proceedings if it would not be possible to conduct the cancellation proceedings in the simplified winding-up proceedings because of the size of the claims subject

[11] Case C-126/16, *Federatie Nederlandse Vakvereniging and Others v. Smallsteps BV*, ECLI:EU:C:2017:241.

to the cancellation proceedings in relation to the value of the assets subject to the insolvency proceedings and because of the anticipated duration of the cancellation proceedings, and also the option of the European legislator to allow the competent authority to decide to continue the simplified winding-up proceedings only in respect of uncontested claims [art. 46(5) of the Directive]. Another sensitive element is the way in which the definition of micro-enterprise is arranged, as the concept proposed in art. 2(j) is inappropriately based on Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises[12].

4. Conclusions

Increasing the efficiency of insolvency proceedings will contribute to a reduction in the length of insolvency proceedings and higher recovery rates for creditors and investors. Enhanced predictability of the insolvency regime would also encourage greater investments. The convergence of insolvency rules should, on the other hand, not compromise the fair treatment of debtors, creditors and other stakeholders in companies under insolvency procedures. Regardless of the final form of the text as it will emerge from the co-decision process, there can be no doubt that such action at EU level is well placed to substantially reduce the fragmentation of national regimes, and the Directive has clear potential to achieve this objective.

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[12] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124/20.05.2003, EUR-Lex - 32003H0361 - EN - EUR-Lex (europa.eu).

THE OBLIGATION OF CONFIDENTIALITY OF THE DESIGNATED PERSON ACCORDING TO THE PROVISIONS OF LAW NO. 361/2022 ON THE PROTECTION OF WHISTLEBLOWERS IN THE PUBLIC INTEREST

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Abstract

Law no. 361/2022 on the protection of whistleblowers in the public interest, entered into force at the end of 2022, is the instrument by which Romania fulfilled its obligation to transpose, into domestic law, Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 regarding the protection of persons who report violations of Union law.

In this respect, Law no. 361/2022 sets forth a general framework for the protection of persons who report violations of the law within authorities, public institutions, other persons under public law, as well as within persons under private law.

In other words, this legal act introduces new obligations, among others, for companies, so the first steps in understanding the new law were the clarification of the meaning of the notion of „whistleblower in the public interest", its purpose and object, as well as emphasising new challenges that its addressees will face.

In addition, in practice, various problems have arisen in the implementation of the rules of compliance with Law no. 361/2022, among which is also the obligation of confidentiality of the designated person according to the provisions contained in Law no. 361/2022 on the protection of whistleblowers in the public interest.

This paper aims to present all these aspects and to provide the author's point of view on the meaning and extent of the obligation of confidentiality of the person designated according to the provisions contained in Law no. 361/2022.

Keywords: *compliance, whistleblowers, obligation of confidentiality, violations of the law, public interest.*

1. Introduction

This paper addresses the obligation of confidentiality of the designated person according to the provisions contained in Law no. 361/2022 on the protection of whistleblowers in the public interest, which is of particular importance to all addressees of the said normative act.

Thus, Law no. 361/2022 entered into force on December 22, 2022, being the instrument for transposing Directive (EU) 2019/in national law/1937 Of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of Union law[1] [hereinafter referred to as „*Directive (EU) 2019/1937*"].

The new law introduces new obligations for companies, so it is imperative to clarify the meaning of the notion of „*whistleblower in the public interest in the public interest*", its purpose and object, as well as highlighting the new challenges that companies will face.

The chosen topic is important from the perspective of authorities, public institutions, and other persons governed by public law, as well as in private law persons in their capacity as recipients of the provisions of Law no. 361/2022.

This legal document sets forth a general framework for the protection of persons who report violations of the law within the above mentioned recipients.

In this respect, the object of the new normative act, expressly provided in the content of art. 1 para. (2) of its content, must be emphasised:

- regulation of the procedure for receiving, examining and handling reports;
- provision of rights and obligations of reporting persons or publicly disclosing information on violations of law;

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[1] OJ L 305/26.11.2019.

- lays down measures to protect reporting persons or publicly disclose information on violations of the law;
- regulation of the obligations of public authorities, institutions, other legal persons governed by public law, as well as private legal persons;
- determination of the rights of the data subjects, as well as
- indication of the powers of the competent authorities.

For a better understanding of the notions and phrases it uses, Law no. 361/2022 expressly provides definitions of terms and expressions. Of these, probably one of the most important definitions is that of the whistleblower in the public interest, namely: the natural person who carries out a report or publicly discloses information regarding violations of the law obtained in a professional context.

In order to ensure the protection of these persons who have a vulnerable status in relation to the person to whom the reporting/disclosure has taken place, the legislator has provided numerous guarantees, including, establishing rules on the creation of a secure framework through which anonymous reporting can be carried out, as well as obligations regarding the receipt, examination, and resolution of reports.

Moreover, it is important to stress that the professional environment in which the whistleblower becomes aware of information on legal violations is widely defined, whistleblower can be any employee, and, the person performing a dependent activity, shareholder, person who is part of the management bodies, volunteer, trainee.

A very interesting aspect is the fact that whistleblowers can include candidates whose employment relationships have not yet started and who are conducting reports/ public disclosures in relation to information obtained during the recruitment process, as well as persons whose employment/service relationship has ceased.

Law no. 361/2022 also has an impact from the perspective of personal data protection, meaning in which companies need to analyse the current measures implemented and determine whether the current mechanism for processing and protecting personal data is sufficiently comprehensive and secure to ensure protection of personal data of all categories of whistleblowers in the public interest.

The author intends to answer the matter under consideration from the perspective of the correlative legal standards and the incidental ones in this matter, especially considering the sensitive field that Law no. 361/2022 regulates.

Furthermore, the paper addresses the relevant obligations of companies and risks to which they are subject under the provisions of Law no. 361/2022, as well as measures to protect the whistleblower in the public interest put in place by Law no. 361/2022.

2. The obligation of confidentiality of the designated person according to Law no. 361/2022

2.1. Scope of Law no. 361/2022

In terms of scope, Law no. 361/2022 establishes, on the one hand, that the rules contained therein apply, according to art. 1 para. (3), in situations where the regulations in the normative acts listed in Annex 1 to it do not contain special binding rules on reporting violations of the law.

By contrast, Law 361/2022 does not apply to reports of breaches of public procurement rules in the fields of defense and national security, where they fall within the scope of art. 346 TFEU[2].

At the same time, Law no. 361/2022 expressly sets out that the new regulation does not affect the provisions on:

- protection of classified information;
- professional lawyer's secret;
- confidentiality of medical information;
- the secrecy of judicial deliberations;
- criminal procedure rules;
- the right of workers to consult with their representatives or trade unions;
- the rules relating to protection against any injurious measure, which are determined by such consultations;
- the rules relating to the autonomy of the social partners and their right to enter into collective

[2] OJ C 326/26.10.2012, p. 0001-0390.

agreements or agreements.

On the other hand, the new normative act stipulates that its applicability concerns the reporting persons who obtained the information regarding the violations of the law, in a professional context, meaning in which the category of such persons implies at least the following: workers; persons engaged in self-employment within the meaning of art. 49 TFEU; shareholders and persons belonging to the management, management or supervisory body of an undertaking, including non-executive board members, shall, volunteers and trainees paid or unpaid; any person working under the supervision and direction of the natural or legal person with whom the contract is concluded, its subcontractors and suppliers.

At the same time, Law no. 361/2022 also applies to:

- persons whose employment relationships have not yet begun and who report through internal or external reporting channels or publicly disclose information about violations of the law obtained during the process recruitment or other pre-contractual negotiations, or where the employment relationship or service relationship has ceased,
- persons who report or publicly disclose information about violations of the law anonymously.

2.2. General principles governing reporting under Law no. 361/2022

The principles governing the protection of reports of violations of the law are as follows:

- the principle of legality, according to which the authorities, public institutions, other legal persons governed by public law, as well as legal persons governed by private law, have the obligation to respect fundamental rights and freedoms, by ensuring full compliance, among others:
    - freedom of expression and information;
    - the right to the protection of personal data;
    - the freedom to conduct a business;
    - the right to a high level of consumer protection;
    - the right to a high level of protection of human health;
    - the right to a high level of environmental protection;
    - the right to an effective remedy;
    - the right of defense.
- the principle of responsibility, according to which the whistleblower in the public interest is obliged to submit data or information on the facts reported;
- the principle of impartiality, according to which the examination and resolution of reports is carried out without subjectivism, regardless of the beliefs and interests of the persons responsible for their resolution;
- the principle of good administration, according to which public authorities and institutions, other legal persons governed by public law are obliged to carry out their activity in the realisation of the general interest, with a high degree of professionalism, in conditions of efficiency and effectiveness of the use of resources;
- the principle of equilibrium, according to which no person can rely on the provisions of this law to diminish the administrative or disciplinary sanction for a more serious act that is not related to reporting;
- the principle of good faith, that the person who had good reason to believe that the information relating to the reported infringements was true at the time of reporting and that the information was within the scope of this law.

2.3. Reporting and disclosure according to the provisions contained in Law no. 361/2022

According to the definition given by Law no. 361/2022, reporting constitutes oral or written communication of information on any act that is a violation of the law, carried out in writing, on paper or in electronic format, by communication to telephone lines or other voice mail systems, or by face-to-face meeting at the request of the whistleblower in the public interest.

In other words, reporting is a communication of information, which the whistleblower in the public interest can do by going through three procedures to benefit from the protection provided by Law no. 361/2022, namely:

- internal reporting - means the communication of information relating to infringements of the law within a company, carried out by means made available by the company (through its own channels). Thus, companies with at least 50 employees are required to identify/establish internal reporting channels and establish procedures for internal reporting. At the same time, Law no. 361/2022 provides the possibility for companies

with between 50 and 249 employees to group and use or share resources in receiving reports;

- external reporting - making available, in any way, in the public space information related to violations of the law. According to art. 12 of Law no. 361/2022, the external reporting channels are:
  - public authorities and institutions which, in accordance with special legal provisions, receive and resolve reports of violations of the law in their area of competence;
  - The National Integrity Agency, hereinafter referred to as the Agency;
  - other public authorities and institutions to which the Agency transmits reports to competent resolution.
- public disclosure - is the making available in the public space, in any way, of information relating to violations of the law. However, public disclosure shall meet one of the following conditions:
  - the whistleblower first reported internally and externally or directly externally, however, it considers that appropriate measures have not been ordered within 3 months of receipt of the report (6 months in justified cases); or
  - has reasonable grounds to believe that: (i) the infringement may constitute an imminent or manifest danger to the public interest or the risk of damage that cannot be remedied; or (ii) in the case of external reporting there is a risk of retaliation or a reduced likelihood that the infringement will be effectively remedied in the light of the specific circumstances of the reporting.

2.4. The main obligations of the companies and the risks they are subject to according to Law no. 361/2022

The main obligation imposed by the new law on companies was to identify/establish internal reporting channels and establish procedures for internal reporting.

This obligation will enter into force on 17 December 2023 and is addressed mainly to companies with between 50 and 249 employees, and the failure to fulfill this obligation is sanctioned with a contravention fine of up to 30,000 lei.

Of course, nothing prevents employers with fewer employees from instituting such procedures or their employees from reporting on possible violations of the law. In this case, however, if there are no internal procedures, the whistleblower will have the right to conduct a direct reporting by using the external channel.

It should be noted that certain companies operating in specific areas (for example, oil field, oil field, insurance, or payment services) must fulfill the above obligation regardless of the number of employees.

Last but not least, the reports made must correspond to the truth, a contrary conduct being sanctioned by the new normative act. In this regard, it should be noted that, according to art. 29 of Law no. 361/2022, the reporting of information on violations of the law, knowing that they are unreal, is a contravention and is sanctioned with a fine from 2,500 lei to 30,000 lei, if the act was not committed in such conditions as to be considered, according to the law, a crime.

The finding and sanctioning of the above contraventions are made by the staff within the specialised structure of the Agency, provided in art. 16 of Law no. 361/2022.

2.5. Measures to protect the whistleblower in the public interest established by Law no. 361/2022

In terms of measures to protect the whistleblower, with the acquisition of this quality, it acquires more rights. Among them are:

- prohibition of retaliation - that is, of actions/omissions, direct or indirect, arising in a professional context, which are determined by the reporting/disclosure and which cause or may cause harm to the whistleblower, such as:
  - the dismissal;
  - extrajudicial unilateral termination of a contract for the provision of services (without fulfilling the conditions in this respect);
  - the modification of the employment contract;
  - reduction of salary or change of work schedule.

The whistleblower may contest retaliation by a request to the competent court, depending on the nature of the dispute. The burden of proof will be on the employer or entity that ordered the measures, which must prove that they are justified on grounds other than those related to reporting/disclosure[3].

- advice, information, and assistance *i.e.*, the obligation of the Agency to provide advice and information on protection measures, rights, procedures, and remedies applicable to whistleblowers, whistleblowers, as well as providing assistance in relation to their protection against retaliation before any authority;
- the protection of the identity of the data subject and third parties - the rules on identity protection applicable to whistleblowers in the public interest are also incidents with regard to the identity of the data subject, moreover, the identity of the data subject shall be protected for as long as the follow-up to the public reporting or disclosure takes place, unless, as a result of the resolution of the report or disclosure, the following, it is found that the data subject is not guilty of violations of the law that were the subject of reporting or disclosure. Data subjects have the right to defense, including the right to be heard and the right to access their own file;
- disciplinary research conditions - at the request of the whistleblower in the public interest investigated disciplinary as a result of internal reporting, external or public disclosure, discipline commissions or other similar bodies within the authorities, or, public institutions, other legal entities of public law or private law legal entities have the obligation to invite the press and a representative of the trade union or professional association or a representative of employees, employees, as applicable; this announcement is made by communication on the website of the authority, public institution, public legal entity or private legal entity at least 3 working days before the meeting, under penalty of nullity of report and disciplinary sanction applied;
- prohibition of waiver of rights and remedies - the above-mentioned rights and measures may not be subject to waiver or limitation by contract, form, or conditions of employment, or including an arbitration agreement prior to a dispute. Any transaction aimed at limiting or waiving the above rights and measures is void of law.

2.6. Confidentiality obligation - limits and interpretation

The provisions with attached in Law no. 361/2022 should be emphasised/2022 Regulating the obligation to maintain confidentiality in the light of reports made by the whistleblower in the public interest (this is the result of the systematic interpretation of the provisions of the same chapter, which is, entitled „*Reporting rules and common provisions applicable to reports of infringements of the law*").

From the analysis of art. 8 of Law no. 361/2022, a series of conclusions can be drawn, namely:

- art. 5 para. (1) - the obligation to keep confidential the identity of the whistleblower or any other information sour to allow its identification presents only one exception - the consent of the whistleblower;
- art. 5 para. (2) - the obligation to keep confidential the identity of the whistleblower or any other information allowing its identification presents another exception (this being an exception to the rule mentioned in the preceding paragraph) - disclosure is necessary for the fulfilment of a legal obligation. In this particular case, according to art. 5 para. (3), the whistleblower must be informed in writing, on disclosure and its reasoning (an obligation which does not persist if the information would jeopardise investigations or judicial proceedings);
- art. 5 para. (4) - trade secrets contained in the reports may not be the subject of any use or disclosure for purposes other than those necessary to resolve the report in question;
- art. 5 para. (5) - the obligation to keep confidential the identity of the whistleblower or any other information allowing its identification does not subsist if the person making the intended disclosure is the whistleblower itself in the public interest;
- art. 5 para. (6) - the obligation to keep confidential the identity of the whistleblower or any other information that allows its identification to be maintained and if the reporting reaches another person in error the framework of the private legal person (other than the designated person).

Therefore, in consideration of all the above-mentioned aspects, it can be easily ascertained that situations which exempt the person designated to resolve the reporting from the disclosure of the identity of the

[3] See S. Voiculescu, *Measures taken against those who claim violations of the law at work can be quickly suspended in court*, available at: *https://www.avocatnet.ro/articol_66914/M%C4%83surile-luate-impotriva-celor-care-reclam%C4%83-inc%C4%83lc%C4%83ri-ale-legii-la-locul-de-munc%C4%83-pot-fi-suspendate-rapid-in-instan%C8%9B%C4%83.html*, last time consulted on 10.05.2024.

whistleblower or other information which may lead to its identification are unrelated to the recipient of the disclosure, other than the designated person.

Moreover, the violation of the obligation to keep the identity confidential or of the information that allows the direct or indirect identification of the whistleblower in the public interest is sanctioned with a fine from 4,000 lei to 40,000 lei, according to the provisions of art. 28 para. (2) letter e) of the Law no. 361/2022.

In other words, the law does not distinguish whether such disclosure can be made to the legal representative of the private legal entity, reason why it can be appreciated that the disclosure or violation of the obligation of confidentiality towards the whistleblower, under the conditions provided by Law no. 361/2022 can be made/intended only for those authorised by the same normative act to solve the reports (the more so as, even in the event of an error in the transmission of the report to another person within that legal person, other than the designated person, the obligation of confidentiality subsists).

2.7. The relationship between the designated person and the legal representative of the private legal person

As mentioned above, the designated person is the appointed person at the level of the authority, public institution or within private legal persons, as well as within other legal persons governed by public law.

This person has duties in relation to the receipt, registration, examination, follow-up actions and resolution of reports, and must act impartially and be independent in the exercise of these duties.

Depending on the number of employees, duties may be exercised by a person, a compartment or may be outsourced to a third party, hereinafter referred to as a designated third party.

In the light of the foregoing, it may be assessed, in particular in considering the obligation of the designated person to act impartially and independently in the exercise of the specific duties of that quality, and, pursuant to Law no. 361/2022, that the designated person is required to keep the identity of the whistleblower confidential in the public interest in relation to all and any person/person, and, of course, with the exceptions expressly provided by the provisions of art. 8 of the Law no. 361/2022.

Instead, it is appropriate to reiterate the situation in which the reporting arrives from error to another person than the designated person, in which case the person to whom these reporting reaches (*e.g.*, the legal representative of the legal entity) is obliged to keep the identity of the whistleblower confidential and to send the reporting further to the designated person.

So, then, it may be considered that the obligation of confidentiality regarding the identity of the whistleblower in the public interest subsists also with respect to the legal representative of the company (even if the reporting would arrive from error in it or in a person other than the designated person).

3. Conclusions

This paper emphasises the importance of a double perspective: of presenting and analysing the rights and obligations of whistleblowers in the public interest, as well as regarding its recipients, namely authorities, public institutions, other legal persons governed by public law, as well as private legal persons.

Moreover, the legal provisions applicable in the matter that is the subject of this study are analysed, so that a series of problems faced in practice by the recipients of Law no. 361/2022 is clarified.

In consideration of all the aspects developed in this paper, the following conclusions can be drawn:

- Law no. 361/2022 on the protection of whistleblowers in the public interest is the general framework for the protection of persons who report violations of the law, which have occurred, or which are likely to occur, within authorities, public institutions, other legal persons governed by public law, as well as within private legal persons;
- the scope of Law no. 361/2022 concerns: the procedure for receiving, examining and handling reports; the rights and obligations of reporting persons or publicly disclosing information on breaches of law; and; their protection measures; the obligations of public authorities, institutions, other legal persons governed by public law, as well as legal persons governed by private law; the rights of the data subjects and the powers of the competent authorities;
- however, Law no. 361/2022 is without prejudice to the rules on the autonomy of the social partners and their right to conclude collective agreements or agreements;
- inter that, Law no. 361/2022 establishes the obligation of the person designated with the resolution of

reports to keep the identity of the whistleblower confidential in the public interest, except for the situations expressly provided by law, namely: the consent of the whistleblower; the whistleblower himself makes the disclosure of his own identity with intention; disclosure is necessary for the fulfilment of a legal obligation;

- at the same time, even if, by mistake, the reporting reaches a person other than the designated person, the obligation to keep the identity of the whistleblower in the public interest remains, in which case the erroneous recipient of the report is required to forward the reporting to the designated person, with the same obligation to keep confidential the identity of the whistleblower in the public interest;
- among the exceptions to the rule of preserving the confidentiality of the identity of the person who is a whistleblower in the public interest is not the hypothesis in which the recipient would be the legal representative of the legal person;
- the exceptions are strict interpretation and application and, where the law does not distinguish, neither the addressee, the interpreter, or the enforcer of the law must distinguish.

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PROTECTION OF THE ADULT THROUGH JUDICIAL COUNSELLING AND SPECIAL GUARDIANSHIP. GENERAL CONSIDERATIONS AND ASPECTS OF COMPARATIVE LAW

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Abstract

This paper aims to analyse the implications of „Law no. 140/2022 on some protection measures for people with intellectual and psychosocial disabilities and the amendment and completion of some legal acts" in Romania, by reviewing the aspects pointed out by the CCR in its unconstitutionality dec. no. 601/2020. This paper will also analyse legislative regulations on the protection of the adult in different legal systems.

Keywords: *vulnerable adults, legal capacity, unconstitutionality, disabilities, judicial counselling, special guardianship.*

1. Introduction

The issue of the protection of vulnerable adults is a topic that has been addressed more and more recently at the European and national level, with various measures being proposed to protect the interests of this population category.

In Romania, according to the data provided by NAPRPD within the Ministry of Labor and Social Solidarity, through CGDSACP, on September 30th 2023, the total number of people with disabilities was 909,754 people (more precisely: 98.23% - meaning 893,686 people - are in the care of families and/or live independently «non-institutionalized» and 1.77% - 16,068 people - are in public residential social assistance institutions for adults with disabilities «institutionalised»).[1]

Therefore, in the context of an ageing world population, combined with increased international mobility, the need for improved international protection for vulnerable adults through legal regulation and international cooperation has been imposed. Life expectancy in many countries is increasing, and this fact also causes a corresponding increase in cases of diseases related to old age. Given these premises, it is important that at the international level there are accurate and clear legal rules regarding the competent authorities that can adopt the necessary measures to protect the person or property of the vulnerable adult, presenting the rules related to jurisdiction, applicable law and international recognition and application of the measures of protection.

This paper aims to analyse the situation of the protection of people with intellectual and psychosocial disabilities at both national and international level and to examine whether there are currently sufficient instruments to protect this category of population.

Regarding the international regulation of the subject of the protection of vulnerable adults, we recall the 2000 Convention that addresses numerous private international law (PIL) issues regarding, for example, the management/sale of assets belonging to persons suffering from impairments of personal faculties. The 2000 Convention also establishes a cooperation mechanism between the authorities of the member states, but it is important to specify that Romania, unfortunately, is not a party to this convention.

The issue of vulnerable adults is also highlighted in CRPD, an international treaty that recognizes the fundamental rights of persons with disabilities and promotes their full and effective participation in society, addressing a wide range of issues in order to protect and respect the rights of these persons, establishing standards for non-discrimination, accessibility, equal opportunities. Romania is party to this Convention since September 26th 2007, the Convention being ratified through Law no. 221/2010.

In Romania, the civil legislation regarding the protection of persons with disabilities was reformed in 2022 by the entry into force of Law no. 140/2022. Such a reform came in the context of the CCR dec. no. 601/2020, the subject for this exception of unconstitutionality being the provisions of art. 164 para. (1) CC, which referred to placing the protected person under judicial interdiction. Therefore, approximately 2 years after the decision

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[1] Available at *https://anpd.gov.ro/web/transparenta/statistici/*.

of the unconstitutionality decision set out above, the Romanian Parliament adopted Law no. 140/2022 which amended the legislation regarding the measures to protect people with intellectual and psychosocial disabilities.

Law no. 140/2022 tends to unify Romanian civil legislation with the CRPD, but it is far from being perfect or even comprehensive. Although the CRPD was ratified by Romania as early as 2010 (through Law no. 221/2010-November 26th 2010), it was only in 2022 that an attempt was made to build a legislation that would be in agreement with the principles stipulated by the CRPD.

2. General considerations and aspects of comparative law regarding the protection of the adult through judicial counselling and special guardianship

2.1. General provision of CRPD

As we saw and established, CRPD promotes and protects the human rights of persons with disabilities and guarantees that these persons have full and equal access to all aspects of social, economic, cultural and political life.

Thus, the purpose of the CRPD is „to promote, protect and ensure the full and equal exercise of all fundamental human rights and freedoms by all persons with disabilities and to promote respect for their intrinsic dignity."[2]

Making a terminological delimitation of the notions of „disability" and „handicap", we underline that the first term suggests the situation in which a person's cognitive or physical abilities are diminished due to a disease they suffer from, while the term „handicap" refers to the person's impediment to participate in society under normal conditions.

CRPD does not, however, define the concept of disability, instead it only states that persons with disabilities „include those persons who have permanent physical, mental, intellectual or sensory impairments, impairments which, in interaction with various barriers, may limit the full and effective participation of individuals in society, on equal terms with others."[3] Regarding the concept of disability, the Preamble of the CRPD stipulates that disability is an evolving concept and highlights the diversity of people with disabilities and the fact that they face attitudinal and environmental barriers that prevent their participation in society under normal conditions.[4]

In Romania, art. 2 para. (1) from Law no. 448/2006 defines disabled persons as „those persons whose social environment, not adapted to their physical, sensory, mental, mental and/or associated deficiencies, totally prevents or limits their access with equal opportunities to the life of society, requiring protective measures in support integration and social inclusion."[5]

Based on the CRPD, CRPD Committee was also established, a body of independent experts that monitors the implementation of the Convention by the state parties. All state parties must submit regular reports to the Committee on how the rights are being implemented, and the Committee examines each report and makes general proposals and recommendations on the report, which then is transmitted to the state party concerned.

The general principles of the CRPD are stipulated in art. 3 and envisage:

„a) respecting the inalienable dignity, individual autonomy, including the freedom to make one's own choices and the independence of individuals;

b) non-discrimination;

c) full and effective participation and integration in society;

d) respect for diversity and acceptance of people with disabilities as part of human diversity and humanity;

e) equal opportunities;

f) accessibility;

g) equality between men and women;

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[2] CRPD, art. 1, part I, available at *https://lege5.ro/App/Document/geztqnryg4/conventia-privind-drepturile-persoanelor-cu-dizabilitati-din-26092007?d=2024-03-18*.

[3] *Idem*, art. 1 part II.

[4] *Idem*, Preamble.

[5] Available at *https://lege5.ro/App/Document/geytinrsgi/legea-nr-448-2006-privind-protectia-si-promovarea-drepturilor-persoanelor-cu-handicap*.

h) respect for the developmental capacities of children with disabilities and respect for the right of children with disabilities to preserve their own identity."[6]

Also, art. 12 CRPD stipulates the obligations that the state parties have in recognizing the legal capacity of persons with disabilities. Thus, they must take all the necessary measures so that disabled people can enjoy, on equal terms with others, legal assistance in all areas of life.

Likewise, in the exercise of their legal capacity, persons with disabilities must be supported by the states parties which are obliged to take all appropriate measures to ensure their access to the support they may need, so that they are adequately and effectively protected from possible abuses.

Art. 12 CRPD provides that „such protection will guarantee that the measures related to the exercise of legal capacity respect the rights, will and preferences of the person, do not present a conflict of interests and do not have an inappropriate influence, are proportionate and adapted to the person's situation, apply for the shortest possible period and are subject to periodic review by a competent, independent and impartial authority or legal body. Protective measures will be proportionate to the degree to which such measures affect the rights and interests of the person."[7]

We conclude that CRPD represents an extremely important and much needed international legal instrument that highlights that protecting the human rights of persons with disabilities will contribute to facilitating the development of the society as a whole.

2.2. Decision no. 601/2020 in the CRPD context

On March 27th2021, the CCR issued dec. no. 601/2020, the object of the exception of unconstitutionality being the provisions of art. 164 para. (1) CC, which has the following content: „The person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, will be placed under judicial prohibition."[8] Therefore, the above-mentioned article highlights the hypothesis of placing under a judicial ban the adult who no longer has the necessary discernment to take care of his interests due to alienation or mental weakness.

According to EXD[9], alienation is a „generic term for any mental illness". But Law no. 71/2011 defined alienation/mental disability as „a mental illness or a mental handicap that determines the mental incompetence of the person to act critically and predictively regarding the social-legal consequences that may arise from the exercise of civil rights and obligations."[10] With reference to the definition of mental impairment, CCR emphasises that although from a medical point of view mental impairment represents a mild form of mental deficiency, from a legal point of view it encompasses all its forms, regardless of the person's degree of incapacity.

Thus, in order to be placed under judicial prohibition, it is necessary to have a legally designed medical diagnosis of a mental illness or a mental handicap that determines the lack of discernment necessary to take care of one's own interests.

CCR defines judicial injunction as a „measure to protect the rights and legitimate interests, patrimonial and non-patrimonial, of the natural person, instituted by the court following the evaluation of the possibility of the person to exercise his rights and fulfil his obligations, the conditions for the establishment of this measure being provided strictly and limitingly by the provisions of art. 164 para. (1) CC."[11]

Related to the formulated definition, the Court stipulates that placing under a judicial ban establishes a substitute regime, highlighting that the rights and obligations of a person subject to such a measure will be exercised by a legal representative, regardless of the degree of impairment of the judgment of the person in question, in the damage a support regime characterised by a support mechanism for the state to grant depending on the degree of impairment of discernment.

Considering the above, CCR believes that it is necessary to clarify whether such a substitute regime complies with the requirements of art. 50 of the Constitution and art. 12 CRPD.

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[6] CRPD, art. 3, available at *https://lege5.ro/App/Document/geztqnryg4/conventia-privind-drepturile-persoanelor-cu-dizabilitati-din-26092007?d=2024-03-18*.

[7] *Idem*, art. 12 para. (4).

[8] Available at *https://lege5.ro/App/Document/gi2tsmbqhe/codul-civil-din-2009*.

[9] Available at *https://dexonline.ro/definitie/aliena%C8%9Bie*.

[10] See Law no. 71/2011, art. 211.

[11] See CCR dec. no. 601/2020, point 29.

Art. 50[12] of the Romanian Constitution provides that disabled people enjoy special protection and the state ensures the implementation of a national policy of equal opportunities, prevention and treatment of disabilities, so that disabled people can effectively participate in the life of the community.

Art. 12 CRPD essentially stipulates that all persons with disabilities have the right to full legal capacity which is indispensable for the exercise of civil, political, economic, social and cultural rights. CRPD emphasises that persons with disabilities enjoy legal capacity under conditions of equality with other persons, in all areas of life. In the light of the above, CRPD provides that the state has the obligation to take all appropriate measures to ensure the access of persons with disabilities to the support they may need in the exercise of legal capacity. The protective measures set out above must be adapted to the particular situation of the person with disabilities, being necessary to be proportional to the degree in which they affect the rights and interests of the person and will be adapted to his situation and will respect the rights, will and preferences of the person. CRPD points out that with regard to the duration for which a protection measure is instituted, it is applied for the shortest possible period, its periodic review by a competent authority being necessary.[13]

Therefore, considering the content of the two articles exposed above, CCR found that „in order to respect the rights of persons with disabilities, any protection measure must be proportional to the degree of capacity, be adapted to the person's life, be available only if other measures cannot provide sufficient protection, to take into account the will of the person, to apply for the shortest period of time and to be reviewed periodically."[14]

In the analysed decision, CCR emphasised that the measure of placing under judicial prohibition must be regulated only as an *ultima ratio*, as it presents an extreme gravity that involves the loss of civil rights as a whole. Such a measure must also be analysed under the aspect of whether other measures have proven ineffective in supporting the civil capacity of the person, and the state must provide all the necessary support to avoid such an extreme measure.

Also, regarding the duration for which the protective measure is instituted, respectively the possibility of its periodic revision, the criticised legal text does not correspond to international standards, according to which a protective measure is applied for the shortest possible period and is subject to periodic revision by a competent authority. CCR highlights that these deadlines must be „fixed, predetermined, easily quantifiable, flexible and without an excessive duration, allowing the periodic review of the measure in an efficient and coherent way".[15]

Therefore, in the light of the above, CCR concluded that the measure of placing under judicial prohibition is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms, since the measure:

- does not take into account the fact that there may be different degrees of incapacity;
- does not consider the diversity of a person's interests;
- it is not ordered for a fixed period of time and is not subject to periodic review.
- In reality, in order to comply with the requirements of the CRPD, any protective measure must:
- be proportional to the degree of capacity (when regulating a protective measure, the legislator must take into account that there can be different degrees of incapacity and mental impairment that can vary in time, so that different degrees of disability must be assigned corresponding the degrees of protection);
- be adapted to the person's life;
- apply for the shortest period of time and reviewed periodically;
- take into account the will and preferences of people with disabilities.

Taking into account the above, we can state that the procedure of placing under judicial interdiction flagrantly violates the ECHR and CRPD, and the unconstitutionality of the measure of placing under judicial interdiction was imperative to be pronounced by the CCR.

2.3. Measure for the protection of the adult regulated by Law no. 140/2022

In the context of CCR dec. no. 601/2020 regarding the exception of unconstitutionality of the provisions of art. 164 para. (1) CC, a legislative reform was obviously necessary. After approximately 2 years from the ruling

[12] Available at *https://lege5.ro/App/Document/gq4deojv/constitutia-romaniei-republicata-in-2003*.

[13] CRPD, art. 12, available at *https://lege5.ro/App/Document/geztqnryg4/conventia-privind-drepturile-persoanelor-cu-dizabilitati-din-26092007?d=2024-03-18*.

[14] See CCR dec. no. 601/2020, point 34.

[15] *Idem*, point 40.

on the unconstitutionality of the provisions of art. 164 para. (1) CC by the CCR, the Romanian Parliament adopted Law no. 140/2022 which amended the legislation regarding the measures to protect people with intellectual and psychosocial disabilities.

It should be noted that since the publication of dec. no. 601/2020 in the Official Gazette and until the legislative reform set out above „it was no longer possible to order the measure of placing under prohibition by court decision; consequently, in the respective time interval, all the legal acts should have been concluded by the persons in question themselves, but the acts of disposition and administration thus concluded are struck by relative nullity for lack of discernment."[16]

The measures to protect vulnerable adults provided by Law no. 140/2022 are judicial counselling and special guardianship. Law no. 140/2022 provides for the first time in Romanian legislation and assistance for the conclusion of legal acts, a support measure intended for an adult natural person who has an intellectual or psychosocial disability and who needs help to take care of himself and manage his patrimony, being a measure that does not affect its exercise capacity.

These protective measures must be based on the following principles: necessity, subsidiarity and proportionality and must be gradually established according to the degree of intellectual and psychosocial disability of the person concerned. More precisely, assistance for the conclusion of legal acts is the only measure that can be ordered by the notary public, and legal advice and special guardianship can only be ordered by the court (the guardianship court or the specialised courts/sections/completions for minors and family).

Therefore, judicial counselling and special guardianship are exceptional protective measures, which apply only to natural persons who cannot look after their own interests because they suffer from a deterioration of their mental faculties, and which have the effect of restricting/depriving the natural person of the ability to exercise and establishment of guardianship.

Regarding the length for which protection/support measures can be instituted, according to the Romanian Civil Code, we specify that:

- judicial counselling can be ordered for a period that cannot exceed 3 years;
- special guardianship can be ordered, as a rule, for a period that cannot exceed 5 years, and as an exception the court can order the extension of this measure for a duration that cannot exceed 15 years. Therefore, the measure of special guardianship can have a maximum duration of 20 years;
- assistance for the conclusion of legal documents can be taken for a maximum period of 2 years and can be renewed for a period that cannot exceed 2 years.[17]

Therefore, the assistance measure for the conclusion of legal acts is addressed to adults with discernment who have an intellectual or psychosocial disability, being a measure whereby the assistant appointed by the notary public has an intermediary role between the protected person and third parties. It should be emphasised that this assistant does not have a significant role in this support measure because he cannot conclude legal acts on behalf of the vulnerable adult, nor can he approve the acts that the vulnerable adult concludes on his own.

Judicial counselling is a measure of protection that can be taken in the situation where the deterioration of the mental faculties of the protected person is partial, and the said person, due to the state in which he is, must be continuously counselled in order to exercise his rights and freedoms.

The situation is different in the case of special guardianship, as it aims at a total and permanent deterioration of the mental faculties of the protected person, but, as in the case of judicial advice, the protected person must be continuously represented in the exercise of his rights and freedoms.

In the light of the above, we note that a new institution has been introduced in the Romanian civil legislation for the protection of the vulnerable person, namely Assistance for the conclusion of legal acts. From my point of view, this is a complicated, clumsily designed procedure that does not bring important benefits to the protected person. However, the Romanian legislator tried to establish a similar procedure as in the states analysed in this paper, in order to align as much as possible with the principles stipulated by the CRPD, and at the moment it is premature to draw conclusions regarding the usefulness of the assistance support measure for the conclusion of the legal acts, so we will let practice have the last word.

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[16] See G. Boroi, C.A. Anghelescu, I. Nicolae, *Fișe de drept civil*, 7th ed., revised and supplemented, Hamangiu Publishing House, Bucharest, 2022, p. 324.

[17] Art. 168 CC, available at *https://lege5.ro/App/Document/gi2tsmbqhe/codul-civil-din-2009*.

2.4. Aspects of comparative law

Legislation from France and Canada represented sources of legislative inspiration for the adoption of Law no. 140/2022. So, in the French legal system, Law no. 308/2007 thoroughly reviewed the legal protection of adults, enshrining a series of important principles in the foundation of legal protection of vulnerable adults, with an emphasis on ensuring the protection of the person, and not only his right to property.[18]

Art. 433 French Civil Code provides for the establishment of a temporary medical or judicial protection measure (judicial guarantee) which can be ordered for a limited period either until the disabled person recovers, or until it is necessary to apply a protective measure, in this case guardianship or guardianship.

In the French legal system, the guardianship is a measure of protection of the vulnerable adult by which his capacity to exercise is lifted, and his representation for all civil law acts is instituted for a period of 5 years which can be renewed by the judge for the same period of time. As in our law, the duration of the guardianship cannot exceed 20 years (art. 428 French Civil Code).

Curatorship is provided in the French Civil Code as a judicial measure that aims to protect the vulnerable adult and his assets, being of 3 types: simple (the protected person carries out administrative or conversation acts by himself, his assistance being required by the curator for the acts that engage his present or future patrimony), reinforced (the curator, in addition to the documents provided for in the simple guardianship, also manages the bank account of the protected adult) and individualised (the guardianship in which the documents that the protected adult can conclude, alone or assisted by the curator, are approved by the court).

Therefore, the French legislator carried out a broad legislative reform regarding the regulation of the protection of people with intellectual and psychosocial disabilities, adjusting the regulations to respond to higher standards of protection. In this sense, the emphasis is on the principle; necessity (a projection measure can only be pronounced if the deterioration of the mental faculties is medically confirmed), subsidiarity (the least restrictive measure must be applied) and proportionality (the protective measure must always be checked and adapted to each situation).

In the Spanish legal system, in 2021 the legislation aimed at the protection of people with intellectual and psychosocial disabilities was reformed in accordance with the principles of the CRPD, emphasising the transformation of the social mentality regarding this category of people. And in this legal system, „an incipient form of future protection mandate" is provided.[19] Therefore, „the law replaces the existing stigma and paternalism with measures of support and respect for human rights", and in the current legislative configuration „disappears the figure of guardianship that led to raising the legal capacity of a person with intellectual disabilities, and guardianship is replaced, mainly, by the application of a voluntary support system or, if that is not possible, by guardianship (guardianship) in fact, guardianship or legal guardian."[20]

In Belgium, the legislation that provides for the protection of persons with disabilities has in mind the stimulation of extrajudicial protection mechanisms that are imposed only when necessary and proportionate to the needs of the vulnerable adult (art. 488^1 Belgian Civil Code). So, in the priority Belgian civil legislation are extrajudicial protection measures.

In the Republic of Moldova, in order to protect the person with disabilities, the civil legislation was reformed establishing contractual protection measures, respectively the assistance contract, the future protection mandate and judicial protection measures, respectively provisional protection, curatorship and tutelage (Law no. 66/2017).

In the Italian legal system, there is a form of assistance to the vulnerable adult („amministrazione di sostegno"[21]) by which the adult preserves as much as possible his exercise capacity/autonomy and which is adapted to his particularities. The Italian legal system also provides for the classic means of protection of the vulnerable person, namely guardianship and guardianship (Law no. 6/2004).

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[18] See L. Andrei, *Ocrotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, (coord.) R. Constantinovici, Solomon Publishing House, Bucharest, 2023, p. 28.

[19] See A. Diaconescu, *Consideraţii asupra proiectului pentru modificarea şi completarea Legii nr. 287/2009 privind Codul civil, a Legii nr. 134/2010 privind Codul de procedură civilă, precum şi a altor acte normative în materia protecţiei persoanelor cu dizabilităţi,* Studia Iurisprudentia 2/2021, *https://sintact.ro/comentarii-monografii-reviste-si-webinarii/articole/consideratii-asupra-proiectului-pentru-151029036*.

[20] See R. Constantinovici (coord.), *Ocrotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, Solomon Publishing House, Bucharest, 2023, p. 28.

[21] Art. 404 Codice Civile (R.D. 16 marzo 1942, n. 262), available at *https://www.brocardi.it/codice-civile/libro-primo/titolo-xii/capo-i/art404.html*.

We note that the states exposed above have modified their civil legislation to be in agreement with the principles stipulated in the CRPD. The protective measures were established in such a way as to be as flexible as possible, to allow the choice of the most appropriate form depending not only on his medical situation, but also taking into account his patrimonial and personal situation, respectively taking into account the fluctuation of the disease due to the fact that medicine evolves.

Therefore, these states directed their attention towards the establishment of subsidiary and necessary protection measures, which take into account the particular situation and needs of the vulnerable adult, promoting the maximum mention of exercise capacity and the proportionality of the measures with the degree of capacity of the vulnerable person.

3. Conclusions

According to the WHO, in 2020, there were approximately 1 billion people with disabilities in the world who fall into the category of the poor population. People with disabilities are discriminated against and looked down upon and are often denied the chance to work, go to school and participate fully in society. CRPD is a very important international legal instrument because it ensures that persons with disabilities have access to the same rights and opportunities as everyone else, and we must each and every one of us try and implement it. The legal framework is important, but it is important only from how sanctions can be applied to those who do not comply. But in the real world, in the real aspects of the day-by-day activities, whether it is in school, work, social gatherings, stores, cinemas and so on, we must ensure that the persons with disabilities feel safe and feel treated as a normal person is treated.

The Convention emphasises that disability is a human rights issue and is intended to encompass many areas where both physical barriers may arise, such as physical access to buildings, roads and means of transport, access to information through written and electronic communications, as well as social, namely the reduction of discrimination and stigmatisation, by which people with disabilities are often excluded from education, employment and health and other services.

In Romania, Law no. 140/2022 tends to unify Romanian civil legislation with the CRPD, but it is far from being perfect or even comprehensive. Although CRPD was ratified by Romania as early as 2010 (through Law no. 221/2010-November 26th 2010), it was only in 2022 that an attempt was made to build a legislation that would be in agreement with the principles stipulated by the CRPD. Therefore, in the Romanian civil legislation a new institution has been introduced for the protection of the vulnerable person, namely Assistance for the conclusion of legal acts. From my point of view, this is a complicated, clumsily designed procedure that does not bring important benefits to the protected person. However, the Romanian legislator tried to establish a similar procedure as in the states analysed in this paper, in order to align as much as possible with the principles stipulated by the CRPD, and at the moment it is premature to draw conclusions regarding the usefulness of the assistance support measure for the conclusion of the legal acts, so we will let practice have the last word.

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ASSESSING THE INFLUENCE OF THE INDUCED TELEWORK ON WOMEN'S EMPLOYMENT IN PORTUGAL

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Abstract

The COVID-19 pandemic has triggered significant shifts in labor markets worldwide, notably an increase in remote work even as restrictions have eased. This rise in telework has led employers to reconsider its viability and feasibility compared to pre-pandemic norms. However, this sudden transition, coupled with gaps in social policies, has disproportionately impacted existing issues such as gender disparities and labor market inequalities.

To explore these dynamics, qualitative interviews were conducted with fifteen Portuguese experts specialising in labor and gender issues, alongside fifteen women who experienced a sudden shift from office-based work to remote work. The study examined how this abrupt change affected women's work processes and contributed to the growing trend of feminization of telework, where more women opt for remote work to balance paid and unpaid responsibilities like household and childcare duties. Data analysis was conducted using MaxQD software.

This paper fills a research gap by focusing on female employment, a topic often overlooked in existing literature that predominantly covers general employment trends. The findings shed light on the increasing participation of women in remote work in Portugal, underscoring its negative impact on efforts to create a fairer and more inclusive labor market. Moreover, the study highlights how female telecommuters in Portugal often struggle with blurred boundaries between work and personal life. The findings underscore the need for transformative policies that prioritise positive discrimination in favor of female teleworkers.

Keywords: *female employment, gender gap, labor market, Portugal, telework.*

1. Introduction

Gender disparity in the labor market is a pervasive issue that impacts women's career trajectories from the onset of employment and continues throughout their professional lives, influencing job promotions, salaries, and access to social security benefits[1]. The Covid-19 crisis in Portugal has brought to light the significance of fostering connections between remote and on-site workers, particularly in addressing and mitigating potential gender gaps that may emerge in telecommuting arrangements. Labor market is a profoundly intricate and multifaceted institution, marked by hurdles for women starting from the stage of preparation (education inequality), continuing with lower rates of entry for female workers comparing to men, worsening upon a double burden of additional reproductive labor and up to issues of retirement (pension gap)[2].

The advancement of technology and digitalization of the labor market have redefined employment as a number of opportunities which can be done presentially, remotely or in a hybrid (mixed) mode[3]. In this 'atypical

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[1] See G. Moraru, *Gender equality in job classification and promotion: An analysis based on collective bargaining in Castilla-La Mancha*, 2022, *https://institutomujer.castillalamancha.es/sites/institutomujer.castillalamancha.es/files/documentos/paginas/archivos/la_igualdad_de_genero_en_la_memoria*, last time consulted on 03.05.2024.

[2] See M. Schneider, *Labor-Management Relations and Varieties of Capitalism*, GLO Discussion Paper, no. 934, Global Labor Organization (GLO), Essen, 2021.

[3] See R. Donnelly, J. Johns, *Recontextualising remote working and its HRM in the digital economy: An integrated framework for theory and practice*, The International Journal of Human Resource Management, 32(1), 1-22, 2020.

employment'[4] personal productivity and advancement, as captured by supervisors, have been maintained as an important indicator for maintaining the job and career progression[5].

The paper covers the impact of induced telework on female employment in Portugal, examining the implications of telework adoption during the COVID-19 pandemic on women's participation in the labor market. It also discusses legal changes related to telework and proposes policy suggestions to address potential gender-related challenges and foster gender equality within the telework framework.

The studied matter is of extreme importance as it addresses potential inequalities that may arise from the widespread adoption of telework, particularly focusing on its impact on female employment. Ensuring gender equality in telework practices is crucial for promoting inclusivity and addressing any disparities that may emerge in the labor market due to remote work arrangements.

The current study intends to answer this matter by conducting a comprehensive assessment of the impact of induced telework on female employment in Portugal. This involves delving into the unique context of telework implementation in the country, analysing legal changes related to telework, and proposing policy recommendations to promote gender equality within the telework framework.

The paper contributes to the existing specialised literature by providing insights into the specific context of telework in Portugal and its impact on female employment. It also analyses recent legal changes related to telework and offers policy recommendations tailored to address gender-related challenges within the telework landscape. This adds to the body of knowledge on telework and gender equality, potentially complementing existing studies and informing future research and policy initiatives in this area.

2. Challenges in evaluating the effects on the labor market

Evaluating the impact of the COVID-19 pandemic on the labor market presents challenges due to limited gender-disaggregated data, as highlighted in the referenced sources. The difficulties in assessing the effects on society stem from incomplete indicators of income inequality and poverty risk, as noted in the World Inequality Report in 2022[6], which emphasises contemporary disparities in income and wealth, slow progress in gender equality, and the influence of national policies on ongoing inequality. However, current understanding is primarily focused on short-term effects and emerging trends, limiting a comprehensive analysis of the pandemic's societal repercussions.

Despite extensive global research on pandemic impacts on labor markets, a lack of comprehensive data on gender disparities persists. Existing data often excludes individuals without internet access or literacy, perpetuating gender, economic, and geographic disparities that hinder a thorough analysis of labor market inequalities. Women, disproportionately affected by pandemic-related employment challenges, are inadequately represented in data collection and subsequent analysis [7], further complicating efforts to address labor market issues effectively and impeding informed policy-making due to data limitations.

The scarcity of gender-disaggregated data restricts data availability despite the recognition that women are among the most affected groups during the pandemic. This limitation constrains the utilisation of data for evidence-based policy-making, thereby restricting approaches to tackling labor market challenges. Notably, this study adopts a binary understanding of „gender" as males and females within gender-disaggregated data[8].

An essential aspect for enhancing understanding and formulating effective policy responses lies in conducting an intersectional analysis that integrates quantitative and qualitative methodologies while considering variables such as gender, age, and migration status. This approach would provide a more nuanced comprehension of the impact and facilitate more targeted policy interventions. Despite acknowledging the dearth of gender-aggregated data, this study maximises all available sources to achieve its analytical objectives.

[4] See L. Westhoff, *Does Atypical Employment Come in Couples? Evidence from European Countries*, Social Indicators Research, 2024.

[5] See S. Yarberry, C. Sims, *The Impact of COVID-19-Prompted Virtual/Remote Work Environments on Employees' Career Development: Social Learning Theory, Belongingness, and Self-Empowerment*, Advances in Developing Human Resources, 23(3), 237-252, 2021.

[6] See *World Inequality Report 2022*, Harvard University Press.

[7] See S.L. Flor, J. Friedman, C. Spencer *et al.*, *Quantifying the effects of the COVID-19 pandemic on gender equality on health, social, and economic indicators: a comprehensive review of data from March 2020 to September 2021*, March 2022, The Lancet 399(10344).

[8] See Global Research Council. *Gender-Disaggregated Data at the Participating Organisations of the Global Research Council: Results of a global survey, 2021*, *https://globalresearchcouncil.org/fileadmin/documents/GRC_Publications/Survey_Report__GRC_Gender-Disaggregated_Data.pdf*, last time accessed on 03.05.2024.

3. COVID-19 and disruption: Portuguese labor market in imbalance

The impact of the COVID-19 pandemic on the Portuguese labor market has been extensively studied, with Lima providing valuable insights into this complex situation[9]. In 2020, Portugal experienced a notable increase in the national unemployment rate, rising from 6.9% at the beginning of the year to a peak of 8.1% in the third quarter before gradually declining. By the second quarter of 2021, the unemployment rate had returned to pre-pandemic levels at 6.8%. However, it is crucial to acknowledge that these figures do not fully capture the structural changes occurring within the labor market.

The absolute number of unemployed individuals surged from approximately 316000 to 392000 between the end of February and April, marking a 24% increase and causing significant market disruption. The nadir of the working population, recorded in May 2020, stood at 4.5 million individuals, constituting 46.1% of the population.

Data from the European Commission projected an average annual unemployment rate of around 7.7% for Portugal in 2020[10]. However, Portugal exceeded this forecast, experiencing substantial impacts during the initial year of the pandemic.

A substantial reduction in working hours was observed in the Portuguese economy during 2020-2021, with a notable decline of 14.9% compared to a modest increase of 1.8% in the preceding 12 months before the pandemic struck.

The concept of underutilization of work provides a comprehensive perspective on the labor market beyond just unemployment rates. This indicator encompasses individuals within the working age bracket (15-64) who are not employed for various reasons, including underemployed part-time workers and those inactive but seeking employment. In Portugal, an average of 761000 individuals were affected by underutilization during the first year of the pandemic, representing an 11.7% increase from 2019 and accounting for 17% of the active population.

In terms of income rates, the average monthly gross compensation per worker in Portugal saw a modest increase of 3.2% during the initial year of the pandemic compared to the previous year, reaching €1,014 (compared to €982 in the corresponding period). This rise does not signify overall salary growth but rather reflects shifts in job structures and compensation dynamics within approximately 4.1 million job positions covered by Caixa Geral de Aposentações.

The COVID-19 pandemic has significantly impacted Portuguese labor markets, manifesting in elevated unemployment rates, reduced working hours, increased underutilization of work, and alterations in income rates due to changes in job distribution and compensation structures.

4. Impact of induced telework on female employment in Portugal

The labor market dynamics in Portugal exhibit a dual structure characterised by a substantial prevalence of temporary employment contracts and a notable proportion of long-term unemployed individuals, including those disengaged from the labor force for extended periods[11]. The quest for employment in Portugal is protracted, with candidates typically taking an average of 22 months to secure a job, double the duration compared to other EU nations[12]. This employment landscape, marked by vulnerability and a high incidence of job losses during crises, underscores the fragility of the Portuguese labor market.

Pre-existing inequalities in Portugal, particularly concerning the unequal distribution of unpaid work encompassing domestic responsibilities and caregiving duties, were exacerbated by the COVID-19 pandemic[13]. The crisis heightened the demand for unpaid work, disproportionately burdening women and weakening their

[9] See F. Lima, *Um ano de pandemia: uma breve síntese - 2020-2021. A year of pandemic: a brief overview*, Instituto Nacional de Estatística, I.P. Monografia, 2021.

[10] See Eurofound. *Telework and ICT-based mobile work: Flexible working in the digital age, New forms of employment series*, 2020a, Publications Office of the European Union, Luxembourg.

[11] See N. Nunes, *Governmental response to the COVID-19 pandemic in Long-Term Care residences for older people: preparedness, responses and challenges for the future: Portugal*, Colabor-Portugal, 2021.

[12] See V. Duarte, *The paradox of the Portuguese labour market: high long-term unemployment and record job vacancies*, CaixaBank research, 2023.

[13] See F. Tavares Oliveira *et al.*, *Teleworking in Portuguese communities during the COVID-19 Pandemic*, Journal of Enterprising Communities People and Places in the Global Economy, July 2020; R. Mamede, M. Pereira, A. Simoes, *Portugal: A quick analysis of the impact of COVID-19 on the economy and in the business market*, ILO – Lisbon, 2020.

position in the labor market. The gendered impact of the pandemic underscored existing disparities, perpetuating inequalities within Portuguese society[14].

The post-pandemic rebound period in 2021-2022 unveiled a distinctive scenario in Portugal where there was a higher number of economically active women compared to men. Despite this higher participation rate, women encountered challenges in securing employment. While women constituted 64.6% of economically active individuals up to 64 years old, their employment rate stood at 60.5%, lower than men at 67.2%. Additionally, women faced a higher unemployment rate at 6.4% compared to the overall rate of 5%[15]. The Caritas report of 2022[16] highlighted persistent labor market issues in Portugal, including underutilisation of available workforce, elevated youth unemployment rates, and regional disparities.

Telework emerged as a pivotal response to the pandemic in Portugal, with data from the National Institute of Statistics revealing a substantial increase in teleworkers during the latter half of 2020, exceeding one million employees and constituting 21.3% of the employed population. Despite initial scepticism regarding Portuguese workers' telework capabilities, the adoption rate surged from 11% to 22%, facilitating white-collar worker retention[17].

The sudden transition to telework brought about significant shifts in work patterns in Portugal. While teleworking was less prevalent before the pandemic compared to other EU-27 countries due to employment structures and qualifications[18], data from COLABOR in 2021 indicated that women exhibited higher telework capacity during and post-crisis. Economic crises tend to amplify existing inequalities; thus, despite increased access to telework for women post-pandemic, they continued to bear the brunt of unpaid domestic responsibilities.

The COVID-19 crisis exacerbated gender and social disparities in Portugal, ushering in a new cycle of inequality and precarity. Efforts to mitigate these challenges led to the implementation of new or revitalised policies. The European Commission's financial assistance aimed at preserving economic activities and preventing mass job losses played a crucial role in supporting member states like Portugal during this tumultuous period.

In conclusion, the COVID-19 pandemic and induced telework measures have significantly impacted female employment in Portugal, magnifying existing inequalities and introducing novel hurdles. While telework presented opportunities for some women, it also underscored the unequal burden of unpaid work and emphasised the necessity for targeted policy interventions to address gender disparities within the labor market.

5. Advancing telework regulations in Portugal

In 2021, the Portuguese government enacted legislation to regulate telework, aiming to establish a standardised framework for remote work practices within the country. This new law introduced key provisions designed to safeguard the rights and interests of teleworking employees.

A pivotal component of this legislation is the mandate for employers to reimburse teleworkers for any expenses incurred due to their remote work setup. This provision acknowledges the potential additional costs faced by teleworkers, such as heightened utility bills or the procurement of office equipment, ensuring that employees are fairly compensated for these expenditures. By enforcing reimbursement obligations, the law acknowledges and addresses the financial challenges that teleworkers may encounter, promoting equity and fairness in remote work arrangements.

Furthermore, the legislation recognizes the unique needs and vulnerabilities of specific groups of workers. Individuals belonging to these categories have the right to request telework arrangements without requiring prior approval from their employers. Among the identified vulnerable groups are parents with children under 8 years old, individuals experiencing domestic violence, and workers responsible for caring for elderly family members.

[14] See F. Lima, *op. cit., loc. cit*.

[15] See M. Caetano, *Já há mais mulheres disponíveis para trabalhar do que homens*, *https://www.dn.pt/dinheiro/ja-ha-mais-mulheres-disponiveis-para-trabalhar-do-que-homens--14819572.html*, 2022, last time consulted on 03.05.2024.

[16] See Caritas Portugal *Cares! National report on poverty*, 2022.

[17] See F. Tavares Oliveira *et al.*, *op. cit., loc. cit*.

[18] See Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, 2017, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva, *http://eurofound.link/ef1658*, last time accessed on 03.05.2024.

By acknowledging these distinct circumstances, the legislation underscores a commitment to safeguarding the rights and welfare of employees navigating challenging personal situations. Telework offers flexibility and support to individuals managing additional caregiving responsibilities or seeking a safe work environment away from potentially harmful conditions. The inclusion of these provisions reflects an acknowledgment of the diverse workforce needs and aims to ensure that remote work is accessible and accommodating for all employees.

The new telework law in Portugal signifies a significant advancement towards fostering an inclusive and equitable work environment. By mandating expense reimbursement for teleworkers and granting vulnerable employees the right to request remote work arrangements, the legislation establishes a framework that prioritises the well-being and rights of individuals engaged in teleworking roles. These measures contribute to cultivating a sustainable and supportive labor market that addresses the evolving demands and complexities faced by workers in today's digital era.

6. Measuring the impact of digitalisation: empirical analysis

6.1. Methods

This qualitative study reports the findings of individual in-depth interviews with 15 female workers and 15 specialists using open-ended questions which were conducted in Portugal in 2023 and lasted for 4 months. Perceptions of specialists and workers on the issue were collected via a questionnaire that was aiming to reflect on the personal assessment of specialists who work with issues of gender and labor in Portugal as well as of females who to switch from onsite mode of work to a remote one. Opinions were collected and the content analysis was applied via MAXQDA.

This investigation uses an exploratory approach as multiple sides of the issue are investigated. In order to look into the challenge that women who switch to a remote mode of their professional activity and attitudes of professionals on that, the interviews were transcribed in a traditional way, however, MAXQDA which is based on a classification system where data is organised into previously defined categories, was applied to texts of interviews. The ability to write notes, as well as to quantify and visualise the results determined the choice of software.

All the interviews were audio recorded and the transcripts were open coded by a researcher. Results: The response rate in this study was 73.65%. The following themes were extracted from the views and opinions shared by the specialists: the abrupt change of working conditions due to the pandemic; peculiarities of telework for female workers; legal framework of telework; feminization of telework; future of telework in Portugal. Opinions shared by female workers included their personal assessment of the abrupt change of the mode of work and its flexibility; individual benefits of new adopted law; preferences and choices concerning the organisation of work; anticipative notions whether telework is here to stay.

The coding was done to make a qualitative content analysis. The categories were concept-based, *i.e.*, defined before the actual analysis of the empirical data starts. Table 1 in the appendix shows the categories and statements of female employees that are tagged under them.

6.2. Study design and participants

This is a study with a content analysis approach which has been conducted to discover the various aspects of the induced work for female professionals in Portugal with the onset in March 2020 and ongoing. Participants were selected based on inclusion criteria through purposive sampling among female workers who were exposed to the change of the mode of work and specialists dealing with issues of labor and gender on a daily basis. Female workers include women with an age range of 18-65, having the ability to understand and transfer concepts to a researcher and experience of working onsite and remotely. Their family and maternity status differs. Exclusion criteria for female workers consisted of: volunteer desire to work remotely, as well as withdrawal and reluctance of the respondent to continue participating in the study. Experts' cohort includes those specialists whose expertise has a link with digitalization and understanding of transformation that occurred due to it with the labor market in Portugal.

All individual and group interviews were conducted by one of the authors of the paper as a PhD student in human rights with the focus on labor rights dynamics and a history of participation in the classes of qualitative research methodology and the use of qualitative analysis software. She also has enough experience in the field

of labor policies. All steps for data recording and data analysis were conducted under the supervision of the faculty members with several years of qualitative study.

6.3. Data collection

After selecting the subjects through the literature review according to the criteria for inclusion in the study, first, the purpose and reasons for the study were explained to each participant and, the times of the face-to-face interviews were set up as desired for the participants. Initially, a pilot interview was conducted, which was analysed and helped to shape the interview guide and how to do the study. Open-ended questions were used to conduct interviews. General questions were first asked to express their individual experiences. In both types of interviews a similar interview guide was used. Examples of these questions for specialists are: „What kind of transformation of employment conditions happened due to the requirement to telework upon the outbreak of the virus?", „Was telework flexible and sufficient to incorporate all women's duties (homecare, childcare, elderly care) in their schedule during the pandemic?" „Upon the pandemics, has the dynamics of feminization of telework changed (speeded up, slowed down, introduced a new direction of development)?" Examples of questions for workers are: „Do you think that the induced telework has been beneficial for your employment?", „What kind of difficulties the remote work brought to you and how your employer reacted on it?", „What should be introduced to the regime of remote work to make it more adequate for your everyday professional life?". To document the data, interviews were first recorded and then transcribed at the right time. Field notes were used as much as possible and non-verbal data such as tone and gestures were also recorded. Interviews were conducted at the workplace of the participants, in an isolated room without the presence of anyone except the participant or via Google meet. A code and nickname were assigned to each participant. Interviews lasted from 30 min to 60 min. A total of 15 individual interviews of experts and 15 individual interviews with female workers were conducted. No interviews were discontinued. One of the interviews was interrupted due to ambient noise and was repeated a few days later.

6.4. Data analysis

Data was analysed based on content analysis with a conventional approach. The advantage of this method was to collect data from the participants directly without imposing any theoretical views by the interviewer. Data analysis was performed with each interview MAXQDA, after recording on paper using. Identified codes were the result of semantic units of the participants' comments.

Qualitative coding was used to analyse the collected data[19]. In the process of analysing qualitative data after categorization of the codes and eliminating similar codes, 52 codes were obtained in 16 sub-sub-categories, 7 sub-categories, 3 main categories.

6.5. Theme of perceived difficulties of telework

This theme consists of 2 categories, 5 sub- categories and 12 sub- sub-categories. The main categories consist of individual and socio-economical difficulties.

6.6. Individual difficulties and perceptions of female workers

Individual difficulties include a main category of individual difficulties which female employees meet while teleworking. This main category is extracted from 2 subcategories and 5 sub-sub-categories: inabilities and additional needs (physical and psychological) and mental difficulties (lack of time, lack of motivation and information, internal inhibitors).

In terms of inabilities and additional needs during the remote work mode, most participants referred to the constraints which are resulting from physical and functional conditions of working from home. They noted:

„The main change of the working conditions that has happened is that the work space and life space united and collided"(r. 11)

„Now I wake up and I am immediately at work."(r. 7)

„Since the work moved to my kitchen table, sometimes I simply can't disconnect at the end of the working day and continue thinking about work being in the kitchen" (r. 2).

[19] See K. Charmaz, *Constructing grounded theory: A practical guide through qualitative analysis*, Sage, 2006.

In terms of the assessment by female workers of the organisation of telework and its flexibility one of respondents said:

„The remote work seems to be a flexible arrangement, however, if I consider all the work that I do professionally and non-professionally it turns into a never-ending working day with no break and before at least I didn't work going to the office"(r. 3).

The respondents showed a concern and weak understanding of the new legal regime of telework:

„I heard about a new law, but I still pay on my own for the electricity and wifi, the company does not reimburse it." (r. 7, r. 15)

On the feminization of telework as a tendence of women to work exclusively in a remote mode, one respondent explicitly showed her concern of becoming an invisible worker:

„Being at home helps me to manage many tasks but I am not sure that this way I can grow professionally" (r. 6).

Future of telework is an unknown concept for most female respondents, however they unite in a point of view that telework is here to stay.

6.7. Assessments and perceptions of specialists

The example of coding is given in table 2 (in the appendix).

All specialists agree that telework is a mode that has become an inevitable element of the organisation of work. However, some of them focused on the point that it hasn't changed anyhow the structure and content of responsibilities at home.

„One hundred years ago women were responsible for washing clothes in rivers, now devices do it, but women are still those who take care of it and they do it while doing their work remotely" (r. 16).

Several specialists noted that *„telework has to do with bringing women back home"* in a sense that it is a retroactive process, negatively influencing the equality of rights (r. 19, 25, 29).

As for the future of telework, experts notice the following:

„Digitalization is a speedy process, and it is difficult to anticipate how it goes and which eventual consequences it will have" (r. 20).

„There is a clear capacity that more and more people will telework in the nearest future" (r. 23).

On legal novelties there are opposite opinions in a way that some experts consider positive discrimination of female workers as a step forward r. 16, 21) as long as others think that it is unacceptable (r. 27,29).

The most concern experts show towards a mental health of workers as the isolation is an intrinsic element of teleworking even for workers who live with their family as it goes far beyond the physical isolation:

„The disruption of contact with other colleagues can bring a high level of anxiety that later on can end up in a burnout that will have a direct impact on the productivity" (r. 24).

„Women tend to have a slower pace of career advancement and the remote mode of work makes it even more difficult to grow professionally and eventually may bring a lot of consolidated distress and disappointment" (r. 16).

Feminization of telework as a tendence of women to choose the remote jobs among the others was also reflected and specialists consider the concept as the crucial one as female workers take such a mode of work as a form of a conciliation, an attempt to facilitate the work-life conflict for women, however, one expert (r. 21) *noted that „it is not a case at all as it brings several structural disadvantages such as the loss of separation between private and professional and longer shifts that women tend to finish after those, who they take care off, fall asleep".*

The general idea of several specialists was that telework and the impact that it brings to inequalities and female employment are extremely dynamic concepts and they should be observed and followed as by now it is impossible to conclude definitively whether it is benevolent or not. However, based on the present data and existing studies, the suggestions to the existing policy can be given:

„Legislator is to consider females as special actors of the labor market as numbers continuously show that women have to cope with a double or, sometimes, a triple burden compared to male employees" (r. 30).

„The capacity of the labor market to offer more remote jobs is not a stable figure, that is why we can only guess how it is going to be in the following years and how many women will be able to join and rejoin a labor market under telework. No doubt that it is a positive tendency for females, however, it is possible to make the

regime of telework more comfortable and adequate for all categories of workers meaning not leaving a space for uncertainties and voluntarism" (r. 27).

7. Conclusions

This paper enters into the debates about „telework" and „female employment" in neoliberal labor market by exploring the ways in which female workers have to make compromises in their professional track, in the context of Portuguese employment. While there is no doubt that being included into the labor market is central to female employment, gendered and personal expectations regarding what this engagement means are dissatisfying and upsetting for women, in spite of any attempt that working remotely might bring. In "careless" companies neither supervisors nor human resource management consider that female workers also need to be gratified gradually, and they are simply expected to intensively perform the labor needed for production[20]. Our analytical choice to focus exclusively on women is supported by the understanding that gender gap so far is an intrinsic element of the modern labor market[21]. Thus, by looking at the experiences of women, we were not claiming that the challenges of telework exist only for women, nor that they represent a unified feminine (or feminist) standpoint[22]. Our objective was to highlight the experiences of women in Portugal with regard to their endeavors as professionals in a pandemic time. Based on the data analysis, the study suggests that the Covid-19 crisis has worsened gender disparities in Portugal in the short term, potentially leading to negative long-term effects on female employment. This is primarily due to the emergence of new precarious conditions and the absence of gender-sensitive responses.

Indeed, the existing literature on the impact of telework on employment offered initial evidence that males are also affected by the atypical jobs[23]. Little is known in details, however, about how men deal with the growing emotional distress and unclarity of career advancement as teleworkers, a gap that requires future research. Adopting a broader understanding of female remote work, our study also opens new investigative avenues to explore how the remote mode of work shaped career track strategies to navigate their professional responsibilities and expectations while being apart from colleagues and supervisors. Studies investigating the impact of the change of mode of work towards a remote one on women demonstrated how female workers found themselves torn between trying to create a perfect environment for conciliation of the double burden and a desire to be acknowledged as professionals, always experiencing a lack of recognition for any labor[24]. Our paper adds to this debate by showing how women's commitment to duties remotely can be linked to a number of different consequences, including the distress with mode of work and companies' gendered expectations of accepting less, the consumer culture of human resource management, the lack of adequate institutional understanding of telework management and a genuine commitment to solve life-family conflict. Interviews conducted with female workers who transitioned to telework revealed a mix of uncertainty and satisfaction, with telework offering relative flexibility. Similarly, expert interviews highlighted concerns about telework being misconstrued as a solution to work-family conflicts for women, as well as the growing desire among women to work remotely, potentially reinforcing traditional gender roles.

In the case of Portugal, given the gendered precarity in the labor market and the importance of being included into the labor market under any price, for many women, the negative impact of feminization of telework might irreversibly compromise their careers. It is essential to acknowledge the inherent instability and job insecurity experienced by female workers in Portugal. We are aware, however, that not all women were equally affected by the disruptions caused by the pandemic and the massive shift to telework that was maintained after the end of the sanitary crisis. The scholarship has shown that existing inequalities experienced by sexual minorities, racialised women, single mothers and mothers with disabilities are exacerbated upon new dimensions of segregation emerge[25]. Thus, the lack of diversity in those sectors of work that can adopt telework

[20] See M. Afota, Y. Provost Savard, A. Ollier Malaterre, E. Leon, *Work-from-home adjustment in the US and Europe: The role of psychological climate for facetime and perceived availability expectations*, The International Journal of Human Resource Management, 34(14), 2765-2796, 2023.

[21] See N. Gravel, *Impacts of Gender and COVID-19 on the Division of Labour*, Carleton University, 2023.

[22] See R. Alexander, *Spatialising careership: towards a spatio-relational model of career* development, British Journal of Sociology of Education, 44(2), 291-311, 2023.

[23] See Eurofound. *Working conditions and sustainable work: The rise in telework: Impact on working conditions and regulations*, 2023.

[24] See A.D. Watson, *The juggling mother: Coming undone in the age of anxiety*, UBC Press, 2020.

[25] See A. Lanau, M. Lozano, *Precariedad laboral y dinámicas de pobreza en hogares con niños*, Perspectives Démographiques, Núm. 027, 2022.

reproduced in our sample is a key limitation in our findings. We agree that telework can constitute a path to conciliation and certain flexibility to many families. However, „the price" of such a path also encompasses a big volume of distress that can deplete women's well-being. Thus, the tendency of female workers to look for a necessarily remote job, without any clear understanding and instruction on how they can proceed with their professional development exacerbate their mental and emotional distress. Taking up Donnelly and Johns´ idea[26] of humanised human resource management, we argue that, when management is informed by an ethic of care that also considers workers' needs, and not by a unilateral expectation of productivity, employees are better motivated and empowered by the process instead of experiencing invisibility and feeling of being lost and abandoned. Professional work underpinned by an ethic of responsibility for employees is committed to alternative forms of professional interactions, transforming enterprises into a place of mutual success and growth[27] instead of a marketplace. This allows for the creation of a true productive community supported by a network of reciprocal care, in which female workers' needs are also taken into account.

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APPENDIX

Table 1. Assessment and perceptions of female workers

Meaning unit	Code	Sub-subcategory	Subcategory	Main category	Theme
There is no division between my own space and my professional life as there is no space for that in the apartment (r1)	Collision of home chores and professional work	Lack of time	Mental issues	Individual issues	Perceived issues
I wish I could have more real - life contact with my colleagues. Sometimes before a zoom meeting we share details of our personal life, but I know that other teams don't do even that. (r1)	Lack of communication with colleagues and management				
Sometimes working remotely, I feel like doing a lot, but I am so bored working from home, and it makes me lazy (r2)	Lack of readiness and motivation	Lack of information and motivation			
I don't know enough about the new law on telework and am afraid to ask for reimbursement of wifi and electricity.	Lack of enough information				
It is embarrassing to ask for special treatment at work as you are a woman and mother.	Shame	Internal reflections			
Sometimes I am not sure that I do the task in a right way and it is awkward to ask my manager since I am remote (r5)	Negative thought				
I am scared that I will be called back to work in office and I won't manage to take care of my elder mother	Fear				

I think that if I am called again to the office, I might miss working from home (r.7)	Worrying				
My company is going fully remote and I feel uncertain about how it will function eventually (r5)	Anxiety				

Table 2. Assessments and perceptions of specialists

Meaning unit	Code	Sub-subcategory	Subcategory	Main category	Theme
Women mistakenly can consider telework as a win-win situation that can make them feel good and effective in any environment - home and professional one. It leads to the situation that they chase only remote jobs excluding the opportunity of working in the office or in a hybrid way (r.21).	Transformation of career choices.	Feminization of telework	Collective unconscious and conscious issues	Professional observation mixed with individual observations	Reflection based on professional experience
The development of telework is to produce a positive effect on rural areas as employees including female ones tend to come back to their native towns and cities from capitals as they are able to work from there and support their families, obtaining a more peaceful environment (r.18).	Capability of future telework	Future of telework			
Mentioning a female worker as a special subject of law can lead to an ambiguous situation and undesired consequences for labor markets, giving preferences to a wider number of workers without any substantial reason for it (r. 27)	Positive discrimination and gender perspective in legislation	Legal adequacy			
The new law gives an overview of all additional costs which have to be a burden of an employer, however there is no monitoring over that (r.23).	Mechanism of new law on telework				
Teleworkers tend to be kind of lost for their colleagues and managers who work in the office (r. 17)	Professional loneliness	Peculiarities of telework conditions			
Living in a modern world, workers obtain mostly a tiny or small environment which is frequently not adjustable for both work and recreation. This way, a kitchen table becomes an office one (r. 25).	Merge of home and professional environment				
Management tends to involve mostly those subordinates with whom they have direct personal contact. Remote workers have to be extremely initiative to be noted and invited, especially if we talk about female workers (r.19).	Invisibility of remote workers				
Being on a run of home and professional chores, female employees tend to leave tasks for a calm time when everybody fall asleep in their residencies (r.30)	Longer shifts				
Feeling themselves further from the office than those who work presentially, female workers tend to underestimate themselves and feel lost concerning a further professional responsibility. This way, they are losing potential opportunities for their talent development.	Vague understanding of career growth				

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THE ISSUE OF PROCEDURAL PASSIVE QUALITY IN THE PROCESSES WHICH CONCERN USUCAPTION

Diana Andreea TOMA[*]

Abstract

In the Romanian legal system, usucaption is an original way of acquiring property rights. In court actions for the establishment of the existence of the right of ownership by virtue of usucaption, the question of the passive procedural quality has frequently been raised. The general rule is that the defendant is represented by the titleholder of the property to be usucaptioned. However, in practice there are different situations which need to be adapted to each individual situation. This paper aims to present the most common situations regarding the passive legal standing in actions for the establishment of ownership by virtue of usucaption.

Keywords: *usucaption, procedural passive quality, property rights, possession, court practice.*

1. Introduction

Usucaption is an original way of acquiring property rights which is characterised by the acquisition of ownership of real estate through long-term possession. Thus, the active subject is the person who has continuously and usefully possessed the immovable property and the passive subject is the legal owner of the property.

On the one hand, usucaption is a benefit for the person who has exercised uninterrupted possession of the property and, on the other hand, it is a penalty for the person who is the rightful owner of the property but has not taken an interest in it, thus remaining passive and allowing another person to acquire ownership of the property in question.

Depending on when the person subject to the proceedings began to exercise possession, several situations can be distinguished as regards the person who has passive procedural capacity.

Usucaption is regulated in the Civil Code in the matter of the effects of possession, applying accordingly the provisions concerning extinctive prescription.[1]

2. Passive procedural status depending on when possession was commenced

When the plaintiff seeks a declaration that he has acquired ownership on the basis of usucaption commenced before the Civil Code came into force, several situations will be distinguished.

The general rule is that the case will be brought against the person who has the last title to the property, who should bear the consequences of remaining in passive possession. As we have already stated, the institution of usucaption is not only a benefit of the law for the person who acquires the property in this way, but also a sanction against the non-diligent owner who leaves the property in the possession of another person for a long time.[2]

A first hypothesis, the one in which the fewest problems arise, is the situation in which the true owner is known. If the true owner is alive, the action will be brought against him and if he is deceased, the action will be brought against his heirs. If the action is brought against other persons or against the State or the territorial administrative unit within whose area the property is situated, the action shall be dismissed as being brought against a person who does not have the passive procedural position.

There are situations where the plaintiff has acquired the property on the basis of a non-transferable document of title, for example a hand receipt from a possessor who has also acquired the property on the basis

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[1] G. Boroi, C.A. Anghelescu, *Fișe de drept civil*, Hamangiu Publishing House, Bucharest, 2021, p. 655.

[2] HCCJ, dec. no. 356/2006, A. Pena, *Accesiunea imobiliară și uzucapiunea. Culegere de practică judiciară*, C.H. Beck Publishing House, Bucharest, 2009, p. 90, apud B. Zdrenghea, *Problema calității procesuale pasive în procesele care au ca obiect uzucapiunea*, in Analele Universității de Vest din Timișoara no. 2/2009, Seria Drept, p. 9.

of a hand receipt. In this case, the claimant must identify the true owner, the person who has title to the property, and litigate against him or his heirs. If the action is brought against the person from whom the property was purchased, *i.e.*, the person who sold the property with the handbill as the title deed, the action will be dismissed as being brought against a person who does not have the capacity to sue and be sued because he is not the true owner of the property.

„The person who must prove that the defendant is the owner, is the plaintiff, since it is he who brings the action and seeks a benefit. This solution is justified by the fact that in such an action, the plaintiff can be sued only in opposition to the true owner, whom he must indicate".[3]

The second hypothesis is the situation where the person who was the owner of the property is not known. Frequently, in this case, the claimant brings the action against the State or the territorial administrative unit in whose area the property is located.

In recent judicial practice there have been two approaches. The first is to dismiss the action as being brought against a person without standing. The second approach has been mainly concerned with a person's right of access to justice. Starting from the premise that the plaintiff had made every effort to identify the true owner, but for objective reasons this could not be done, the national courts have recently taken a different approach, based also on the ECtHR rulings, in particular those in the Case *Holy Monasteries v. Greece*.

On the basis of this ECtHR judgment, domestic judicial practice has held that „in this situation, if the administrative territorial unit were not considered the owner of the property and therefore had passive legal standing in the action for usucaption, the claimant-possessor would inevitably be deprived of any real possibility of obtaining recognition of his right of ownership acquired by usucaption. If the plea of lack of the passive procedural position on the part of the administrative territorial unit were to be examined as a matter of priority and upheld, the substance of the applicant's right to effective access to the courts, an essential pillar of the right to a fair trial, would be affected".[4]

Thus, according to domestic court practice, if the claimant is objectively unable to obtain information about the owner of the property he wishes to obtain the ownership on, he would be entitled to bring an action against the State or territorial administrative unit. Otherwise, his right of access to justice would be affected.

HCCJ also ruled in this regard in dec. no. 24/03.04.2017 on the interpretation and application of the provisions of art. 1845 in conjunction with art. 1847 CC 1864 and art. 36 CPC, in which it held: „A review of the case law of the selected judgments of the courts of appeal shows that, to a considerable extent, the majority opinion of the courts is to the effect that as long as there are no other persons (natural or legal) who have title to the immovable property in relation to which it has been requested that the statute of limitations on acquisition has expired, the immovable property is deemed to belong to the public or private domain of the administrative-territorial unit, within the radius of the immovable property, which has passive legal standing."[5]

Another possible situation would be where the true owner of the property is known but the claimant is unable to indicate his heirs because there is not enough data on the person in the population register databases. In our opinion, the above-mentioned situation, in which the plaintiff sues the State or the territorial administrative unit, is also applicable in this case.

At the same time, there may be situations where the true title holder is more than one person. In this situation, legal action should be brought against them or against the heirs of each of the owners. The situation becomes even more difficult when the title deeds are old and information about the heirs of the owners is difficult to obtain. However, if the plaintiff is only able to obtain information about the heirs of one of the owners and proves that he has made every effort to identify the heirs of the other owners, but is unable to do so, it has been held in judicial practice that this situation can be described as one of mixed passive legal standing.

In this case, the territorial administrative unit invokes the plea of lack of passive legal standing on the ground that it does not have passive legal position because the true heirs must be sued. However, a court judgment held that ,, Therefore, as regards the heirs of C T B, they have been identified, the defendants being the natural persons in the present case. As regards the heirs of M T B, they could not be identified. Analysing first of all the plea of lack of passive legal standing of the defendant Municipality of Bucharest, the court notes

[3] CA Bucharest, dec. no. 1528/1996, available at *http://spete.avocatura.com/speta.php?pid=469*, apud B. Zdrenghea, *Problema calităţii procesuale pasive în procesele care au ca obiect uzucapiunea*, Analele Universităţii de Vest din Timişoara no. 2/2009, Seria Drept, p. 3.

[4] District 3 Court, Bucharest, dec no. 8812/09.10.2023, pronounced in case no. 5808/301/2022.

[5] HCCJ, civ. s., dec. no. 24/03.04.2017, *www.scj.ro*.

that judicial practice has consistently held that, in a situation where the true owner of the possessed property has not been identified in the usucaption action, the ECtHR in the Case *The Holy Monasteries v. Greece* are applicable. In view of the all above reasons, the court considers that the case requires the existence of a mixed passive procedural capacity represented both by the heirs of C T B (the defendants natural persons in the present case) and by the Municipality of Bucharest through the Mayor who is suing in view of the impossibility of establishing the heirs of M T B. In the light of these considerations, the court will reject the plea of lack of *locus standi* of the defendant Municipality of Bucharest, raised in the statement of defence, as unfounded."[6]

Another approach taken by the courts in cases where the heirs could not be identified was to request that a certificate of inheritance vacancy be attached to the case file, on the grounds that this was the only way to justify the passive procedural status of the territorial administrative unit.

Thus, in doctrine, it has been held that „before establishing usucaption, however, it must be established that the succession is vacant".[7] „In the same sense, the provisions of art. 1 letter b) of GO no. 128/1998 specify that among the goods that become the private property of the State are also movable or immovable property resulting from inheritances without legal or testamentary heirs."[8]

A clarification is necessary to be made with regard to the application of the law over time in relation to the holder of the vacant inheritance. If the inheritance became vacant during the period of application of the old Civil Code, it is the State which becomes the holder of the inheritance. Thus the provisions of art. 477 CC 1864 state that „All vacant and unclaimed estates, as well as those of persons who die without heirs, or whose estates are bequeathed, belong to the public domain"[9]. Art. 680 CC 1864 also states that in the absence of legal or testamentary heirs, the property left by the deceased passes to the State.

On the other hand, if the inheritance becomes vacant after the entry into force of the new Civil Code, art. 1138 CC stipulates that „Vacant inheritances shall revert to the commune, town or, as the case may be, the municipality in whose territorial area the property was located at the date of the opening of the inheritance and shall enter their private domain".

In judicial practice, it has been decided that the court hearing an action for usucaption may find, as an incidental question, that the succession is vacant. In this respect, it has been pointed out that the absence of a notarial certificate of vacancy is not such as to justify the general lack of jurisdiction of the courts to find that the succession is vacant, especially as the court is seised of the application of a person who justifies an interest.[10]

In this situation it is important to note that the provisions on the jurisdiction of the courts are also relevant. Thus, if it is requested that an inheritance be found to be vacant, the provisions of art. 118 CPC become applicable, which states that in cases concerning inheritance, until the end of the indivision, the court of the last domicile of the deceased has jurisdiction. However, in the case of actions for a declaration of the existence of a right of ownership by virtue of usucaption, the court of the place where the property is situated has jurisdiction. The two courts could therefore be different. In this situation, the court hearing the case on usucaption would be able to suspend the case under art. 413 para. (2) CPC, until the case is resolved by finding that the inheritance is vacant, so that the administrative-territorial unit has standing legal position in the original case on usucaption.

As mentioned above, there have also been situations where courts have held that the territorial administrative unit or the State has standing when heirs cannot be identified, without also requesting the certificate of inheritance. Thus, in a ruling it was stated that „As regards the passive legal standing of the defendant Municipality of Bucharest, represented by the Mayor General, the court holds that the plaintiff has not indeed provided unquestionable proof of ownership belonging to the private domain of the State, in the sense of showing a title deed. On the other hand, in the present dispute, all possible and necessary steps were taken before the court in order to ascertain the heirs of the owners of the property. From all the evidence in the case file it appears that there is no evidence for the period prior to the plaintiff's occupation of the land and that for over 42 years the plaintiff has never been disturbed in the exercise of his possession. However, in these circumstances, dismissing the case on the basis that the Municipality of Bucharest is a person lacking passive

[6] District 3 Court, Bucharest, dec no .1275 from 23.02.2024, pronounced in case no. 4326/301/2021.

[7] B. Zdrenghea, *Problema calității procesuale pasive în procesele care au ca obiect uzucapiunea*, Analele Universității de Vest din Timișoara no. 2/2009, Seria Drept, p. 5.

[8] GO nr. 128/1998 for the regulation of the manner and conditions for the exploitation of goods legally confiscated or entered, according to the law, in the private property of the state, published in the Official Gazette of Romania, Part I, no. 863/26.09.2005.

[9] Art. 477 CC 1864.

[10] B. Zdrenghea, *op. cit.*, p. 4.

legal standing, would mean depriving the plaintiff of any possibility of recovering their rights, which constitute an 'asset' within the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights."[11]

In our opinion, if there are no heirs or if the heirs of the owner of the property right cannot be identified, the correct solution is that the plaintiff obtains a certificate of inheritance before filing a lawsuit for a declaration of ownership by virtue of usucaption. In this way, there can be no doubt as to the passive procedural status of the territorial administrative unit. This cannot be regarded as a restrictive interpretation restricting the claimant's access to justice. In the cases mentioned above, the passive procedural status of the territorial administrative units or of the State can be established by means of the certificate of inheritance, following a fairly simple procedure, which does not prevent the claimant from having access to justice. This will simplify the process of seeking a declaration of ownership on the basis of usucaption, as the passive procedural status of the State or of the territorial administrative units will be clearly established.

3. Passive procedural position in the case of usucaption commenced during the period of application of the new civil code. Special procedure provided by the new code of civil procedure

If the plaintiff bases his action for a declaration of ownership on the basis of usucaption on the provisions of the new Civil Code and implicitly on the procedure provided for by the new Code of Civil Procedure, the passive procedural status changes quite a lot.

So far there has been ample discussion as to whether the plaintiff can avail himself of the provisions of the new Civil Code in relation to the time of the commencement of his possession. CCR dec. no. 225/02.04.2015 established that the new procedure can also be applied with regard to rights acquired by virtue of usucaption under possessions commenced prior to the entry into force of the new Civil Code. Subsequently, by dec. no. 19/05.10.2015, HCCJ handed down in an appeal in the interest of the law, established that the procedure provided for by the new Code applies only where possession began after the entry into force of the current Civil Code.

The question of the application of the law over time is not the subject of this paper, so the passive procedural quality in actions based on the establishment of the right of ownership by virtue of usucaption will be analysed on the premise that the new Civil Code and the new Code of Civil Procedure will apply.

Analysing the provisions of art. 1050-1052 CPC, it can be seen that the procedure to be followed is a non-contentious one. At the initial stage of the action, the court checks whether the plaintiff's action contains all the documents provided for in art. 1051 and the list of the two witnesses to be heard. Subsequently, the court orders the summons to be served on the holder of the right entered in the land register or on his heirs and also orders the issue of summonses to be posted at the court's premises, at the premises of the property to be usurped, at the land registry office and at the premises of the town hall in whose district the property is located. Also, the summons are published in two newspapers.

So we can see that at least in the initial phase, the procedure is not very long. Although the non-contentious procedure is defined as „a procedure involving the delivery of judgments in cases where the court is required to intercede, but in which the aim is not to establish an adverse claim against another person"[12], the legislator has chosen to greatly simplify the procedure whereby a person can obtain title to a piece of real estate, thus sanctioning the passivity of the true owner.

This „non-contentious" procedure can only be transformed into a contentious procedure if the interested parties lodge opposition. Thus, if opposition has been lodged, it is communicated to the plaintiff so that he can defend himself by means of a statement of defence. It can be seen that in this case, although it is the plaintiff who brings the action, he subsequently becomes the party who formulates defences. This procedure thus introduces a new feature in the way civil proceedings are conducted in this respect too. In practice, passive procedural quality is also transferred to the plaintiff, who must defend himself against the claims of a person who is interested in not acquiring ownership of the property.

However, if no person objects, the procedure remains uncontested until the court finally finds that the claimant has acquired ownership of the property by virtue of usucaption.

[11] District 3 Court, Bucharest, dec. no. 10565/10.11.2022, pronounced in Case no. 31453/4/2019.

[12] R.I. Vasiliu, *Procedura necontencioasă în Noul Cod de procedură civilă – Comentariu*, Revista de Drept Social no. 8/2012, p. 2.

4. Conclusions

In conclusion, the new procedure brings significant novelties in terms of passive legal standing in actions concerning usucaption. Although it starts from a non-litigious procedure, with no need to name a defendant, it can subsequently be transformed into a procedure involving two or more parties, depending on the number of persons lodging objections.

It is difficult to understand why the legislator chose to simplify so much a procedure whereby a person becomes the owner of a property right, as usucaption is an original way of acquiring property rights. In our opinion, the publicity of the procedure provided by the publication of notices is not sufficient.

Therefore, we can conclude that the issue of standing in actions based on obtaining a right of ownership by virtue of usucaption is topical, regardless of whether the plaintiff bases his action on the provisions of the old Civil Code or on the provisions of the new Civil Code.

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PRELIMINARY DISCUSSIONS ON ISSUES RELATED TO A EUROPEAN BUSINESS CODE

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Abstract

The standardisation of European law occurred in rapid steps in the last decades. However, there is no code or uniform regulation of commercial relations that occur between subjects with an address or seat on the territory of the European Union.

Such a regulation could significantly increase the process of economic integration and the dynamics of commercial exchanges.

There are several initiatives, but the development of a European business code represents a titanic task. In addition, any approach in this sense requires putting on the table the real needs, obstacles and possible and alternative solutions.

Without claiming to be exhaustive, the present study aims to start a serious research with practical effects in order to identify the problems of such an approach and to find effective solutions in the face of real impediments.

Keywords: *European Business Code, commercial code, private law, European Law, uniformisation.*

1. Preliminary aspects

1.1. The unification of law in the Member States of the European Union is an inherent effect of the implementation of the Treaties which initially created the three Communities and later the European Union

In the field of private law, however, with a few exceptions, standardisation is still at an early stage, although the freedom of movement of goods calls for such a response.

Today, the need for uniformity has been met by a new project, namely that of a European Business Code[1].

This, based on the existence of 13 books, contains extremely diverse provisions, starting with the concept of the professional and the market and ending with provisions relating to insolvency, intellectual property, employment relations and taxation.

1.2. The process of codification has been regarded in history as the dividing line between the so-called civilised existence of mankind and other forms of existence of human communities. The great codes of antiquity are today considered the high point of human civilisation, even though research shows that certain worlds have reached a high degree of civilisation, influencing us with their ideas and deeds, including those of today, without providing us with coherent legislation.

History itself plays with the logic of the human mind. Ancient Greece passed on to us the democratic system, the notion of rights and the rule of law, but without bequeathing us an integrated commercial legislation, despite the fact that the whole of Mediterranean trade and beyond - if we consider a number of Greek polis on the shores of the Black Sea.

Roman law reached its apogee during the reign of Emperor Justinian, who codified the most important rules of law and precisely those rules that were favourable to the development of a trading economy, but this achievement, which was extremely valuable for the following centuries and for the modern period in the West, occurred at a time when the empire was in a state of economic and social decline.

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[1] *https://www.henricapitant.org/actions/projet-de-code-europeen-des-affaires-2/*, accessed on 14.03.2024.

2. The Renaissance of Codification Process

Although the 19th century is traditionally considered as the century of codifications since the most important codes were promulgated during this period of time and we refer mainly to the Napoleonic code of 1804, the French commercial code of 1807, the Austrian general civil code of 1812 or the German codes of the second half of the century, namely the general commercial code of 1862, the civil code of 1896 and the commercial code of 1897, the picture is to a large extent not true.

In reality, the idea of putting legal rules into a unified and systematic framework is significantly older.

If at least at the theoretical level in the last part of the existence of the Roman Empire civil law seems to have imposed itself in all the regions administratively controlled by Rome, on the contrary, in the Middle Ages human interactions are regulated by a series of local customs, varying from one province to another, sometimes written and sometimes not, edicts of princes or monarchs, statutes of guilds or compilations of Roman law.

As Western monarchs understood that replacing local customs with written laws strengthened their political power and at the same time encouraged trade and industry, which became more important sources of income than the taxes levied on royal domains, the codification of rules to be applied in various areas became a phenomenon that spread from France to southern Germany.

Thus, the royal ordinances began to make up the fundamental laws in commercial or procedural matters[2].

Enlightenment, through its appeal to human reason, accelerated this process in the second half of the 18th century.

3. The Codification in Europe

Today, in most EU countries, civil and commercial law is found in civil or commercial codes, whether they were adopted in the first decades of the 19th century and subsequently amended (in the case of France, Austria or Spain) or in civil or sometimes commercial codes adopted between the last decades of the 19th century and the first decades of the present century (in the case of Germany, Italy, Poland, Hungary or Romania).

It should obviously be noted that special laws governing new contracts or new legal procedures are added to the rules contained in a civil or commercial code.

The legislation supplementing the civil or commercial code indicates that no matter how clearly scholars have identified the rules to be systematised by the new codes, social and economic developments have been so rapid that even if some social changes were taken into account, the code could never be a single regulatory instrument.

This should not lead us to believe that the use of a code is outdated by the new pace of economic or social life, but only that we should look at the code as a general regulatory tool.

4. Trends in private law codification

The 20th century witnessed important changes in the view of private law as a set of rules governing social relations between persons in positions of legal equality.

On the one hand, after the drafting of the Civil Code and the Code of Obligations in Switzerland, the idea spread that a uniform regulation of private law would be superior to the dualism that characterised the vision of the 19th century legislator.

This idea was imposed in Italy in 1942, even if for purely ideological reasons, namely the existence of a society in which social classes were less important, and was then taken up by other countries in the process of rebuilding private law, such as the Low Countries, Romania and Hungary.

5. The problems of codification today

As we have seen, codification as a process of systematisation at European level has not resulted in uniform legislation, nor has it followed a similar path, although some countries have tried to imitate the French model (in the case of Romania and Italy) or the German model (*e.g.*, the eastern provinces of the Austro-Hungarian Empire in the field of commercial law).

[2] See A. Padoa Schioppa, *Storia del diritto in Europa. Dal medioevo all'età contemporanea*, Bologna: il Mulino, 2016, p. 342-343.

Each improvement in civil and commercial law was reflected in various forms in the European states both in the 19th century and in the following century.

Sometimes the legislator took a Western code as a model (most often the French civil and commercial code) without making any changes despite the fact that society had evolved from its state at the beginning of the 19th century.

At other times, legal rules or innovative visions were also taken over but they did not match the stage of development of the society where they were to be applied.

Last but not least, ideology or nationalism generated a desire to look for innovative ideas that perhaps had not yet matured or, on the contrary, there was a reluctance to take up innovative ideas and regulations.

In any case, the main European states tried to develop legislation that bore the imprint of the nation and less legislation shaped by the social needs of the moment.

At present, the differences between national regulations in the field of private law, which should not be exaggerated, have been compounded by the problems raised by consumer legislation.

Thus, while until the 1970s there was controversy over the uniformity of private law, or in other words the need for a civil code to incorporate some of the rules of the commercial code, the emergence of consumer law regulations has led to a new division of the private law of each EU country.

As such, efforts to standardise private law at national level were overshadowed by the birth of consumer law. EU founding states, such as Italy, have encountered serious problems in absorbing consumer protection legislation.

Thus, as a preliminary conclusion, if efforts to renew private law had to choose between a uniform private law based only on the civil code or a private law split between civil law and commercial law, today any effort to reform and systematise private law must take into account the fact that most legal relationships arise between professionals and consumers and that, consequently, contracts binding the parties will fall under the general rules on contracts and obligations contained in the civil code, certain rules found or to be found in the commercial code and finally certain mandatory rules belonging to consumer protection legislation.

6. The Codification under EU Law

The Treaty on the Functioning of the European Union does not expressly provide for the idea of systematising European Union law by adopting codes. According to the art. 288 TFEU „to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions".

As we know the same article explains the substance of these legal tools. A regulation has general application and is binding in its entirety and directly applicable in all Member States while the directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but permits the national authorities to choose the form and methods.

Finally, a decision is binding in its entirety while the recommendations and opinions have no binding force.

The Union Customs Code (UCC) defines the legal framework for customs rules and procedures in the EU customs territory, adapted to modern trade models and communication tools.

7. What would be the advantages of a codification?

We have seen how the codification process has defined the evolution of private law over the last two centuries.

Understanding what the benefits or objectives of the codification process are can lead to different answers.

Undoubtedly, in the modern era, the first codifications aimed at bringing together the various rules applied in a given field so that courts could administer justice more efficiently.

At the same time, codification, especially when we are talking about customs or unwritten rules, also leads to knowledge of the law so that human behaviour tends to change and become uniform.

The first codifications were limited to the settlement of rules already applied in a single source of law, bringing few innovations to already known rules.

At present, at the level of the European Union, the problem is both the unification of law and its innovation, *i.e.*, the adoption of new concepts.

8. What is European business law?

In recent decades, based on the findings or convictions of prestigious French authors, the existence of a „business law" has been argued.

It has been concluded that „commercial law" as a branch of law is outdated in the realities of modern economic life and should therefore be replaced by „business law", which would cover today's complex social relations at the heart of which lies the entrepreneur or enterprise[3].

In other words, „commercial law and business law have distinct fields of application, governed by different application criteria"[4].

Commercial law can be defined as all the rules of law applicable to traders in the exercise of their professional activity. Traders are themselves defined precisely: they are commercial companies and individuals habitually carrying out the commercial acts.

Business law can be defined as the set of legal rules applicable to businesses in general. A company is any organised entity having an economic activity of production, distribution or provision of services. The concept of a company is broader than that of a trader. Some businesses, such as agricultural businesses or real estate development businesses, are not commercial businesses.

Thus, within business law, which applies to all businesses, commercial law constitutes a subset, which applies more specifically to the businesses of traders. Business law encompasses and extends commercial law. The two branches complement each other and order each other, but without confusing each other.

By a somewhat forced but accepted analogy in the literature, EU business law has been considered to be a branch of European law, mainly regulating the use of the single currency, the implementation of the four fundamental freedoms and the regulation of competition in the EU[5].

It is obvious, from my point of view, that today commercial law as it was conceived as a legal science in the 19th century has profoundly changed its object.

However, the rules affecting commercial activity are to a large extent also in the sphere of public law. To what extent and to what extent can we define public law rules as part of business law?

European business law is the corporate, individual, organisational and procedural law relating to the functioning of the European internal market

In terms of content, European business law includes all regulations that contribute to increasing the efficiency of the internal market or relate to economic matters that cross member state borders. These issues can lie in civil law, but also in some areas of public law (for example in tax and subsidy law). The latter areas are traditionally treated in more detail in textbooks on public (commercial) law.

Formally, European business law includes the external and EU internal market law, which emerged through legislation and recitals for the harmonisation and coordination of national and for the creation of original European law[6].

9. Could we conceive borders for European business law?

As we noticed above, commercial law was conceived as a branch of law closely related to the activity of traders.

On the other hand, the notion of business law seems much more fluid.

Will we include in the concept of business law everything that influences the commercial activity of an enterprise?

This means that not only the law of contracts, the law of companies, the rules regarding competition between companies form business law.

On the one hand, it must be taken into account art. 28 para. 1 TFEU, according to which "the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries".

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[3] Y. Guyon, *Droit des affaires*, Paris, Economica, 1995, I, 1.

[4] J.-B. Blaise, R. Desgorces, *Droit des affaires. Commerçants - Concurrence – Distribution*, Paris, LGDJ, 2023, p. 21.

[5] C. Gavalda *et al.*, *Droit des affaires de l'Union Européenne,* Paris, LexisNexis, 2015, p. 14.

[6] W. Kilian, D. Henning Wendt, *Europäisches Wirtschaftsrecht*, Baden Baden, Nomos, 2023, p. 41.

On the other hand, beyond the rules of the treaty that have a major impact on the activity of a company (such as, for example, competition regulation), at the level of the European Union there is a series of regulations that have a clear impact on commercial activity.

For example, in the content of the title XV of the treaty there is an article which states the following:

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

As can be seen, the text does not expressly impose a common consumer protection policy, but nevertheless consumer law has become very extensive in European law.

On the other hand, if there were striking differences between countries, this would lead to imbalances of treatment on the internal market of the Union.

10. What would be the obstacles in the way of coding?

It would be unrealistic to think that the codification process would not encounter obstacles or stoppages.

Many similarities can be made. The largest European states faced a period of unification of private law: France after 1789, Spain from 1829, Germany starting with the 1860s, Italy in 1865 and so on.

Such a history would emphasise the fact that sooner or later private law tends to unify at European level and that at least the German model, *i.e.*, of a confederation, could inspire the future codification.

However, I don't think we can be very optimistic because there are many impediments.

On the one hand, European countries have a well-established legal tradition, *i.e.*, a system of law that has acquired particular or national features over time.

The unification of legislation took place in the 19th century, it is true, through the imposition of new codes, but the previous legislation was clearly inferior to the civil and commercial codes.

On the other hand, current legislation, whether European or national, is very complex, which will lead to numerous discussions on what a future European Union business code should contain so as not to unbalance national systems.

Last but not least, it should be borne in mind that certain social relations are organically part of the sovereignty of the national state and cannot be regulated at European level, or if they were regulated, they could arouse strong discontent in the Member States.

11. What should be included in a future business code? Do we need more stages in the codification process?

These are two fundamental questions that we are trying to answer at this point in time knowing at the outset that the answer is not complete.

In my view, such a code should mainly regulate obligations and contracts for commercial purposes concluded between traders.

European competition law can be added to this.

But we need to consider whether consumer protection legislation could be part of the code. In theory, consumer contracts are about adding value to goods and services, but the changes that occur at various stages would suggest that it would be more efficient to systematise the rules in a common source that will certainly be subject to further changes.

Last but not least, with regard to the codification process, I believe that the idea of drawing up a code that is complete at a given date is not practical, although it is attractive to any lawyer.

The regulation should take into account those economic relations that are very important for the internal market of the Union and as this initiative is well received, it should move on to the regulation of other hypotheses.

12. Conclusions

Nobody disputes the need for a European business code.

It is in itself an instrument that would allow the innovation and systematisation of commercial legislation. It would certainly make it easier to conclude commercial transactions between traders based in EU Member States.

However, any project must perhaps be developed on a pragmatic basis so that the objectives can be achieved even if in several stages or over several decades.

To understand these bases we need to reflect on the key issues we have highlighted in this context.

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STRATEGIC LAWSUITS AGAINST JOURNALISTS - AN UNCONVENTIONAL WAY TO ENACT CIVIL LIABILITY

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Abstract

In the last decade, a new way of bringing journalists to civil liability has gained momentum, which is also a form of intimidation in carrying out their activity, namely SLAPP (strategic law-suit against public participation) trials.

This paper analyses the essential elements necessary to qualify a trial filed against a journalist as a slap-trial, starting from two relevant European acts: the Proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings („strategic lawsuits against public participation") and the Commission Recommendation (EU) 2022/758 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('strategic lawsuits against public participation').

As it has been pointed out, there are at least two essential elements that qualify a law-suit as a SLAPP-trial and identifying them is only a prerequisite of the correct qualification, that may also imply subjective elements as bad faith, or abuse of law.

Keywords: *SLAPP, intimidation trial, public communication, abuse of law, bad faith, communication law.*

1. Introduction

Today, freedom of the press is one of the most important guarantees of democracy, being a universally recognized value worldwide. Although this is not equivalent to freedom of expression, it is, in our opinion, the most important form of its manifestation.

Although freedom of expression has been recognized internationally since the time of the French Revolution in 1789[1], its regulation has evolved substantially with the emergence of mass media, both in the form of print media and radio and television.

The last decades have surprised by the development of a new form of public communication, namely the online press, which was characterised by a heterogeneous editorial rigor, journalists having both the opportunity to write for formidable publications, with a consistent editorial policy, and the opportunity to publish materials on their own pages, either on social media platforms or on blogs.

Although the regulation dates back to 1950, ECHR recognized in art. 10 para. 1, the importance of freedom of expression[2] in any democratic society based on European values, always updating its content through the ECtHR jurisprudence. Under these conditions, the press has earned its reputation as the „watchdog" of democracy, a term repeatedly used by the European court. In this sense, in the Case *Axel Springer AG v. Germany*[3], the Court reiterated the essential role of the press in a democratic society, that of disseminating information and ideas in all areas of public interest, a fact to which the public's right to receive said information corresponds.

In the last decade, the evolution of content-sharing software led to new specialised channels, in various fields of journalism, in which the publication of materials did not know limitations or restrictions, thus, any

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[1] When was the Declaration of the Rights of Man and Citizen adopted; according to art. 11: „The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this freedom in the cases determined by Law".

[2] According to art. 10 para. 1 ECHR: „Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of borders. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

[3] Grand Chamber, Case no. 39954/08, dec. of 07.02.2012, para. 79, available online at *https://hudoc.echr.coe.int/fre?i=001-109034*, last consulted on 17.03.2024.

journalistic investigation, any finding of irregularities in public institutions, could be brought to the attention of society almost effortless.

If society gained by the uncovering of incorrect practices, in administration, justice and even in the private sector, there were still certainly people directly harmed by these disclosures, whose interests required the denial of the facts and the possible discrediting of the journalist.

In specialized literature[4] it was shown that for effective citizen participation in government, anti-SLAPP laws should also protect the media.

In this material, we will follow the analysis of particular elements regarding lawsuits brought against journalists by people directly subjected to press investigations. These types of lawsuits usually take the form of civil litigation in which defamation of the person by the journalist is invoked, but in certain situations, there may even be criminal lawsuits brought against journalists for how they obtained the information published.

Tortious civil liability is recognized by the unanimity of European legal systems and constitutes the mechanism by which the author of an illegal act is held responsible by the injured person, in order to obtain compensation. This mechanism, originating from Roman law[5], acts, in the field of public communication, as a double-edged sword.

As long as the journalist exceeds the limits of freedom of expression, therefore, when he commits an illegal act, the injured person can obtain compensation for the injuries suffered, but when the injured person acts in bad faith, without the journalist having committed an illegal act, the civil process will produce a different effect: that of harassing the journalist.

2. SLAPP-type lawsuits against journalists

Against the background of an increasingly important concern, a series of regulations have been developed at the European Union level regarding strategic processes directed against public participation, in which sense Commission Recommendation (EU) 2022/758 was adopted on the protection journalists and human rights defenders involved in public mobilisation actions against patently unfounded or abusive judicial procedures[6] and a proposal for a directive of the European Parliament and the Council of 27.04.2022 on the protection of persons involved in public mobilisation actions against patently unfounded or abusive legal proceedings[7].

The two regulations, although lacking binding legal force, represent the most important legislative steps taken at European level for the protection of journalists against abusive processes, intended to intimidate and harass them, in order to gain their silence. In legal literature[8] it has been shown that the purpose of the anti-Slapp measures is to protect people who became targets of SLAPP-type trials or, moreover, those who have ceased their civic or journalistic activity precisely for fear of becoming a target of a judicial process of this kind. Obviously, such trials constitute a violation of the principle of exercising rights in good faith[9] and, at the same time, it represents a hidden form of intimidation by generating responsibilities for the journalist to carry out the process.

A concrete definition of SLAPP-trial does not result from the content of the previously mentioned acts, but can be derived from a previous act, namely the Resolution of the European Parliament from November 11, 2021 regarding the consolidation of democracy, media freedom and pluralism in the EU: the unjustified recourse to civil law actions and criminal to silence journalists, NGOs and civil society[10]. Letter „e" in its preamble states: „lawsuits or other legal actions (*e.g.*, injunctions, asset-freezing) brought forward by private individuals and entities, and also by public officials, public bodies and publicly controlled entities, directed at one or more individuals or groups, using a variety of legal bases mostly in civil and criminal law, as well as the threats of such actions, with the purpose of preventing investigation and reporting on breaches of Union and national law, corruption or other abusive practices or of blocking or otherwise undermining public participation".

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[4] S. Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, in Valparaiso University Law Journal, vol. 41, no. 3/2007, p. 1283.

[5] The *Lex Aquilia*, which first regulated tortious civil liability, dates from the 3rd century BC.

[6] Available online at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022H0758*, last consulted on 19.03.2024.

[7] Available online at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0177*, last consulted on 19.03.2024.

[8] C.H. Barylak, *Reducing uncertainty in Anti-Slapp protection*, in Ohio State Law Journal, vol. 71, no. 4/2010, p. 869.

[9] Qualified as a general principle of law, also relevant in the field of public communication. See S.Al. Vernea, *Dreptul comunicării*, Hamangiu Publishing House, Bucharest, 2021, p. 11.

[10] OJ C 205/2/20.05.2022.

As shown in the first paragraph of the proposed Directive of 27.04.2022 of the European Parliament and the Council's preamble, in recent years, the phenomenon of SLAPP trials has become a common reality, increasingly widespread in the EU. Against this background, it is necessary to adopt a uniform regulation at the European level, precisely because in the sphere of public communication, the existence of online platforms has determined the effective lack of borders both between states and between civilizations. Thus, on 27.04.2022, the two reference normative acts were adopted, respectively Recommendation (EU) 2022/758 of the Commission and the previously mentioned directive proposal.

For the correct understanding of the specifics of the regulations, we consider it necessary to analyse each one under the aspect of the definition of SLAPP trials, of characteristic features and remedies.

3. The proposal for a directive of 27.04.2022 regarding the protection of persons involved in SLAPP-type processes

We note that the statement of reasons of the proposed directive begins with a characterization of SLAPP-type legal proceedings: "a particularly harmful form of harassment and intimidation used against those involved in protecting the public interest. They are groundless or exaggerated court proceedings typically initiated by powerful individuals, lobby groups, corporations and state organs against parties who express criticism or communicate messages that are uncomfortable to the claimants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition".

Although the text is meritorious in terms of description, it is also of particular importance in terms of the characteristics of this type of trial. Synthesizing the features, the EU act considers the following to be the defining factors: (i) they are clearly unfounded or exaggerated legal proceedings, (ii) they are initiated by influential persons or their associates against those who criticised the activities of the former by uncovering illegal acts or facts and (iii) the aim is to reduce to silence the critics.

In the content of the directive proposal, in art.3, point 3, the notion of *"abusive court proceedings against public participation, mean court proceedings brought in relation to public participation that are fully or partially unfounded and have as their main purpose to prevent, restrict or penalise public participation. Indications of such a purpose can be: (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof; (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters; (c) intimidation, harassment or threats on the part of the claimant or his or her representatives".*

From the previous text, we note that the legislator did not aim to expose some essential elements of this type of procedure, but made an example of the features, these not being mandatory in all SLAPP-type processes.

In our opinion, the technique used by the European legislator is relatively deficient, on the one hand, because it does not allow the correct delimitation of this type of procedure, and on the other hand, because the qualification of the process as SLAPP-trial is the only reason to ensure the remedies of preventive nature regulated in Chapter III of the proposed directive, thus it is necessary to establish the determination criteria a priori.

Regarding the remedies available to the journalist for such actions, we note that in the proposed directive there are three different categories of measures: (i) remedies of preventive nature, (ii) remedies of reparatory nature and (iii) remedies of protective nature.

The first category, of preventive remedies, includes the measures stipulated in art. 9-13, which aim to establish an abbreviated judicial procedure[11], with the reversal of the burden of proof, in which strictly the clearly unfounded character of the action will be judged. The judgment of the main dispute will be suspended until the final resolution of this abbreviated procedure.

The second category includes remedies of reparatory nature, regulated by art. 14-16, which include the stipulation of the plaintiff's obligation to pay all the court costs of the defendant, including the costs of legal representation, unless the latter are excessive. Equally, the right of the person injured by being sued in such a process to claim and receive compensation for the damage caused was provided for. Equally, states will have

[11] In specialized literature, it was noted that following the abbreviated procedure produces a „chilling effect", which results in either giving up the procedure or disinterest in it. See S.P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, in Duquesne Law Review, vol. 44, no. 4/2006, p. 642.

the obligation to impose a series of effective, proportionate and dissuasive sanctions on the person who initiated such a trial procedure, with the aim of discouraging him from resorting to similar actions in the future.

The third category concerns protective measure in favor of a person convicted in a SLAPP trial in another European Union member state. In this sense, art. 17 of the proposed directive provides a reason for refusing to recognize the judgment pronounced in a member state, to the extent that the respective action would have been considered manifestly unfounded or abusive if it had been brought before the courts from the Member State where recognition or enforcement is sought, and the respective courts would have applied their own legislation.

4. Commission Recommendation (EU) 2022/758 on the protection of persons involved in SLAPP-type processes

Unlike the proposal for a directive, the Recommendation does not contain a definition of this type of litigation, but it captures their characteristics through point 9, the second thesis, of the Preamble: „These court proceedings are either manifestly unfounded or fully or partially unfounded proceedings which contain elements of abuse justifying the assumption that the main purpose of the court proceedings is to prevent, restrict or penalise public participation".

Then, in sentence II, point 11 of the Preamble, it was shown that such procedures „They often involve imbalance of power between the parties with the claimant having a more powerful position than the defendant for example financially or politically".

Under these conditions, the main characteristics of the SLAPP-type processes, as it results from the previously reproduced texts, consist in (i) the clearly unfounded character, in whole or in part, of the action, (ii) the purpose of the procedures is to prevent or limit the mobilisation public, and (iii) the litigating parties are placed in a power imbalance.

We note that, despite the different terminology, the three features are conceptually identical to the defining features retained from the analysis of the directive proposal.

Under these conditions, we note that the European legislator was consistent in determining the essential conditions, even if the regulatory manner was exemplary, by listing some conduct specific to plaintiffs in these types of processes.

As for the remedies, we note that the recommendation provides substantially more complex solutions than the directive proposal, starting from the training of legal practitioners and the persons affected by such procedures, up to actions to raise awareness of civil society and the public in the respective field.

Equally, the recommendation established support mechanisms, namely the identification and support by the member states of organisations that provide guidance and support to people sued in such trials. Concretely, all these measures must lead to the provision of effective legal assistance to the persons concerned, regardless of whether they can afford to cover the cost of legal services from their own sources.

In addition, the recommendation proposes the establishment of a data collection, reporting and monitoring mechanism, useful both for the organisation of member states' efforts to ensure protection of journalists and public activists against this type of litigation, and for interstate cooperation for the same purpose.

5. Delimitation criteria of SLAPP-type processes

From the two European acts, we noticed that there are three defining characteristics of SLAPP-type procedures: (i) the clearly unfounded or exaggerated nature of the action, (ii) imbalance of power or status between the parties involved in the litigation and (iii) the purpose of the procedure is to prevent or reduce public mobilisation.

Analysing their content, we appreciate that only two can be considered essential for any SLAPP-type process, respectively: (i) the subjective character - the purpose of the procedural approach is to prevent or limit the criticism brought, or public mobilisation and (ii) the objective character - the disproportion of economic power or social position between the litigating parties.

As for the manifestly unfounded or exaggerated character of the action, we note that this can constitute a reference element only with regard to civil actions resulting from accusations of defamation. In the hypothesis that the action addressed to the judicial bodies has a criminal or even administrative nature, the analysis of the

manifestly unfounded character becomes impossible to achieve in practice, it being necessary to administer evidence and go through some steps inherent in any process.

Moreover, we consider that even the terminology used by the European legislator is inconsistent in this aspect, in the directive proposal the phrase „groundless or exaggerated" was used, while in the recommendation the phrase „manifestly unfounded or fully or partially unfounded" was used. In this situation, we appreciate that a request addressed to the judicial bodies can be considered unfounded, groundless or exaggerated only *a posteriori*, after going through the stages of the process, especially the evidence administration procedure. Equally, the manifestly unfounded character of some claims is contradicted by the possibility that they may be founded only in part.

For these reasons, we appreciate that the inclusion of the clearly unfounded or exaggerated character of the action among the defining elements of this type of process cannot be unanimously accepted. We appreciate, however, that most cases of this nature will have a predominantly unfounded, even abusive character, but this majority feature is not defining.

As for the subjective nature, looking at the purpose of the approach, we appreciate, in accordance with the perspective of the European legislator, that in order to qualify a judicial process as SLAPP, it is strictly necessary that the goal pursued by the plaintiff is that of reducing the defendant to silence, through intimidation or exhausting its resources. Equally, the purpose pursued cannot be dissociated from the plaintiff's intention to retaliate[12] for the previous conduct of the defendant, which would have led to the disclosure of illegal acts, of any nature, committed by the plaintiff or his associates.

An interesting problem exists in the matter of proof, since proving the intention with which the plaintiff sued the defendant is difficult to achieve, being a subjective component. In our opinion, proving the purpose pursued by the plaintiff can only be done by identifying some related elements (previous correspondence, offer to end the litigation under certain conditions, etc.), which can be explained, mainly, by the truthfulness of his purpose. As long as the motivation for starting the process is in the nature of a legal fact, we appreciate that it can be proven by any means of evidence.

We do not exclude that other elements of subjective nature can be found in the vast majority of SLAPP-type processes, such as the bad faith of the plaintiff at the time of the start of the process or the abuse of rights, but these are not defining, essential elements for qualifying the act as such.

Regarding the objective character, namely the disproportion of economic power or social position between the litigating parties, we consider that this inequality between the parties can take multiple forms, being specific both to the relationship between the employee and his current or previous employer, in the conditions where between them there is or there was a dependency relationship during the duration of the employment relationship, or between a student and his teacher, regardless of whether the student took or is going to take an exam with that teacher.

A similar situation also exists in the relationship between a dignitary, or other person representing the public authority, and a person towards whom his authority was, at a given moment, exercised.

Beyond the previously mentioned hypotheses, there are undoubtedly SLAPP-type lawsuits initiated by corporations against journalists or legal entities operating in the media field, and between them the imbalance is of purely economic nature, being determined by the budget likely to be allocated by each, for the dispute in question.

In support of the previously mentioned, we note that in November 2023 a study prepared at the initiative of the European Parliament - Committee on Civil Liberties, Justice and Home Affairs was published[13], according to which, 42.6% of the plaintiffs in SLAPP-type lawsuits are represented by public figures from among politicians and civil servants, 21.3% by companies, including entities owned by them.

The defendants in such lawsuits are, in 44.7% of the cases, journalists - natural persons and in 28.4% of the cases are legal persons carrying out activity in the field of media.

In these conditions, according to our assessment, the objective criterion referring to the imbalance of an economic nature or social position between the parties constitutes a defining element for SLAPP trials.

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[12] A.L. Roth, *Upping the ante: Rethinking anti-SLAPP laws in the age of the internet*. BYU Law Review, 2016, p. 741.

[13] J. Borg-Barthet, F. Farrington, *Open Slapp Cases in 2022 and 2023 – The incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union*, p. 30, available online at: *https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf*, last consulted on 19.03.2024.

6. Conclusions

Strategic, fictitious processes designed to intimidate and reduce criticism are unacceptable tools in a democratic society. These can be included in the concept of judicial bullying[14], in a broad sense that includes harassment through the courts, carried out by the parties.

Obviously, taking measures to prevent these practices is increasingly important, with the increase in the number of cases of such type throughout the EU.

Although the beginning of regulation at the EU level is commendable, we believe that, in the absence of normative acts with binding legal force, the taking of concrete measures is left to the discretion of the member states.

At national level, we consider it necessary to adopt a minimum standard and some internal remedies, starting from the model of the directive proposal, divided into preventive measures, reparatory measures and protective measures.

In the absence of the adoption of a basic normative framework, with binding legal force, processes of this kind will hinder the activity of the judiciary and will endanger freedom of the press and even freedom of speech.

We consider that the application of an elementary filter, composed of the analysis of the two defining features (i) the subjective character - the purpose of the procedural approach is to prevent or limit the criticism brought, or the public mobilisation and (ii) the objective character - the disproportion of economic power or social position between the litigating parties, would allow the quick identification of processes in this category and would justify the defendant's appeal to institutions and organisations capable of providing legal and financial assistance in such cases.

Normally, the journalist can be obliged to pay compensation for his work, only to the extent that he has impermissibly violated the limits of freedom of expression. By leaving this type of process unregulated at national level, the journalist is exposed to a new, non-conventional form of civil liability, contrary to any limit provided by the European Convention on Human Rights for freedom of expression - the trial costs.

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SOME CONSIDERATIONS ON GENDER GAP IN EMPLOYEES PROFESSIONAL TRAINING

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Abstract

The issue of gender gap within workplace dynamics is an ongoing and significant concern that is addressed by both European Union and national legislation and policies. This article delves into the various legal frameworks that have been established to ensure continuous professional development for all employees, aiming to bridge the gap in opportunities and treatment between genders. It also scrutinises the mechanisms in place for combating discrimination based on sex, a persistent challenge in labor relations. Moreover, the paper goes beyond merely outlining the legal stipulations, venturing into an analysis of how these regulations are enacted in the workplace. By exploring both the theory behind the laws and their practical outcomes, the article sheds light on the effectiveness of current strategies and the areas that require further attention to achieve true gender equality in the workplace.

Keywords: *training, gender, gender gap, employment, labor law, statistics.*

1. Introduction

The gender gap in the workplace is a multifaceted issue that has persisted despite advances in gender equality. Persistent earnings and pay gaps between men and women exist across various sectors and occupations, not fully explained by differences in qualifications or work patterns[1]. Moreover, the gender composition of occupations, especially in national labor markets, significantly influences the authority gap, with men benefiting more in terms of workplace authority[2]. This gap is not solely due to personal attributes or employment settings but is influenced by broader societal and organisational factors[3]. Thus, the gender gap is influenced by cultural norms, particularly around childbirth and parenting, which disproportionately affect women's career opportunities and earnings[4]. Continuous development and training are essential for personal career growth and organisational success. They provide employees with new skills and knowledge, keeping them relevant in a rapidly changing work environment. However, despite the clear benefits, there exists a notable gender gap in who accesses these opportunities. Research shows that men are more likely to receive on-the-job training and participate in professional development courses than women. This discrepancy can be attributed to various factors, including unconscious bias, organisational culture, and the different roles men and women traditionally occupy in the workplace[5]. The gender gap in training is also influenced by the societal expectations and roles assigned to men and women. Women are more likely to take career breaks or work part-time to manage family responsibilities, which can lead to fewer opportunities for professional development. Furthermore, women may not be encouraged or feel confident enough to pursue training opportunities due to a lack of role models or mentors in leadership positions[6].

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[1] See H. Lips, *The Gender Pay Gap: Challenging the Rationalizations. Perceived Equity, Discrimination, and the Limits of Human Capital Models*, in Sex Roles, no. 68, 2012, p. 169-185, *https://doi.org/10.1007/s11199-012-0165-z*; B. Petrongolo, *The gender gap in employment and wages*, in Nature Human Behaviour no. 3, 2019, p. 316-318, *https://doi.org/10.1038/s41562-019-0558-x*.

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The article endeavors to present the manner in which various facets of the gender disparity phenomenon within the professional sphere, particularly influencing professional development, have been tackled through legislative policies at both regional and national strata. Furthermore, following an examination of the regulatory framework provided by the Labor Code concerning professional training, this study presents and scrutinises statistical data pertinent to professional training. Additionally, it delves into nuances associated with the gender disparity in professional training, that may arise from an analysis of the statistical data.

2. Contents

The gender disparity dimensions illustrated by empirical research have been assimilated by political entities and subsequently translated into actionable measures at both regional and state levels. These actions, informed by rigorous scientific investigation, aim to rectify gender imbalances and foster equality, marking a significant step toward harmonising theoretical knowledge with policy execution. In alignment with its foundational principles, EU has enacted a range of strategies to mitigate the gender gap within professional environments, underscoring its commitment to gender equality as a central tenet, a fundamental right[7], and a key principle of the European Pillar of Social Rights.

In the Gender Equality Strategy 2020-2025[8], the European Commission delineated enhancing workers' work-life balance as a pivotal approach to ameliorating the gender disparities prevalent in the labor market. It emphasised the necessity for both parents to adopt a sense of responsibility and entitlement concerning familial care duties. To this end, the Work-Life Balance Directive[9] was introduced, establishing minimum benchmarks for family leave and adaptable working conditions for employees, while advocating for a more equitable distribution of caregiving responsibilities between parents. This directive represents a significant stride towards fostering an environment where gender equality is reflected not only in professional settings but also in the domestic sphere, reinforcing the EU's commitment to creating a more balanced and inclusive society.

The European Pillar of Social Rights enshrines the right to education, training, and lifelong learning as its first principle. This aligns with the ambitious headline target set forth in the Action Plan of the European Pillar of Social Rights[10], which stipulates that by 2030, 60% of all adults should engage in training annually, underscoring a commitment to fostering continuous professional and personal development across the EU. This initiative reflects a strategic vision aimed at enhancing the skills and competencies of the European workforce, thereby contributing to the overall growth and competitiveness of the region in the global landscape.

At the national level, Romania has transposed the provisions of the Work-Life Balance Directive into its Labor Code, instituting a gamut of stipulations that support a judicious equilibrium between one's personal and professional realms. Notably, statistical evidence underscores that women's professional progression is disproportionately hindered by domestic responsibilities and caregiving roles. Hence, these legal frameworks are pivotal in advancing workplace equality measures.

Thus, to adapt the work schedule to the demands of personal life, art. 118 provides that the employer can establish individualised work schedules for all employees, including those who are on caregiver leave, with their agreement or at their request, which can be limited in duration. Individualised work schedules imply a flexible mode of organising work time, defined by law as the possibility for employees to adapt their work schedule, including through the use of remote work, flexible work schedules, individualised work schedules, or part-time work schedules. Should an employer demur the establishment of a personalised schedule, they are required to furnish a substantiated written declination within five business days post-receipt of the request. The Labor Code abstains from delineating the maximum duration for which an individualised schedule may be solicited or the specific conditions under which such a request may be made, affording both employer and employee the latitude to determine these parameters, albeit this latitude could potentially precipitate legal disputes. The provisions of the law remain general, para. (6) of art. 118 stipulating that when the individualised work schedule has a limited duration, the employee has the right to return to the initial work schedule at the end of the agreed period. The employee has the right to return to the initial schedule before the end of the agreed period, in the case of changing circumstances that led to the establishment of the individualised schedule.

[7] See art. 2 and 3(3) TEU, art. 8, 10, 19 and 157 TFEU and art. 21 and 23 of the EU Charter of Fundamental Rights.
[8] European Commission, A Union of Equality: Gender Equality Strategy 2020-2025, COM(2020) 152 final, Brussels, 05.03.2020.
[9] Directive (EU) 2019/1158 on work-life balance for parents and carers.
[10] Available at: *https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/*, last time consulted on 20.03.2024.

Another measure established by law regards the right of employees responsible for children up to 11 years of age to elect to perform their duties from home or under a teleworking arrangement for four days per month, barring scenarios where the nature or specifics of the work preclude such modalities.

For those situations where an employee needs to provide care or personal support to a relative or a person living in the same household, the employee may benefit from caregiver leave. The law also regulates the scenario where the employee is required to be absent from work in unforeseen situations, caused by a family emergency due to illness or accident, which necessitates the immediate presence of the employee. Absence from work cannot exceed 10 working days in a calendar year, and the hours missed must be made up, with the method of recovery being agreed upon by both parties.

The legal infrastructure, crafted through the incorporation of European directives, is designed to equip employees with essential legal mechanisms to seamlessly navigate their dual responsibilities as both professionals and family caretakers. This initiative is aimed at fostering a harmonious work-life equilibrium, which is anticipated to yield significant benefits for women's career advancement. By addressing and mitigating one of the most formidable obstacles - deeply ingrained cultural norms and responsibilities, particularly those associated with childbirth and child-rearing - this framework sets the stage for a more inclusive and supportive professional environment for women.

Within the framework of professional development, the Labor Code imposes a duty on employers to facilitate access to professional training programs for all employees at minimum intervals: biennially for organisations with at least 21 employees and triennially for those with fewer than 21 employees, as stipulated in art. 194. Moreover, legal entities employing more than 20 individuals are obligated to annually devise and execute professional training plans, following consultations with either the trade union or employee representatives, as applicable. Consequently, the developed professional training plan is integrated as an annex to the collective labor agreement at the organisational level, ensuring that employees are duly informed about the plan's specifics.

For a holistic comprehension of the professional training landscape, a more extensive examination is essential, particularly through the lens of statistical data. The practical application of the Labor Code's directives would impact approximately 52.3 thousand enterprises and their associated workforce. Yet, the actual scenario in 2020 reveals that among these 52.3 thousand enterprises, constituting the statistical study's reference population, a mere 17.5% engaged in offering continuous professional training to their employees. This represents a decrease from the year 2015 when 26.7% of enterprises had implemented such initiatives. It follows that in 2020, a significant majority, over 80% of enterprises, neglected to provide ongoing professional training, perpetuating a troubling decline: 82.5% in 2020 compared to 73.3% in 2015, 75.9% in 2010, and 59.7% in 2005, did not offer any form of employee training[11].

In another vein, ensuring the professional training of employees goes beyond a mere legal obligation, as professional training can be a crucial aspect of a company's Corporate Social Responsibility (CSR) strategy, contributing to employee development and job satisfaction[12]. Therefore, priority should be given firstly to increasing the number of employers who provide adult professional training, and secondly, to genuinely ensuring equal access to these opportunities, including on the basis of gender. The study by the National Institute of Statistics mentioned earlier notes that for the 43.2 thousand enterprises (82.5%) that did not offer any form of training to their employees, the most frequently cited reason was „the current level of qualifications, skills, and competencies of the employees met the needs of the enterprise". However, such an approach overlooks the objectives of professional training, as listed in art. 192 of the Labor Code, which encompasses a wide range of situations, such as adapting the employee to job requirements; obtaining a professional qualification; updating knowledge and skills specific to the job and workplace; improving professional training for the main occupation; acquiring advanced knowledge, methods, and procedures necessary for carrying out professional activities; promotion at work and career development. Additionally, professional training aims at career conversion due to socioeconomic restructuring or preventing unemployment risks.

In this rather negative context of implementing legal provisions regarding professional training, statistical data on women's access to professional training seem to lead to more optimistic conclusions regarding gender

[11] See National Institute of Statistics, *Caracteristici ale formării profesionale în întreprinderile din România în anul 2020*, 2022, p. 23.

[12] See S. Valentine, G.M. Fleischman, *Ethics Programs, Perceived Corporate Social Responsibility and Job Satisfaction*, in Journal of Business Ethics no. 77, 2007, p. 159-172, *https://doi.org/10.1007/S10551-006-9306-Z*.

balance in the workplace. Indeed, as the data from the National Institute of Statistics shows, in 2020, the overall participation rate of women in continuous professional training courses was slightly higher compared to men (18.6% for women, compared to 16.5% for men)[13].

However, optimism must be tempered as, from the correlation of statistical data, it emerges that although more women than men have benefited from professional training courses, the situation of employed women, considered as a distinct category, is precarious. They have had extremely limited access to professional skill development, with the situation deteriorating compared to previous years.

Furthermore, data on access to professional training should be correlated with those related to the gender employment gap and the situation concerning the education level of graduates. According to Eurostat data[14], the gender employment gap in Romania is around 19% (19.3 in 2020, 20.1 in 2021, 18.6 in 2022, 19.1 in 2023), compared to the EU average of around 10% (11.1 in 2020, 10.9 in 2021, 10.7 in 2022, 10.3 in 2023), with significantly more men entering the workforce than women[15]. Regarding the situation of educational graduates, at the university level, the 2015-2023 statistics from the National Institute of Statistics[16] show a 20 percentage point gap in favor of women, while at the high school level the percentage is around 10 point.

It follows that although a much larger number of women are high school and university graduates, a significant shift in percentage occurs in favor of men upon entering professional life. Among women who choose to become employed, very few are involved in continuous professional training programs with their employer, with the 20% gap in favor of women observed at graduation levels narrowing to 2% when it comes to professional training.

One primary reason that could be cited to explain this situation is the substantial role women play in child-rearing and household management. While not dismissing the validity of this explanation, it should be noted that art. 193 of the Labor Code provides a wide range of forms in which professional training can take place. Employees can participate in courses organised either by the employer or by domestic or international professional training service providers. There are also provisions for internships, either for professional adaptation to the job and workplace requirements or for practice and specialisation at home and abroad. Training can either focus on a specific theme dedicated to a group of employees or be customised to the needs of a particular employee. Moreover, the law allows the parties to agree on any other forms of training, which can take into account the special situation of a woman whose involvement in extraprofessional life might, at a certain point, be more significant. It remains to be seen whether the recent legislative changes generated by the transposition of the Work-Life Balance Directive provisions will bring improvements in employees' participation in professional training, in general, and women's participation, in particular.

Another reason that could be invoked to explain the low participation of women in professional training might be related to possible gender-based discrimination perpetrated by the employer. In favor of this reasoning, one could argue that statistical data demonstrates a significantly higher interest of women in formal education programs (there are 20% more female graduates of higher education), while among female employees the gap is significantly smaller. We are reserved in accepting this reasoning without reservations, as long as there is no specific analysis of the case law of the courts and of the NCCD which would indicate a generalised practice of employers discriminating based on gender in terms of access to professional training.

However, it must be pointed out that the issue of discrimination in access to professional training exists in the aforementioned jurisprudence, with the petitioners being female individuals, even though the invoked criterion is not gender related. In this context, we note that, in accordance with the provisions of art. 3 letter a) of GO no. 137/2000 on preventing and punishing all forms of discrimination[17], the provisions of the normative act apply to all natural or legal persons, public or private, as well as public institutions with responsibilities regarding employment conditions, criteria and conditions for recruitment, selection and promotion, access to all

[13] See National Institute of Statistics, *op. cit.*, p. 26.

[14] See Eurostat, *Gender employment gap*, available at: *https://ec.europa.eu/eurostat/databrowser/view/tesem060/default/table?lang=en&category=tepsr.tepsr_eo.tepsr_eo_hi*, last time consulted on 20.03.2024.

[15] See Gh.D. Isbășoiu, D. Volosevici, A. Grigorescu, *Social Challenges of the Green Transition: A Focus on the Employment Gender Gap in Romania,* in Entrepreneurship and Development for a Green Resilient Economy, p. 131-163, Emerald Publishing Limited, 2024, *doi:10.1108/978-1-83797-088-920241005*.

[16] See *Caiete statistice privind învățământul superior*, INS, 2015-2023, in Raport privind starea învățământului superior din România 2022-2023, Ministry of Education, Bucharest, December 2023.

[17] Published in the Official Gazette of Romania no. 166/07.03.2014.

forms and levels of guidance, training, and professional development. Art. 7 states that it constitutes an offense to discriminate against a person because they belong to a certain race, nationality, ethnicity, religion, social category, or a disadvantaged category, respectively due to beliefs, age, gender or sexual orientation in a labor and social protection relationship, except for cases provided by law, manifested regarding training, improvement, retraining, and professional promotion.

Thus, for example, through dec. no. 464/06.07.2016[18], the Directorial College of the NCCD decided that it constitutes discrimination for an employer to refuse a female employee's access to professional training courses, the invoked criterion being, however, the employee's beliefs. In other cases[19], where the petitioners were also female employees who claimed limited or blocked access to professional training, the Council decided that there is no discrimination. An in-depth analysis of the NCCD decisions could lead to a clearer picture of the issue of discrimination in professional training and, consequently, to the identification and implementation of appropriate tools to combat discrimination.

Another action that could contribute to clarifying the situation regarding access to professional training would be to obtain statistical data related to the mode of access to training programs, considering that art. 196 para. 1 of the Labor Code stipulates that participation in professional training can occur at the initiative of either the employer or the employee. It could thus be analysed to what extent female employees take the initiative to continue professional training, in any of the forms provided by law, and how many of their applications have been legitimately or abusively rejected by the employer.

It should be mentioned that, according to the wording of art. 199 of the Labor Code, the employer's approval is only necessary when the professional training involves taking the employee out of their work activity. In this latter case, the employer must review the employee's request together with the union and decide within 15 days of receiving the request. The employer will also decide on the conditions under which they will allow the employee to participate in the training, including whether they will cover all or part of the cost incurred by it. According to art. 77 para. (4) letter p) of the Fiscal Code, expenses incurred by employers for the professional training and improvement of employees, training related to the activity performed by the respective individuals for the employer, are not taxable in terms of income tax. Similarly, these expenses are not included in the base for calculating social insurance or health insurance contributions. This fiscal framework is intended to foster the professional development of employees and to promote the assumption by employers of the responsibility to cover the expenses incurred by such training.

3. Conclusions

Without any intention of exhausting the subject, the article has presented a transdisciplinary examination of the issue of access to professional training, suggesting the alignment of legal provisions with the actual situation as indicated by statistical data. From this simple exercise, it first emerged that although the legal framework allows for the selection of forms of professional training closely aligned with the actual circumstances of each employer and employee or group of employees, the number of enterprises and employees utilising professional training mechanisms is exceedingly low. Secondly, through the analysis of various categories of statistical data, a new interpretation was proposed regarding a potential limitation on women's access to professional training. Finally, the article underscores the necessity of collecting new categories of data related to professional training, data that would enable a broader analysis of the gender gap issue in professional training.

Any section of this article could be expanded into a more extensive research endeavor, which we propose should maintain a transdisciplinary nature, as a mere analysis of legal provisions lacks the capacity to rigorously identify the barriers to access in professional training.

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THE ROLE OF THE CJEU IN SOLVING THE PROBLEMATIC ASPECTS RELATED TO THE ACQUISITION AND LOSS OF EUROPEAN CITIZENSHIP

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Abstract

Granted automatically to anyone who holds the nationality of any EU country, European citizenship generates a variety of rights and benefits derived both from domestic and EU law. If the first ones may differ from country to country, the others are the same all over the EU countries, being enshrined in The Treaty on the Functioning of the European Union and the EU Charter of Fundamental Rights. It is exactly this multitude of rights that makes third States' citizens to aspire to EU citizenship and there are legal procedures that regulate such a demarch. Nevertheless, some problematic issues could occur on these occasions and sometimes the Court of Justice of the European Union is requested to intervene in order to solve these kind of situations, on the basis of preliminary rulings. The present paper intends to depict and analyse relevant case-law of the CJEU in this field, dealing, for instance, with topics like discrimination on grounds of nationality, derived right of residence of third-country nationals who are family members of a Union citizen or loss of citizenship of the Union on account of loss of nationality of a Member State.

Keywords: *European citizenship, non-discrimination, freedom of movement, social rights, CJUE's case-law.*

1. Introduction

Being a permanent link between the individual and the State to which he or she belongs, generating mutual rights and obligations between these two entities, citizenship has acquired a much wider dimension since its consecration at the EU level. Thus, European citizenship was enshrined by the Maastricht Treaty, being regulated in art. 17-22 TEEC. Currently, the status of the European citizens is regulated by art. 20-25 TFEU[1].

European citizenship is a quality that does not annihilate national citizenship and does not replace it[2], but joins it, enriching the values of the relationship between the individuals and the European public entities. It is essential to keep in mind that the national citizenship is a *sine qua non* condition (or a pre-condition) for acquiring European citizenship.

As it is generally known, citizenship is a key concept of national constitutional law, being inextricably linked to the idea of State. Citizenship presupposes a biunivocal relationship between the natural person and the State of which he or she is a citizen, implying both a political and a legal dimension, which inevitably interfere.

Thus, regarding the political component of this notion, it should be noted that acquiring the quality of citizen represents an act of State sovereignty[3], being exclusively a matter of the State[4], in which it will prevails. According to the established CJEU case-law, it is for each Member State, having due regard to European law, to lay down the conditions for the acquisition and loss of nationality[5]. In this light, Member States must have in mind that the importance of the rights conferred through the citizenship of the Union should be taken into

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consideration by national authorities when exercising their discretion. All the more since, as shown in the doctrine, human rights and freedoms are dynamic, being sensitive to the dynamics of the society of each state[6].

The present paper intends to underline the importance of the European citizenship and to draw attention on the CJEU case-law in this area. In order to achieve this goal, there will be depicted several label-like cases that set genuine benchmarks in the way the law professionals should handle the issues in this field.

As CJEU has held on numerous occasions, the status of citizens of the Union is intended to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy, within the scope *ratione materiae* of the Treaty, the same treatment in law irrespective of their nationality[7].

The EU citizenship is considered to be both a resonant political ideal and a legal status attached to individuals[8]. Due to these characteristics, it was subject to various analysis in the doctrine, most scholars who dedicated their researches to the study of European law have inevitably approached the issue of Union's citizenship. But the CJUE case-law is the most relevant from a practical point of view, because it deals with real problems raised by the potential conflict of national citizenship of Member States, for instance when one of them do not accept the double citizenship and the risk of statelessness arises, or when rights and freedoms usually granted to European citizens are no longer applicable.

2. Content

2.1. European citizenship - a gate wide opened to rights and freedoms

Citizenship proves the belonging of an individual to a certain human community organised as a State. It creates a basically indestructible and perpetual link between the natural person and that State, integrated into the set of concrete economic, social and cultural realities. Moreover, in the doctrine it was noted that citizenship is a complex notion, and traditions and approaches to it have varied throughout history, depending on the specificity of the societies, cultures and ideologies of different countries[9].

Yet, EU citizenship is not a citizenship in the classical sense, because it is not inextricable related to a unique People or Nation, but to each and every EU Member State. It is automatically acquired once the individual gets the citizenship of at least one Member State. As mentioned before, Member States enjoy the sovereign right to grant and withdraw national citizenship. The consequence of States actions in this sense is open access to the totality of rights and freedoms granted by the European legislation or, in case of withdrawal, sometimes complete loss of them and even the occurrence of statelessness.

Crucial in the analysis of this issue is the golden rule of non-discrimination[10], according to which all European citizens have equal rights, no matter their nationality[11]. This rule derives from another essential one, that involves the Member States themselves. It implies that, within the Union, the Member States have an equal position, and no preferential status can be applied. Moreover, the citizens of the Member states are equal before the law and the institutions of the Union[12].

In the following pages, we will present some of the most resonant recent CJEU case-law and we will see how the issues raised by the acquisition and loss of national citizenship influence the statute of the individuals from the complex point of view of the European citizenship.

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[6] L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, 2nd ed., Hamangiu Publishing House, Bucharest, 2024, p. 9.

[7] See, judgment of 02.06.2016, *Bogendorff von Wolffersdorff*, C-438/14, para. 29 and 30, or judgment of the Court, Fifth Chamber, 25.07.2018, *A. intervener Espoon kaupungin sosiaali*, C-679/16, para. 56.

[8] J. Shaw, *Citizenship: Contrasting Dynamics At the Interface Of Integration And Constitutionalism*, in The Evolution Of EU Law, edited by Paul Craig and Gráinne de Búrca, Oxford University Press, 2nd ed., first published in 2011, p. 575.

[9] R. Popescu, *Aspecte generale privind reglementarea cetățeniei în dreptul internațional și în dreptul intern*, in Buletinul de informare legislativă al Consiliului Legislativ nr. 2/2022, Tipografia „Monitorul Oficial" R.A. Publishing House, Bucharest, p. 24.

[10] M.-C. Cliza, *What Means Discrimination In A Normal Society With Clear Rules?*, in CKS e-book, 2018, p. 458 *et seq*.

[11] For a detailed presentation of the principle of equal rights, but as it was developed in the CCR case-law, see E. Anghel, *The Principle Of Equal Rights: Concept And Reflection In The Case Law Of The CCR*, in CKS e-book, 2022, p. 199-200.

[12] L.-C. Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p. 213.

2.2. Issues regarding the acquisition and loss of Member States' nationality and the consequences on the European citizenship

2.2.1. Loss of original nationality by reason of naturalisation. Loss of nationality acquired by naturalisation on account of deception practised in that acquisition. Statelessness leading to loss of the status of citizen of the Union (Case C-135/08, *Rottman*, 2010)

The interplay of obtaining and losing the citizenship of various Member States may lead to sometimes awkward situations. For instance, the CJUE pronounced a preliminary ruling concerning the case of a person who initially had Austrian citizenship obtained by birth, then he transferred his residence to Munich and applied for German nationality (Case C-135/08, *Janko Rottman v. Freistaat Bayern*, Judgment of the Court, Grand Chamber, 02.03.2010). During the naturalisation procedure he failed to mention that in Austria he was subject to a criminal investigation opened on account of suspected serious fraud on an occupational basis in the exercise of his profession. The naturalisation in Germany was granted to the applicant and, in accordance with Austrian law, it had the effect of losing Austrian nationality. Later on, the city of Munich was informed by the municipal authorities of Graz, Austria, that a warrant for Dr. Rottmann's arrest had been issued in Graz. In the light of those circumstances, and after hearing the applicant, German authorities decided to withdraw the naturalisation with retroactive effect, on the grounds that the applicant had not disclosed the fact that he was the subject of judicial investigation in Austria and that he had, in consequence, obtained German nationality by deception.

The Court noted (para. 32) that the problem is that when naturalisation obtained by deception is withdrawn, a person becomes stateless, with the result that he loses the citizenship of the Union. It suffices, for the proviso formulated by the Court in Case C-369/90 *Micheletti and Others* [1992] ECR I-4239 - to the effect that Member States must exercise their powers in the sphere of nationality having due regard to European Union law - to be observed, that the importance of the rights conferred through that citizenship of the Union should be taken into consideration by the competent German authority when exercising its discretion. According to that court, the effect of assuming that there existed, in European Union law, an obligation to refrain from withdrawing naturalisation obtained by deception would be to strike at the heart of the sovereign power of the Member States, recognized by art. 17(1) TEC, to define the detailed rules for the application of their nationality law.

The Court stated (Rottman, para. 59) that it is not contrary to EU law, in particular to art. 17 TEC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, even if that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin. Though, the crucial condition is that the decision to withdraw observes the principle of proportionality. In this context, the Court underlined the importance which primary law attaches to the status of citizen of the Union and, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.

From this perspective, The Court stressed that a decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality (para. 51).

From the Court's point of view (para. 52), that conclusion relating to the legitimacy, in principle, of a decision withdrawing naturalisation adopted in circumstances such as those in the main proceedings is borne out by the relevant provisions of the Convention on the reduction of statelessness. Art. 8(2) thereof provides that a person may be deprived of the nationality of a Contracting State if he has acquired that nationality by means of misrepresentation or by any other act of fraud. Likewise, art. 7(1) and (3) of the European Convention on nationality does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to that person.

2.2.2. Loss of the nationality of a Member State and of citizenship of the Union by operation of law. Consequences. Proportionality (Case C-221/17, *Tjebbes*, 2019)

The Court examined the Netherlands Law on Nationality[13] which provides that an adult loses his Netherlands nationality if he also holds a foreign nationality and if, after attaining his majority and while holding both nationalities, he has his principal residence for an uninterrupted period of 10 years outside the Netherlands and outside the territories to which the EU Treaty applies. It also provides that a minor loses, in principle, Netherlands nationality if his father or mother has lost his or her Netherlands nationality pursuant, *inter alia*, of the aforementioned reason.

The goal of the Netherlands legislature was to introduce a system to avoid the undesirable consequences of one person having multiple nationalities. One of the objectives of the Law on Nationality is also to preclude persons from obtaining or retaining Netherlands nationality where they do not, or no longer have, any link with the Kingdom of the Netherlands and is intended to restore unity of nationality within the family (para. 34).

The situation of citizens of the Union who, like the applicants in the main proceedings, are nationals of one Member State only and who, by losing that nationality, are faced with losing the status conferred by art. 20 TFEU and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law.

Nevertheless, when exercising its competence to lay down the conditions for acquisition and loss of nationality, it is legitimate for a Member State to take the view that nationality is the expression of a genuine link between it and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of nationality. It is also legitimate for a Member State to wish to protect the unity of nationality within the same family (para. 35).

The Court noticed (para. 36) that a criterion such as the one in question, which is based on the habitual residence of nationals of the Kingdom of the Netherlands, for an uninterrupted period of 10 years, outside that Member State and outside the territories to which the EU Treaty applies, may be regarded as an indication that there is no such link. Similarly, the lack of a genuine link between the parents of a child who is a minor and the Kingdom of the Netherlands can be understood, in principle, as a lack of a genuine link between the child and that Member State.

The legitimacy, in principle, of the loss of the nationality of a Member State in those situations is indeed supported by the provisions of art. 6 and art. 7(3) to (6) of the Convention on the Reduction of Statelessness which provide that, in similar situations, a person may lose the nationality of a Contracting State in so far as he does not become stateless. The risk of becoming stateless is precluded, in the present case, by the national provisions at issue in the main proceedings, given that their application is conditional on the possession by the person concerned of the nationality of another State in addition to Netherlands nationality. Similarly, art. 7(1)(e) and (2) of the Convention on Nationality provides that a State Party may provide for the loss of its nationality, inter alia, in the case of an adult, where there is no genuine link between that State and a national habitually residing abroad and, in the case of a minor, for children whose parents lose the nationality of that State (para. 37).

The Court highlighted (para. 40) that, however, it is for the competent national authorities and the national courts to determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned and, if relevant, for that of the members of his or her family, from the point of view of EU law.

In the light of the foregoing considerations, the Court ruled that the answer to the question referred is that art. 20 TFEU, read in the light of art. 7 and 24 of the Charter, must be interpreted as not precluding legislation of a Member State such as that at issue in the main proceedings, which provides under certain conditions for the loss, by operation of law, of the nationality of that Member State, which entails, in the case of persons who are not also nationals of another Member State, the loss of their citizenship of the Union and the rights attaching thereto, in so far as the competent national authorities, including national courts where appropriate, are in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality. In the context of that

[13] Judgment of the Court (Grand Chamber), 12.03.2019, C-221/17, *M.G. Tjebbes, G.J.M. Koopman, E. Saleh Abady, L. Duboux v. Minister van Buitenlandse Zaken*.

examination, the authorities and the courts must determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of each person concerned and, if relevant, for that of the members of their family, from the point of view of EU law.

2.2.3. Loss of the nationality of the Member State by operation of law for nationals born abroad, who have never resided on the Member State's territory (Case C 689/21, *X. v. Udlændinge-og Integrationsministeriet*, 2023)

A recent case, C 689/21, *X. v. Udlændinge-og Integrationsministeriet*, Judgment of the Court (Grand Chamber) of 05.09.2023, regards the situation of Danish nationals born abroad, who have never been resident in Denmark and have also not spent time there in circumstances indicating a genuine link with Denmark, are to lose, by operation of law, Danish nationality at the age of 22, unless they would thereby become stateless. In these circumstances, the objective of the Danish Law on Nationality is to prevent Danish nationality being handed down from generation to generation to persons established abroad who have no knowledge of or link with the Kingdom of Denmark.

The Court stated (para. 59) that the answer to the question referred is that art. 20 TFEU, read in the light of art. 7 of the Charter, must be interpreted as not precluding legislation of a Member State under which its nationals born outside its territory who have never been resident there and have not spent time there in circumstances demonstrating a genuine link with that Member State lose, by operation of law, the nationality of that State at the age of 22, which entails, for persons who are not also nationals of another Member State, the loss of their citizenship of the European Union and the rights attaching thereto, provided that the persons concerned are given the opportunity to lodge, within a reasonable period, an application for the retention or recovery of the nationality, which enables the competent authorities to examine the proportionality of the consequences of the loss of that nationality from the point of view of EU law and, where appropriate, to allow the retention or recovery *ex tunc* of that nationality. Such a period must extend, for a reasonable length of time, beyond the date on which the person concerned reaches that age and cannot begin to run unless those authorities have duly informed that person of the loss of his or her nationality or of the imminence of that loss, and of his or her right to apply, within that period, for the maintenance or recovery of that nationality. Failing that, those authorities must be in a position to carry out such an examination, as an ancillary issue, in the context of an application by the person concerned for a travel document or any other document showing his or her nationality.

2.2.4. Renunciation of the nationality of one Member State in order to obtain the nationality of another Member State in accordance with the assurance given by the latter to naturalise the person concerned. Revocation of that assurance on grounds of public policy or public security. Statelessness (Case C 118/20, *JY v. Wiener Landesregierung,* 2022)

On the case[14], JY, an Estonian national, applied for Austrian nationality. The Government of the Province of Lower Austria, Austria assured JY that she would be granted Austrian nationality if she could prove, within two years, that she had relinquished her citizenship of the Republic of Estonia. JY, who had since moved her primary residence to Vienna (Austria), provided, within the two-year period stipulated, confirmation by the Republic of Estonia that her citizenship of that Member State had been relinquished by decision of the government of that Member State of 27.08.2015. JY has been a stateless person since relinquishing that citizenship. Later on, the Government of the Province of Vienna, Austria, which had become competent to examine JY's application, revoked the decision of the Government of the Province of Lower Austria and justified that decision by stating that JY had committed, since receiving the assurance that she will be granted Austrian nationality, two serious administrative offences (failing to display a vehicle inspection disc and driving a motor vehicle while under the influence of alcohol) and that she had committed eight administrative offences between 2007 and 2013, before that assurance was given to her. Therefore, according to that administrative authority, JY no longer satisfied the conditions for grant of nationality laid down in the Austrian Law on Citizenship. In accordance with this law, a foreign national who satisfies the conditions laid down in that provision is to be given the assurance that he or

[14] Judgment of the Court, Grand Chamber, 18.01.2022, C 118/20*, JY v. Wiener Landesregierung*.

she would be granted Austrian nationality if, within two years, he or she provides proof of having relinquished the citizenship of his or her State of origin. It follows that, in the naturalisation procedure, the grant of Austrian nationality to that foreign national, following such assurance, requires, as a precondition, the loss of his or her previous nationality.

The Court noted (para. 35) that it is, however, important, that, in a situation such as that of JY, although the loss of the status of citizen of the Union stems from the fact that the Member State of origin of that person, at that person's request, has dissolved the bond of nationality with the latter, that application was made in the context of a naturalisation procedure seeking to obtain Austrian nationality and is the consequence of the fact that that person, taking account of the assurance given to him or her that he or she will be granted Austrian nationality, complied with the requirements of both the Austrian nationality Law and the decision concerning that assurance.

The Court stated (para. 36) that in those circumstances, a person such as JY could not be considered to have renounced voluntarily the status of citizen of the Union. On the contrary, having received from the host Member State the assurance that he or she will be granted the nationality of the latter, the purpose of the application for dissolution of the bond of nationality with the Member State of which that person is a national is to enable that person to fulfil a condition for the acquisition of that nationality and, once obtained, to continue to enjoy the status of citizen of the Union. Where, in the context of a naturalisation procedure, the competent authorities of the host Member State revoke the assurance as to the grant of nationality of that State, the person concerned who was a national of one other Member State only and renounced his or her original nationality in order to comply with the requirements of that procedure is in a situation in which it is impossible for that person to continue to assert the rights arising from the status of citizen of the Union. Consequently, such a procedure, taken as a whole, even if it involves an administrative decision of a Member State other than that of which nationality is sought, affects the status conferred by art. 20 TFEU on nationals of the Member States, since it may result in a person in a situation such as that of JY being deprived of all the rights attaching to that status, although, at the time when the naturalisation procedure began, that person held the nationality of a Member State and thus had the status of citizen of the Union.

The Court ruled (para. 44) that the situation of a person who, having the nationality of one Member State only, renounces that nationality and loses, as a result, his or her status of citizen of the Union, with a view to obtaining the nationality of another Member State, following the assurance given by the authorities of the latter Member State that he or she will be granted that nationality, falls, by reason of its nature and its consequences, within the scope of EU law where that assurance is revoked with the effect of preventing that person from recovering the status of citizen of the Union.

Moreover, the Court held (para. 70) that, in view of the nature and gravity of the two administrative offences committed by the applicant and of the requirement that the concepts of 'public policy' and 'public security' be interpreted strictly, it does not appear that JY represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security in the Republic of Austria. Traffic offences, punishable by mere administrative fines, cannot be regarded as capable of demonstrating that the person responsible for those offences is a threat to public policy and public security which may justify the permanent loss of his or her status of citizen of the Union. That is all the more so since, in the present case, those offences resulted in minor administrative fines and did not deprive JY of the right to continue to drive a motor vehicle on the public highway.

The Court ruled (para. 74) that art. 20 TFEU must be interpreted as meaning that the competent national authorities and, as the case may be, the national courts of the host Member State are required to ascertain whether the decision to revoke the assurance as to the grant of the nationality of that Member State, which makes the loss of the status of citizen of the Union permanent for the person concerned, is compatible with the principle of proportionality in the light of the consequences it entails for that person's situation. That requirement of compatibility with the principle of proportionality is not satisfied where such a decision is based on administrative traffic offences which, under the applicable provisions of national law, give rise to a mere pecuniary penalty.

2.3. Issues regarding the rights and duties that derive from the citizenship of the European Union

2.3.1. The right to vote for the European Parliament (Case C-650/13, *Delvigne*, 2015)

The largest transnational elections in the world, the European elections are the chance of citizens of the EU to have their say on the future of Europe[15]. The right to vote for the European Parliament elections was at stake in a case concerning the situation of a French citizen who was convicted of a serious crime and given a custodial sentence of 12 years by a final judgment and the ancillary penalty of the loss of civic rights, consisting, inter alia, in his being deprived of his right to vote and of his right to stand for election[16].

The Court noted that art. 8 of the 1976 Act provides that, subject to the provisions of that act, the electoral procedure is to be governed in each Member State by its national provisions[17].

In the case, the plaintiff was removed from the electoral roll because, as a result of his conviction of a serious criminal offence, he is among those who, under the provisions of the French Electoral Code, do not fulfil the conditions for eligibility to vote in national elections. Or, the conditions for the election of representatives to the European Parliament are similar to those conditions.

The Court has held that the provisions of art. 20(2)(b) TFEU is confined to applying the principle of non-discrimination on grounds of nationality to the exercise of the right to vote in elections to the European Parliament, by providing that every citizen of the Union residing in a Member State of which he is not a national is to have the right to vote in those elections in the Member State in which he resides, under the same conditions as nationals of that State[18].

In the case, the Court noticed that the deprivation of the right to vote to which Mr. Delvigne is subject under the provisions of national legislation at issue in the main proceedings represents a limitation of the exercise of the right guaranteed in art. 39(2) of the EU Charter of Fundamental Rights.

In that regard, the Court stated (paragraph 46) that it must be borne in mind that art. 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in art. 39(2) of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognized by the European Union or the need to protect the rights and freedoms of others[19].

But a limitation such as that at issue in the main proceedings is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty (Delvigne, para. 49).

On those grounds, the Court ruled that the Charter of Fundamental Rights of the European Union[20] must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which excludes, by operation of law, from those entitled to vote in elections to the European Parliament persons who, like the applicant in the main proceedings, were convicted of a serious crime and whose conviction became final before 1 March 1994.

2.3.2. Free movement and residence rights of EU citizens and their families[21]

A. Exercising the right of free movement without risk of being extradited (Case C-473/15, *Adelsmayr*, 2017)

According to art. 19(2) of the EU Charter of Fundamental Rights, no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Analysing the request of a preliminary ruling, the CJEU

[15] *https://www.europarl.europa.eu/topics/en/article/20240429STO20939/voting-in-the-european-elections-how-and-why*.

[16] Judgment of the Court (Grand Chamber), 06.10.2015, Case C-650/13, *Thierry Delvigne v. Commune de Lesparre-Médoc, Préfet de la Gironde*.

[17] For a detailed presentation of the Romanian regulations in this area, see M. Enache, Șt. Deaconu, V. Bărbățeanu, *Sistemul electoral și referendumul în jurisprudența Curții Constituționale*, C.H. Beck Publishing House, Bucharest, 2022, p. 159-174.

[18] See, to that effect, judgment in *Spain v. United Kingdom*, C-145/04, EU:C:2006:543, para. 66.

[19] See, to that effect, judgments in *Volker und Markus Schecke* and *Eifert*, C-92/09 and C-93/09, EU:C:2010:662, para. 50, and *Lanigan*, C-237/15 PPU, EU:C:2015:474, para. 55.

[20] More precisely, art. 39(2) and the last sentence of art. 49(1) of the Charter.

[21] See Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely.

confronted the situation of the possible extradition of a national of a EU Member State to a third State where he risks being subjected to the death penalty[22].

The case concerned an Austrian physician residing in Austria who was about to travel to Germany to speak at a conference on working conditions and litigation in the United Arab Emirates, where he had practised as an anaesthesist and intensive care physician and where he was sentenced for the death of a patient to life imprisonment in interim proceedings which could be resumed at any time and in which he would still be liable to the death penalty.

The Court noticed (para. 24) that in so far as the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State, on the basis of information that is objective, reliable, specific and properly updated[23].

In the case, the Court took note that the referring court states that the public prosecution service requested the death penalty in respect of Mr. Adelsmayr in the proceedings involving him in the United Arab Emirates. It follows that Mr. Adelsmayr runs a 'serious risk' within the meaning of art. 19(2) of the Charter of being subjected to the death penalty in the event of extradition.

Therefore, the Court stated (para. 27) that a request for extradition originating from a third country concerning a Union citizen who, in exercising his freedom of movement, leaves his Member State of origin in order to reside on the territory of another Member State, must be rejected by the latter Member State where that citizen runs a serious risk of being subjected to the death penalty in the event of extradition.

B. Extradition of a Union citizen having also the nationality of a third State (Case C-237/21, *S.M.*, 2022)

In the area of the same topic, the Court rendered a preliminary judgement in connection with the request sent to a Member State (Germany) by a third State (Bosnia-Herzegovina) for the extradition of a Union citizen who is a national of another Member State (Croatia), but who also holds the nationality of that third State, and who has exercised his right to free movement in the first of those Member States[24].

The Court noted that the fact that a national of a Member State other than the Member State to which an extradition request was submitted also holds the nationality of the third State which made that request cannot prevent that national from asserting the rights and freedoms conferred by Union citizenship, in particular those guaranteed by art. 18 and 21 TFEU. The Court has repeatedly ruled that holding dual nationality of a Member State and a third State cannot deprive the person concerned of those rights and freedoms[25].

Secondly, according to the case-law of the Court, a Member State's rules on extradition which give rise to a difference in treatment depending on whether the requested person is a national of that Member State or a national of another Member State, in so far as they have the consequence that nationals of other Member States who are lawfully resident in the territory of the requested Member State are not afforded the protection against extradition enjoyed by nationals of the latter Member State, are liable to affect the freedom of the nationals of other Member States to move and reside in the territory of the Member States[26].

The Court stated (para. 34, 35) that in a situation such as that in the main proceedings, the unequal treatment involved in permitting the extradition of a Union citizen who is a national of a Member State other than the requested Member State gives rise to a restriction on the freedom to move and reside in the territory of the Member States, within the meaning of art. 21 TFEU. Such a restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of national law.

Art. 18 and 21 TFEU require that nationals of other Member States who reside permanently in the requested Member State and whose extradition is requested by a third State for the purpose of enforcing a custodial sentence should be able to serve their sentence in the territory of that Member State under the same conditions as nationals of that Member State (para. 42).

Following a complex analysis, the Court ruled (paragraph 58) that a Member State to which a request for extradition has been made by a third State for the purpose of enforcing a custodial sentence imposed on a

[22] Order of the Court (First Chamber), 06.09.2017, Case C-473/15, *Peter Schotthöfer & Florian Steiner GbR v. Eugen Adelsmayr*.

[23] See, to that effect, judgment of 06.09.2016, *Petruhhin*, C-182/15, para. 58 and 59.

[24] Judgment of the Court (Grand Chamber), 22.12.2022, Case C-237/21, S.*M. other party: Generalstaatsanwaltschaft München*.

[25] See, to that effect, judgment of 13.11.2018, *Raugevicius*, C-247/17, para. 29, and judgment of 17.12.2020, *Generalstaatsanwaltschaft Berlin* (Extradition to Ukraine), C-398/19, para. 32.

[26] *Raugevicius*, para. 39.

national of another Member State residing permanently in the first Member State, the national law of which prohibits only the extradition of its own nationals out of the European Union and makes provision for the possibility that that sentence may be enforced in its territory provided that the third State consents to it, is required by those provisions actively to seek such consent from the third State which made the extradition request, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State. Also, the Court decided that if such consent is not obtained, that first Member State is not precluded by those provisions, in such circumstances, from extraditing that Union citizen, in accordance with its obligations under an international convention, in so far as that extradition does not infringe the rights guaranteed by the Charter of Fundamental Rights of the European Union.

C. Freedom of movement in conjunction with the right to education and social assistance provided to people with disabilities (Case C-679/16, *A.*, 2018)

The plaintiff, A., applied to the municipality of Espoo, Finland, under the Disability Services Law, for personal assistance amounting to about five hours per week. At the time of that application, A. was in the process of moving to Tallinn in Estonia to attend a three-year, full-time law course there: as a result of that move, the services that he applied for would therefore have had to be provided outside Finland, and for this reason, the application was rejected.

The Court stated[27] that EU law does not impose any obligation on the Member States to provide a system of funding for higher education pursued in a Member State or abroad. However, where a Member State provides for such a system which enables students to receive such grants, it must ensure that the detailed rules for the award of that funding do not create an unjustified restriction of the right to move and reside within the territory of the Member States[28].

The Court also reminded[29] that from settled case-law that national legislation which places certain nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by art. 21(1) TFUE on every citizen of the Union[30].

According to the Court's judgement (para. 61-63), the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State can be dissuaded from using them by obstacles resulting from his stay in another Member State, because of legislation of his State of origin which penalises the mere fact that he has used those opportunities. That consideration is particularly important in the field of education, in view of the aims pursued by art. 6(e) TFEU and the second indent of art. 165(2) TFEU, namely, amongst other things, encouraging mobility of students and teachers. The case-law mentioned is applicable even though the personal assistance at issue in the main proceedings is not granted exclusively for the pursuit of studies, but for the social and economic integration of persons who are severely disabled in order to enable them to make their own choices, including as to whether to follow a course of study.

In the case, the personal assistance at issue in the main proceedings was refused solely because the course of higher education that A. - who was otherwise eligible for that assistance - was intending to follow took place in a Member State other than Finland. Such a refusal must be regarded as a restriction on the freedom to move and reside within the territory of the Member States, which art. 21(1) TFEU affords to every citizen of the Union. Such a restriction can be justified in the light of EU law only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to the legitimate objective of the provisions of national law. It follows from the Court's case-law that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to achieve it.

On those grounds, the Court ruled that art. 20 and 21 TFEU preclude the home municipality of a resident of a Member State who is severely disabled from refusing to grant that person a benefit, such as the personal

[27] Judgment of the Court, -Fifth Chamber, 25.07.2018, *A. intervener Espoon kaupungin sosiaali*, C-679/16, para. 59.
[28] Judgment of 26.02.2015, *Martens*, C-359/13, EU:C:2015:118, para. 24.
[29] *A. intervener Espoon kaupungin sosiaali*, cited above no. 9, para. 60.
[30] Judgment of 26.02.2015, *Martens*, C-359/13, EU:C:2015:118, para. 25.

assistance at issue in the main proceedings, on the ground that he is staying in another Member State in order to pursue his higher education studies there.

D. Restriction on free movement and different treatment on the basis of nationality in what concerns the participation in the national championship of a Member State by an amateur athlete holding the nationality of another Member State (Case C-22/18, *TopFit eV and Daniele Biffi,* 2019)

The case[31] was about an Italian national who lived in Germany and competes in amateur running races in the senior category, being a member of the Berliner Leichtathletik-Verband (Berlin Athletics Association). Since 2012, Mr. Biffi, who is no longer affiliated to the Italian National Athletics Federation, has participated in national senior championships in Germany. Until 2016, the Athletics Rules provided that participation in the German championships was open to EU citizens who did not have German nationality if they had an entitlement to participate through a German athletics association or athletics community and had had that entitlement for at least one year. This rule was amended and now it refers only to nationals, and it is therefore those with German nationality who have priority when athletes are selected to participate in national championships. Thus, Mr. Biffi was authorised to participate in races, but only in part, that is to say, without being classified either in time trials or in disciplines involving a final, such as the 100 m, in which he was permitted to participate only in the heats without being able to progress to the final.

Regarding this situation, the Court noted (para. 27, 28) that an EU citizen, such as Mr. Biffi, an Italian national who moved to Germany, where he has resided for 15 years, has exercised his right to free movement within the meaning of art. 21 TFEU. According to settled case-law, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for[32] and the situation of an EU citizen who has made use of his right to move freely comes within the scope of art. 18 TFEU, which lays down the principle of non-discrimination on grounds of nationality[33]. The Court held that that article is applicable to an EU citizen who, like Mr. Biffi, resides in a Member State other than the Member State of which he is a national and in which he intends to participate in sporting competitions in an amateur capacity.

Furthermore, the Court has stated (para. 31) that, under EU law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity and that access to leisure activities available in that Member State is a corollary to that freedom of movement[34].

The Court has also found that the rights conferred on an EU citizen by art. 21(1) TFEU are intended, amongst other things, to promote the gradual integration of the EU citizen concerned in the society of the host Member State[35]. Moreover, art. 165 TFEU reflects the considerable social importance of sport in the European Union, in particular amateur sport, as highlighted in Declaration no. 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam[36] and the role of sport as a factor for integration in the society of the host Member State.

The Court therefore stated (para. 34) that it is clear from art. 21(1) TFEU, read in conjunction with art. 165 TFEU, that practising an amateur sport, in particular as part of a sports club, allows an EU citizen residing in a Member State other than the Member State of which he is a national to create bonds with the society of the State to which he has moved and in which he is residing or to consolidate them. That is also the case with regard to participation in sporting competitions at all levels.

The Court decided (para. 40) that the rules of a national sports association, such as those at issue in the main proceedings, which govern the access of EU citizens to sports competitions, are subject to the rules of the Treaty, in particular art. 18 and 21 TFEU.

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[31] Judgment of the Court, Third Chamber, 13.06.2019, Case C 22/18, TopFit eV and *Daniele Biffi v. Deutscher Leichtathletikverband eV*.
[32] Judgment of 20.09.2001, *Grzelczyk*, C-184/99, para. 31.
[33] Judgment of 13.11.2018, *Raugevicius*, C-247/17, para. 27.
[34] Judgment of 07.03.1996, *Commission v France*, C-334/94, para. 21.
[35] Judgment of 14.11.2017*, Lounes*, C-165/16, EU:C:2017:862, para. 56.
[36] See, to that effect, judgments of 15.12.1995, *Bosman*, C-415/93, para. 106, and of 13.04.2000, *Lehtonen and Castors Braine*, C-176/96, para. 33.

In the field of sport, the Court has consistently held that the provisions of EU law concerning the free movement of persons and services do not preclude rules or practices justified on grounds that relate to the particular nature and context of certain sports matches, such as matches between national teams from different countries. However, such a restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty[37].

Consequently, the Court ruled (para. 67) that art. 18, 21 and 165 TFEU must be interpreted as precluding rules of a national sports association, such as those at issue in the main proceedings, under which an EU citizen, who is a national of another Member State and who has resided for a number of years in the territory of the Member State where that association, in which he runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can, or can participate in them only 'outside classification' or 'without classification', without being able to progress to the final and without being eligible to be awarded the title of national champion, unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued, this being a matter for the referring court to verify.

E. Exclusion from the benefit of social assistance benefits of economically inactive citizens of the Union. Non-discrimination based on nationality (Case C-709/20, *C.G.,* 2021)

The case[38] is about a national with dual Croatian and Netherlands nationality, which is the single mother of two young children. She declared her arrival in Northern Ireland in 2018. She has never carried out any economic activity in the United Kingdom and lived there with her partner until she moved to a women's refuge. CG has no resources at all to support herself and her two children. The Home Office (United Kingdom) granted CG a temporary right of residence. The grant of that status is not subject to any condition as to resources. CG applied to the Department for Communities in Northern Ireland for the social assistance benefit known as Universal Credit. That application was refused, on the ground that CG did not meet the residence requirements in order to receive it. The competent administrative authority considered that only persons having their habitual residence in the United Kingdom are entitled to claim Universal Credit. By contrast, nationals of Member States, such as CG, who have a right of residence under the Settlement Scheme contained in Appendix EU, are excluded from the category of potential beneficiaries of Universal Credit. The Appeal Tribunal (Northern Ireland) decided to refer to the Court of Justice for a preliminary ruling.

For the Court, the problem was that in the present case, on 01.02.2020, the date on which the Agreement on the withdrawal of the United Kingdom[39] entered into force, that State withdrew from the European Union, thus becoming a third State. It follows that the courts and tribunals of the United Kingdom, as from that date, can no longer be regarded as courts of a Member State. However, that agreement provides, in art. 126, for a transition period between the date of its entry into force on 01.02.2020 and 31.12.2020. Art. 127 of that agreement provides that, during that period, unless otherwise provided in that agreement, EU law is to be applicable in the United Kingdom and in its territory, produce the same legal effects as those which it produces within the Union and its Member States, and is to be interpreted and applied in accordance with the same methods and general principles as those applicable within the European Union.

Eventually, the Court stated that it is not precluding the legislation of a host Member State which excludes from social assistance economically inactive Union citizens who do not have sufficient resources and to whom that State has granted a temporary right of residence, where those benefits are guaranteed to nationals of the Member State concerned who are in the same situation. However, provided that a Union citizen resides legally, on the basis of national law, in the territory of a Member State[40] other than that of which he or she is a national, the national authorities empowered to grant social assistance are required to check that a refusal to grant such benefits based on that legislation does not expose that citizen, and the children for which he or she is responsible, to an actual and current risk of violation of their fundamental rights, as enshrined in art. 1, 7 and 24 of the

[37] See, to that effect, judgment of 15.12.1995, *Bosman*, C-415/93, para. 76 and 127.

[38] Judgment of the Court, Grand Chamber, 15.07.2021, C-709/20, *CG v. The Department for Communities in Northern Ireland*.

[39] For an exhaustive presentation of this issue, see A. Fuerea, *EU-UK Brexit Agreement and Its Main Legal Effects*, in CKS 2021 e-book, p. 419 *et seq.*, *https://cks.univnt.ro/cks_2021.html*, last consulted on 20.03.2024.

[40] For further details regarding the foreigners' status in international law, see R.-M. Popescu, *(General Aspects Concerning) The Legal Regime Of Foreigners In International Law, Accessible To Everyone*, in CKS e-book, 2022, p. 339 *et seq.*, *https://cks.univnt.ro/cks_2022.html*, last consulted on 20.03.2024.

Charter. Where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and her children are actually entitled to benefit.

3. Conclusions

These selected CJUE judgements, briefly presented in this paper, are only some of the many rendered in cases related to European citizenship and they highlight the wide range of problematic aspects that could occur in this field. The CJUE task is so very complex and delicate in this field, due to the serious consequences that loss of European citizenship can draw to individuals. It also underlines the general statement that the doctrine has asserted, according to which any normative plan of action can only develop with respect for fundamental rights, as they are enshrined in the Charter of Fundamental Rights of the European Union[41].

The case-law included in this paper also tried to show the so-called transnational character of most Union citizenship rights as enumerated in the Treaties and interpreted by the Court of Justice[42]. As it has been stated by law scholars, „the key to understanding citizenship's role within the EU is to avoid thinking about Union citizenship and citizenship of the Member States as two separate and unrelated phenomena. The two concepts are not linked just because one (national citizenship) gives access to the other (Union citizenship)" and „as has been articulated in the EU Treaties since the Treaty of Amsterdam, Union citizenship and national citizenship are complementary in character and the former, in particular, is not supposed to supplant or replace the latter, but rather to be additional to it [art. 20(1) TFUE]"[43].

The multitude of situations related to the European citizenship is and will for sure be also in the future an inexhaustible source of intricate analysis in the CJEU case-law and they will continuously arouse the interest of law scholars and will also be example of good practice for national authorities responsible in this field.

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[41] E.E. Ștefan, *News and Perspectives of Public Law*, in Athens Journal of Law, vol. 9, issue 3, July 2023, p. 397.
[42] J. Shaw, *op. cit.*, p. 575.
[43] *Idem*, p. 578-579.

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LEGAL FICTIONS IN CJEU CASE LAW: SPACE

Alina Mihaela CONEA[*]

Abstract

This paper examines the pervasive yet often overlooked role of legal fictions in shaping the European Union's legal framework. It focuses on the concept of space, exploring three key fictions: lex rei sitae, habitual residence, and non-entry. Lex rei sitae, a fiction that simplifies property disputes by anchoring contracts to the location of the property, gains new layers of meaning through the CJEU case-law. Habitual residence, while intentionally flexible, defines jurisdiction for various legal matters. The controversial „non-entry" fiction allows member states to deny legal entry to migrants despite their physical presence. By analysing these fictions, the paper sheds light on how the EU constructs and defines space within its legal system. This analysis paves the way for further research on legal fictions within EU law.

Keywords: *legal fiction, lex rei sitae, habitual residence, non-entry, CJEU case-law.*

1. Introduction

Space is relative ….not only in physics.

It is important to acknowledge the constant presence of legal fictions within legal systems. Legal fictions are as necessary to law as are other technical procedures, fulfilling at least a corrective function in relation to existing legal norms and taking into account the dynamics of legal relations. For example, the fiction of the legal person has become a concrete reality through the deepening and resizing of the legal category of legal subject[1]. Legal fictions can serve a pragmatic purpose by providing solutions to life's complexities and enhancing efficiency or functionality within the legal system[2]. They are also constantly found in EU law. In this paper, we will highlight some legal fictions that are related to the concept of space (the physical one).

In this paper, we will highlight some legal fictions related to the concept of space.

We focus on three areas of EU Law and examine the fictionalisation of space.

First, we focus on the concept of space in contractual obligations. *Lex rei sitae* dictates that the governing law for a contract concerning immovable property is typically the law of the country where the property is situated. The *lex rei sitae* fiction simplifies matters by ensuring a clear and predictable legal framework for disputes involving immovable property.

Then, another legal fiction central to EU private international law is the concept of „habitual residence". It plays a crucial role in determining jurisdiction for various legal matters, including divorce, child custody, and social security benefits. However, the concept is deliberately fluid, allowing for interpretation based on the specific legal instrument.

Third, we examine space and borders in immigration law[3]. The concept of „non-entry" employed in EU immigration law is a particularly controversial legal fiction. It allows member states to deny legal entry to third-country nationals (individuals not citizens of the EU) despite their physical presence on EU territory.

By examining these three legal fictions, we gain a deeper understanding of how the EU constructs and defines space within its legal framework. These fictions serve pragmatic and even creative purposes but also raise questions about fairness and consistency.

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[1] I. Deleanu, *Fictiunile juridice*, All Beck Publishing House, Bucharest, 2005.

[2] D. Lind, *The Pragmatic Value of Legal Fictions*, in: M. Del Mar, W. Twining (eds), *Legal Fictions in Theory and Practice*, Law and Philosophy Library, vol. 110, Springer, Cham., 2015.

[3] See on free movement of persons, A. Fuerea, *Dreptul Uniunii Europene. Principii, actiuni, libertati*, Universul Juridic Publishing House, Bucharest, 2016, p. 188.

2. The trees and *lex rei sitae*

In the case C-595/20, *UE v ShareWood Switzerland*[4], an Austrian consumer (UE) filed a lawsuit against ShareWood, a company located in Switzerland, in an Austrian court. The lawsuit stemmed from a main agreement between UE and ShareWood for the purchase of teak and balsa trees growing in Brazil. This agreement included four separate purchase contracts and additional terms. The purchase price encompassed ground rent for the land where the trees were planted. ShareWood managed the trees, including harvesting and selling them, and retained a portion of the profits as a service fee. Notably, one purchase contract involving 2600 teak trees was mutually cancelled by both parties. The Austrian court (Oberster Gerichtshof) is deciding on the applicable law of this contract. Despite choosing Swiss law, the court considers Austrian consumer protection laws may still apply.

The Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17.06.2008 on the law applicable to contractual obligations (Rome I) unequivocally establishes the principle of party autonomy in contractual obligations. This principle allows parties to freely choose the governing law of their contract without constraints. In the absence of choice, the regulation[5] establishes some rules, such as: a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated (*lex rei sitae*[6]).

However, the Regulation imposes certain limitations on party autonomy, particularly when its exercise would disadvantage the weaker party in contracts involving consumers[7].

Normally, contracts with consumers would be governed by the law of the party providing the primary performance if no choice of law is made [art. 4(2)]. This typically refers to the law of the professional engaged by the consumer. However, art. 6 of the Regulation alters this approach by subjecting such contracts, in the absence of a choice of law, to the law of the country where the consumer has their habitual residence. This is presumed to be, if not more favourable, at least more familiar to the consumer. Additionally, the Regulation extends consumer protection to all contracts, except those explicitly excluded by art. 6(4). So, a contract relating to a right *in rem* in immovable property or a tenancy of immovable property will be governed by the law of the professional.

According to the CJEU in its judgment of 10.02.2022, C-595/20, *UE v. ShareWood Switzerland* [8], «the trees must be regarded as being the proceeds of the use of the land on which they are planted. Although such proceeds will, as a general rule, share the same legal status as the land on which the trees concerned are planted, the proceeds may nevertheless, by agreement, be the subject of personal rights of which the owner or occupier of that land may *dispose separately* without affecting the right of ownership or other rights *in rem* appertaining to that land. A contract which relates to the disposal of the proceeds of the use of land cannot be treated in the same way as a contract which relates to a „right *in rem* in immovable property", within the meaning of art. 6(4)(c) of the Rome I Regulation.»

In conclusion, contracts related to trees planted on land leased *for the sole purpose of harvesting* those trees *for profit* are not „contracts having as their object rights *in rem* in immovable property or tenancies of immovable property".

CJEU seems to have a flexible approach, taking the *lex rei sitae* rule as a starting point but holding its application against the light of the interests involved[9].

[4] Judgment of the Court (Eighth Chamber), 10.02.2022, *UE v. ShareWood Switzerland AG and VF*, Case C-595/20, ECLI:EU:C:2022:86.

[5] Art. 4(1)(c), Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17.06.2008 on the law applicable to contractual obligations (Rome I), OJ L 177/04.07.2008, p. 6-16.

[6] E. Anghel, *Drept privat roman: izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 191.

[7] Art. 6, Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17.06.2008 on the law applicable to contractual obligations (Rome I), OJ L 177/04.07.2008, p. 6-16.

[8] Judgment of the Court (Eighth Chamber), 10.02.2022, *UE v. ShareWood Switzerland AG and VF*, Case C-595/20, ECLI:EU:C:2022:86, para. 28.

[9] S. van Erp, *Lex rei sitae: The Territorial Side of Classical Property Law*, in Regulatory Property Rights, Leiden, The Netherlands: Brill | Nijhoff, 2017, p. 80.

3. The habitual residence

The concept of habitual residence[10], central to EU private international law, presents a paradox. Interestingly, its meaning remains fluid, receiving different interpretations depending on the legal instruments to which it is linked.

„Habitual residence" is a connecting factor across various areas of EU legislation.

One area is the EU legislation concerning conflict rules, such as: (1) Contractual obligations (Rome I Regulation[11]); (2) non-contractual obligations (Rome II Regulation[12]); (3) divorce and legal separation (Regulation no. 1259/2010[13]); (4) matrimonial matters and parental responsibility (Regulation Brussels II bis[14]); (5) maintenance obligations (Regulation no. 4/2009[15]); (6) succession matters (Regulation no. 650/2012[16]).

„Habitual residence" extends its influence beyond private law, serving as a connecting factor in various EU public law instruments. These include, for example: (1) social security coordination (Regulation no. 883/2004[17]); (2) European Arrest Warrant (Council Framework Decision 2002/584/JHA [18]); (3) staff regulations of EU officials. A special area is that of the insolvency proceedings[19].

3.1. Habitual residence may be different for child and adults

In the field of family law, CJEU recognise that „the particular circumstances characterising the place of habitual residence of a child *are clearly not identical* in every respect to those which make it possible to determine the place of habitual residence of a spouse".

The CJEU case law establishes that a young child's *habitual residence* is determined in part by the parents' social and family environment.

Within the context of parental responsibility under Regulation no. 2201/2003, the CJEU has established a framework for determining a child's habitual residence, particularly for young children. This framework prioritises the parents' situation, focusing on their: (1) Stable presence and integration into a social and family environment; (2) Intention to settle in that location, where that intention is manifested by tangible steps.

This approach acknowledges the dependence of young children on their parents and the significance of their family environment[20].

The *IB v FA*, C-289/20[21], involves a French-Irish couple (IB and FA) married in Ireland (1994) with a family home there. IB initiated divorce proceedings in France (2018) where he had worked since 2010. While FA argued their habitual residence remained in Ireland, IB highlighted his stable employment, apartment ownership, and social life in France. The French appeal court acknowledged IB's ties to both countries: his professional center in France since 2017 and ongoing family connections in Ireland. This situation led them to question whether EU regulations allow spouses with divided lives to have a habitual residence in two member states, granting jurisdiction to courts in both locations.

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[10] A.M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2019.

[11] Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17.06.2008 on the law applicable to contractual obligations (Rome I), OJ L 177/04.07.2008, p. 6-16.

[12] Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11.07.2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/31.07.2007, p. 40-49.

[13] Council Regulation (EU) no. 1259/2010 of 20.12.2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/29.12.2010, p. 10-16.

[14] Council Regulation (EU) no. 2019/1111 of 25.06.2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178/02.07.2019.

[15] Council Regulation (EC) no. 4/2009 of 18.12.2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7/10.01.2009, p. 1-79.

[16] Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 04.07.2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/27.07.2012, p. 107-134.

[17] Regulation (EC) no. 883/2004 of the European Parliament and of the Council of 29.04.2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland), OJ L 166/30.04.2004, p. 1-123.

[18] 2002/584/JHA: Council Framework Decision of 13.06.2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190/18.07.2002, p. 1-20.

[19] Regulation (EU) no. 2015/848 of the European Parliament and of the Council of 20.05.2015 on insolvency proceedings, OJ L 141/05.06.2015, p. 19-72.

[20] Judgment of the Court (Fifth Chamber), 28.06.2018, Proceedings brought by HR, Case C-512/17, ECLI:EU:C:2018:513.

[21] Judgment of the Court (Third Chamber), 25.11.2021, IB v. FA, Case C-289/20, ECLI:EU:C:2021:955.

The court acknowledges that unlike children, whose environment is primarily familial (*Mercredi*, C-497/10 PPU[22]), adults have a more diverse range of activities and interests spanning professional, social, cultural, and financial aspects. This complexity makes it impractical to expect these interests to be concentrated within a single EU member state. This aligns with the objectives of Regulation no. 2201/2003: facilitating divorce applications through flexible conflict of laws and protecting spouses who leave the common habitual residence due to marital breakdown (Mikołajczyk, C-294/15[23]).

For adults, the Court identifies the key factors in determining habitual residence: a stable stay within the Member State and, at minimum, evidence of integration into the social and cultural environment. The Court establishes that a spouse residing in two Member States can only have *one* habitual residence[24].

3.2. Habitual residence for social security

In the case *I. v. Health Service Executive*, C-255/13[25], Mr. I, an Irish national, fell severely ill while on holiday in Germany. Since then, for 11 years he has required constant medical care and resides there with his partner, Ms. B. Despite maintaining financial ties and contact with his family and children in Ireland, Mr. I's limited mobility prevents him from easily returning. This case centres on his eligibility for social security benefits. Ireland initially covered his treatment in Germany under EU regulations, but later denied further support due to his perceived residency shift. The Irish High Court questions if EU law allows continued healthcare coverage under these circumstances, considering Mr. I's compelled stay in Germany due to his medical condition.

The court establishes that „since the determination of the place of residence of a person who is covered by insurance for social security purposes must be based on a whole range of factors, the simple fact that such a person has remained in a Member State, even continuously over a long period, does not necessarily mean that he resides in that State"[26]. The court adds that „the length of residence in the Member State in which payment of a benefit is sought cannot be regarded as an intrinsic element of the concept of residence".

The Court of Justice clarifies that such a person can be considered „staying" in the second member state, but only if their *habitual centre of interests* remains in the first. Notably, a prolonged stay in the second state due to illness is not enough to establish *residency* for social security purposes.

3.3. Habitual residence as centre of main interest in insolvency proceedings

Jurisdiction to open insolvency proceedings belongs to the courts of the Member State in which the debtor's center of main interests is located[27]. In the case of individual, the centre of main interests shall be presumed to be the place of the individual's *habitual residence* in the absence of proof to the contrary.

The Regulation provides a definition of the concept of „*center of main interests*" (COMI) in art. 3(1) of Regulation no. 2015/848 as the place where the debtor habitually manages its interests and which is verifiable by third parties[28]. According to the CJEU, the concept[29] has an autonomous character. The interpretation of the

[22] Judgment of the Court (First Chamber), 22.11.2010, *Barbara Mercredi v. Richard Chaffe*, Case C-497/10 PPU, ECLI:EU:C:2010:829, para. 54.

[23] Judgment of the Court (Second Chamber), 13.10.2016, *Edyta Mikołajczyk v. Marie Louise Czarnecka and Stefan Czarnecki*, Case C-294/15, ECLI:EU:C:2016:772, para. 50.

[24] Judgment of the Court (Third Chamber), 25.11.2021, *IB v. FA*, Case C-289/20, ECLI:EU:C:2021:955.

[25] Judgment of the Court (Fourth Chamber), 05.06.2014, *I. v. Health Service Executive*, Case C-255/13, ECLI:EU:C:2014:1291

[26] *Idem*, para.48.

[27] Art. 3(1) Regulation no. 2015/848.

[28] For a critical review of the definition and presumptions: R. Mangano, *The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises*, European Business Organization Law Review, Springer, 2019.

[29] In the previous Regulation, Regulation no. 1346/2000, the current definition was found in Recital 13.

concept provided by the CJEU in the *Eurofood*[30] and *Interedil*[31] cases has been codified in the amended version of the Regulation.

Thus, Recital 30 of the Regulation emphasises that what is relevant in identifying the „COMI" is the real center of management and supervision of the company and the center of management of its interests.

The following presumptions are established (subject to a time condition[32]):

(1) In the case of a company or legal person, the center of main interests is presumed, until proven otherwise, to be the place where the registered office is located;

(2) In the case of a natural person who exercises an independent activity or a professional activity, the center of main interests is presumed to be the main place of business, in the absence of evidence to the contrary;

(3) In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's *habitual residence* in the absence of proof to the contrary.

In the case *MH and NI*[33] A UK-resident couple seeks insolvency in Portugal, where their sole asset is located and financial troubles arose. The Portuguese lower court declined jurisdiction due to the presumption of COMI being habitual residence (UK). The couple argues Portugal is their COMI due to asset location and insolvency origin, questioning the presumption's strength. The referring court seeks clarification on rebutting the presumption for non-business individuals. The CJEU stated that „the presumption established in that provision for determining international jurisdiction for the purposes of opening insolvency proceedings, according to which the centre of the main interests of an individual not exercising an independent business or professional activity is his or her habitual residence, is not rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence"[34].

3.4. Reside or stay in European arrest warrant

The interpretation of the terms „resident" and „staying" in the executing Member State emerged as a central issue in the European arrest warrant[35] case of *Szymon Kozłowski*[36]. The CJEU concluded that a requested person is „resident" in the executing Member State when he has established his actual place of residence there and he is „staying" there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence. In order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term „staying", it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State[37].

4. The borders and „non-entry"

State borders mark physical lines separating countries (sovereignty) and legal reach (jurisdiction). The national legal systems rely on a defined territory for their rules and enforcement[38].

The concept of „non-entry" is a legal mechanism employed by states to manage their borders. It allows them to deny third-country nationals (individuals not citizens of the member state) legal entry despite their physical presence on the territory. This fiction applies until the individual obtains official clearance from border or immigration officers. In the field of immigration control, the European Commission's proposal for a pre-

[30] Judgment of the Court (Grand Chamber), 02.05.2006, *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281.

[31] Judgment of the Court (First Chamber), 20.10.2011, *Interedil Srl, in liquidation v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, Case C-396/09, ECLI:EU:C:2011:671.

[32] This presumption applies only if the main place of business has not been moved to another Member State in the three months preceding the application for the opening of insolvency proceedings.

[33] Judgment of the Court (Ninth Chamber), 16.07.2020, *MH and NI v. OJ and Novo Banco SA*, Case C-253/19, ECLI:EU:C:2020:585.

[34] *Idem*, dispositive.

[35] Council Framework Decision 2002/584/JHA of 13.06.2002 on the European arrest warrant and the surrender procedures between Member States.

[36] Judgment of the Court (Grand Chamber), 17.07.2008, *Szymon Kozłowski*, Case C-66/08, ECLI:EU:C:2008:437.

[37] *Idem*, para. 54.

[38] R.-M. Popescu, *Drept Internațional Public. Noțiuni Introductive*, Universul Juridic Publishing House, Bucharest, 2023, p. 139.

screening regulation[39] alongside the amended procedures directive strengthens their preventative approach built on the „non-entry" fiction[40].

Pre-entry screening in the EU subjects third-country nationals to a state of non-recognition. They are deemed unlawfully present despite their physical location within EU territory. This exclusion from lawful[41] presence denies them crucial human rights protections, particularly those prohibiting pushbacks and refoulement. International law obligates countries to uphold these protections, but only for those who have lawfully entered before seeking asylum. Furthermore, pre-entry screening integrates these individuals into the EU's extensive migration surveillance system, including mandatory biometric registration.

Scholars[42] debate the existence of a potentially contrary[43] or inconsistent[44] approach by the ECtHR compared to the CJEU on this issue.

Through a series of rulings[45], the CJEU has deemed such state practices incompatible with the Charter[46]. The CJEU upholds his constant approach in the case *M.A. v. Valstybės sienos apsaugos tarnyba*, C-72/22 PPU[47], assessed national emergency measures enacted in Lithuania to address a migrant influx. The case involved M.A., a third-country national detained for irregular entry. Lithuania's emergency measures allowed detention based solely on irregular entry during a mass influx and restricted asylum applications. The CJEU ruled these measures incompatible with EU law. It emphasised that asylum procedures must guarantee effective access to protection, and irregular entry cannot prevent applications. Additionally, detention of asylum seekers solely based on irregular stay is not permitted. The CJEU concluded that EU law prohibits national provisions denying asylum applications and detaining solely on irregular residence during a declared mass influx.

5. Conclusions

Legal fictions are often unseen in the legal structure. They are present throughout legal systems, subtly shaping how the law operates. This paper explored three such fictions within the European Union: *lex rei sitae*, habitual residence, and non-entry. These concepts demonstrate the often-unnoticed role legal fictions play in streamlining legal processes (*lex rei sitae*), defining jurisdiction (habitual residence), and managing complex situations (non-entry). Recognizing these nuances allows for a more informed discussion about the role of legal fictions within the EU legal framework.

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[40] V. Mitsilegas, *The EU external border as a site of preventive (in)justice*, Eur Law J. 2022; 28(4-6): 263-280, *doi:10.1111/eulj.12444*.

[41] E.E. Ștefan, *Drept administrativ, Partea a II-a, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2023, p. 35.

[42] V. Mitsilegas, *op. cit., loc. cit.*

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[46] M.-A. Nită (Dumitrașcu), O.-M. Salomia, *Dreptul Uniunii Europene II. Curs universitar*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2023, p. 253.

[47] Judgment of the Court (First Chamber), 30.06.2022, *M.A. v. Valstybės sienos apsaugos tarnyba*, Case C-72/22 PPU, ECLI:EU:C:2022:505.

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BENEFICIARIES OF THE FREEDOM OF MOVEMENT WITHIN THE EU

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Abstract

One of the consequences producing direct effects, on short, medium and long term, generated by the quality of member state of the European Union, is that of valuing the fundamental freedoms of movement existing at the level of the European Union. The emphasis in matters of freedoms must fall on the rule of law, knowledge, understanding and, above all, on compliance and enforcement. Why? Because, in the European space as well, freedom is seen as representing what philosophers call „understood necessity", not chaos, not chance, not disorder. This is the reason why, we shall briefly analyse in our approach, the beneficiaries of the freedom of movement, starting from the reality according to which freedom belongs to everyone, not just to some people, under conditions of equal chances, but also of involvement in valuing the legal rules of the European Union, the recipients of which are the individuals.

Keywords: *freedom of movement at EU level, direct beneficiaries, indirect beneficiaries, primary law, secondary law.*

1. General aspects

Regardless of the field to which we refer when we discuss the application of the principle of freedom of movement within the European Union (goods, persons, services, capital and payments), their beneficiaries remain constantly the same, namely the subjects of domestic law (natural persons and legal persons) or the subjects of international law, here speaking, equally, about member states[1], third countries and, to a relative extent, about international organisations[2].

An important place among the beneficiaries of this principle is, naturally, the EU itself, as subject of international law, especially after acquiring legal personality, under art. 47[3] TEU, after the entry into force, on December 1, 2009, of the Treaty of Lisbon.

The evolution of the freedoms of movement has been characterised by continuity, judging the frequent emergence of primary and secondary regulations, adopted at the community/union level, but also according to the jurisprudence of the jurisdictional courts of the European Union. An increasingly obvious characteristic over time was, is and we believe, will be, that giving a systemic component to this principle, including from the beneficiaries' perspective. The permanent interference of these fields in which the man/person is at the centre of attention, is an indisputable reality. Not by chance, at the beginning, but also nowadays, the free movement of services, for example, was and still is viewed/analysed/regulated together with the free movement of people. In the final analysis, the man is equally the creator of these freedoms, but also their beneficiary, from the multiple perspectives acquired by the concrete forms of manifestation. Basically, the free movement of goods, capital, payments or services is inconceivable without human intervention, at least in this historical stage that humanity is still going through.

That is precisely why, whenever we tried to highlight the number of freedoms of movement enshrined in EU law, we did not succeed. Why? Because four of these freedoms are grouped two by two (persons with services, respectively capital with payments), only one being analysed individually (the free movement of goods).

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„The state is the main subject of public international law, being the holder of rights and obligations at international level" (according to R.M. Popescu, *Drept internațional public. Noțiuni introductive*, Universul Juridic Publishing House, Bucharest, 2023, p. 83).

[2] «International organization represents „an association of states, established by treaty, endowed with a common constitution and bodies and with legal personality, distinct from that of the member states". The Vienna Convention on the Law of Treaties (1969) stipulates, in art. 2, that international organizations are „intergovernmental organizations" (...). Considering that international organizations are constituted by a treaty - which expresses the will of the states -, they are qualified as derivative subjects of international law» (according to R.-M. Popescu, *op. cit*., p. 109.

[3] „The Union has legal personality".

2. Natural and legal persons - main beneficiaries of the application of the principle of freedom of movement

From the point of view of the distribution of competences, according to the art. 4 TFEU, the freedoms of movement fall under the incidence of their sharing between the Union and the member states, in the field of „freedom, security and justice", together with others that have as direct or indirect beneficiaries, the individuals, as natural persons and legal persons, such as: consumer protection; social policy (for those aspects defined by the treaty); economic and social cohesion; the environment (from the perspective of third-generation human rights „the right to a healthy environment"[4]) combined, from the same perspective, with the fields of energy and transport; internal market and agriculture, respectively fishing[5].

The field of public health security [art. 4 para. (2) letter k) TFEU], last stated at the level of shared competences, is closely related to natural persons, as main beneficiaries of the freedom of movement. In a natural logic, this last field from the second level of competences is corroborated with the first field from the third level (of actions to support, coordinate and complement the action of the member states, under art. 6 TFEU).

The first field highlighted at the third level is in complete correlation with the last one at the second level, aiming at „the protection and improvement of human health" [art. 6 letter a) TFEU].

2.1. The seat of the matter

Lato sensu, „the right to free movement is guaranteed by the international legal instruments regarding the protection of human rights[6], by the supreme rules of the states, as well as by the constitutive acts of the European Communities and the European Union"[7].

The analysis of the main regulations regarding persons as main beneficiaries of the freedom of movement highlights the existence of both a primary seat of the matter (treaties) and a secondary seat (regulations, directives).

The primary seat of the matter is the TEU, which, in art. 6 para. (1), states that „The Union recognizes the rights, freedoms and principles provided for in the Charter of Fundamental Rights of the EU (...) which has the same legal value as the treaties".

The same treaty, in art. 3 para. (2), addressing objectives and values, lists, among other things, the fact that „The Union offers to its citizens a space of freedom, security and justice, without internal borders, within which the free movement of people is ensured". It joins the provisions of the TEU and those of the TFEU. Thus, from the corroboration of the provisions of art. 45 TFEU with those of art. 48 para. (1) TFEU, it unequivocally follows that a first category of beneficiaries of the free movement of persons is that of *salaried employees*. In the same sense, there are also the provisions of art. 48 para. (1) TFEU and art. 49 para. (1) TFEU according to which *migrant workers performing an independent activity* are included in the category of beneficiaries of the freedom of movement of persons. Art. 49 para. (2) regulates another category of beneficiaries, namely *companies* „constituted in accordance with the provisions of civil or commercial legislation, including cooperative societies and other legal entities under public or private law, except for non-profit ones"[8]. A last category of beneficiaries is given *by the dependents of salaried migrant workers or who carry out an independent activity*[9]. The exception

[4] „Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations" (quotation from E.E. Ștefan, *Climate Change - An Administrative Law Perspective, Athens Journal of Law,* vol. 9, issue 4, October 2023, p. 577).

[5] For details on European policies and the Union's competences, see A.M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, pp. 11-21.

[6] *E.g.*: „the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter „ECHR") designed to protect, in the first place, civil and political rights of human being, democracy and the rule of law. The human rights protection mechanism enshrined in the Convention (*i.e.*, ECHR) is considered the most advanced in the world, its effectiveness being due to the right of individual applications (art. 34 ECHR) as a consequence of the acceptance of the binding force and execution of the ECtHR judgments (art. 46 ECHR)" – according to M.-C. Cliza, L.-C. Spătaru-Negură, *Environmental Protection Derived from the European Convention for Human Rights and from the European Social Charte*r, LESIJ NO. XXVII, vol. 2/2020, p. 123.

[7] M.A. Niță, O.M. Salomia, *Dreptul Uniunii Europene II*, 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2023, p. 231.

[8] Art. 54 para. (2) TFEU.

[9] Art. 48 para. (1) TFEU.

are those people who want to work in the public administration or to exercise activities that are associated in the residing state, even on an occasional basis, with the exercise of public authority[10].

For companies, as beneficiaries of free movement, the seat of the matter is represented by art. 54 TFEU, according to which „Companies established in accordance with the legislation of a member state and having their registered office, central administration or principal place of business within the Union are assimilated, in the application of this chapter, to natural persons who are nationals of the member states".

The provisions of primary sources are supplemented by the provisions of Regulation (EU) no. 492/2011 on the free movement of workers within the Union[11] and Directive 2004/38/EC on the right to free movement and residence on the territory of the member states for citizens of the Union and their family members[12], as sources of secondary EU law. Directive 2006/123/EC on the free movement of services[13] joins the EU secondary law regulations.

2.2. Salaried workers and self-employed workers - the main beneficiaries of freedom of movement

From the interpretation of the provisions of TFEU, the free movement of persons is conditioned by the fulfilment of requirements related, on the one hand, to the citizenship of the person, who must be of a member state of the European Union, and, on the other hand, to the exercise of a professional or economic activity. Regarding citizenship, each member state determines, in a sovereign way, the conditions under which it is granted. For example, Romanian citizenship is granted under the conditions of Law no. 21/1991[14], republished, with subsequent amendments and additions. Regarding the exercise of a professional or economic activity, „The Court considered (…) that all the provisions of the Treaty on the free movement of persons aimed at facilitating to the nationals of (…) [the European Union], the exercise of professional activities of any nature on the territory (…) [of the Union] European] and opposed measures that could disadvantage them when they wanted to exercise an economic activity on the territory of another member state"[15]. In the specialised literature[16], it is specified that «a *professional activity* can consist of the performance of a salaried activity, while the *economic activity* refers to the productive, income-generating activity. (...) Over time, the phrase „economic activity" has acquired a wider meaning, including members of professions such as doctors, veterinarians, lawyers, architects, subject to the equivalence of their studies»[17]. Moreover, it should be noted that the notion of „professional activity" is understood, by the Luxembourg Court of Justice, in a broad sense, if we consider the fact that, accordingly, the requirement is met in the case of professional sports activities, the Court deciding whether professional football players may be subject to either the legal provisions for salaried workers or to the provisions relating to the free provision of services[18].

It should be noted that the Treaty uses the concept of "worker" without defining it. Moreover, the secondary legislation, adopted to implement the provisions of the Treaty, does not provide any definition of this

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[10] Pursuant to art. 51 para. (1) TFEU.

[11] Regulation (EU) no. 492/2011 of the European Parliament and of the Council of 05.04.2011 regarding the free movement of workers within the Union, published in OJ L 141/27.05.2011.

[12] Directive 2004/38/EC of the European Parliament and of the Council of 29.04.2004 regarding the right to free movement and residence on the territory of member states, for Union citizens and their family members, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE, published in OJ L 158/30.04.2004. The directive was transposed into Romanian legislation by GEO no. 102/2005 regarding the free movement on the territory of Romania, of citizens of the member states of the European Union, the European Economic Area and of citizens of the Swiss Confederation, republished in the Official Gazette of Romania, Part I, no. 774/02.11.2011, with subsequent amendments and additions.

[13] Directive 2006/123/EC of the European Parliament and of the Council of 12.12.2006 on services within the internal market, published in OJ L 376/27.12.2006. The directive was transposed into Romanian legislation by GEO no. 49/2009 regarding the freedom of establishment of service providers and the freedom to provide services in Romania, with subsequent amendments and additions, published in the Official Gazette of Romania, Part I, no. 366/01.06.2009.

[14] Published in the Official Gazette of Romania, Part I, no. 576/13.08.2010.

[15] Judgment of December 15, 1995, *Union royale belge des sociétés de football association ASBL v. Jean Marc Bosman, Royal club liégeois SA v. Jean Marc Bosman et al. and Union des associations européennes de football (UEFA) v./ Jean Marc Bosman*, case C 415/93, EU:C:1995:463, point 94.

[16] M. Dony, *Droit de la Communaute et de l'Union Europeenne*, Editions de L'Universite de Bruxelles, 2001, p. 161.

[17] I. Moroianu Zlătescu, *Dreptul la liberă circulaţie a persoanelor în statele membre ale Uniunii Europene – cu referire specială la România*, in Human Rights Magazine no. 3/2003, p. 48.

[18] In this regard, the CJEU judgment of December 15, 1995, *Union royale belge des sociétés de football association ASBL v. Jean Marc Bosman, Royal club liégeois SA v. Jean Marc Bosman et al. and Union des associations européennes de football (UEFA) v./ Jean Marc Bosman,* (EU:C:1995:463): „(...) practising a sporting activity is related to Community law insofar as it constitutes an economic activity in the sense " of the Treaty (…). This rule also applies to the activity of professional or semi-professional football players when they exercise a salaried activity or when they provide remunerated services" - point 73.

notion. That is why, as in many other fields, it was the Court that, over time, defined the „worker". The Court assumed the role of defining that concept, considering that «if the definition of that term were within the competence of national law, each member state could, consequently, modify the meaning of the notion of „migrant worker" and eliminate whenever it pleased, the protection granted by the Treaty in the case of certain persons. (…) articles (…) [of the Treaty referring to workers] would therefore be effectless and the objectives (…) of the Treaty thwarted, if the meaning of such a notion were to be unilaterally fixed and changed by national law»[19]. Therefore, the notion of *„worker"* is autonomous and established by jurisprudence. From the interpretations offered by the Court of Justice to the notion of worker, we note the following:

– any citizen of a member state of the European Union has the right to work in another member state and

– the notion of „worker" has a certain meaning in EU law and can't be subject to national definitions. It refers to any person who performs real and actual work under the direction of someone else, for which they are paid.

The doctrine of the field shows that „a professional activity can consist of the performance of a paid activity, but it can also take the form of an independent activity"[20]. The latter can be exercised by the independent person, „either by getting settled, in a sustainable manner on the territory of another member state, or by offering services in another member state, by performing isolated professional acts"[21].

The right of establishment of self-employed persons from the point of view of recognition was and still is an important source for the enrichment of the Luxembourg court jurisprudence. In its jurisprudence, the Court came up with additional details, according to which Member States could not „simply deny a person's access to a profession or to the practice of a profession, on grounds that they lacked internal qualification, even though an internal recognition of the equivalence of foreign qualifications does not exist yet"[22].

2.3. Family members of employed or self-employed migrant workers

The secondary seat of the matter is represented by art. 2 para. (2) of Directive 2004/38, according to which „family members" and, implicitly, beneficiaries, under certain conditions, of the right to free movement and residence on the territory of the European Union are:

„a) the husband;

b) the partner with whom the Union citizen has contracted a registered partnership, under the legislation of a Member State, if, according to the legislation of the host Member State, registered partnerships are considered equivalent to marriage and in accordance with the conditions provided by the relevant legislation of the host Member State;

c) direct descendants not older than 21 or who are dependent on them, as well as direct descendants of the spouse or partner, according to the definition in letter b) and

d) the dependent direct ascendants and those of the spouse or partner, according to the definition from letter b)".

Pursuant to art. 7 para. (4) of Directive 2004/38/EC, „(...) only the spouse, the registered partner within the meaning of art. 2 para. (2) letter (b) and the dependent children also enjoy the right of residence, as family members of a citizen of the Union who meets the conditions set out in para. (1) letter (c). Article 3 para. (1) applies in the case of direct relatives in ascending line dependent on the citizen of the Union, as well as those of the spouse or registered partner".

The recipients of the provision of a service (*e.g.*: medical or legal assistance) constitute, likewise, an important category of beneficiaries of the freedom of movement.

Particular attention is paid to the doctrine and jurisprudence of fictitious or disguised marriages/partnerships.

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[19] The judgment of *M.K.H. Unger, married R. Hoekstra v./ Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten à Utrecht*, case 75/63, EU:C:1964:19, text taken from P. Craig, G. de Búrca, *European Union Law. Commentaries, Jurisprudence and Doctrine*, 4th ed., Hamangiu Publishing House, Bucharest, 2009, p. 929.

[20] M. Dony, *Droit de la Communauté et de l'Union Européenne,* Editions de L'Université de Bruxelles, 2001, p. 161.

[21] *Ibidem*.

[22] P. Craig, G. de Búrca, *op. cit*., p. 993.

2.4. Companies – important beneficiaries of freedom of movement

The primary seat of the matter is represented by art. 54 TFEU which provides that „companies established in accordance with the legislation of a member state and having their registered office, central administration or principal place of business within the Union are assimilated, (...) [in application of the provisions relating to the right of establishment] by the natural persons, nationals of the member states". In other words, the Treaty requires that companies are treated in the same way as natural persons, citizens of EU member states. „This is not strictly possible, given the differences between the natural persons and the legal entities"[23].

In the meaning of the Treaty, companies are those entities „constituted in accordance with the provisions of civil or commercial legislation, including cooperative companies and other legal entities of public or private law, except for the non-profit ones"[24]. In this way, non-profit companies are excluded, although the Court, in the *Sodemare*[25] case, considered as follows: „the condition of the absence of a profit-making purpose can't be considered contrary"[26] to the provisions of the Treaty.

The conditions for a company to benefit from the provisions of art. 54 TFEU, cover several aspects, such as: compliance with the legislation of a member state, *i.e.*, „to have its registered office on its territory and its principal place of business somewhere in the Union"[27], even if the Luxembourg court considered that „it is not possible for the competent national authorities of a member state to refuse (…) the benefit of the national health insurance regime for the simple reason that the company was established according to the legislation of another member state in which it had its registered office, even if it did not exercise commercial activities in that state"[28].

For fiscal reasons, but also for the fact that companies can exist only under the national legislation that can determine the conditions of their reporting to the legislation of a state and the ways of transferring their registered office, companies can't benefit from any Union rule that would provide the effective right to transfer the registered office from one member state to another. The freedom of establishment "with main title" is cancelled. Companies can't invoke any legal act of the European Union to remove the national provisions related to the affiliation of a company to a certain legislation and to the methods of transfer of registered offices.

It is not possible, except for the situation where art. 49 TFEU is breached, to prevent a company from leaving economically, a member state, and giving up being regulated by its law. Specifically, the national law to which the company originally belonged, will determine the ways of transfer. Most laws prohibit transfers of registered offices or submit them to certain legal and fiscal conditions[29]. This is legitimate and it is just the consequence of the diversity of national laws. Cross-border mergers are considered possible. Some national legal systems are more flexible than others. This fact makes legislative or conventional harmonisation necessary. From a fiscal point of view, the relocation of the registered office could only be carried out after such harmonisation.

The choice of the secondary seat is the only way of establishment within the European Union. This can be achieved, pending fiscal harmonisation. According to the „General Program for the elimination of restrictions on the freedom to provide services"[30], a company claiming the right to establish a secondary establishment (subsidiary, agency, branch) must have „an effective and continuous link with the economy of a Member State". The formula is characterised by imprecision, which may mean more than incorporation and less than the actual registered office. It is enough to have a flow of real and serious business (even if this flow is a minority in the activity of the company). The turnover, its permanence and investments must be taken into account, but it is not, in any case, about control or the citizenship of the associates or of those who run the company.

Pursuant to art. 54 TFEU, the free provision of services can be offered to any company which was established within the Union. Art. 54 TFEU does not distinguish between the main and the secondary establishment. Any location can be the starting point for the free provision of services. Of course, a service providing activity within the registered office will develop an effective and continuous connection of the registered office with the economy of a member state.

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[23] P. Craig, G. de Búrca, *op. cit*., p. 1002.

[24] Art. 54 TFEU.

[25] Judgment of *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia*, C 70/95, EU:C:1997:301.

[26] *Idem*, point 34.

[27] P. Craig, G. de Búrca, *op. cit*., p. 1003.

[28] Judgment of July 10, 1986, *D. H. M. Segers v./ Bestuur van de Bedrijfsvereniging voor Bank en Verzekeringswezen, Groothandel en Vrije Beroepen*, case 79/85, EU:C:1986:308, operative part.

[29] Dissolution, assignment of the activity with immediate charge, etc.

[30] Adopted by the Council on December 18, 1961, published in OJ 36/15.01.1962.

Also, art. 50 para. (2) letter g) TFEU stipulates that the European Parliament, the Council and the Commission exercise their functions, especially „coordinating the guarantees requested by the member states for companies, to the extent necessary and aiming at their equalisation, within the meaning of art. 54 second paragraph[31], to equally protect the interests of associates and third parties". The article is placed within the provisions on freedom of establishment. This comes naturally because the rules for the establishment and operation of companies concern, first of all, their bodies which are found, in principle, in the registered offices. However, it does not mean that, as far as coordination is concerned, it has nothing to do with the free provision of services. The borderless space of the EU contributes to the solution according to which companies deal with their customers across borders. The security of customers within the free provision of services is all the better ensured, as the guarantees offered by all companies record a certain degree of equivalence.

All this is reflected, correlatively and inevitably in everything that concerns the free movement of capital and payments, but also of goods.

3. Conclusions

The Schengen area with its three components (land, air and water) constitutes the legal framework by removing internal border controls and moving checks to external borders, at the level of the European Union, which allows the beneficiaries of freedom of movement to use with maximum efficiency, all the opportunities offered. This is highlighted by EU member states or non-member states that are also parties to the Schengen Agreement, from the perspective of the three components. Currently, Romania finds itself in the situation of relating to only two of these components (air and water?), with justifiably increased (real) chances to also have access to the land component, generating unprecedented advantages for all categories of beneficiaries from the point of view of the freedom of movement of persons, goods, services, capital and, implicitly, of correlative payments.

Exceptions and safeguard clauses in the matter of freedom of movement should not be ignored, given the developments that result from unforeseen events, at national, European and international level.

The current context is likely to determine a less predictable evolution from the point of view of the legislation that will govern it. When we make such a statement, we have inevitably in mind, a series of arguments related, above all, to: a) the pandemic/post-pandemic/epidemic period that gave rise to profound paradigm changes, including from the perspective of freedom of movement; b) the energy crisis, global warming and the concern regarding the transition of mankind to the use of alternative sources of energy (its renewable nature), directly influencing the freedom of movement, including from the perspective of the means of transport used; c) the conflict situations on the world map, even if the state of war is still undeclared, but hidden under the phrase „special operations", right in the proximity of our country borders and d) the unprecedented developments of digitization combined with those related to artificial intelligence, which are already influencing all areas of social life, including from the perspective of the beneficiaries of freedom of movement.

The constraints related to ensuring the safety of these freedoms of movement are additional to the economic and social constraints that affect free movement of the imminent beneficiaries, in a more and more accentuated manner, including at the EU level, the causes being among the most diverse and complex.

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RESIDUAL JURISDICTION VERSUS FORUM NECESSITATIS IN EU FAMILY LAW

Marian GOCIU[*]

Abstract

In the area of judicial cooperation in civil matters, the Council passed a number of regulations under art. 81(1) TFEU, adopting family law provisions with cross-border implications. These measures aimed at approximating the laws, regulations and administrative provisions of the Member States.

Among these measures, this paper will analyse the provisions on residual jurisdiction in Council Regulation (EU) 2019/1111 of 25.06.2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility and concerning international child abduction (Brussels IIb or ter Regulation) in comparison with the provisions on forum necessitatis under Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Measures to approximate the laws of the Member States in cross-border family law, in particular in the case of conflict of jurisdiction, should be able to solve the problems faced by the courts of the Member States when dealing with a dispute in this area. This purpose requires not only the „approximation" of legal acts but also their unification at EU level.

With this study we aim to examine the two types of jurisdictions, residual and forum of necessity, and to establish the similarities and differences between them. We will then try to identify the reasons why the Council opted for different regulation of the jurisdiction in question in the family law sub-branches of the Regulations, analyse whether the two legal institutions are likely to achieve their purpose and, finally, we will present our arguments for proposing the adoption of a unitary provision on the matter.

Keywords: *residual jurisdiction, forum necessitatis, cross-border family law disputes.*

1. Preliminary considerations

Until the year 2000, the Member States of the European Union relied heavily on bilateral and multilateral conventions on private international law, but after that year we can observe a constant concern of the EU legislature to approximate the laws of the Member States in this area.

Therefore, pursuant to art. 81(1) TFEU, the Council adopted a series of regulations on judicial cooperation in civil and commercial matters, among which, in the sub-framework of family law, we recall Council Regulation (EC) no. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children (Brusseles II), repealed by Regulation (EC) no. 2201/2003 (Brusseles IIa or bis), the latter being repealed by the adoption of Council Regulation (EU) 2019/1111 (Brusseles IIb or ter), and Council Regulation (EC) no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

With these listed legal acts, the Council has established clear provisions, applicable immediately and uniformly throughout the EU, on the international jurisdiction of the courts of the Member States in family law disputes with cross-border implications, recognition and enforcement of judgments.

The need to adopt a legal framework in family law, as regards private international law rules, arose primarily from the increasing migration of EU citizens from one Member State to another, in particular in search of better paid employment, but this phenomenon was due precisely to the exercise of the right to free movement provided for in art. 45 *et seq.* TFEU.

Secondly, in this context, an increasing number of family law disputes have become cross-border in nature and have led to the emergence of a non-uniform judicial practice regarding the application of the rules of private international law, taking into account the fact that these provisions have a different content from one State to another.

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Therefore, through this study we aim to examine the two types of jurisdictions, residual and forum of necessity, and to establish the similarities and differences between them. We will then try to identify the reasons why the Council opted for different regulation of the jurisdiction in question in the family law sub-branches of the Regulations, analyse whether the two legal institutions are likely to achieve their purpose and, finally, we will present our arguments for proposing the adoption of a unitary provision on the matter.

2. Legal framework

As regards residual jurisdiction, according to art. 6 of Council Regulation (EU) 2019/1111 of 25.06.2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and concerning international child abduction[1] (hereinafter Brussels IIb or ter Regulation):

„(1) Subject to para. 2, where no court of a Member State has jurisdiction pursuant to art. 3, 4 or 5, jurisdiction shall be determined, in each Member State, by the law of that State.

(2) A spouse habitually resident in the territory of a Member State, or a national of a Member State, may be sued in another Member State only pursuant to art. 3, 4 and 5.

(3) Any national of a Member State habitually resident in the territory of another Member State may, like nationals of that State, invoke the rules of jurisdiction applicable in that State against a defendant who is not habitually resident in a Member State and is not a national of that State."

Art. 14 of the same Regulation states that „Where no court of a Member State has jurisdiction pursuant to art. 7 to 11, jurisdiction shall be determined, in each Member State, by the law of that Member State."

The jurisdiction of the forum of necessity is governed by art. 7 of Council Regulation (EC) no. 4/2009 of 18.12.2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[2] (hereinafter referred to as Regulation (EC) no. 4/2009):

„Where no court of a Member State has jurisdiction pursuant to art. 3, 4, 5 and 6, the courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. The dispute must have a sufficient connection with the Member State of the court seised."

3. Residual jurisdiction

It has been held that in private international law jurisdiction is „that which concerns the determination of the courts of one country, in relation to the courts of another country, which are called upon to settle a dispute arising"[3] with an element of foreignness.

International jurisdiction provisions are often based on principles such as territoriality[4] (based on the domicile or residence of the parties), nationality[5] and sometimes on the choice of forum by the parties[6], but there are situations where none of these criteria apply.

Residual jurisdiction in EU law refers to the determination of whether a court in a Member State has jurisdiction to hear disputes which are not covered by the jurisdictional provisions laid down in the legal acts of the Union, and the rules of private international law of the Member State of which the court is a member apply. Under private international law, jurisdictional provisions determine which court or legal system has the authority to hear a particular dispute.

In the CJEU case law, in the Sundelind case[7], Mrs Sundelind (a Swedish citizen), married to Mr Lopez (a Cuban citizen), filed for divorce in a Swedish court. That court dismissed the application on the ground that, during their cohabitation, the spouses had lived in France and that, at the time the court was seised, while Mrs Sundelind was still living in France, her husband was living in Cuba, so that the French courts had jurisdiction to hear the case under art. 3 of Regulation no. 2201/2003.

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[1] OJ L 178/02.07.2019, pp. 1-115.
[2] OJ L 7/10.01.2009, pp. 1-79.
[3] I.P. Filipescu, *Drept Internațional Privat*, Actami Publishing House, Bucharest, 1999, p. 473.
[4] See art. 1066 CPC.
[5] See art. 1079, art. 1081 para. (2) items 1, 3 CPC.
[6] For example art. 1068 CPC.
[7] CJEU, judgment of 29.11.2007, *Kerstin Sundelind Lopez v. Miguel Enrique Lopez Lizazo*, C-68/07, EU:C:2007:740.

Mrs Sundelind appealed against the dismissal, arguing that art. 6 of Regulation no. 2201/2003, which establishes the exclusive nature of the jurisdiction of the courts of the Member States under art. 3 to 5 of that regulation where the defendant is habitually resident in a Member State or is a national of a Member State, implies that, where the defendant is neither of those persons (as in the case of her husband), the exclusive jurisdiction of those courts does not apply and the jurisdiction of the Swedish courts could be based on national law.

The Swedish Court of Appeal referred to the CJEU the question whether, in factual circumstances such as those set out above, the action may be heard by a court of a Member State which does not have jurisdiction under art. 3 of Regulation no. 2201/2003, even though a court of another Member State may have jurisdiction in that regard under one of the rules of jurisdiction laid down in that art. 3.

CJEU held that the parties do not dispute that the French courts have jurisdiction to hear the divorce under the second or fifth indent of art. 3 of Regulation no. 2201/2003 and that, according to the clear wording of art. 7(2) of Regulation no. 2201/2003, if no court of a Member State has jurisdiction under art. 3 to 5 of that regulation, jurisdiction is determined, in each Member State, by national law.

Furthermore, under art. 17 of Regulation no. 2201/2003, the court seised which does not have jurisdiction under this Regulation must declare of its own motion whether a court of another Member State has jurisdiction under that Regulation.

In those circumstances, the Court of Justice concluded that the Swedish courts could not declare that they had jurisdiction to hear the case on the basis of the provisions of national law, since, under art. 7 para. 1 and art. 17 of that regulation, the Swedish courts are required to find that they do not have jurisdiction, taking into account the fact that the French courts have jurisdiction to rule on the application pursuant to art. 3(1) of that regulation.

We note that in this case the Court has clearly set out the stages of the analysis which a court of a Member State must carry out when it is seised of an application in matrimonial matters or in matters of parental responsibility, the residual jurisdiction (based on the national law of the Member State in whose territory the court seised is situated) not being available in any event if a court of another Member State has jurisdiction under the jurisdictional rules laid down in the regulation. This conclusion also applies where the defendant is not habitually resident in a Member State and is not a national of a Member State.

4. *Forum necessitatis*

In order not to violate the right of access to a court recognised by art. 47 ECHR, in Romanian national law, the legislator has regulated the legal institution of the *forum necessitatis* as a solution for resolving situations in which concrete jurisdictional rules of private international law would not apply.

According to art. 1070 CPC, if the law does not provide for the jurisdiction of the Romanian courts, then the Romanian court becomes competent to hear the case if the following conditions are met: the case has a sufficient connection with the place where the court seised is located; it is proved that it is not possible to bring a claim abroad or that it cannot reasonably be expected to be brought abroad.

In the Romanian doctrine[8], it has been argued that the New Code of Civil Procedure[9] has taken over the institution of the „forum of necessity" from European regulations in the field.

This claim is plausible, since the legal institution in question was not previously regulated by Law no. 105/22.09.1992 on the regulation of private international law relationships[10], and the EU legislature regulated the forum of necessity on 18.12.2008 by art. 7 of Regulation (EC) no. 4/2009, in the area of maintenance obligations, prior to the date of adoption of the Civil Procedure Code.

In the ECtHR Case *Naït-Liman v. Switzerland* (para. 84), the Court conducted a comparative law analysis and found that the rules governing universal civil jurisdiction in twelve of the 39 European States considered (Austria, Belgium, Estonia, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Portugal, Switzerland and Romania) explicitly recognise either the forum of necessity or a principle that goes by another name but has very similar consequences.

[8] C.-P. Buglea, *Dreptul internațional privat român din perspectiva reglementărilor europene aplicabile în domeniu și a noului Cod civil român,* 2nd ed., Universul Juridic Publishing House, Bucharest, 2015, p. 185.

[9] Adopted by Law no. 134/01.07.2010, published in the Official Gazette of Romania no. 545/03.08.2012.

[10] Published in the Official Gazette of Romania no. 245/01.10.1992.

At the same time, we note from this case law that the forum of necessity is a type of universal civil jurisdiction recognised in private international law, which can sometimes raise problems of sovereignty, equity and comity between States, in particular when several jurisdictions could claim authority over the same dispute, or practical difficulties concerning the taking of evidence, recognition and enforcement of judgments[11].

Author Abhimanyu George Jain has noted in the paper *Universal Civil Jurisdiction in International Law*[12] that in European states that have regulated the institution of *forum necessitatis*, courts are permitted to exercise jurisdiction despite the absence of any connection with the forum, but, however, most of these states interpret the doctrine of *forum necessitatis* as removing the requirement of a legal basis for jurisdiction, but not removing the requirement of some connection with the forum.

In our opinion this conclusion is based on the wrong premise, namely that the forum necessity regulated by the European states does not presuppose a sufficient connection with the state of the court seised. Therefore, the requirement of a connection with the forum is not merely an interpretation of the courts of the respective states, but a legal requirement.

In this paper we will use the definition of *forum necessitatis* as developed by the EU legislator. Thus, *forum necessitatis* is the authority of a court of a Member State to hear and determine, in exceptional cases, disputes which do not fall within the scope of the jurisdictional rules laid down in the legal acts of the Union, if the court proceedings cannot reasonably be brought or conducted, or cannot reasonably be conducted, in a third State with which the dispute is closely connected, provided that the dispute is sufficiently connected with the Member State of the court seised.

In the following, we will present some details concerning the interpretation given by the Court of Justice of the EU to the legal institution of *forum necessitatis* in its recent case law.

In Case *MPA v. LCDNMT*[13], the referring court referred six questions to the Court of Justice for a preliminary ruling, the fifth of which sought to ascertain, in essence, in the event that the habitual residence of all the parties to the dispute in matters relating to maintenance obligations is not in a Member State, the circumstances in which jurisdiction based, in exceptional cases, on the *forum necessitatis*, referred to in art. 7 of Regulation no. 4/2009, could be established. In particular, the referring court is seeking to ascertain, first, the conditions necessary for it to be held that proceedings cannot reasonably be brought or conducted, or would be impossible in a third State with which the dispute is closely connected, and whether the party relying on art. 7 is required to demonstrate that he or she has been unsuccessful in bringing or has attempted to bring those proceedings before the courts of that third State and, second, whether, in order to find that a dispute must have a sufficient connection with the Member State of the court seised, it is possible to base such a finding on the nationality of one of the parties.

First, the Court noted that the mere fact that all the parties to the dispute are habitually resident in a non-member State is not sufficient for the first condition of the forum of necessity to be regarded as satisfied, since the national court is required to verify and find that no court of a Member State has jurisdiction under art. 3 to 6 of Regulation no. 4/2009 (para. 101).

Secondly, the Court held that the habitual residence of the parties in the territory of a third State is an element which is covered by the notion of 'close connection' with the third State, since the courts of the State in whose territory the maintenance creditor and debtor are habitually resident would be in the best position to assess the child's needs, having regard to the social and family environment in which the child lives and will live (para. 105).

As regards the condition that the proceedings in question cannot reasonably be initiated or conducted or that it is impossible to conduct them before the courts of the third State concerned, the CJEU referred to the example in recital 16 of Regulation no. 4/2009, namely civil war, and noted that the Regulation does not provide further guidance as to the circumstances that may be invoked, but indicated that the forum of necessity was regulated in order to remedy in particular situations of denial of justice.

Thus, the court seised in a Member State may not require the maintenance creditor to prove that he initiated or attempted to initiate the proceedings in question before the courts of the third State with which he

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[11] ECtHR judgment of 15.03.2018, *Naït-Liman v. Switzerland*, Case no. 51357/07, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-181789%22]}*, last consulted on 23.03.2024.

[12] A. George Jain, *Universal Civil Jurisdiction in International Law*, in Indian Journal of International Law, vol. 55, no. 2, June 2015, pp. 224 and 225, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766734*, last consulted on 23.03.2024.

[13] CJEU judgment of 01.08.2022, *MPA v. LCDNMT*, C-501/20, EU:C:2022:619, para. 97-113.

has a close connection, without success, it being sufficient that, having regard to all the facts and points of law of the case, the court seised is able to satisfy itself that the obstacles in the third State in question are such that it would be unreasonable to require the applicant to seek enforcement of the maintenance obligation before the courts of that third State.

This valuable finding for national courts was reinforced by Advocate-General Maciej Szpunar in his Opinion in Case *MPA v. /v. LCDNMT*[14], who added that the court seised must not only take into account the circumstances invoked by the appellant in the main proceedings, but must also base its decision on findings based on objective information and data, in particular, a finding that there are difficulties relating to women's effective access to the courts or that there are discriminatory practices against women in the non-member State would allow the court in question to consider that there is a risk of denial of justice.

The Advocate-General also listed other examples of exceptional occurrences which could be covered by the hypothesis under consideration, *i.e.*, the court of the third State with which the dispute is closely connected refuses to exercise jurisdiction, there are abusive procedural conditions, when, due to civil unrest or natural disasters, it is dangerous to travel to certain places, and the normal work of the third state cannot be exercised, where access to justice is unjustifiably impeded (legal representation is excessively costly, the length of proceedings is excessively long) or there are either serious problems of corruption in the judicial system, or deficiencies in fundamental fair trial guarantees or systemic deficiencies.

Finally, the Court of Justice emphasised that the nationality of one of the parties constitutes a sufficient link with the Member State of the court seised, as this element was given as an example in recital (16) of Regulation no. 4/2009.

With regard to this last condition, it has been argued in the Romanian literature[15] that the notion of „sufficient connection" is likely to create confusion between the determination of the international jurisdiction of the Romanian courts and the determination of territorial jurisdiction under domestic law, in the sense that, once the court seised establishes that it has international jurisdiction to hear the case as a forum of necessity, it will have recourse to the domestic rules of territorial jurisdiction in order to determine in concrete terms the competent court on Romanian territory.

Our opinion is that there is no confusion in determining the court with international and national territorial jurisdiction, since, if the connection identified as sufficient does not fall within any of the criteria for establishing domestic territorial jurisdiction, then the application will be directed, following the rules of subject-matter jurisdiction, to the Court of 1st District of the Municipality of Bucharest, respectively to the Bucharest Tribunal[16]. This conclusion also applies in the case of the forum of necessity provided for in Regulation (EC) no. 4/2009.

5. Similarities and differences between the two institutions

Among the similarities, we note that the two types of jurisdictions are subsidiary in nature, in the sense that they are applicable when the specific jurisdictional rules in the regulations that established them are not applicable. Both types of jurisdictions are forms of universal civil jurisdiction in private international law.

Some authors[17] have argued that, at European level, there are indirect references to the forum of necessity, with the examples given of art. 7 and 14 of the Brussels IIa Regulation, which govern residual jurisdiction. This would suggest an equivalence between the two legal institutions.

We cannot agree with this opinion, because residual jurisdiction, in the view of the EU legislator, is the case where the conflict of jurisdiction rules specifically laid down in the regulation are not applicable, referring to the internal rules of jurisdiction, in the field of private international law, of the Member States. From this point of view, the provisions of the Member States are different in that some of them provide for the institution of a forum of necessity (as in section 4), but regulated differently, or contain another provision which would constitute a basis for establishing international jurisdiction, different from the forum of necessity, while others have not legislated for the institution in question.

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[14] Opinion of Advocate General Maciej Szpunar delivered on 24.02.2022 in Case C-501/20 *MPA v. LCDNMT*, EU:C:2022:138, para. 122-128.

[15] S. Popovici, *Procesul civil international în reglementarea noului Cod de procedură civilă – Partea I: Competența internațională a instanțelor române (art. 1064-1069)*, in Revista Română de Drept al Afacerilor no. 6/2013, p. 16, *https://www.sintact.ro/#/publication/151007899?keyword=%20procesul%20civil%20international&cm=STOP*, last consulted on 23.03.2024.

[16] See art. 1072 para. (2) CPC.

[17] G. Boroi *et al.*, *Noul Cod de procedură civilă, comentariu pe articole*, vol. II, Hamangiu Publishing House, Bucharest, 2013, p. 690.

Thus, there is no identity of content between the residual jurisdiction and that of the forum of necessity, differing, in particular, by reference to the scope, effective application and the circumstances in which they are invoked. As soon as we find that a dispute cannot fall within the jurisdiction of the court seised, on the basis of the jurisdictional rules of the two regulations in question, in the case of residual jurisdiction, the court seised will apply the provisions of jurisdiction under national law, whereas in the case of forum de necessity, the court will proceed to analyse the four conditions laid down in art. 7 of Regulation no. 4/2009.

As mentioned in section 4 of this study, ECtHR carried out a comparative law analysis in the Case *Naït-Liman v. Switzerland* (para. 84), which concluded that *forum necessitatis* (or a principle with the same content but with a different name) was explicitly recognised in 12 of the 39 European states considered (Austria, Belgium, Estonia, France, Germany, Luxembourg, Netherlands, Norway, Poland, Portugal, Switzerland and Romania). Of these 12 European countries, only Norway and Switzerland are not Member States of the European Union.

In the given context, where only 10 out of 27 EU Member States have regulated in their national law the institution of the forum of necessity, when the conditions for residual jurisdiction are met in matrimonial matters and parental responsibility matters, this does not mean that the forum of necessity will be applied, as it depends on the aspect of the regulation of that institution by the Member State of the court seised in its internal law system.

For this reason, we note that there is no identity between the forum of necessity and residual jurisdiction, as species of universal civil jurisdiction, nor are they in a part-whole relationship, there being common aspects only where the court seised belongs to a Member State which has regulated the forum of necessity in national law and only if there are no other jurisdictional provisions applicable.

As regards the reasons why the Council opted for a different rule on residual jurisdiction in the Brussels IIb Regulation compared to the forum of necessity in Regulation no. 4/2009, the Report of 15.04.2014 from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) 2201/2003[18] showed that in both matrimonial matters and matters of parental responsibility, there is no uniform and exhaustive rule on residual jurisdiction and this results in unequal access to justice for citizens of the Union.

The Commission added that this regulation does not contain a rule on *forum necessitatis* which is found in other EU regulations (on maintenance or succession). Such a criterion for conferring jurisdiction was requested by the European Parliament in its legislative resolution of 15.12.2010 on the proposal for a „Rome III" Regulation[19].

Although it stated that the lack of provisions setting out the cases in which Member States' courts may decline jurisdiction in favour of a court in a third State creates a high level of uncertainty, the Commission proposed to regulate the institution of forum de necessity in the new Council Regulation (EU) 2019/1111, but without success.

Our opinion is that the non-adoption of the institution of the forum of necessity in Council Regulation (EU) 2019/1111 is precisely due to the differences between the jurisdictional provisions of private international law of the Member States, since only 10 Member States have recognised and legislated this institution.

Continuing this reasoning, we note, however, that the EU legislator has provided in Regulation (EU) 2019/1111 for a substitute for the forum of necessity, namely residual jurisdiction which entails the application of the legal provisions of the domestic law of the Member State in whose territory the court seised is located.

6. Case study

We chose to examine a court ruling which raised the issue of the application of Regulation (EC) no. 2201/2003, because we did not identify relevant jurisprudence of the Romanian courts with regard to Regulation Brussels IIb, taking into account the relatively recent date of application (01.08.2022), but the residual jurisdiction remained unchanged by the new regulation.

[18] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no. 1347/2000, celex 52014DC0225, pp. 8 and 9, *https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52014DC0225*, last consulted on 24.03.2024.

[19] European Parliament legislative resolution of 15.12.2010, P7_TA(2010)0477, point 3, *https://www.europarl.europa.eu/doceo/document/TA-7-2010-0477_EN.pdf*, last consulted on 24.03.2024.

By civil judgment no. 598/23.01.2023, pronounced by the District 5 Bucharest Court in case no. 20795/302/2022, the court admitted the exception of international incompetence of the Romanian courts, invoked on its own motion, and rejected the divorce application as not falling within the competence of the Romania courts. As a matter of fact, the court found that the parties were Romanian citizens and at the time of filing the application they had their residence abroad, respectively in the United Kingdom of Great Britain and Northern Ireland, where they currently live.

The court found that the residence of the parties in the United Kingdom of Great Britain and Northern Ireland constitutes an element of extraneity, which gives the disputed legal relationship the nature of an international private law relationship, and, given that the UK has left the European Union, becoming a third State at the end of the transitional period (31.12.2020), from that date, the provisions of Regulation (EC) no. 2201/2003 no longer find their application in cases which have an extraneous element, consisting of the English citizenship of a party or the habitual residence in the Kingdom, because they have ceased to be extraneous elements of EU law. Furthermore, to determine international jurisdiction, the court applied the domestic provisions provided for by art. 1066 *et seq.* CPC.

We note that the District 5 Bucharest Court has wrongly established that the applicability of Regulation (EC) no. 2201/2003 would be analysed in relation to the location of the extraneity element, since this is carried out according to the scope provided for in art. 1 of the regulation itself. Furthermore, given that the two parties were Romanian nationals, the international jurisdiction was the court before which the case was brought, in relation to the criterion of common citizenship provided for in art. 3(1)(b) of Regulation (EC) no. 2201/2003.

Another example is Civil judgment no. 667/04.07.2022, pronounced by the Novaci Court in file no. 324/267/2022. The court found that it was not internationally competent to hear the case with the object of increasing the maintenance pension requested by the claimant C.M.V. (Romanian citizen), through the legal representative of P.E., against the defendant C.D.M. (Romanian citizen).

The court has found that the minor creditor and the debtor reside in Spain and the subject matter of the case relates to the payment of maintenance to the minor, so that the provisions of art. 3 (a) and (b) of Regulation (EC) no. 4/2009 are applicable to the establishment of international jurisdiction, the Spanish courts having jurisdiction to settle the case.

The court also rightly found that the common citizenship of the parties is not sufficient to attract the competence of the Romanian courts, when there are special rules of jurisdiction such as those mentioned above.

The provisions of art. 1070 CPC relating to the forum of necessity are also not applicable, given the direct applicability of Regulation (EC) no. 4/2009 and the fact that no proof has been made that an application for an increase in maintenance pension could not be lodged on the territory of Spain.

We believe that the Judgement of Novaci has thoroughly rejected the claimant's argument regarding the establishment of the Romanian court's jurisdiction as a forum of necessity, since the first condition is not fulfilled - that no court in a Member State is competent under art. 3, 4 and 5 of Regulation (EC) no. 4/2009.

Although it was no longer necessary, the Novaci Court stated that the second requirement of the forum of necessity was also not met, since access to justice is not restricted in Spain, the complainant being able to make a request to the courts of that State and having the possibility of resorting to the instruments for the provision of legal assistance.

7. Conclusions

A first point that we want to highlight is that the jurisdictional provisions issued by the European Union have priority over the provisions of private international law of the Member States, but the latter are not excluded from application in full, but are complementary on the basis of residual jurisdiction. Residual jurisdiction provides flexibility in the EU legal system, allowing the courts of the Member States to deal with cases which, although they would not be competent under the provisions of the regulations adopted by the Council, could be settled by those courts under the provisions of national law of the State on whose territory they are located.

In analysing the CJEU case-law on residual jurisdiction, I have found that this type of competence cannot under any circumstances intervene if a court of another Member State is competent pursuant to the judicial rules laid down in the Regulation, even if the defendant does not have his or her habitual residence in a Member State and is not a national of one of the Member States.

After comparing residual jurisdiction under the Brussels II bis Regulation with the *forum necessitatis* under Regulation no. 4/2009 (commonly referred to as the Maintenance Obligations Regulation), we concluded that the main differences lie in the scope (matrimonial matters and matters of parental responsibility versus maintenance obligation), the actual application and the circumstances under which they are invoked. Essentially, while both the residual jurisdiction and the *forum necessitatis* aim to address the gaps in jurisdictions, they apply in different areas of family law and have distinct criteria and procedures for invoking them.

Another relevant conclusion is that there is no identity between the forum of necessity and residual jurisdiction, as species of universal civil jurisdiction, nor are they in a part-whole relationship, there being common aspects only where the court seised belongs to a Member State which has regulated the forum of necessity in national law and only if there are no other jurisdictional provisions applicable.

Although the Commission has proposed to the European Parliament, the Council and the European Economic and Social Committee to amend the Brussels IIa Regulation by regulating the *forum necessitatis* principle, in the new Bruxelles IIb (ter) Regulation the Council has retained residual competence, because of the differences between the jurisdictional rules of private international law of the Member States, since only 10 Member States have recognised and legislated this institution.

However, we believe that it is necessary to uniform the provisions of international private law adopted by way of regulations by the EU legislature in different areas of family law (particularly in matrimonial matters, parental responsibility matters and maintenance obligation) for the sake of efficiency and clarity, given that two different solutions (residual competence and the forum of necessity) have been applied to the same problem (gaps in jurisdiction provisions), but without an objective justification, which is likely to create confusion among the courts in the Member States.

Since the principle of the forum of necessity is much better characterised, including the concrete requirements needed to be applied, we propose to amend art. 6 and 14 of the Brussels IIb Regulation by replacing the rule on residual jurisdiction with the *forum necessitatis* principle, as provided for in Regulation (EC) no. 4/2009.

Nevertheless, there is still another important part to research and cover in the future, the regulation of universal jurisdiction in conflict of laws in matrimonial matters.

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THE IMPLICATIONS OF THE EU AI ACT ON CONVERSATIONAL TECHNOLOGIES LIKE CHATGPT

Emilian MATEICIUC[*]

Abstract

This paper investigates the implications of the European Union's Artificial Intelligence Act (AI Act), on conversational AI technologies. As the EU institutes a groundbreaking framework for AI regulation, this study assesses how the AI Act's risk-oriented approach impacts the crafting, deployment, and oversight of conversational AI. The analysis explores the Act's system classification, high-risk AI categorization, and delineation of duties for AI developers and deployers, examining effects on innovation, privacy, and ethical considerations within conversational AI.

The significance of this research lies in its exploration of the EU AI Act's effort to balance technological progression with the safeguarding of fundamental rights and user privacy. By examining the AI Act provisions specific to conversational AI technologies like ChatGPT, this paper highlights the challenges and opportunities within the legislative framework. It addresses key regulatory concerns including data protection, algorithmic transparency, and accountability, evaluating the Act's role as a potential standard for AI legislation globally.

Situated within the extensive debate on AI regulation and ethics, this contribution is timely, offering insights into how legislative bodies can adapt to and influence the rapid development of AI technologies. This analysis seeks to guide policymakers, developers, and the academic sphere in navigating the complexities of conversational AI regulation, proposing strategies to align AI technology's growth with societal values and legal frameworks.

Keywords: *EU AI Act, Conversational AI, ChatGPT, AI ethics, AI governance.*

1. Introduction

This study centres on the European Union's Artificial Intelligence Act (AI Act), unanimously approved by the Council of EU Ministers on 02 February 2024[1], to assess its influence on conversational AI technologies, notably ChatGPT. This legislative development is crucial for guiding the integration of such technologies into society and industry, ensuring they align with ethical standards and public welfare.

The necessity of analysing the AI Act in the context of conversational AI is underscored by the escalating use of these technologies across diverse sectors, prompting concerns about privacy, security, and ethical application. The Act aims to foster an environment where innovation is pursued within a structure of strong safeguards for individual and societal values.[2]

In tackling these issues, the study will examine the AI Act's classifications and requirements for conversational AI systems. This entails assessing the responsibilities placed on developers and operators by the Act and considering the wider implications for the trajectory of AI-mediated communication.[3] Through an examination of the legislative text, complemented by insights from academia and industry, this paper seeks to chart the course for conversational AI in the wake of the AI Act's adoption.

Setting itself apart from existing dialogues, this paper aims to bridge a gap in the literature by directly connecting the EU AI Act's regulatory schema to the rapidly evolving domain of conversational AI. It situates itself

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[1] European Union, *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*, OJ from 02.02.2024.

[2] J. Doe, A. Smith, *The Impact of Regulatory Frameworks on AI Development: A Comparative Study*, in Journal of AI Ethics, 5(2), 2023, p. 123-145.

[3] B. Johnson, *Conversational AI: Challenges and Opportunities in Ethics and Regulation*, in Technology and Society, 30(4), 2023, p. 234-250.

at the juncture of legal analysis and technological exploration, hoping to ignite further discussion on aligning AI advancements with legal and ethical standards.[4]

2. Overview of the EU AI Act

2.1. Foundation

Within the ambit of the European Union's AI Act, specific attention is dedicated to the realm of conversational AI technologies, such as chatbots and virtual assistants. These technologies, which are powered by advanced algorithms similar to those behind ChatGPT, have become integral to digital communication, offering new avenues for interaction in consumer services, education, and many other sectors. The AI Act introduces nuanced provisions tailored to address the unique challenges and implications posed by these conversational interfaces, ensuring they serve the public good while adhering to ethical standards.

The Act meticulously outlines the obligations for creators and distributors of conversational AI, focusing on critical aspects like transparency, accountability, and the safeguarding of user rights. A pivotal requirement set forth by the legislation is the unambiguous disclosure when users are engaging with AI-driven platforms rather than human counterparts. This mandate is crucial in the context of conversational AI, where the blurring lines between AI-generated and human responses can lead to ambiguity. Ensuring clarity in these interactions is not just about fostering trust; it's about reinforcing the user's autonomy in digital ecosystems, providing them with the knowledge to make informed decisions about their engagement with AI technologies.

Furthermore, the legislation compels the entities behind conversational AI tools to conduct thorough risk assessments and implement measures to mitigate any identified risks. This is particularly significant in preventing the perpetuation of biases or discriminatory practices through these AI systems. Given the EU's robust commitment to principles of non-discrimination and data protection, conversational AI developers are tasked with integrating these values right from the design phase through to deployment and operation. This means creating systems that not only respect privacy and ensure data security but also proactively address and rectify potential ethical pitfalls, such as biases in language understanding or response generation.

By embedding these stringent requirements within the regulatory framework, the EU AI Act does more than just legislate; it steers the development and application of conversational AI towards a more humane and ethically conscious direction. This legislative approach underscores the EU's intention to harness the benefits of conversational AI while minimising the risks, ensuring these technologies augment human capabilities and enhance service delivery without compromising fundamental rights or ethical principles.

2.2. Provisions Relevant to Conversational AI

The European Union's Artificial Intelligence Act is pioneering in its comprehensive regulatory approach towards AI technologies, applying a nuanced risk-based framework that classifies AI systems according to the level of risk they pose. This classification broadly categorises AI systems into four levels: unacceptable risk, high risk, limited risk, and minimal risk. This segmentation is pivotal in tailoring regulatory requirements to the potential impact of different AI technologies on society and individuals.[5]

For conversational AI technologies – such as chatbots and virtual assistants, which are integral to customer service, healthcare triage, and educational platforms – the classification under the EU AI Act primarily hinges on their application and the extent of their interaction with humans. Conversational AI systems that are designed to interact with people in high-stakes contexts (*e.g.*, healthcare advice, legal information, or educational guidance) might be classified under „high risk" or „limited risk" categories, depending on their potential to affect users' rights or safety.

Systems categorised as „high risk" must follow strict compliance requirements before their deployment. These requirements include, but are not limited to, rigorous testing for accuracy and safety, transparent disclosure of AI interaction to users, and robust data protection measures to safeguard personal information. The primary aim here is to ensure that conversational AI technologies are reliable, secure, and transparent, thus fostering trust and safeguarding users' fundamental rights.

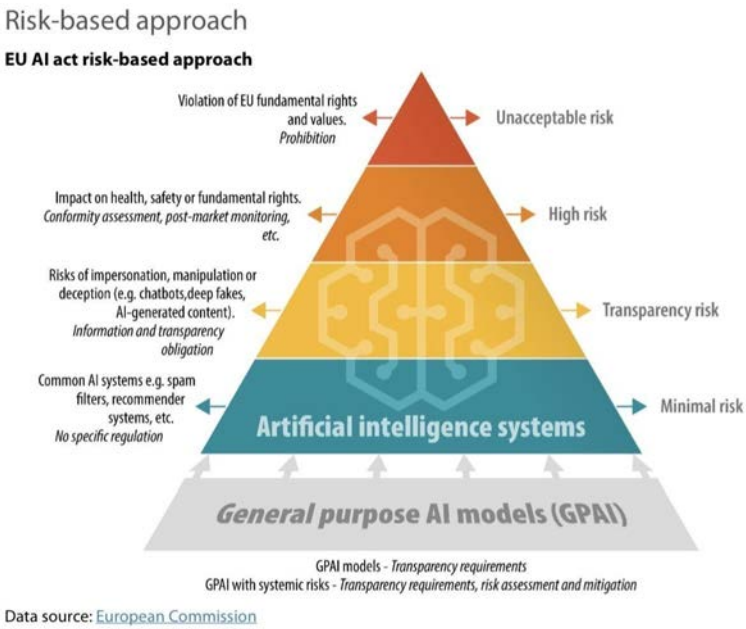
[4] European Commission, *White Paper on Artificial Intelligence: A European Approach to Excellence and Trust*, Brussels, 19.02.2020.
[5] European Parliament, *Briefing on Artificial Intelligence Act*, 11.03.2024.

Conversational AI technologies that are classified as „limited risk" or „minimal risk" are subjected to comparatively lighter regulatory requirements. For instance, AI systems offering recommendations on less critical matters, such as movie choices or restaurant recommendations, might fall into these categories. Such systems are expected to ensure transparency, informing users that they are interacting with an AI. This requirement is vital in maintaining user autonomy and trust by clearly delineating between human and AI-generated responses.

The governance and enforcement of these provisions are structured through a comprehensive framework that involves both national supervisory authorities and the European Artificial Intelligence Board (EAIB). National supervisory authorities are tasked with the local oversight and implementation of the Act, ensuring that AI systems developed or deployed within their jurisdictions comply with the established regulations. On a broader scale, the EAIB plays a crucial role in harmonising regulatory practices across EU member states, facilitating knowledge exchange, and providing strategic guidance on AI regulation. The Board's involvement ensures a cohesive approach to AI governance across the EU, promoting consistency in the application of the AI Act's provisions and fostering an environment of cooperation among member states.

3. Regulatory Implications for ChatGPT

Under the EU AI Act's structured framework, conversational AI technologies, such as ChatGPT, are evaluated based on their intended use and the potential risks they pose to users' rights and safety. This evaluation determines their classification into risk categories, which could range from high risk to limited risk. The Act's risk-based approach is particularly relevant for conversational AI due to its widespread application in various sectors, including customer service, education, healthcare, and more.



High-risk Classification: If a conversational AI system is classified as high risk, it indicates that its application has significant implications for individuals' rights or safety. For instance, a chatbot used for delivering medical advice or legal assistance would fall into this category due to the potential consequences of inaccurate information. High-risk conversational AI systems must adhere to stringent compliance requirements before and after deployment. These requirements include conducting thorough risk assessments to identify and mitigate any potential harm, implementing robust data governance measures to protect personal data, ensuring transparency about AI's role in decision-making processes, and maintaining human oversight to intervene whenever necessary. Such measures are crucial in maintaining the integrity of high-risk AI applications, ensuring they serve the public's interest without compromising ethical standards;

Limited-risk Classification: Conversational AI systems classified as limited risk may involve interactions where the stakes are not as high but still require certain regulatory adherence to ensure user trust and safety.

These systems must be transparent in their use of AI, often requiring clear communication to users that they are interacting with an AI system. This transparency is vital in allowing users to make informed decisions about their engagement with these technologies.

3.1. Ramifications of Classification on Compliance Requirements[6]

Risk Management: For high-risk conversational AI, developers must implement a comprehensive risk management system. This involves identifying potential risks related to privacy, discrimination, and overall safety, and taking appropriate measures to mitigate these risks before deploying the technology;

Data Governance: The AI Act places a strong emphasis on protecting personal data, especially for high-risk AI applications. Conversational AI developers are required to establish solid data governance frameworks that ensure data accuracy, security, and privacy, adhering to the principles of data minimization and purpose limitation;

Transparency: The requirement for transparency affects both high-risk and limited-risk conversational AI systems. Developers must disclose the use of AI in their systems, providing users with information about how decisions are made, the data used, and the possibility of human oversight. This is crucial for building user trust and facilitating accountability;

Human Oversight: For high-risk applications, the AI Act mandates human oversight to ensure AI decisions can be overridden or altered by human operators. This provision ensures that, despite AI's autonomy, critical decisions can be reviewed and amended by humans, particularly in situations where AI's judgment may impact individuals' rights significantly. Developers are required to disclose the involvement of AI in interactions, which necessitates embedding mechanisms that can clearly inform users when they are communicating with an AI.

3.2. Compliance Challenges[7]

These challenges primarily revolve around ensuring data protection, accuracy and fairness – each of which holds significant implications for the development and deployment of these AI systems.

Data Protection: Conversational AI systems often process vast amounts of personal data to provide personalised and contextually relevant responses. Adhering to the AI Act's stringent data governance and protection standards necessitates robust mechanisms to secure data, ensure privacy, and obtain explicit consent from users for data usage. The challenge intensifies with the need to implement these measures without compromising the user experience or the performance of the AI system. Balancing data protection with the operational requirements of conversational AI involves sophisticated data handling and privacy-preserving techniques, including anonymization and encryption, which can be complex and resource-intensive to implement;

Ensuring Accuracy and Fairness: Ensuring that conversational AI systems like ChatGPT are both accurate and fair poses another significant compliance challenge. Accuracy involves the system's ability to understand and respond to user queries correctly, which is crucial for high-risk applications. Fairness, on the other hand, entails the AI's capability to deliver unbiased responses and avoid perpetuating stereotypes or discrimination. Addressing these aspects requires continuous monitoring, testing, and refinement of AI models to identify and mitigate biases. Developers must employ diverse datasets and inclusive design principles from the outset, along with implementing fairness assessments and bias correction mechanisms. However, achieving and maintaining high standards of accuracy and fairness in conversational AI is an ongoing process, fraught with technical complexities and requiring constant vigilance to evolving societal norms and values.

4. Ethical Considerations and User Protection

The integration of conversational AI technologies into daily interactions introduces a spectrum of ethical considerations and necessitates robust user protection mechanisms. As these technologies, exemplified by systems like ChatGPT, become more ingrained in various sectors, their ethical implications and the importance of safeguarding users against potential harms have come into sharper focus.

[6] European Parliament, *Briefing on Artificial Intelligence Act*, 11.03.2024.
[7] *Ibidem*.

4.1. Ethical Issues

The ethical landscape for conversational AI technologies is complex, touching on issues of privacy, autonomy, accountability, and fairness:

Privacy and Data Security: Conversational AI systems process vast amounts of personal and sensitive data to function effectively. This raises ethical concerns about user privacy and the security of data against unauthorised access or breaches. Ensuring that these systems respect user confidentiality and secure data is paramount;

Autonomy and Consent: The ability of conversational AI to influence decisions and behaviours poses ethical questions about user autonomy. It's crucial that these systems operate transparently, making users aware of the AI's involvement in interactions and ensuring that consent is informed and freely given;

Accountability and Transparency: Holding AI systems and their developers accountable for the outcomes of AI interactions is a pressing ethical issue. This includes ensuring that there's clarity about how decisions are made by AI and providing recourse for users affected by potentially harmful decisions;

Bias and Fairness: The potential for conversational AI to perpetuate or even amplify biases presents significant ethical challenges. Ensuring fairness in AI interactions and outcomes requires vigilant efforts to identify and mitigate biases in AI models and datasets.

4.2. User Protection

In light of the ethical issues identified, protecting users in their interactions with conversational AI systems like ChatGPT is critical. The EU AI Act aims to establish safeguards that uphold user rights and safety:

Transparency and Informed Consent: Users must be clearly informed when they are interacting with AI, not humans. This transparency is foundational for ensuring informed consent, where users understand the nature of their interaction and the implications of their data usage;

Right to Explanation: For high-risk applications, users have the right to receive explanations for AI decisions that significantly affect them. This is crucial for maintaining trust and accountability, allowing users to challenge decisions or seek redress;

Privacy Safeguards: The Act emphasises strict adherence to data protection principles, requiring that conversational AI systems implement measures to protect user data rigorously. This includes data minimization, ensuring that only the necessary data for the intended purpose is collected and processed;

Bias Mitigation and Fairness: Developers are obligated to regularly assess and address biases in their conversational AI systems, promoting fairness and preventing discrimination. This involves careful design and continuous monitoring to ensure equitable outcomes for all users, regardless of their background.

The EU is a pioneer when it comes to citizen rights and privacy, becoming a model worldwide, just like it was the case with the GDPR Act.

5. Conclusions

Looking into the European Union's Artificial Intelligence Act and its impact on chatbots and similar AI tech shows a well-thought-out plan for regulation. This deep dive into the AI Act breaks down how it sorts AI technologies by risk levels and explains how this sorting affects rules for AI like chatbots. It points out the obstacles developers have to navigate to make sure their AI is transparent, keeps data safe, is accurate, and treats everyone fairly. The discussion also brings up important ethical points and how the Act sets up safeguards for users, focusing on keeping things clear, making sure users know what they're dealing with, and reducing bias.

The findings from this research are poised to significantly influence the development and regulatory oversight of conversational AI technologies. By spotlighting the principal compliance challenges and ethical considerations, the paper aims to contribute to the refinement of regulatory frameworks, ensuring they are fully attuned to the intricacies of conversational AI. The focus on user protection mechanisms is expected to build a foundation of trust in AI technologies among users, promoting their development and use in a manner that aligns with societal values and ethical standards.

Looking forward, the dynamic and rapidly evolving landscape of AI technology presents several avenues for further investigation. The practical effectiveness of the AI Act's risk-based classification system merits close examination, as does its impact on fostering or hindering innovation within the European Union. Additionally, comparing the EU AI Act with regulatory initiatives in other jurisdictions could offer valuable insights into

opportunities for global regulatory harmonisation, supporting the development of universally accepted standards that encourage innovation while safeguarding ethical considerations. Lastly, understanding the long-term societal impacts of conversational AI technologies, particularly in terms of privacy, autonomy, and the potential for a digital divide, is crucial. Such research could illuminate the pathways through which AI regulation can evolve to foster technologies that are not only innovative but also equitable and aligned with the broader interests of society.

A particularly compelling facet of our examination of the European Union's Artificial Intelligence Act is its approach to enforcing compliance through the imposition of fines. The Act's framework is stringent, setting out penalties that serve as a testament to the EU's commitment to ensuring that AI technologies, including conversational AI like ChatGPT, operate within clearly defined ethical and operational parameters. Specifically, the legislation delineates that fines for non-compliance can reach up to €20 million or 4% of the annual worldwide turnover of the offending company, whichever is greater. This scale of financial penalty is indicative of the serious stance the EU takes towards violations of the Act, particularly concerning breaches that compromise data protection, transparency, and the fundamental ethical conduct expected of AI systems.

The magnitude of these fines plays a dual role. Firstly, it acts as a deterrent, signalling to developers and companies the financial risks associated with neglecting the AI Act's compliance requirements. Secondly, it underscores the high value placed on safeguarding user rights and the integrity of AI interactions. For conversational AI technologies, this means any system that interacts with users—whether for customer service, education, or healthcare advice—must adhere to rigorous standards that ensure user data is protected, the basis of AI decisions is transparent, and any potential biases are adequately addressed.

The enforcement mechanism, highlighted by the potential for significant fines, reflects a broader EU strategy to not only promote ethical AI development but also to foster a digital ecosystem where trust in AI technologies is paramount. For companies developing conversational AI, this creates an imperative to integrate compliance measures into every stage of AI system design and deployment. It necessitates a proactive approach to understanding the Act's requirements, implementing robust data governance frameworks, ensuring transparency in AI-driven interactions, and continually monitoring AI systems for fairness and accuracy.

As AI technologies continue to advance and permeate various aspects of human life, the insights drawn from this analysis are vital in shaping a future where AI serves the public good, guided by principles of transparency, fairness, and accountability.

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AI AND ETHICS. THE CASE OF REFUGEES

Samuel MIREUȚĂ[*]

Abstract

Technological progress has had both benefits and negative effects over time. The road to civilization was paved by scientists through hard work. Today we enjoy the results produced over a long period of time when civilizations and empires succeeded each other. Man has always sought to lead a better life, to explore territories and seek new opportunities. The institutionalisation of people's power in the form of the state led to some limitations on the freedom of free movement. The establishment of states led to the emergence of borders. This paper seeks to analyse how today's most advanced advancement, AI, can have both beneficial and negative contributions to society. In a world where basic human rights are no longer a novelty, regulation of new technologies has become a necessity. The lack of clear regulations leads to abuses by the state or its members. Ethics is a basic pillar in any field of activity. Scientific discoveries led to economic progress. Competitiveness has bred efficiency. Even if in a first stage there are systemic changes in certain economic branches, with the possibility of technology replacing certain activities carried out until then by man, the economic prosperity of the last two centuries was only possible through a mass development of production. The political factor, through its representative bodies, has the mission of ensuring a balance between technological development and society as a whole. The balance is ensured through regulation, legislation. Technologies must have a positive impact on the democratic world. This article examines new technologies in the context of refugees. Displacement of populations is not new, but in correlation with new technologies and fundamental human rights it acquires a new dimension.

Keywords: *international law, refugee law, technological progress, AI, ethics in the use of technology, case-law.*

1. Introduction

Technology has represented throughout the centuries and is still today the key to a society of well-being. Through its multiple valences, *i.e.*, depending on the sector it impacts, technology as a tool and science as a branch of study have provided the path to progress. Science, human genius and the development of the arts have led to a society where life expectancy and culture have increased considerably, overall. However, as technological progress experienced an unprecedented momentum, the need arose to ensure a balance regarding how new discoveries do not contravene moral or legal norms. Morality has been the subject of philosophical research and debate since ancient times. However, we have most of the writings and conceptions of life from the Greeks and the Romans, according to the development of written sources. The Greeks often used the phrase „common good", to express the legitimacy of measures that could take the form of legal norms. Today, we are no longer talking about the novelty of the vaccine or the telephone, but about artificial intelligence. The unprecedented development would not have been possible without the contribution brought by globalisation. Economic exchanges and migration of populations gradually led to economic prosperity. Migration is not only caused by people's desire to lead a better life, but also by other events such as natural calamities or wars. These events lead to movements of people, either within the same territory or outside it. If it is carried out within the state, then we are talking about internal displacement. In the case of the movement of the population by crossing the border of a state, we speak of an external displacement or migration.

This paper aims to provide a look at artificial intelligence in the wider context of migration looking from an ethical and legal perspective of the use of new technologies. When crossing the border of a state there are security measures. Some of these use some of the most sophisticated technologies. The storage of data has become an issue that concerns people because in the absence of clear legal norms regarding their use, state authorities may violate fundamental rights enshrined in domestic or international legal acts.

The importance of approaching such a topic results precisely from the need to ensure a balance between the dynamics and statics of law. On the one hand, the legal norm must not inhibit technological progress, on the

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other hand, we cannot allow certain vital aspects to be left out of the regulatory framework, thereby giving the possibility for abuses to occur. The lack of an ethical perspective on the use of new technologies and legal legitimacy can lead to a challenge from society. There is reluctance on the part of the religious spectrum when new technologies may conflict with religious principles. These tensions are fuelled by misinterpretations from religious leaders of all world religions. The lack of legal consecration leads to the lack of state's coercion.

In order to analyse the phenomenon of the use of artificial intelligence in a world increasingly affected by migratory populations, the author uses content analysis as a qualitative research technique. In addition to the scientific literature incidental to the subject under analysis, there is a concern for case-law because the sanctioning of abuses by the courts, whether at the national or international level, leads not only to possible damages, but also to the adoption of new regulations or the modification of existing ones. The rule of law is a basic pillar especially in the European Union, a union based on law.

Compared to the existing scientific literature, the article aims to include several concepts converging to the subject under attention.

2. Border management using computer systems

2.1. Preliminary Considerations

Government must demonstrate its functionality in the real world. Before identifying the tasks of Government and the processing of designs required to be transposed, it is necessary to look at the circumstances in which Government is to focus on public sector performance. Reforms in Government must adapt to existing processes, institutions, cultures, values, resources, conditions and circumstances, but also to those foreseen, anticipated[1].

Computerization is a necessary component for economic and social development in society. In an international economy that relies on knowledge and electronic devices, the lack of their use can be a setback to a nation's technical and scientific progress. The establishment of a modern administration, using technology and knowledge, will have important benefits in society, eliminating mentalities anchored in the past and developing a new organisational culture. The enhancement of new technologies is received differently in society. The implementation of new technologies resulting from technical and scientific progress generally raises issues of trust. Citizens are concerned about the security of their data, its collection. Electronic systems process data. The attention that government structures must pay to cyber security is fundamental so that it can be implemented and favorably received by citizens. The risk of citizens' data being used by unauthorised persons or being disseminated for purposes other than those intended, generates fear for the use of new technologies[2].

2.2. A brief history of surveillance technologies in the field of migration since the modern era[3]

Passports were the classic means of identifying travellers. However, these documents could be easily borrowed or falsified, which led to the search for new methods for the transit of people to be made as safe as possible. The challenges were to establish the authenticity of documents and the identity of travellers. Although the use of passports became widespread before World War I, efforts to standardise them were made after the Second World War. The International Civil Aviation Organization, established in 1947 as a result of the International Convention on Civil Aviation of 1944, had a significant role in establishing standard travel documents.

Although the history of fingerprints is a long one, they have been associated with individual identity since 4000 years ago, the systematisation and standardisation of this practice was developed at the end of the XIX century by William Herschel.

Photographs of the defendants. This practice began around 1843. There has been controversy over this method, with some researchers believing they can approximate a man's character based on physical appearance, which later led to the development of eugenic theory.

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[1] A. Profiroiu, M. Profiroiu, *Cadrul de analiză a performanțelor sectorului public*, Revista Economie Teoretică și Aplicată, 2007, pp. 46-49.

[2] C. Vrabie, *Elemente de e-guvernare*, Pro Universitaria Publishing House, Bucharest, 2014, p. 53.

[3] C. Dumbravă, *European Parliamentary Research Service, Artificial intelligence at EU borders. Overview of applications and key issues*, Brussels, European Union, 2021, pp. 1-41.

Mind-reading machines. Although attempts to develop such an instrument began as early as 1880, in 1920 the first polygraph (death detector) was invented, able to record and interpret indicators such as blood pressure, pulse, breathing, etc. Although it also has shortcomings, this tool continues to be used, its role is to understand what is happening in the mind of the perpetrator based on physiological parameters.

Thus, states developed automatic identification and artificial intelligence. In the pre-digital era, the collection and interpretation of certain indicators required sustained physical work. There was a need for increased attention from the operators involved in this activity. Digital development has led to the interpretation of indicators by information systems. Facial identification has implications not only in entertainment activities or in the use of performing gadgets, but also in terms of security, being used in criminal cases and not only. In the field of migration, facial recognition is used at borders.

2.3. Migration management systems at EU level

The security system of the Schengen Area was put in place to protect its external borders. The security network consists of three essential systems that identify fraud and prevent dangerous individuals from entering the travel area. The three systems are: Visa Information System (VIS) Schengen Information System (SIS) European Dactyloscopy (EURODAC). *The Visa Information System (VIS)* allows the member states of the Schengen Area to exchange visa data. It is a central IT system and a communication infrastructure that links the central system to national systems. VIS connects consulates in non-EU countries and all external border crossing points of the Schengen Area. *SIS* is a large-scale information system. SIS is a basis for cooperation in law enforcement and protection of the external borders of the Schengen Area. SIS provides information to the police, migration, justice, and other authorities regarding missing people, criminals or criminal entities, and people who are forbidden to enter. EURODAC makes it easier for the EU States to determine which state is responsible for revising asylum applications by comparing fingerprint data. The system does this through an EU asylum fingerprint database. When an individual applies for asylum, their fingerprints are transmitted to the EURODAC central system. It is an essential tool that provides fingerprint comparison evidence[4].

2.4. Artificial intelligence in the context of refugees

It is considered that in the future, border management will depend on the contribution of artificial intelligence. There is hope that artificial intelligence can help eliminate certain factors such as race, ethnicity, etc., which can lead to discrimination. So, it could be useful in the context of flows of migrants or refugees. Artificial intelligence can examine vast amounts of data, and correlate them, which is of real use for decision-makers. However, the introduction of technologies from the sphere of artificial intelligence must be treated carefully. Artificial intelligence can make a wrong decision by returning a person who has applied for asylum because there is a risk of being persecuted in the country of origin. States are ultimately signatories to international obligations. A balance must be struck between the obligations of States and the integration of technological progress. So far, artificial intelligence does not enjoy regulation like other areas[5].

3. Ethics in the use of IT systems

The European Union and beyond is facing a crisis of migrants waiting at the gates of Europe to obtain asylum. This presents a challenge in terms of border management. Speeches of political leaders show that they approach the issue of migration from a more humanitarian, inclusive perspective. Some authors believe that SIS II (the modern version of SIS)[6], VIS[7] and EURODAC[8] violate the principle of purpose limitation by collecting as much data as possible, exceeding the purposes for which they were established. Tools that were intended for migration, asylum and border management can affect the rights of migrants. Although these tools have been effective in combating illegal entry into the Union, technology can have enormous consequences for migrants'

[4] For more information use the following link: *https://www.etiaseu.com/articles/sis-vis-and-eurodac-the-security-system-of-the-schengen-zone*, accessed on 27.11.2023.

[5] M. Forster, *Refugee protection in the artificial intelligence era. A test case for rights. Research Paper, International Law Programme*, September 2022, pp. 1-38.

[6] For more information use the following link: *https://home-affairs.ec.europa.eu/*, accessed on 27.11.2023.

[7] Regulation (EC) no. 767/2008 of the European Parliament and of the Council of 09.07.2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

[8] Regulation (EU) no. 603/2013 of the European Parliament and of the Council of 26.06.2013 on the establishment of 'Eurodac'.

rights. There isn't a proper assessment of the impact these surveillance technologies can have, which raises some ethical concerns. The storage of personal and biometric information of migrants and asylum seekers is at an unprecedented level. The collection of personal data on a large scale by law enforcement authorities, internal security and national security (intelligence services), including European ones (such as Europol or Eurojust) may violate art. 8 ECHR regarding the right to respect for private and family life[9].

It is necessary that the norms be precise, limited to the purpose, regardless of the act that includes them: treaty, convention, law and so on. The need for the norm to be precise resides in the fact that it must not leave room for uncertainty in the mind of the reader. Moreover, another aspect that must be taken into account is that, in addition to the addressees, the acts involve the intervention of the national authority at various levels (public officials, scientists, lawyers, etc.), including technical instructions whose implementation rests with the officials specialised in the regulated field, which is why this must be taken into account when drafting the normative act[10].

ECtHR notes that it is not disputed by the Government that DnA material is personal data and that in the present cases there was an interference with the applicant's right to respect for his private life. The Court, having regard to its case-law, according to which DnA profiles clearly constitute data pertaining to one's „private life" and their retention amounts to an interference with the right to respect for one's private life within the meaning of art. 8 ECHR finds no reason to hold otherwise. The Court has also previously found that the retention of fingerprints amounts to an interference with the right to respect for private life, within the meaning of art. 8 ECHR. The retention of the applicant's DnA Profile and fingerprints therefore amounted to an interference with his private life. The applicant alleged under art. 8 ECHR that the indefinite retention of his DnA profile, fingerprints and photograph in accordance with the blanket policy of retention of personal data of any individual convicted of a recordable offence, amounted to a disproportionate interference with the right to respect for his private and family life and could not be justified[11].

We must say that that the European Parliament has considered the possibility of using artificial intelligence by police bodies and judicial authorities at various administrative and criminal investigation times in Resolution 2020/2016(INI) [12]. Thus, the European Parliament has considered limiting the technology that cannot correctly identify persons belonging to ethnic minorities, seniors or women, states will publish or use only computer systems that can be accessed in a transparent manner.

The European Parliament also stressed that any technology that automatically identifies people in the public space should be banned, any application and device that obtains its information from a private database will not be authorised, as there is a risk of law enforcement in a predictive manner. At the same time, the resolution proposes to ban systems that can carry out a social evaluation of people.

What we consider relevant in this analysis is the AI border management system represented by the iBorderCtrl program, which the European Parliament has considered to be an interference with the rights of persons transiting or requesting a form of protection. It is therefore assessed that this is, in fact, a computerised lie detector mechanism and which does not support the beneficiary with a proper service, because human rights are inviolable.

This system has been the subject of an analysis by the CJEU[13], in which the Court held that projects similar to iBorderCtrl were developed by persons who must respect the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union and, therefore, the entire technical documentation of the project cannot be published just because there is a suspicion of non-compliance with the Charter limits.

We must say also that other systems based on AI have also been developed at EU level to support people who require a form of protection such as DoNotPay[14], enabling the identification of efficient and free legal solutions or at a low cost.

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[9] S. Giray, C. Kaya, *The Role of Surveillance Technologies in the Securitization of EU Migration Policies and Border Management*, Uluslararası İlişkiler / International Relations, 2020, vol. 17, no. 68, Special Issue: Revisiting Migration in International Relations, pp. 145-160.

[10] R.-M. Popescu, *Claritatea, precizia și previzibilitatea – cerințe necesare pentru respectarea Constituției, a supremației sale și a legilor în România*, in Dreptul no. 9/2017.

[11] ECtHR, Case *GAUGHRAN v. THE UNITED KINGDOM*, app. no. 45245/15, 2020.

[12] European Parliament resolution of 06.10.2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters.

[13] CJEU, Case of C-135/22, *Patrick Breyer v. European Research Executive Agency*, 2023, para. 105-106.

[14] For more information use the following link: *https://donotpay.com/*, accessed on 27.11.2023.

Similar projects to iBorderCtrl have also been proposed in the United States, where the doctrine presents the AVATAR project that aims at the credibility of the person who appeals to the virtual assistant available at the border and which is a veritable automated interview device[15]. However, these devices must not replace the human decision regarding the recognition of refugee status, and the fact that it cannot be substituted for the assessment of the aspects which may constitute grounds for granting that status or other form of protection.

AI can also be used to support refugees in identifying a place where they can accommodate. Thus, GeoMatch is a project developed in Switzerland through which asylum seekers receive recommendations on which canton is most adapted to their needs[16].

At the same time, other traditional and accessible means for refugees already exist and can benefit from improvements, so the literature presents the situation of mobile terminals that are connected to GPS and the internet, as well as the situation of the mobile terminals, thus, the dependence on guides or traffickers is removed, however, access to these services can be used by states or malicious individuals to identify and intercept possible asylum seekers before they can complete the administrative application procedure[17].

Similarly, Germany has used artificial intelligence-based information systems to check the origin of asylum seekers, including linguistically[18]. However, these devices represent for some authors real challenges when we put in balance the protection of human rights, because systems with AI are inherently built with stereotypes or prejudices[19].

Thus, there may be a serious interference, threats to the physical and mental integrity of the asylum-seeker, discriminatory results, systematic perpetuation of discrimination and marginalisation, or violation of the principle of non-refoulement.

The European ethical Charter on the use of AI in judicial systems and their environment contains five fundamental principles when referring to the link between the judiciary and artificial intelligence. These principles are[20]:

- Principle of respect for fundamental rights: ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights;
- Principle of non-discrimination: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals;
- Principle of quality and security: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, in a secure technological environment;
- Principle of transparency, impartiality and fairness: make data processing methods accessible and understandable, authorise external audits;
- Principle „under user control": preclude a prescriptive approach and ensure that users are informed actors and in control of the choices made.

On 13.03.2024, the European Parliament approved the AI Act. According to the Regulation, „the purpose is to improve the functioning of the internal market and promoting the uptake of human centric and trustworthy artificial intelligence, while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, rule of law and environmental protection against harmful effects of artificial intelligence systems in the Union and supporting innovation"[21].

4. Conclusions

Public authorities must adapt to social dynamics. The role of public actors is to create confidence in the use of new technologies by their citizens.

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[15] N. Kinchin, D. Mougouei, *What can artificial intelligence do for refugee status determination? A proposal for removing subjective fear*, International Journal of Refugee Law, vol. 34, no. 3-4, October/December 2022, pp. 373-397.

[16] D. Walsh, *Using machine learning to help refugees succeed,* Stanford University - Human-Centered Artificial Intelligence, 13.11.2023, for more information use the following link: *https://hai.stanford.edu/news/using-machine-learning-help-refugees-succeed*, accessed on 27.11.2023.

[17] A. Alencar, *Technology can be transformative for refugees, but it can also hold them back*, Migration Policy Institute, 27.07.2023.

[18] M. Forster, *Refugee protection in the artificial intelligence era*, Research Paper, Chatham House, 07.09.2022, p. 6.

[19] *Idem*, pp. 9-10.

[20] *European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, European Commission for the Efficiency of Justice, Strasbourg, 2018, p. 3.

[21] European Union AI Act.

States are involved to international treaties, conventions, etc. The implementation of systems in the field of artificial intelligence must be carried out taking into account the legal and ethical dimensions. Fundamental human rights and the implications of managing the flows of asylum seekers are a dimension that states need to take into account. The principles and norms of *ius cogens* are guidelines in international law.

The use of technologically advanced tools is particularly challenging in areas of law where there is a high concern for the protection of certain social values such as criminal law, for example. In certain strategic decisions or areas that have a high impact on individuals, the existence of an external agent, an expert, would be necessary to avoid significant harm.

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THE PEACEFUL SETTLEMENT OF DISPUTES - FUNDAMENTAL PRINCIPLE OF PUBLIC INTERNATIONAL LAW

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Abstract

Enshrined in the 1970 Declaration, under the name of the principle of peaceful settlement of international disputes, the principle obliges states to settle their disputes by peaceful means, so that peace, international security and justice are not endangered. States must act in good faith and in a spirit of cooperation to reach a swift and just solution based on international law. For this purpose, states can resort to means such as: negotiation, investigation, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their choice, including any settlement procedure agreed upon, prior to the occurrence of a dispute to which they are parties.

Keywords: *peaceful settlement of disputes, dispute, fundamental principle of public international law, means of peaceful settlement of disputes.*

1. Introductory aspects

„The principles of international law represent legal constructions around values considered important for international relations, for their highlighting, their promotion in the system of legal rules and institutions that govern the international conduct of states and, in particular, for their protection"[1]. These principles „arise through the tacit or express agreement of states, by customary or conventional means [and] have an imperative character"[2]. International relations are regulated by the principles of international law.

The relations that are established within the international society arise and develop on the ground of the creation and application of international law, one of its fundamental principles being *the peaceful settlement of disputes*.

Peace, defined as the absence of war, has always been one of the major challenges faced in international law. The interests of international society highlight the efforts made by the international community of states to keep intact the «binding legal character of the principle of peaceful settlement of disputes, to keep war „outlawed". (...) The increasingly obvious disarmament and jurisdictionalisation of international life, especially through the International Court of Justice and the International Criminal Court, are contributing to the coherence of the notion of lasting peace. As a result, the use of force remains an option clearly framed and delimited by legal rules clearly defined by the international community»[3].

2. The notion of „dispute"

In public international law, international disputes arise between subjects of international law in the form of conflicts between states, disputes or litigation between states and international organisations, conflicts between international or even internal organisations within different international organisations. Conflicts between persons of private law and subjects of international law do not constitute a dispute of public international law *stricto sensu*. This is why the peaceful settlement of disputes occupies an important place in international relations. „The prolongation of conflicts is likely to question peace and security in international relations. In domestic law[4], the judge is the physical body called to settle disputes between different subjects of

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[1] A. Năstase, B. Aurescu, *Drept internațional public. Sinteze*, 9th ed., C.H. Beck Publishing House, Bucharest, 2018, p. 76.

[2] G. Geamănu, *Drept internațional public*, vol. I, Didactic and Pedagogic Publishing House, Bucharest, 1981, p. 126.

[3] B.M. Tchéré, *Le reglement pacifique des differends internationaux*, (*https://revuejuris.net/2020/09/04/le-reglement-pacifique-des-differends-internationaux/#:~:text=La%20mission%20de% 20la%20CIJ,pas%20tous%20deux%20des%20Etats.*, accessed on 04.10.2023).

[4] With regard to domestic law, the remark made in the doctrine draws attention, namely: „The internal determination of law is based on the legal quality of will and interest, which is the essential quality of the whole legal system. No matter how many changes the legal system undergoes, this quality will remain unchanged" (M.-C. Cliza, C. Nivard, L.-C. Spătaru-Negură, *The European Social Charter and the*

law, whether they are persons of private law or persons of public law. In public international law, the absence of an institution similar to the justice of peace does not necessarily mean an absence of rules to which the subjects of international law must obey, for the settlement of their disputes"[5].

Not every dispute arising in international relations can be qualified as „dispute", even if, we are, often in the presence of subjects of public international law which have as object, a more or less specific subject. We are going to approach situations of *international dispute* likely to endanger, by their dimension, international peace and security.

In international disputes we encounter subjects of international law. *Ratione personae*, disputes may involve conflicts between states, between states and international organisations, or between international organisations. However, conflicts between persons of private law and subjects of public international law do not constitute an international dispute.

In 1924, PCIJ, in the judgment in Mavrommatis Case[6], defined *the dispute* as „a disagreement on a question of law or fact, a contradiction, an opposition of theses or legal interests between two states". In the practice of the International Court of Justice, reference is often made to this definition offered by the PCIJ, as early as 1924. Thus, in the judgment pronounced in the case of Northern Cameroon[7], the Court considered that „it is sufficient to state that (...) the opposite positions of the parties regarding the interpretation and application of the relevant articles of the Trusteeship Agreement reveal the existence, between the Republic of Cameroon and the United Kingdom, (...) of a dispute that they have, in the sense accepted by the jurisprudence of the current and former court"[8]. In the same sense, there is also an advisory opinion[9] of the Court from 1988, in which the court considered that „the existence of an international dispute must be established objectively", but also the judgment pronounced in the East Timor case[10] in which „the Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a matter of law or fact, a conflict, an opposition of theses or legal interests between the parties"[11]. A final example that we have in mind is the judgment of the ICJ in *the Land and Maritime Boundary Case* between Cameroon and Nigeria[12] which states that, „having the meaning accepted in its jurisprudence and in that of its predecessor, a dispute is a disagreement on a matter of law or fact, a conflict, an opposition of legal theses or interests between the parties"[13].

The notion of *dispute* should not be confused with the notion of *situation*. According to art. 34 of the UN Charter, *the situation* is a state of fact that „could lead to international friction or give rise to a dispute". The dispute arises from a claim of a state against another state that refuses to comply with it.

Disputes vary widely in both their severity and nature. In public international law, they can be classified into *legal disputes* and *political disputes*.

Legal disputes are those in which the parties dispute a right. At the same time, these disputes may have as object, a misunderstanding between the states, regarding the existence, application or interpretation of a rule of law (for example: the interpretation of a treaty; any issue of international law; the existence of any fact, which, if established, would constitute a breach of an international obligation; the nature and extent of compensation due because of a breach of an international obligation)[14].

Theory of Human Rights Law, in The European Social Charter: A Commentary, vol. 1, Cross-cutting Themes, Koninklijke Brill NV, Leiden, 2022, p. 211).

[5] *Ibidem*.

[6] The judgment of 30.08.1924, *Affaire des concessions Mavrommatis en Palestine*, in Publications de la Cour Permanente de Justice Internationale, series A, no. 2, p. 11 (*https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf*, accessed on 04.10.2023).

[7] *Affaire du Cameroun septentrional (Cameroon v. Royaume-Unie)*, Exceptions préliminaires, judgment of 02.12.1963, ICJ Recueil 1963, p. 15 (*https://www.icj-cij.org/sites/default/files/case-related/48/048-19631202-JUD-01-00-FR.pdf*, accessed on 23.01.2024).

[8] *Idem*, p. 27.

[9] *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'Accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies*, Advisory Opinion of 26.04.1988, ICJ Recueil 1988, p. 12 (*https://www.icj-cij.org/sites/default/files/case-related/77/077-19880426-ADV-01-00-FR.pdf*, accessed on 23.01.2024).

[10] *Timor Oriental (Portugal v. Australia)*, judgment of 30.06.1995, ICJ Recueil 1995, p. 90 (*https://www.icj-cij.org/sites/default/files/case-related/84/084-19950630-JUD-01-00-FR.pdf*, accessed on 23.01.2024).

[11] *Idem*, p. 99-100, para. 22.

[12] *Frontière terrestre et maritime entre le Cameroun et le Nigéria*, exceptions préliminaires, judgment of June 11, 1998, ICJ Recueil 1998, p. 275 (*https://www.icj-cij.org/sites/default/files/case-related/94/094-19980611-JUD-01-00-FR.pdf*, accessed on January 23, 2024).

[13] *Idem*, p. 314, par. 87.

[14] Art. 36 para. (2) of the ICJ Statute: „2. The states parties to this Statute may at any time declare that they recognize as *ipso facto* binding and without a special convention, in relation to any other state accepting the same obligation, the jurisdiction of the Court for all legal disputes having as object: a. the interpretation of a treaty ; b. any issue of international law; c. the existence of any fact that, if

Political disputes are those in which the contradiction has no legal ground, but represent claims that have no counterpart in positive law; the parties rely on extrajudicial considerations.

International disputes must be settled based on the sovereign equality of states and in accordance with the principles of free choice of means. The recourse to a settlement procedure or the acceptance of such a procedure freely consented to by States in respect of a dispute to which they are parties, or a dispute to which they may be parties in the future, cannot be regarded as incompatible with sovereign equality.

3. The principle of peaceful settlement of disputes

One of the particularities of public international law resides in the fact that it benefits from its own principles, different from the principles of law, known by the constitutional systems of states. It concerns those „legal constructions created around values considered important for international relations, (...) which govern the international conduct of states”[15]. These principles „arise through the tacit or express agreement of states, by customary or conventional means [and] have an imperative character”[16]. International relations are regulated through the principles of international law.

The fundamental principles of international law are rules of universal application, which means that they can be applied in all fields, as a result of the will of the overwhelming majority of states and have an *erga omnes* effect). They are characterised by maximum generality[17], in the sense that "they represent the abstraction of what is essential from the entire system of public international law, having a leading and dominant role for this system"[18]. At the same time, they have an imperative character (they are *ius cogens* legal rules), they are binding and they protect a fundamental value in the relations between the subjects of public international law.

Pursuant to *the Declaration on the Principles of International Law Concerning Friendly and Cooperative Relations between States, according to the United Nations Charter of 1970*[19], all states must „be inspired by these principles in their international conduct, and develop their mutual relations based on the strict observance of the above-mentioned principles”. Among the principles enshrined in the Declaration[20], there is also the principle of peaceful settlement of international disputes. Under this principle, states must settle their disputes by peaceful means so that peace, international security and justice are not endangered. Thus, states have the obligation to identify a fair settlement of their international disputes by resorting to one of the following means: negotiation, investigation, mediation, conciliation, arbitration, judicial settlement. They can also resort to regional bodies and agreements.

The parties to an international dispute have the obligation, should they fail to reach a solution through one of the peaceful means, to continue to seek a settlement of their dispute through other peaceful means upon which they shall agree. States involved in an international dispute, as well as other states, must refrain from any act likely to aggravate the situation, so as not to endanger international peace and security.

International disputes must be settled based on the sovereign equality of states and in accordance with the principles of free choice of means. The recourse to a settlement procedure or the acceptance of such a procedure freely consented to by States in respect of a dispute to which they are parties, or a dispute to which they may be parties in the future, cannot be regarded as incompatible with sovereign equality.

Enshrined in the 1970 Declaration, under the name of *the principle of peaceful settlement of international disputes*, the principle is also found in the *Declaration on the principles governing mutual relations between the participating states*, an integral part of *the Final Act of the Conference for Security and Cooperation in Europe, drawn up in Helsinki on August 1, 1975*. Thus, states „shall endeavour in good faith and in a spirit of cooperation to reach a swift and equitable solution based on international law.”

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established, would constitute a violation of an international obligation; d. the nature or extent of the reparation due because of the breach of an international obligation”.

[15] A. Năstase, B. Aurescu, *op. cit.*, p. 76.

[16] G. Geamănu, *Public International Law ...*, *op. cit.*, p. 126.

[17] «In respect of the term „general”, Franck Moderne raised the question on the degree of generality used in order to define a principle as being general - at the level of an institution, of a branch of the law or at the level of the entire legal order» (E. Anghel, *General Principles of Law*, LESIJ no. XXIII, vol. 2/2016, p. 120).

[18] A. Năstase, B. Aurescu, *op. cit.*, p. 78.

[19] UN General Assembly Resolution no. 2625 (XXV) October 24, 1970, at the 25th (1970) jubilee session of the UN General Assembly.

[20] The declaration includes 7 fundamental principles, namely: the principle of non-recourse to the threat of force or the use of force; the principle of resolving international disputes by peaceful means; the principle of non-interference in the internal affairs of states; the principle of cooperation; the principle of self-determination; the principle of sovereign equality of states; the principle of fulfilling international obligations in good faith - *pacta sunt servanda*.

The obligation to settle disputes by peaceful means is the first rule to which the subjects of public international law must obey. It prohibits the use of force to enforce claims or settle disputes. Beginning with the Briand-Kellogg Pact, war, as a means of settling disputes, was prohibited. This obligation is the corollary of the prohibition to threaten or resort to force in order to settle international disputes, a prohibition which is expressly mentioned in art. 2 para. (3) of *the UN Charter*[21].

On November 15, 1982, the UN General Assembly adopted, in its session of 1980, held in Manila (Philippines), the *Manila Declaration on the Peaceful Settlement of International Disputes*[22], based on a text prepared by the Special Committee on the Charter of the United Nations and for Strengthening the Organization's Role. The declaration was developed at the initiative of the following states: Egypt, Indonesia, Mexico, Nigeria, Philippines, Romania, Sierra Leone and Tunisia.

According to point 2 of the Declaration, „all states must settle their international disputes exclusively by peaceful means, so that international peace and security and justice are not endangered". In accordance with the provisions of the Declaration, the settlement of disputes is achieved based on the sovereign equality of states and in accordance with the principle of free choice of means, complying with the obligations arising from the UN Charter and the principles of justice, respectively of public international law[23].

Throughout the duration of the dispute, the states parties must continue to respect in their mutual relations, their obligations under the fundamental principles of international law regarding the sovereignty, independence and territorial integrity of states[24]. Also, these States, as well as others not involved in the dispute, must refrain from any act likely to aggravate the situation to the point of jeopardising the maintenance of international peace and security[25] and making it difficult or preventing a peaceful settlement of the dispute.

Before addressing the Security Council or the UN General Assembly, in accordance with the provisions of the Charter of the United Nations, "states party to regional agreements or organisations shall make every effort to settle their local differences by peaceful means through such agreements or organisations".

Starting from the content of the Declaration, we can identify, both for the states involved in the dispute and for third states, a series of "correlative obligations, among which it should be noted: during the peaceful settlement process, the states party to an international dispute, like other states, must refrain from any act likely to aggravate the situation; since peaceful settlement has been established as a fundamental principle of international law, both parties have the obligation to settle the dispute peacefully; strict compliance with the principle of the freedom of parties to choose the modalities of this regulation is required; disputes must be settled in accordance with the principles of justice and international law"[26].

4. Means of peaceful settlement of disputes

The issue of the peaceful settlement of international disputes was discussed as early as 1899 and 1907, at the Hague Peace Conferences, but within the conventions concluded at those conferences, war, as a means of settling disputes, was not prohibited. It was only in 1928, through the Briand-Kellogg Pact, that military means of conflict resolution were recognized as illegal. Therefore, with the prohibition of interstate armed conflicts, peaceful dispute settlement procedures have become a fundamental principle of international law aimed at preventing and resolving conflicts between states, by peaceful means.

The settlement of disputes can be characterised by the existence of an obligation and a right, as follows: the obligation of the parties involved to settle disputes by peaceful means and the right (freedom) of choice of the parties regarding the method of settlement of these disputes.

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[21] Art. 2 para. (3) of the UN Charter: „All Members of the Organization shall settle their international disputes by peaceful means, in such a manner that international peace and security, as well as justice, are not endangered."

[22] Endorsed by Resolution 37/10 (*https://documents.un.org/doc/resolution/gen/nr0/427/42/pdf/nr042742.pdf?token=bdFxEanoUxZ7bNeljm&fe=true*, accessed on 22.02.2024).

[23] Point 3 of the Declaration.

[24] Point 4 of the Declaration.

[25] We note that this obligation is not imposed only at the level of UN member states; it is also present in the regulations of the European Union. Thus, „maintaining peace and strengthening international security according to the principles of the United Nations Charter, as well as the principles and objectives of the Helsinki Final Act and the objectives of the Paris Charter, including those relating to external borders" is one of the objectives of the Union (A. Fuerea, *Dreptul Uniunii Europene. Principii, libertăți, acțiuni*, Universul Juridic Publishing House, Bucharest, 2016, p. 18).

[26] R.M. Beșteliu, *Drept internațional public*, vol. II, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014, p. 2.

The peaceful settlement of disputes was first codified in the *Hague Convention for the Settlement of International Disputes* of October 18, 1907. Currently, this obligation is found in the UN Charter, in art. 33 para. (1). Thus, „the parties to any dispute, the prolongation of which could endanger the maintenance of international peace and security must seek to settle it, first of all, through negotiations, investigation, mediation, conciliation, arbitration, through judicial means, recourse to organisations or regional agreements or by other peaceful means of their choice".

According to point 5 of the Manila Declaration[27], states must seek in good faith and in a spirit of cooperation, a swift and equitable solution to their international disputes through any of the following means: negotiation, investigation, mediation, conciliation, arbitration, judicial settlement, recourse to agreements or regional entities or through other peaceful means chosen by them, including good offices. In seeking this solution, the parties will agree on peaceful means that are appropriate to the circumstances and nature of the dispute.

Therefore, states are free to choose the method of dispute settlement: through non-jurisdictional or jurisdictional procedures.

Non-jurisdictional procedures are represented by political-diplomatic means (negotiation, good offices, mediation, investigation and conciliation), while jurisdictional procedures include arbitration and institutionalised courts. Recourses to international organisations in order to settle the dispute, are also included in the jurisdictional procedures.

If by using one of the mentioned peaceful means, a solution is not reached, the parties to the dispute must identify a mutually acceptable means to settle the dispute peacefully.

States parties to a dispute have the obligation to refrain from any action that could aggravate the situation so as to endanger the maintenance of international peace and security and thereby make the peaceful settlement of the dispute more difficult.

5. Conclusions

The legal rules of public international law come from the will of the states, which is materialised in conventions or customs, generally accepted as enshrined and established legal principles for the purpose of regulating the coexistence of these independent communities or in order to pursue common objectives[28]. States have reached a consensus that whenever disagreements between them escalate into a dispute, it should be submitted to peaceful settlement. Art. 2 para. (3) of the UN Charter obliges member states to „settle their international disputes by peaceful means". Moreover, art. 33 of the Charter provides a list of ways (negotiation, mediation, arbitration, etc.) from which states can choose to settle disputes that, if left unsettled, would endanger international peace and security. International documents subsequent to the Charter, such as the Helsinki Final Act of 1975 and the Manila Declaration of 1982, contain legal rules confirming the willingness of states to accept the settlement of their disagreements by peaceful means. Currently, the settlement of international disputes by peaceful means represents one of the fundamental principles of international law, with significant character[29].

This guiding principle of international law aims at maintaining international peace and security, along with ensuring international justice, should these be endangered by unilateral armed attacks or multilateral aggression. It is universally applied, as result of the will of the overwhelming majority of states, and has *erga omnes* effect. Moreover, it has imperative character, being, therefore, a legal rule of *jus cogens*.

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[27] *Precited*.

[28] R.-M. Popescu, *Drept internațional public. Noțiuni introductive*, Universul Juridic Publishing House, Bucharest, 2023, p. 19.

[29] „Perhaps more than ever, humanity faces this reality: the obligation to identify legislative solutions for the time being as well as for future generations along the fine lines between law, ethics and morality. This is why the drafters of international legal instruments, which will subsequently be reflected in national legislation must show great wisdom in proposing those measures that safeguard the present as well as the future on the one hand and, on the other hand, that guarantee the existence of the rule of law" (E.E. Ștefan, *News and Perspectives of Public Law*, Athens Journal of Law, vol. 9, issue 3, July 2023, p. 395).

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- *Frontière terrestre et maritime entre le Cameroun et le Nigéria*, exceptions préliminaires, judgment of June 11, 1998, ICJ Recueil 1998;
- The UN Charter;
- ICJ Statute;
- UN General Assembly Resolution no. 2625 (XXV) October 24, 1970, at the 25th (1970) jubilee session of the UN General Assembly.

NATURE OF THE DISTINCTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW AS BRANCHES OF INTERNATIONAL LAW

Kremena RAYANOVA [*]

Abstract

Despite the fact that there is a trend in understanding international humanitarian law and international human rights law as two separated branches of international law, discussions about these two concepts and their relationship continues. Rather than looking for which approach is correct, we should analyse what implications these discussions have in both theoretical and applied terms. To achieve that it is necessary to ascertain what is the nature and, consequently, what are the implications of identifying international humanitarian law and international human rights law as branches of international law, as well as the attributing specific norms to a particular branch.

Keywords: *international law, international humanitarian law, legal regulation, human rights.*

1. Introduction

The fairness of the application of the approach widely held in legal theory, according to which the division into branches depends on the object and method of legal regulation, is disputed even with regard to the rules of national law. Thus, some authors insist on the use of criteria such as the „presence of specific functions", the purpose and content of the legal regulation, the particularities of the subject composition and the types of legal liability.

2. Contents

The term „law of war"[1] has long been used to refer to international legal norms concerning the laws and customs of war, the codification of which began in 1864[2], but as the ICJ noted in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. Over time, these norms were given a new name, „international humanitarian law". By the mid-1970s in the twentieth century, the concept of "international humanitarian law" became associated with the Geneva Conventions, dedicated to the protection of the victims of war, and was separated from the Hague Conventions, which limited the means and methods of warfare. It is this approach that is reflected in the writings of such scholars as, for example, D. Levin,[3], L. Savinsky[4], as well as K. Ipsen. It is generally accepted that with the adoption of the two Additional Protocols to the Geneva Conventions for the Protection of Victims of War[5] in 1977, this distinction was to some extent overcome[6]. Today, the term „international humanitarian law" is mainly used as a generic term for the Geneva and Hague Conventions [7].

In addition to the concept of „international humanitarian law", it has been proposed in academic and educational literature to use terms such as „law of armed conflict"[8], „law of war"[9] to refer to rules dealing with

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[1] Мартенс Ф.Ф., *Современное международное право цивилизованных народов*. СПб.: Тип. Министерства путей сообщения (А. Бенке), 1883. Т. 2, p. 513.

[2] ICJ, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 08.07.1996, para. 75.

[3] А.И. Полторак, Л.И. Савинский, *Вооруженные конфликты и международное право*, М.: Наука, 1976, p. 80.

[4] K .Ipsen, *Völkerrecht*. München: Beck, 2004, S. 1211, 1219-1220.

[5] Additional Protocol I to the Geneva Conventions of 12.08.1949, relating to the protection of victims of international armed conflicts, dated 08.06.1977.

[6] W.H. von Heinegg, *Entschädigung für Verletzungen des humanitären Völkerrechts // Berichte der Deutschen Gesellschaft fuer Voelkerrecht*, Bd. 40. Heidelberg, 2003, p. 5-6.

[7] *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, para. 75.

[8] Международное право: Учебник / Отв. ред. С.А. Егоров. 5-е изд. М.: Статут, 2014, p. 997-1004; Арцибасов И.Н., Егоров С.А. Вооруженный конфликт: право, политика, дипломатия. М.: Международные отношения, 1989, p. 19; Белугина А.В. Указ. соч., p. 12; Бирюков П.Н. Международное право: Учебник для вузов. 6-е изд. М.: Юрайт, 2013, p. 517.

[9] Фердросс А. Международное право. М.: Иностр. литер., 1959, p. 429.

the conduct of armed struggle and the protection of victims of armed conflict"[10], „international humanitarian law applicable to armed conflict"[11], „international law during armed conflict"[12].

At the same time, with the polyphony of viewpoints still existing, there is now a tendency to use the term „international humanitarian law" to refer to international legal norms specifically designed to protect the victims of armed conflict and limit the means and methods of war. One of the most frequently cited is the definition of „international humanitarian law" formulated by H.-P. Gasser, „the law applied in armed conflicts ... which attempts to mitigate the manifestations of war by, first, imposing restrictions on the methods of warfare ... and, second, obliging those engaged in hostilities to protect those who do not or have ceased to engage in hostilities".[13] A similar approach to the definition of this concept has been followed in recent decades by the UN, the International Criminal Court as well as the International Committee of the Red Cross (hereinafter ICRC), which is by no means a passive guardian of the Geneva Conventions and their Protocols, but actively contributes to the further development of international legal norms in this field[14].

There are many approaches to the relationship between the concepts of „international humanitarian law" and international human rights law, but despite the fact that it is still impossible to put an end to the decades-long dispute over the terms, it should be noted that a viewpoint has already been formed that is shared by most researchers. The prevailing view in scholarship is that international humanitarian law and international human rights law are two independent branches of international law[15].

It should be noted that J. Pictet, the author of the famous commentaries on the Geneva Conventions who introduced the term „international humanitarian law" into scholarly circulation, pointed out in his earlier writings its dual nature, including in this concept both the international law protection of human rights and the law of war[16]. Over time, however, his position changed - he came to see international humanitarian law as „an important part of public international law that draws inspiration from the ideas of humanity and that focuses on the protection of people in times of war[17], indicating that international human rights protection and international humanitarian law are "close but distinct and should remain so as they complement each other perfectly"[18].

As a generic name for these two branches of G. Pictet proposes to use the term „humane law"[19]. Another authoritative international jurist, T. Meron, also insists that these branches of law are „distinct and must remain distinct" and „there is no point in pretending that international humanitarian law and international human rights law are one and the same"[20].

Proponents of this approach offer definitions of international human rights law that are quite similar in meaning. For example, A. Saidov proceeds from the fact that it is „a branch of modern public international law which establishes obligations for the subjects of international law with respect to persons under their jurisdiction to guarantee, respect and protect their rights and freedoms"[21]. Y. Kolosov, D. Bekjashev and D. Ivanov understand „international human rights law" as „principles and norms governing international cooperation in the promotion and protection of human rights, the respective rights and obligations of the subjects of international law, including the obligation of States to respect the rights and fundamental freedoms of all people without distinction of race, sex, language or religion". According to V. Gavrilova, „international human rights law protection" is „a set of international legal principles and norms that determine the general standards and framework of conduct of States in their activities to recognize, protect and control the observance of socially determined rights and freedoms of individuals and their associations in a particular territory, as well as to regulate inter-State cooperation in this area". The author specifies that the „international legal protection of human rights has its own specific sources, special sectoral principles and qualitatively distinct subject matter of

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[10] В.А. Батырь, *Международно-правовая регламентация применения средств ведения вооруженной борьбы в международных вооруженных конфликтах // Государство и право*, 2001, no. 10, p. 63.

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[12] П.Н. Бирюков, *Международное право: Учебник для вузов*. 6-е изд. М.: Юрайт, 2013, p. 562-563.

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[14] *http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf*.

[15] M. Shaw, *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008, p. 1167-1170; International Law / ed. by M.D. Evans, 4th ed., Oxford: Oxford University Press, 2014, p. 783-790, 821-831.

[16] J. Pictet, *Le droit humanitaire et la protection des victimes de la guerre*, Leiden: Sijthoff, 1973, p. 11.

[17] J. Pictet, *International Humanitarian Law: Definition // International Dimensions of Humanitarian Law. International Dimensions of Humanitarian Law*, Geneva: Henry-Dunant Institute/UNESCO, 1986, p. XIX.

[18] Ж. Пикте, *Развитие и принципы международного гуманитарного права*, М.: МККК, 2001, p. 11.

[19] Х.-П. Гассер, *Международное гуманитарное право. Введение*. М.: МККК, 1999, p. 12.

[20] T. Meron, *International Criminalization of Internal Atrocities*, in American Journal of International Law, 1995, vol. 89, p. 100.

[21] Саидов А.Х. Указ. соч., p. 11.

legal regulation", which is why its „must be distinguished from (...) international humanitarian law, the norms of which are aimed exclusively at protecting the participants and victims of armed conflicts and limiting for this purpose the means and methods of warfare"[22]. The existence of two branches - international humanitarian law and the international protection of human rights – was the basis for the advisory opinions of the International Court of Justice on the legality of the threat or use of nuclear weapons in 1996 and on the legal implications of the construction of a wall in the Occupied Palestinian Territory in 2004, as well as the 2005 decision in the Case *Democratic Republic of Congo v. Uganda*[23].

In addition to this approach to the relationship between the concepts of „international humanitarian law" and international human rights protection, scholarship presents others, the essence of which is that the scope of these two concepts is fully or partially inclusive. Some scholars, when formulating the concept of „international humanitarian law", start from the meaning given to the term „humanitarian" – „relating to man and his culture; directed to the human person, to the rights and interests of man". So, according to I. Blishchenko, A. Sukharev and O. Smolnikova, „international humanitarian law is a set of international legal norms defining the regime of human rights and freedoms in peacetime and in times of armed conflict, as well as a set of legal norms defining the limitation of the arms race, the restriction and prohibition of certain types of weapons and disarmament".[24] O.I. Tiunov also uses the concept of „international humanitarian law" as a general one, including in it «contemporary international norms relating to human rights in all aspects of these rights („human rights law")», and „humanitarian norms that have evolved with regard to the protection of the individual in a particular situation, namely in armed conflict"[25], which the author also calls „international humanitarian law"[26], clearly based on the possibility of appealing to this concept in a broad and narrow sense.

A. Kapustin adheres to a similar position, understanding by „international humanitarian law" the norms of international human rights law, as well as „international humanitarian law applicable in armed conflicts".[27] D. Yagofarov also notes that „international humanitarian law essentially includes human rights norms applied ... in times of war and/or armed conflict"[28]. The same approach is used by Biryukov, however, using the concept of „international humanitarian law" to mean „a body of international legal principles and norms governing the provision and protection of human rights and freedoms both in peacetime and in times of armed conflict, the regulation of cooperation between States in the humanitarian sphere, the legal status of all categories of persons, and the establishment of responsibility for violations of human rights and freedoms". Accordingly, calling „international law in time of armed conflict" a branch of international law that „determines the permissibility of the means and methods of warfare, provides for the protection of victims of armed conflict, establishes the relations between belligerent and non- belligerent States"[29].

Another approach to the relationship between the concepts of „international humanitarian law" and international human rights protection is that, on the contrary, international humanitarian law, which contains rules that grant individuals subjective rights, is in this part included in international human rights law. This position has been consistently held by Kartashkin, who since the mid-1970s has written that „human rights as a branch of international law are a set of principles and norms embodied in three (...) groups of international instruments": the first includes „principles and norms relating to human rights mainly in conditions of peace", the second, „international conventions for the protection of human rights in time of armed conflict", and the third, „international instruments which regulate responsibility for criminal violations of human rights both in peaceful"[30]. Accordingly, the scholar provides the following definition of this industry: „a set of principles and

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[22] *Idem*, p. 480.

[23] ICJ: Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, para. 25; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 09.07.2004, para. 102, 106, *http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case =131&code=mwp&p3=4* (далее - Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory); Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda, Judgment, 19.12.2005, para. 217-219 [Электронный ресурс], *http://www.icj-cij.o*.

[24] И.П. Блищенко, *Обычное оружие и международное право*, М.: Международные отношения, 1984, p. 75; О.Ю. Смольников, А.Г. Шапочка, *Красный Крест и международное гуманитарное право в современном мире*, М.: Медицина, 1989, p. 9.

[25] О.И. Тиунов, Указ. соч. p. 10.

[26] *Idem*, p. 151.

[27] Международное гуманитарное право: Учебник / Под ред. А.Я. Капустина. 2-е изд. М.: Юрайт, 2011, p. 9.

[28] Д.А. Ягофаров, Международное гуманитарное право // Права человека: энциклопедический словарь / Отв. ред. С.С. Алексеев. М.: Норма: ИНФРА-М, 2013, p. 523.

[29] П.Н. Бирюков, *Международное право: Учебник для вузов*, М.: Юрайт, 2013, p. 562-563.

[30] В.А. Карташкин, Права человека: международная защита в условиях глобализации, p. 50-51; В.А. Карташкин, Международное право и личность // Современное право, 2012, no. 11, p. 110-118.

norms that define the obligation of states to guarantee and respect fundamental human rights and freedoms without discrimination of any kind, both in peacetime and during armed conflict, and also establish responsibility for criminal violations of these rights"[31]. This point of view is shared by N. Morozov[32], as well as A. Saidov, directly stating that „international humanitarian law is included in international human rights law in the part that relates to the rights of victims of war"[33]. Indeed, international humanitarian law and international human rights law have both similarities and differences. The generality and even interconnectedness of these norms is due to the fact that both branches of international law pursue the same goal - the protection of the individual[34]. Moreover, human rights and international humanitarian law have influenced each other in their development[35]. The Universal Declaration of Human Rights[36] was taken into account in the formulation of the provisions of the Geneva Conventions for the Protection of Victims of War of 1949, and the provisions of the International Covenants of 1966 were taken into account in the texts of the two Additional Protocols to the Geneva Conventions adopted in 1977. At the same time, the branches of international humanitarian law and international human rights law have different histories, are codified in different sources and are only partially applicable to the same relations[37]. Unlike international human rights law, international humanitarian law is specifically designed to regulate armed conflict and therefore deals with such concepts as „military objectives", „military necessity", „combatants", „direct participation in hostilities", „collateral damage", „internment" and many others[38], *i.e.*, if human rights are based on the principle of humanity, then international humanitarian law is a compromise between the requirements of humanity and military necessity. Finally, if fundamental human rights are universal, the application of international humanitarian law is limited both by the type of armed conflict and by the category of persons to which a person falls[39].

So, the treaty norms of international humanitarian law emerged much earlier than international human rights treaties, humanitarian law obligations extend to other actors, including non-state actors, the specificity of norms in this sector is to limit their application to armed conflict and occupation. International humanitarian law, like international human rights law, has developed its own system of principles. Moreover, the norms of international humanitarian law and international human rights law have long been enshrined in various international treaties. All this cannot but provide a basis for isolating the body of international legal norms designed to regulate the situation of armed conflict from all others, including the norms of international human rights law. In general terms, the division of international law norms into those related to international humanitarian law and those related to international human rights law is a manifestation of the fragmentation of international law, a natural process of norm diversification due to the expansion of the subject matter of regulation and the geographical, institutional and functional decentralisation of international law-making and law enforcement bodies.

Despite the fact that there is a trend in understanding international humanitarian law and international human rights law as two separated branches of international law, discussions about these two concepts and their relationship continues. Rather than looking for which approach is correct, we should analyse what implications these discussions have in both theoretical and applied terms. To achieve that it is necessary to ascertain what is the nature and, consequently, what are the implications of identifying international humanitarian law and international human rights law as branches of international law, as well as the attributing specific norms to a particular branch.

The fairness of the application of the approach widely held in legal theory, according to which the division into branches depends on the object and method of legal regulation , is disputed even with regard to the rules

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[31] Права человека: Учебник / Отв. ред. Е.А. Лукашева. 2-е изд. М.: Норма: ИНФРА-М, 2012, p. 495.

[32] Н.В. Морозов, *Права человека*: Учеб. пособие. М.: Московский фил. ЛГУ им. А.С. Пушкина, 2012, p. 268-269.

[33] А.Х. Саидов, *op. cit.*, p. 72.

[34] Ж. Пикте, *Развитие и принципы международного гуманитарного права*, М.: МККК, 2001, p. 11; А. Эйде, *Внутренние волнения и напряженность / Международное гуманитарное право / Аби-Сааб Д. и др. М.: Ин-т проблем гуманизма и милосердия*, 1993, p. 341.

[35] H.-P. Gasser, *International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion?*, German Yearbook of International Law, 2002, vol. 45, p. 152-153.

[36] Всеобщая декларация прав человека от 10 декабря 1948 г. Резолюция 217 А (III) Генеральной Ассамблеи ООН // Действующее международное право. Т. 2, p. 5.

[37] H.-P. Gasser, *op. cit.*, p. 161-162.

[38] Х.-П. Гассер, *Международное гуманитарное право*, Введение, p. 27.

[39] Ch. Greenwood, *Historical Development and Legal Basis // The Handbook of Humanitarian Law in Armed Conflicts*, ed. by D. Fleck, Oxford: Oxford University Press, 2003, p. 9.

of national law. Thus, some authors insist on the use of criteria such as the 'presence of specific functions'[40], the purpose and content of the legal regulation, the particularities of the subject composition and the types of legal liability.

In international law, which is a separate legal order, these two criteria obviously cannot be applied: in international law, one method of legal regulation is used - that is the method of „coordinating, harmonising the wills of states"[41].

At least three main approaches have been presented in the scholarly literature that are proposed to be used in the process of dividing international law into branches. First, the recognition of the existence of a branch of international law may be based on the attribution to rules governing a particular group of relations with the properties of „autonomous" or „self-contained" regimes. Secondly, a functional approach may be used, where a set of norms is considered as a „special regime"[42]. Finally, third: this can be an extremely utilitarian approach. This occurs when a number of norms governing a particular area of relations, based on a set of criteria, are combined under a certain general concept for ease of understanding, teaching or application. Without, however, claiming to clearly distinguish the norms of that industry from others.

If we are to understand an autonomous or self-contained regime as „an interrelated set of rules on a particular subject matter, together with rules designed to create, interpret and apply, modify and terminate those rules", *i.e.*, as a regime isolated from general international law, then we must recognize that M. Koskenniemi was right to conclude, in a report on the fragmentation of international law prepared under his direction, that none of the regimes claiming to be self-sufficient is completely closed, if only by virtue of clause 3(c) of art. 31 of the Vienna Convention on the Law of Treaties, which subjects every treaty to the „principle of systemic integration"[43]. Accordingly, neither international humanitarian law nor international human rights law are autonomous regimes *stricto sensu*.

In considering whether international human rights law can be considered an autonomous regime in the broad sense, *i.e.*, isolated not from general international law but from other branches, it would be fair to draw a line between the individual international human rights treaties that provide for the creation of a jurisdictional body, on the one hand, and the general body of international law governing human rights, on the other. But even individual international human rights treaties cannot be considered autonomous regimes, since art. 31(3)(c) of the Vienna Convention on the Law of Treaties indicates that, in addition to the context, the interpretation of the rules takes into account „all relevant rules of international law applicable in the relations between the parties". Even if we were to recognize these treaty regimes as autonomous, this isolation is not an inherent property of the entire body of international human rights law, but merely an artificial construct designed to resolve pragmatic problems related to the need to establish and limit the competence of treaty bodies. Going beyond this institutional perspective, it should be concluded that, in general, the norms of international human rights law cannot be regarded as an autonomous regime, since they do not exclude reference to general norms not only of the law of treaties, but also of international responsibility, recognition of subjects of international law, succession, territory, etc., including the norms of international humanitarian law. Therefore, neither international humanitarian law nor international human rights law can be recognized as autonomous regimes, neither in a narrow nor in a broad sense.

The next step is to determine whether these sets of rules constitute „special regimes". Unlike the concept of „autonomous regime", which is based on the opposition of a special set of rules to general international law, the concept of „special regime" implies the possibility of distinguishing it from other „special regimes" by the subject matter of regulation[44]. But is it possible to clearly separate international humanitarian law and international human rights law in terms of the subject matter of regulation? The subjects of regulation of these branches do overlap, insofar as international humanitarian law contains human rights norms. As the ICJ stated in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, three situations are possible: „some rights may be exclusively governed by international humanitarian law, others may be exclusively governed by human rights law, and some may be subject to both branches of

[40] Т.Н. Радько, *Теория государства и права*, М.: Проспект, 2011, p. 403.

[41] Л.П. Ануфриева, *Соотношение международного публичного и международного частного права (сравнительное исследование правовых категорий): дис докт. юрид. наук.*, М.,2004, p. 240.

[42] Международное право: Учебник для бакалавров / Под ред. А.Н. Вылегжанина. 2-е изд. М.: Юрайт, 2012, p. 42.

[43] Виенска конвенция за правото на договорите от 1969.

[44] Е.Т. Усенко, *О системе международного права*, Советское государство и право, 1988, no. 4, p. 117-126.

international law"[45]. Therefore, it cannot be concluded that international humanitarian law and international human rights law are „special regimes".

In general, despite the fact that almost every modern textbook on international law is based on the branch system of international law, there is still no common understanding in Russian and foreign scholarship on international law regarding the criteria to be used for dividing norms into branches of international law and in relation to the name and number of branches. As a rule, a utilitarian approach is used in classifying norms: a set of norms regulating homogeneous social relations is distinguished as an independent industry, provided that it has special principles, a large body of normative material and a number of other criteria that vary according to the theoretical views of the authors[46]. This approach is undoubtedly voluntaristic[47] and the classification made on its basis cannot serve as one of the preconditions for drawing conclusions related to the application of specific rules of international law.

However, it must be recognized that this approach is at the heart of the qualification of international humanitarian law and international human rights law as two independent branches of international law. These branches regulate overlapping, but not completely overlapping, relationships, are based on different international treaties, and are each based on their own set of special principles. In international humanitarian law, these are the principles of humanity, distinction, proportionality, precaution, military necessity and responsibility for violations of international humanitarian law[48], and in international human rights law, the principles of inalienability of rights, universality, non-discrimination, equality and interrelatedness. Thus, behind the attribution of international legal norms to the first or second branch is a desire to give a certain generic concept to a number of rules in order to facilitate understanding, application or teaching; behind such an act of naming there are neither clear criteria nor the will of States themselves to divide norms into independent groups and, accordingly, such a division does not imply logical „purity", *i.e.*, non-overlapping scopes of these concepts.

It follows that the discussion of the scope of the concepts of „international humanitarian law" and international human rights protection, their relationship, and the attribution of a particular rule of international law to the first or second branch, is of no practical significance. , and the use of these concepts, as well as the identification of these branches, is of a purely utilitarian nature. At the same time, this does not alleviate the acute problems that arise in determining the relationship between the various rules of international law that regulate fundamental human rights in armed conflict.

3. Conclusions

Thus, in deciding which norm of international law should apply and how it relates to another, the separation of rules into branches of international humanitarian law and international human rights law cannot be relied upon. On the other hand, the approach to analyse the relationship directly between the rules of international law governing fundamental human rights in armed conflict will be based on the substance and content of the individual rules, rather than their affiliation to international human rights law or international humanitarian law, as this classification has no clear criteria is not the result of scholarly consensus and does not reflect the will of the creators of the rules of international law themselves.

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[45] Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 106.

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CONSEQUENCES OF BREXIT FOUR YEARS AFTER THE UNITED KINGDOM'S WITHDRAWAL FROM THE EU

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Abstract

Following the 2016 referendum that saw the United Kingdom vote in favour of leaving the European Union, the actual process of withdrawal was a slow and arduous one, only reaching its formal conclusion in 2020, when the withdrawal agreement entered into force on 31 January. However, the agreement also instated a transition period that lasted until the end of that year, with Brexit truly starting to make its effects felt only from 1 January 2021 onwards. Since then, the United Kingdom and the EU have worked on adapting to the new legal, economic, and social reality, but progress has been slow, and has been affected by other geopolitical factors, as well as by the Covid pandemic. This article will analyse the current situation, with a view to comparing the positive and negative effects that the United Kingdom's withdrawal from the EU has had on the two parties.

Keywords: *Brexit, tariff regime, EU Settlement Scheme, customs union, dispute resolution.*

1. Introduction

The roots of Brexit can be traced back to historical scepticism about the UK's integration with Europe, fluctuating public and political opinion on European membership, and the rise of Euro-sceptic politics. Over the years, issues such as sovereignty, immigration, and economic contributions to the EU were hotly debated, fuelling the call for a referendum regarding the UK's membership of the EU. On 23.06.2016, such a referendum was finally held, as a culmination of growing Euroscepticism and pressure from various political factions and public sentiment pushing for a national vote. The referendum was announced by then-Prime Minister David Cameron following negotiations with the EU that led to some concessions aimed at appeasing the Eurosceptic wing of his party. The result was a narrow but clear decision: 52% voted to leave the EU, whilst 48% voted to remain, with a turnout of 72% of eligible voters.

Following the referendum, the UK entered a tumultuous period marked by political instability and complex negotiations with the EU. The process was fraught with challenges, including several changes in British leadership and attempts to negotiate a withdrawal agreement that faced multiple setbacks in getting the deal approved by the UK Parliament. A revised deal with the EU, which included changes to the Irish border arrangements and the political declaration on future relations, finally led to the UK officially leaving the EU on January 31, 2020. The transition period concluded on December 31, 2020, at which point the UK ceased to follow EU rules and fully exited the organisation. This period of Brexit marked significant political and social upheaval within the UK, reflecting deep divisions in public opinion and the complex nature of disentangling decades of political and economic integration[1] with Europe.

A four-year period provides a substantial timeframe to assess not only the immediate repercussions of Brexit on the legal landscape but also to begin observing emerging trends and the long-term implications for both the UK and the EU. Of particular interest are the evaluation of regulatory and legal framework adjustments post-Brexit and the assessment of economic and social effects, with a view to facilitate and inform policy making. Since Brexit, both the UK and EU have had to realign their legal and regulatory frameworks, and this period allows for a review of how effectively these new systems are functioning independently of each other, identifying areas of success and aspects that may require further negotiation or adjustment. The legal changes post-Brexit have deep economic and social impacts, influencing everything from trade and commerce to individual rights and

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[1] The European Union sets itself apart from other international organisations through its functioning model, which involves the Member States going through a process of integration, rather than cooperation. A key difference is that, within an integrated international organisation, the legislative acts of the organisation's institutions or organs are immediately applicable within the Member States' juridical order, without a process of ratification being necessary in order to render those acts legally binding for the States. For more on this, see A. Fuerea, *Manualul Uniunii Europene*, 6th ed., Universul Juridic Publishing House, Bucharest, 2016, p. 250-253 and R.-M. Popescu, A. Dumitrașcu, *Dreptul Uniunii Europene - Sinteze și aplicații*, Universul Juridic Publishing House, Bucharest, 2011.

labour laws. A thorough analysis helps in understanding how these changes are playing out in real scenarios, guiding future policy and legal decisions. The insights gained from a detailed examination of Brexit's consequences can inform ongoing policy and legal decisions. It is especially important as the UK and EU continue to define their future relationship. New or unexpected legal challenges that have arisen can be addressed more effectively with a comprehensive understanding of the post-Brexit landscape.

A unique case of a Member State withdrawing from the European Union, Brexit's lessons can offer insights into the processes and consequences of significant geopolitical changes, serving as a case study for other states considering similar paths or for the EU on how to manage potential future exits. The analysis of Brexit's legal consequences four years on is pivotal in shaping ongoing and future strategies, ensuring that both the UK and the EU can navigate the post-Brexit world with greater awareness and preparedness.

2. Changes to legal frameworks

After Brexit, the UK established new legal regimes to adapt to its departure from the European Union, replacing EU laws and frameworks with domestic regulations. Some of the key changes included the UK Internal Market Act 2020[2], the establishment of an independent tariff policy, the opening up of the previously existing framework for data protection to potential changes, modifications regarding immigration laws, diverging regulations in the area of financial services, and new national agricultural and fisheries policies

Concerning the UK Internal Market Act 2020, this piece of legislation was introduced to ensure that trade within the UK remains barrier-free and that standards set in one part of the UK are recognized across all its nations. The Act aims to prevent new barriers to trade and ensure a seamless market across England, Scotland, Wales, and Northern Ireland, which is crucial given the devolved powers of each nation.

No longer being part of the EU's customs union, the UK has been able to implement its own tariff regime, the UK Global Tariff (UKGT), which simplifies and lowers tariffs compared to the EU's Common External Tariff, thus encouraging imports. The UKGT applies to all goods being imported into the UK, with the exception of goods imported from a country that has a trade agreement with the UK, certain exceptions, such as a tariff suspension, have been legally introduced, or if the goods are being imported from developing countries covered by the Developing Countries Trading Scheme (DCTS)[3]. This change aims to make it cheaper to import goods from outside the UK and is tailored to benefit UK consumers and businesses.

When it comes to data protection, although the UK has largely retained the General Data Protection Regulation (GDPR) framework through the UK GDPR[4], there are now provisions for potential divergence in future data protection rules. The UK aims to maintain high standards of data protection whilst having the flexibility to diverge from EU regulations where it sees strategic advantages, but this also opens up the UK to pressure from certain companies to relax the protection standards, something that has so-far been avoided within the EU.

Immigration-wise, the UK has introduced a points-based system that replaces the free movement of EU citizens into the UK. This new system prioritises skills and talents over nationality, with the aim of controlling and reducing immigration levels whilst filling gaps in the labour market.

In the area of financial services, the UK has begun to diverge from the EU in financial regulatory frameworks. It is focusing on tailoring regulations to better suit the domestic market and enhance the UK's attractiveness as a global financial centre. This includes reviewing and potentially amending rules inherited from the EU on financial trading, reporting, and conduct.

An important talking point during the Brexit campaign was the fact that, within the EU, Member States transfer competences regarding farming and fisheries towards the EU's institutions. As a consequence of Brexit, the UK has been able to elaborate its own agricultural and fisheries policies. The UK is phasing out the EU's Common Agricultural Policy in favour of a system that pays farmers public money for „public goods" such as environmental improvements. In fisheries, the UK now independently negotiates fishing rights and quotas, aiming to manage its marine resources sustainably.

All of these changes reflect the UK's broader strategy to regain legislative and regulatory autonomy post-Brexit, focusing on areas deemed strategic for national interests. However, these transitions also pose

[2] UK Internal Market Act 2020, *https://www.legislation.gov.uk/ukpga/2020/27/contents*.

[3] For more on the UKGT, see *https://www.gov.uk/guidance/tariffs-on-goods-imported-into-the-uk*.

[4] The Data Protection Act 2018 represents the UK's implementation of the General Data Protection Regulation (GDPR), and has so far been maintained. The Act is available at *https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted*.

challenges, including new administrative burdens and the need for new international agreements - whilst a Member State, the UK benefited from the very advantageous trade deals negotiated by the EU; on its own, it must now negotiate its own international agreements, and has failed thus far in negotiating better deals than the ones it had access to in the EU. The UK continues to navigate these complexities, adjusting its legal frameworks to better fit its post-Brexit status.

Some of the most significant post-Brexit pieces of legislation include the EU Withdrawal Act 2018[5], the Immigration and Social Security Coordination (EU Withdrawal) Act 2020[6], the UK Internal Market Act 2020, the Agriculture Act 2020[7] and Fisheries Act 2020[8], the Finance Act 2020 and subsequent updates[9], and the Data Protection, Privacy, and the Electronic Communications (Amendments etc) (EU Exit) Regulations 2019[10].

The EU Withdrawal Act 2018 has foundational value, as it repealed the European Communities Act 1972[11], which resulted in the UK joining the EU. It also incorporated existing EU law into UK law as „retained EU law", ensuring continuity and stability in the legal framework immediately post-Brexit. This allows the UK to retain, amend, or repeal these laws, as necessary.

The Immigration and Social Security Coordination (EU Withdrawal) Act 2020 ended the free movement of EU citizens into the UK and established the new points-based immigration system. It marks a significant shift in the UK's approach to immigration, focusing on skills and qualifications rather than EU nationality.

The aforementioned UK Internal Market Act 2020 was designed to ensure trade continuity and prevent new barriers to internal trade within the UK after its withdrawal from the EU. The act establishes principles for mutual recognition and non-discrimination for goods and services across England, Scotland, Wales, and Northern Ireland.

The Agriculture Act 2020 and Fisheries Act 2020 establish new policies for agriculture and fisheries management, replacing the EU's Common Agricultural Policy and Common Fisheries Policy. The Agriculture Act introduces a system for providing subsidies based on environmental and public benefits rather than direct payment per land area farmed. The Fisheries Act provides the legal framework for the UK to operate as an independent coastal state, managing its own waters and fish stocks.

The Finance Act 2020 and its subsequent updates encompass various tax measures, including adjustments that reflect the UK's new relationship with the EU. It addresses issues related to customs and excise duties, and Value Added Tax (VAT) in the context of goods and services moving between the UK and EU Member States.

The Data Protection, Privacy, and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 is a set of regulations that amended the UK's data protection laws to ensure they function effectively after withdrawal from the EU. Whilst the UK has retained the General Data Protection Regulation (GDPR) in UK law as the UK GDPR[12], these changes ensure the continuity of data protection standards and cross-border data flow between the UK and the EU.

All of these legislative changes represent the UK's efforts to adapt its legal system to the post-Brexit reality, implementing changes where it deems it necessary, whilst aiming to maintain stability and continuity where beneficial. The ongoing challenge for the UK will be to refine these laws to better suit its independent status outside the EU, balancing domestic priorities with international obligations and relationships.

[5] EU Withdrawal Act 2018, *https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted*.

[6] Immigration and Social Security Coordination (EU Withdrawal) Act 2020, *https://www.legislation.gov.uk/ukpga/2020/20/contents/enacted*.

[7] Agriculture Act 2020, *https://www.legislation.gov.uk/ukpga/2020/21/contents*.

[8] Fisheries Act 2020, *https://www.legislation.gov.uk/ukpga/2020/22/contents/enacted*.

[9] Finance Act 2020 and subsequent updates, *https://www.legislation.gov.uk/ukpga/2020/14/contents*.

[10] Data Protection, Privacy, and the Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, *https://www.legislation.gov.uk/ukdsi/2019/9780111178300/contents*. This instrument uses powers under the EU (Withdrawal) Act 2018 (EUWA) to amend the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 in order to „correct deficiencies in EU-derived data protection legislation as a result of the withdrawal of the UK from the EU".

[11] European Communities Act 1972, available in its original form at *https://www.legislation.gov.uk/ukpga/1972/68/enacted*. The Act has now been repealed.

[12] Available at *https://www.legislation.gov.uk/eur/2016/679/contents*.

3. Trade and economic impacts

3.1. Legal changes in trade relations between the UK and the EU

The legal adjustments in trade relations between the UK and the EU post-Brexit have been extensive and multifaceted, involving changes to tariffs, customs procedures, and regulatory alignments. The Trade and Cooperation Agreement (TCA)[13], effective from January 1, 2021, governs the new trade relationship between the UK and the EU. It provides for zero tariffs and zero quotas on goods that comply with the appropriate rules of origin. Despite this agreement, businesses have faced additional costs and complexities due to non-tariff barriers, such as customs declarations and checks, which did not exist whilst the UK was an EU member.

Another significant change has been the introduction of customs checks and controls. Goods moving between the UK and the EU now require customs declarations, and in some cases, businesses need to prove the origin of their goods to benefit from the zero-tariff agreements. This has increased the administrative burden on companies and caused delays at borders, impacting supply chains and the timely delivery of goods[14].

Additionally, whilst the TCA set out a framework to avoid unnecessary barriers to trade, there is potential for regulatory divergence over time. The UK has the autonomy to set its own standards and regulations, which may lead to differences from the EU. This divergence could create barriers to trade if UK and EU regulations are not mutually recognised. The impact is particularly notable in sectors such as chemicals, pharmaceuticals, and financial services, where stringent regulatory compliance is essential.

The services sector, which is a significant part of the UK economy, particularly financial services, does not have the same level of market access under the TCA as it did before the UK withdrew from the EU. The lack of a comprehensive agreement on services means that UK firms may face restrictions on providing services within the EU market, and may need to comply with varying regulations across member states.

The TCA includes mechanisms for resolving disputes between the UK and the EU, which are crucial for addressing any disagreements that arise under the terms of the agreement; this includes arbitration panels and other dispute resolution procedures. However, the lack of direct jurisdiction of the European Court of Justice in the UK represents a significant shift in how legal disputes are resolved, potentially leading to different interpretations of the agreement.

Perhaps one of the most contentious aspects of the post-Brexit adjustments has been the Northern Ireland Protocol[15], which was designed to avoid a hard border on the island of Ireland. This protocol effectively keeps Northern Ireland in the EU's single market for goods, leading to checks on goods moving between Northern Ireland and the rest of the UK. This has raised political tensions and practical issues about the internal market's functioning within the UK.

Whilst the legal adjustments in trade relations between the UK and the EU aim to maintain as smooth a trade relationship as possible post-Brexit, the transition has introduced several challenges. Businesses have had to navigate a new landscape of tariffs, customs procedures, and regulatory requirements, impacting operations and strategic planning. The evolution of this relationship will likely continue to require adjustments and negotiations as both the UK and the EU adapt to their new trading relationship.

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[13] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22021A0430%2801%29*.

[14] The UK has repeatedly delayed the introduction of several types of customs checks, such as meat, dairy and plant product customs EU import checks that were scheduled to come into effect on 30.04.2024 (after several previous delays), and that were delayed a sixth time by the UK government.

[15] The Northern Ireland Protocol, which came into force on 01.01.2021, is separate from the TCA, and is instead part of the EU-UK Withdrawal Agreement. The UK requested the modification of certain aspects of the Protocol following concerns, particularly from segments of Northern Ireland's Unionist community, regarding the Protocol's operation in Northern Ireland and the checks and controls it imposes on goods moving between Great Britain and Northern Ireland. On 27.02.2023, after two years of negotiations, the EU and the UK announced a new agreement to amend the operation of the Northern Ireland Protocol, an agreement known as the Windsor Framework. Despite the changes introduced by the Windsor Framework, the Democratic Unionist Party (DUP), the largest Unionist party in Northern Ireland, refused to participate in a power-sharing Executive and obstructed the functioning of the Northern Ireland Assembly, demanding further modifications to the Protocol's operation. On 30.01.2024, the DUP endorsed a deal to restore the Assembly and Executive, and on 31.01.2024, the Government published details on how the deal would impact the functioning of the Protocol/Framework. For more information on the Protocol, see *https://commonslibrary.parliament.uk/research-briefings/cbp-9548/*.

3.2. The effect of these changes on tariffs, customs, and regulatory practices

The post-Brexit changes affecting tariffs, customs, and regulatory practices between the UK and the EU have had considerable impacts on trade, business operations, and the broader economic landscape[16].

Under the TCA, the UK and the EU agreed to zero tariffs and zero quotas on goods that comply with the appropriate rules of origin; this arrangement was designed to maintain cost-effective trade relations. However, despite this provision, not all trade is tariff-free due to the complexity of rules of origin requirements. Businesses must now prove that their goods meet these criteria to avoid tariffs, adding a layer of complexity and potential cost, particularly for smaller businesses that may struggle with the administrative burden.

The imposition of customs checks and declarations has been one of the most significant post-Brexit changes. Whilst the UK was part of the EU, goods moved freely without customs checks between member states. Now, traders must complete customs declarations for goods shipped to and from the EU, leading to increased bureaucracy and delays at borders. These delays can disrupt supply chains, especially for industries reliant on just-in-time delivery systems, such as automotive and manufacturing sectors.

The Northern Ireland Protocol has introduced a unique customs situation, creating a de facto customs border in the Irish Sea. This has led to political and logistical challenges, particularly for goods moving from Great Britain to Northern Ireland, complicating trade within the UK itself.

Regulatory divergence is a growing concern. Whilst the TCA provides mechanisms to manage and potentially limit divergence through a level playing field agreement, there is still significant potential for the UK to set its own standards. This autonomy allows the UK to tailor regulations more closely to domestic needs but also poses risks of diverging from EU standards. Such divergence could increase barriers to trade, as UK products might not automatically be deemed compliant with EU standards.

For sectors heavily regulated at the EU level, such as chemicals (under REACH), pharmaceuticals, and financial services, adapting to new UK-specific regulations requires strategic planning and adaptation. Financial services, in particular, have lost their passporting rights, which permitted them to sell services across the EU from a UK base without additional licenses. Now, firms often need to establish entities within the EU to continue operating seamlessly across the market, leading to increased operational costs and restructuring.

These changes reflect the complexity of redefining a trade and regulatory relationship as significant as that between the UK and the EU. The adjustments in tariffs, customs, and regulatory practices continue to evolve as both sides navigate the post-Brexit landscape, aiming to minimise disruption whilst protecting their respective regulatory and economic interests. As businesses and governments adapt to these new conditions, ongoing negotiations and amendments to practices may be necessary to address emerging challenges and opportunities.

3.3. Examples illustrating specific sectoral impacts.

Post-Brexit changes have had specific impacts across various sectors. The automotive sector, which relies heavily on just-in-time manufacturing processes, has been significantly affected by customs delays and increased bureaucracy. For example, additional customs documentation and potential tariffs on parts coming from suppliers in the EU have created challenges for UK-based manufacturers. Companies like Nissan and BMW had to assess their operational and supply chain strategies to mitigate potential disruptions caused by these new trade barriers.

The pharmaceutical industry faces challenges due to regulatory divergence and the need for separate approvals for new drugs from UK and EU regulatory bodies. Previously, a single approval through the European Medicines Agency (EMA) was sufficient. Post-Brexit, companies such as AstraZeneca have had to navigate dual regulatory approvals to continue selling their products across Europe and the UK, potentially delaying the availability of new treatments.

[16] A 2023 analysis indicates that the UK's real GDP is approximately 2-3% lower than it would have been had it remained in the EU. This equates to a reduction of about £850 per capita as of 2023. The analysis projects that the negative impact on the UK's economy will continue to grow, with an expected decrease in GDP of 5-6% by 2035, or roughly £2,300 per person. The ongoing economic decline is attributed primarily to a decrease in real income driven by reduced trade terms with the EU and a decline in productivity, with these effects intensifying over time. Ahmet Kaya, Iana Liadze, Hailey Low, Patricia Sanchez Juanino, Stephen Millard, "Revisiting the effect of Brexit", *NiGEM Topical Feature*, Autumn 2023, p. 11.

London's role as a financial hub[17] has been impacted by the loss of passporting rights[18]. Financial firms previously relied on these rights to serve the entire EU market from the UK. Companies like J.P. Morgan and Goldman Sachs have had to move staff and operations to cities like Frankfurt and Paris to maintain access to EU markets, leading to increased operational costs and restructured European operations.

The fishing industry, a focal point in Brexit negotiations, has experienced both regulatory and market changes. UK fishermen now have increased quotas for some fish stocks; however, they face decreased access to EU markets and increased customs paperwork, affecting the profitability of their catch. This has particularly affected shellfish exporters, who have struggled with delays and market access issues due to the perishable nature of their products.

UK farmers have had to adapt to changes in subsidy frameworks as the EU's Common Agricultural Policy (CAP) subsidies were phased out. New UK agricultural policies aim to reward environmental stewardship rather than just land ownership, significantly affecting how farmers operate. Additionally, the export of agricultural products to the EU now requires compliance with new phytosanitary regulations, creating further compliance costs and logistical challenges.

These cases highlight how different sectors are adapting to the new realities imposed by Brexit, navigating both opportunities and challenges as they adapt to the post-Brexit regulatory and economic landscape.

4. EU and UK citizens' rights and social implications

Once the UK withdrew from the European Union, significant changes occurred in residency, work, and freedom of movement rights for UK and EU citizens, impacting how they live, work, and travel between the UK and EU member states.

One of the most fundamental changes is the end of freedom of movement between the UK and EU. Previously, UK and EU citizens enjoyed the right to live, work, and travel freely across each other's territories. After Brexit, these rights ceased, requiring new systems for immigration and visas. EU citizens who were already living in the UK before December 31, 2020, could apply to the newly-created EU Settlement Scheme[19] to continue their residence. Those qualifying for settled status can stay indefinitely, whilst those getting pre-settled status can stay for five years, needing to apply for settled status later. For UK citizens residing in an EU country, the approach varies by country, but generally, they had to apply for residency status to secure their rights under the Withdrawal Agreement.

As far as new immigration is concerned, the introduction of a points-based immigration system[20] in the UK marks a significant shift in treatment. It treats EU and non-EU citizens similarly, focusing on skills and qualifications rather than nationality. EU citizens moving to the UK for work must now meet specific criteria and obtain appropriate visas, no longer enjoying freedom of movement, whilst UK citizens wishing to work in the EU now face different regulations depending on the member state, often requiring work permits and meeting local employment laws[21].

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[17] In 2021, the UK's financial services sector made a contribution of £173.6 billion, representing 8.3% of the country's total economic output. The financial services sector also achieved a trade surplus of £44.7 billion, with exports valued at £61.3 billion and imports at £16.6 billion. However, there has been a noticeable decline in financial services exports to the EU since 2018, dropping by 19% in cash terms, while exports to non-EU countries increased by 4%. For an in-depth presentation of the decline of this sector following Brexit, see J.M.T. Ryan, *How Brexit Damaged the United Kingdom and the City of London*, in The Economists' Voice, vol. 20, no. 2, 2023, pp. 179-195.

[18] These are regulations that previously allowed financial institutions authorised in any European Economic Area (EEA) state to conduct business across the other EEA states with minimal additional authorization. These rights were designed to facilitate the free flow of financial services across borders, making it easier for banks, insurance companies, and other financial services providers to operate throughout the EU and EEA.

Under passporting, a financial institution could obtain a license in one EEA member state and use it to provide services across all other EEA countries without needing further licenses in each country. However, after Brexit, UK-based financial institutions lost these passporting rights, meaning they now have to comply with each EU member state's regulatory requirements if they wish to operate there, or establish subsidiaries within the EU to continue providing services across the region. This change necessitates adjustments in how UK financial firms operate within the EU market and has significant implications for their European business strategies. Some Member States, such as Ireland and Denmark, established temporary permissions for UK firms that were passporting into particular parts of financial markets for specific periods of time from 01.01.2021.

[19] More information available at *https://www.gov.uk/settled-status-eu-citizens-families*.

[20] For more information, see *https://www.gov.uk/government/publications/uk-points-based-immigration-system-employer-information/the-uks-points-based-immigration-system-an-introduction-for-employers*.

[21] The updated immigration system marks a substantial tightening of EU migration controls. Under this new system, migrants seeking lower-skilled and lower-paid jobs generally will not be allowed entry. Those who qualify must have their employers apply on their behalf, incur considerable fees, and will have fewer rights, such as limited access to public benefits, similar to the restrictions currently faced by non-

For short visits, UK citizens can travel to Schengen Area countries visa-free for up to 90 days within any 180-day period, but they cannot work or study during these visits. For longer stays, visas or residence permits are required. Similarly, EU citizens can visit the UK for up to six months visa-free but would need a visa for work or longer stays.

These changes necessitate adjustments from both UK and EU citizens used to the previous freedom of movement, affecting personal and professional life plans and requiring compliance with new legal frameworks for living and working abroad.

The „settled status" scheme, formally known as the EU Settlement Scheme, was established by the UK government to allow EU citizens and their family members who were living in the UK before December 31, 2020, to continue residing in the UK after Brexit. The scheme presented its beneficiaries with both advantages and certain challenges. Successful applicants to the scheme have been able to continue enjoying their preexisting rights, receiving either settled or pre-settled status, which secures their rights to live, work, and access public services such as healthcare and education in the UK, in conditions similar to those applicable to British citizens; additionally, EU citizens who have received settled status may remain in the UK indefinitely and have the option to apply for British citizenship once meeting certain requirements.

Conversely, some applicants have struggled with proving their continuous residence in the UK, especially in the case of self-employed EU citizens or those who travelled frequently during the pre-Brexit period. Another issue raised by the implementation of the scheme has been that of raising awareness of its existence among vulnerable groups, including elderly individuals, children in care, and non-English speakers, potentially leaving some eligible individuals without status once the deadline (30.06.2021) passed. The post-Brexit legal landscape has been one fraught with complexity and uncertainty, with changes in law and policy creating uncertainty about future rights and statuses, and there have also been reports of increased xenophobia and discrimination post-Brexit, affecting EU citizens' sense of security and belonging in the UK[22].

Overall, whilst the „settled status" scheme has provided essential protections for many EU citizens in the UK, the implementation and broader social challenges highlight the need for ongoing support and clarity to ensure all eligible individuals can secure their status and rights. This assessment suggests that the government may need to enhance efforts in outreach, support, and legal clarity to address these challenges effectively.

5. Dispute resolution and legal proceedings

The Withdrawal Agreement between the UK and the EU, concluded to manage the consequences of Brexit, includes specific provisions for dispute resolution to address any disagreements that arise under the terms of the agreement. Following Brexit, these mechanisms are crucial for maintaining a structured legal process for resolving conflicts. These mechanisms include a Joint Committee[23], an arbitration panel[24], and a specific role for the Court of Justice of the EU[25], when there is a matter regarding the interpretation of EU law applicable in disputes between the EU and the UK.

The Withdrawal Agreement established a Joint Committee responsible for overseeing the implementation and application of the agreement. This committee plays a pivotal role in managing the relationship between the UK and the EU post-Brexit and is empowered to make decisions in respect of the agreement which are binding on both parties. The Joint Committee can also refer disputes that it cannot resolve to arbitration, and it supervises the activities of six Specialised Committees, making decisions based on their recommendations. The six Specialised Committees focus on citizens' rights, the relationship between Ireland and Northern Ireland, the

EU migrants. Conversely, the new policies considerably liberalise the conditions for non-EU migrants, reducing the requirements for minimum salary and skills levels, and removing the cap on the number of migrants. This represents a significant shift towards easing entry conditions for non-EU nationals compared to the stricter regime for EU migrants. J. Portes, *The economics of the UK's post-Brexit immigration system*, in J. Portes, (eds), *The Economics of Brexit: What Have We Learned?*, CEPR Press, Paris & London, 2022, *https://cepr.org/publications/books-and-reports/economics-brexit-what-have-we-learned*, p. 74.

[22] For more information, see: J. Fox, *Eastern Europeans, Brexit and Racism*, *https://www.britsoc.co.uk/about/latest-news/2017/may/eastern-europeans-brexit-and-racism/*; M. Savage, *The Return of Inequality. Social Change and the Weight of the Past*, Harvard University Press, 2021; S. Das, *Post-Brexit racism in the UK: Experiences of Eastern European and Muslim communities*, written evidence available at *https://committees.parliament.uk/writtenevidence/70129/pdf/*.

[23] Art. 164-166, 169 of the Withdrawal Agreement.

[24] Art. 170-181 of the Withdrawal Agreement.

[25] Art. 158-163 of the Withdrawal Agreement.

legal situation of Gibraltar, the Sovereign Base Areas in Cyprus, financial provision, and other separation provisions.

For disputes regarding the interpretation and application of the Withdrawal Agreement that cannot be resolved through consultation within the Joint Committee, an arbitration panel can be established. This panel is intended to provide a binding resolution to disputes. The panel consists of arbitrators chosen by both the UK and the EU, ensuring a balanced representation.

CJEU retains a specific role in disputes related to the interpretation of EU law. Where a dispute raises a question of the interpretation of EU law, the arbitration panel must refer that question to the CJEU, and the Court's decision will bind the arbitration panel. This provision ensures consistency in the application of EU law.

Beyond the Withdrawal Agreement, TCA also provides mechanisms for dispute resolution, focusing largely on rebalancing measures and safeguarding provisions. TCA allows either party to take unilateral safeguard measures if significant imbalances arise due to the operation of the agreement.

These mechanisms reflect a blend of negotiation, arbitration, and judicial oversight, tailored to handle the unique legal and practical challenges posed by Brexit. They aim to provide a structured and effective framework for managing disputes, ensuring that both the UK and the EU have avenues for resolution that respect both parties' sovereignty and legal orders.

6. Conclusions

Several ongoing and future legal challenges related to Brexit continue to shape the UK's legal landscape and its relationship with the EU. These challenges encompass a variety of areas, including trade, legal rights, and regulatory frameworks.

One of the primary areas of concern is the potential for regulatory divergence between the UK and EU. As UK laws begin to deviate from EU standards, conflicts may arise, particularly in sectors such as chemicals, pharmaceuticals, and financial services. These sectors are heavily regulated, and divergence could lead to significant barriers to market access, necessitating ongoing negotiations and potential legal disputes.

The Northern Ireland Protocol remains a contentious issue. Designed to prevent a hard border between Northern Ireland and the Republic of Ireland by keeping Northern Ireland aligned with certain EU regulations, the protocol has faced opposition within Northern Ireland and from some British politicians. Disagreements over the interpretation and implementation of the protocol could lead to sustained legal and political challenges.

Data protection is another critical area of ongoing legal challenge. The UK has adopted its own version of the GDPR, known as the UK GDPR, but the EU has only granted the UK a data adequacy decision temporarily. Any divergence in data protection laws could jeopardise this status, affecting the free flow of data between the UK and the EU.

On the matter of dispute resolution, the mechanisms for resolving disputes between the UK and EU set out in the Withdrawal Agreement and the Trade and Cooperation Agreement are likely to be tested. The complexity of new arrangements and the potential for disputes over their interpretation means that the effectiveness of these mechanisms will be a significant focus of legal attention.

The rights of EU citizens in the UK and UK citizens in the EU, particularly concerning residency and access to services, continue to evolve. Legal challenges may arise as individuals and advocacy groups seek to clarify, enforce, or challenge these rights under the new regimes.

As far as financial services are concerned, the UK's departure from the single market has excluded it from the passporting system, which allowed financial services firms licensed in any EU country to trade freely in any other with minimal additional authorization. The UK and EU have yet to agree on a comprehensive framework for financial services, which could lead to legal uncertainties and challenges in cross-border financial activities.

These ongoing and emerging challenges highlight the complex nature of disentangling UK law from EU frameworks and the potential for legal disputes in multiple areas as both entities continue to define their post-Brexit relationship, and serve as a warning for other EU Member States with regards to the uncertainty of such a process, and the lack of positive effects.

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- Fisheries Act 2020, *https://www.legislation.gov.uk/ukpga/2020/22/contents/enacted*;
- Finance Act 2020 and subsequent updates, *https://www.legislation.gov.uk/ukpga/2020/14/contents*;
- Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22021A0430%2801%29*;
- United Kingdom Internal Market Act 2020, *https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted*.

CLIMATE CHANGE AND THE MOST RECENT ECtHR GRAND CHAMBER RULINGS

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Abstract

Climate change is a reality that is already threatening our existence, and it could not be ignored anymore. Every day, on television, at the radio, at work, on the streets, in schools and universities, at home, we discuss about climate change and its effects on our planet and on our lives. The politicians and the governments worldwide are addressing this matter more or less, but from the decisions taken, we can easily notice that the measures taken (if they are taken) are not sufficient to counteract climate change. Therefore, in our opinion, states worldwide are failing to do what is necessary to counteract climate change. Through the state's actions or, even worse, their inaction, on one part, they violate human rights, and, on the other part, they decrease the chances of ensuring a bright future that is worth living for the future generations on earth.

This is why, nowadays, more and more people, worldwide, young or elder, living in a state at risk or not, are taking these states to court, arguing that their individual rights were violated because of the States' failure to take sufficient measures to combat climate change. Since 2021, for the first time, the European Court of Human Rights in Strasbourg was faced with the responsibility of holding CoE Member States accountable for violating human rights by not taking such sufficient measures - in Duarte Agostinho and Others v. Portugal and Others and in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland. On April 9th, 2024, ECtHR has delivered its Grand Chamber rulings in these two climate change cases.

This study will attempt to analyse the legal consequences of these rulings. What is the Strasbourg Court vision on climate change?

Keywords: *climate change, Carême, Duarte Agostinho and Others, ECtHR, ECHR, failure, Strasbourg, Verein KlimaSeniorinnen Schweiz, violation.*

1. Introductory Remarks

The founders of the Council of Europe had a great idea when decided to create the European Court of Human Rights (hereinafter „*the Court*" or „*ECtHR*"), a permanent, independent international jurisdiction based in Strasbourg, that began its work on 21.01.1959 (when eight states accepted its jurisdiction). This international jurisdiction is specialised in human rights litigation, and it is worldwide recognised as the highest human rights regional court in the world, inspiring other international courts of law (*e.g.*, the European Court of Justice in Luxembourg[1]), national courts of law and constitutional courts[2] in the Member States[3], despite the fact that values and traditions[4] vary from State to State[5].

The Court has jurisdiction to examine individual applications and inter-State applications concerning violations of the provisions of the European Convention on Human Rights and the additional protocols to the

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[1] For more information about the European Union and the European Court of Justice, see A. Fuerea, *Dreptul Uniunii Europene - principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016. Additionally, regarding the two international courts and their reasoning, see M.-C. Cliza, C.-C. Ulariu, *Drept administrativ. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 188.

[2] See, for instance, in Romania, the chapter regarding the control of constitutionality exercised by the Constitutional Court of Romania in the light of the Court's jurisprudence, in S.-G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constitutional*, C.H. Beck Publishing, Bucharest, 2021, p. 233 *et seq.*, and C. Ene-Dinu, *A Century of Constitutionalism,* in Challenges of the Knowledge Society (CKS) Proceedings, 2023, pp. 405-412, *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.05.2024.

[3] See A.-G. Marin, *Current Justice Laws in Romania*, in Challenges of the Knowledge Society (CKS) Proceedings, 2023, pp. 413-426, *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.05.2024.

[4] For instance, for Romania, please see E.-E. Ștefan, *Values and Traditions in the Administrative Code and Other Normative Acts,* in Challenges of the Knowledge Society (CKS) Proceedings, 2023, pp. 479-485, *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.05.2024, and E. Anghel, *Values and Valorization,* in Challenges of the Knowledge Society (CKS) Proceedings, 2015, Pro Universitaria Publishing House, Bucharest, pp. 357-363, *https://cks.univnt.ro/cks_2015.html*, last consulted on 12.05.2024.

[5] For instance, regarding the history of Romania, see C. Ene-Dinu, *Istoria statului si dreptului românesc*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2023.

Convention (hereinafter „*the Convention*" or „*ECHR*"[6]), reason for which this Court receives a great number of applications.

Thus, according to *the most recent general statistics communicated by the Court*[7], in 2023, 34,650 applications (compared to 45,500 applications in 2022[8]) were assigned to a judicial formation, and as of 31.03.2024 there were 65,700 applications pending before the Court's judicial formations[9] (compared to 77,400 in 2023).

One may ask why this international jurisdiction could be „appealing" from the point of view of climate change matters. Well, please note that besides the fact that the Court's judgments might impose States to pay sums of money by way of just satisfaction, in certain cases where the Court uses the pilot judgment procedure, the Court also might order the States to change the applicable domestic law in order to comply with the provisions of the Convention [*please* see*, for instance,* the *Maria Atanasiu and Others v. Romania*[10], *Rezmiveș and Others v. Romania*[11], *Burdov v. Russia (no. 2)*[12], *Gerasimov and Others v. Russia*[13]].

2. Is the Right to a Healthy Environment Enshrined in the Convention?

Although the Convention does not recognise, *expressis verbis*, the right to a healthy environment, given that the interpretation of the Convention is constantly evolving, the corollary of art. 8[14] ECHR - *Right to respect for private and family life*, also indirectly recognises the right to a healthy environment (an indirect protection, by ricochet, since pollution or degradation of the environment does not constitute direct violations of this right), which involves the protection of health.

Thus, the right to a healthy environment is not guaranteed *in terminis* by the ECHR, but derives from the right to privacy. In this respect, in a world where there appear very diverse environmental[15] issues, the Court has held that the following constitute interference with the privacy of individuals: noise pollution due to (i) heavy air, rail and road traffic, (ii) nightclubs in residential buildings, (iii) industrial premises in the vicinity of people's homes. Chemical pollution is another factor which may violate art. 8 ECHR.

According to the ECtHR case-law[16], in order to fall within the scope of art. 8 ECHR, complaints relating to environmental nuisances have to show:

- first, that there was an „actual interference" with the applicant's enjoyment of his or her private or family life or home. The „actual interference" relates to the existence of a direct and immediate link between the alleged environmental harm and the applicant's private or family life or home[17]. The general deterioration

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[6] Please see, for instance, C. Bîrsan, *Convenția europeană a drepturilor omului: comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2010, L.-C. Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, 2nd ed., Hamangiu Publishing House, Bucharest, 2024. Additionally, please see R.-M. Popescu, *Theoretical Aspects Regarding the Application of Treaties in Time and Space*, in Challenges of the Knowledge Society (CKS) Proceedings, 2023, pp. 321-326, *https://cks.univnt.ro/cks_2023.html*, last consulted on 12.05.2024.

[7] See the statistics available at *https://www.echr.coe.int/statistical-reports*, last consulted on 12.05.2024.

[8] See the statistics available at *https://www.echr.coe.int/Documents/Stats_annual_2022_ENG.pdf*, last consulted on 12.05.2024.

[9] See the statistics available at *https://www.echr.coe.int/documents/d/echr/stats-pending-month-2024-bil*, last consulted on 12.05.2024.

[10] Grand Chamber, judgment from 12.10.2010, app. nos. 30767/05 and 33800/06, *https://hudoc.echr.coe.int/fre?i=001-100989*, last consulted on 12.05.2024.

[11] Fourth Section, judgment from 25.04.2017, app. nos. 61467/12, 39516/13, 48231/13 and 68191/13, https://hudoc.echr.coe.int/fre?i=001-173105, last time consulted on 12.05.2024.

[12] First Section, judgment from 15.01.2009, app. no. 33509/04, *https://hudoc.echr.coe.int/eng?i=001-90671*, last consulted on 12.05.2024 – the first judgment in the pilot procedure against Russia concerning non-execution or delayed execution of final domestic judgments.

[13] First Section, judgment from 01.07.2014, app. no. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11 and 60822/11, *https://hudoc.echr.coe.int/eng?i=001-145212*, last consulted on 12.05.2024.

[14] Ar. 8 ECHR provides that:

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

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

of health or morals, or for the protection of the rights and freedoms of others".

[15] For instance, for an interesting study regarding environmental issues, see, I. Pădurariu, *Space Debris, Another Environmental Issue,* in Challenges of the Knowledge Society (CKS) Proceedings, 2022, pp. 323-331, *https://cks.univnt.ro/cks_2022.html*, last consulted on 12.05.2024.

[16] Please see *Pavlov and Others v. Russia*, no. 31612/09, § 51, 11.10.2022, § 59, *Çiçek and Others v. Turkey* (dec.), no. 44837/07, 04.02.2020, § 22, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 09.04.2024, § 514.

[17] *Ivan Atanasov v. Bulgaria*, no. 12853/03, 02.12.2010, § 66, and *Hardy and Maile v. the United Kingdom*, no. 31965/07, 14.02. 2012,

of the environment is not sufficient, and there must be a negative effect on an individual's private or family sphere[18] and,

- secondly, that a certain minimum level of severity was attained[19]. Of course that the assessment of that minimum is relative and depends on all the circumstances of the case (*e.g.*, the intensity and duration of the nuisance and its physical or mental impact on the applicant's health or quality of life)[20].

Therefore, for environmental damage to constitute a violation of art. 8 para. 1 ECHR, it must be shown that the alleged environmental nuisance was serious enough to adversely affect (to a sufficient extent!) the applicant's enjoyment of his/her right to respect for private and family life and home.

The exposure of a person to a serious environmental risk may be sufficient to trigger the applicability of Article 8[21].

People have the right to be informed about risks, to have access to the results of studies on pollution and climate change, and the right to participate in environmental decision-making, therefore the States have several positive obligations in this respect.

In each case dealing with the right to a healthy environment under art. 8 ECHR, the Court examines whether the domestic authorities have struck a fair balance between the right of an individual to respect for private and family life and the economic well-being of the State concerned (the so-called „fair balance test").

Interestingly, the Romanian doctrine speaks of „a primacy over all other fundamental rights" of the right to a healthy environment - even over the right to life. This is possible because the right to a healthy environment goes beyond the right to life: „[a]lthough it cannot be accepted that future generations already have a right to life, there is nevertheless an obligation on the part of present generations to protect the environment in such a way as not to compromise the life expectancy of those who follow"[22].

3. The ECtHR Grand Chamber Rulings in the Climate Change Cases

On April 9th, 2024, the ECtHR delivered its Grand Chamber rulings in three climate change cases.

3.1. The Case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[23]

This application was lodged at the ECtHR, in 2020, against the Swiss Confederation, by four individual applicants and by a Swiss association, Verein KlimaSeniorinnen Schweiz, whose members were concerned about the consequences of global warming on their living conditions and health.

They strongly considered that the Swiss authorities did not take sufficient action to mitigate the dramatic effects of climate change.

Analysing this case, the Court found that the Convention encompasses a right to effective protection by the domestic authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life:

„519. Drawing on the above considerations, and having regard to the causal relationship between State actions and/or omissions relating to climate change and the harm, or risk of harm, affecting individuals (see paragraphs 435, 436 and 478 above), Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life."[24].

The Court also stressed that: „there will be no arguable claim under Article 8 if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. Conversely, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes, in such a way as to affect their private and family life adversely, without, however, seriously endangering their

§ 187).

[18] *Kyrtatos v. Greece*, no. 41666/98, § 52.

[19] *Yevgeniy Dmitriyev v. Russia*, no. 17840/06, 01.12.2020, § 32.

[20] *Çiçek and Others*, cited above, § 22.

[21] See, for instance, *Hardy and Maile*, cited above, §§ 189-92, *Dzemyuk v. Ukraine*, no. 42488/02, 04.09.2014, §§ 82-84.

[22] Al. Boroi (coord.), M. Gorunescu, I.A. Barbu, B. Virjan, *Dreptul penal al afacerilor*, 6th ed., C.H. Beck Publishing House, Bucharest, 2016, p. 460.

[23] Grand Chamber, judgment from 09.04.2024, app. no. 53600/20, *https://hudoc.echr.coe.int/?i=001-233206*, last consulted on 12.05.2024.

[24] *Idem*, § 519.

health (see *Jugheli and Others v. Georgia*, no. 38342/05, § 62, 13.07.2017, with further references). Moreover, the Court has explained that it is often impossible to quantify the effects of the environmental nuisance at issue in each individual case and to distinguish them from the influence of other relevant factors such as age, profession or personal lifestyle. The same applies to the possible worsening of quality of life, which is a subjective characteristic that hardly lends itself to a precise definition (*idem*, § 63)"[25].

As regards the applicant association, Verein KlimaSeniorinnen Schweiz which was, according to its Statute, a non-profit association established under Swiss law to promote and implement effective climate protection on behalf of its members[26], the Court held that it had the necessary *locus standi* in this proceeding and that Article 8 is applicable to the complaint[27].

Moreover, in the respect of this association, after a very interesting analysis of the content of States' positive obligations, the Court found that the Swiss Confederation exceeded its margin of appreciation and failed to comply with its positive obligations under the Convention:

„572. In these circumstances, while acknowledging that the measures and methods determining the details of the State's climate policy fall within its wide margin of appreciation, *in the absence of any domestic measure attempting to quantify the respondent State's remaining carbon budget, the Court has difficulty accepting that the State could be regarded as complying effectively* with its regulatory obligation under Article 8 of the Convention (see para. 550 above).

573. In conclusion, there were some *critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework*, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, *as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets* (see paragraphs 558 to 559 above). *By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework*, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

574. The above findings suffice for the Court to find that *there has been a violation of Article 8* of the Convention."[28].

Moreover, the Court engaged into analysing the alleged violation of art. 6 para. 1 (civil limb) of the Convention, considering that the applicants complained that they had not access to a domestic court in order to address the adverse effects of climate change.

We underline that the Court stressed that:

„604. In the environmental context, the Court has been prepared to accept that disputes concerning environmental matters were genuine and serious. It has drawn that conclusion from, in particular, the fact that the relevant appeal had been declared admissible at the domestic level (…), from the substance of the applicant's pleadings before the domestic courts (…), or from the arguments used by the domestic courts to dismiss a given action (…).

607. By contrast, *where the adverse environmental effects on an applicant's rights were immediate and certain, the Court considered that the dispute concerning the matter fell under Article 6 § 1*."[29].

After an extended analysis of the applicability of art. 6 para. 1 ECHR to this case, the Court held that the association's claims fell within the scope of art. 6, and that its right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired.

In this respect, the Court stressed that:

„639. (…) the Court considers it essential to emphasise the *key role which domestic courts have played and will play in climate-change litigation*, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of

[25] *Idem*, § 517.

[26] This association had more than 2,000 female members who live in Switzerland (average age 73 years), and approximately 650 members are 75 or older. The Statute provided that the association (i) is committed to engaging in various activities aimed at reducing GHG emissions in Switzerland and addressing their effects on global warming, and that it (ii) acts not only in the interest of its members, but also in the interest of the general public and future generations, with the aim of ensuring effective climate protection.

[27] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, § 526.

[28] *Idem*, §§ 572-574.

[29] *Idem*, §604, § 607.

shared responsibility and subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed."[30].

Therefore, as regards the association, the Court held that (i) there had been a violation of the right to respect for private and family life enshrined in art. 8 ECHR and, additionally, that there had been a violation of the right to access to the court enshrined in art. 6 para. 1 ECHR, and that (ii) it is not necessary to examine the applicant association complaint under art. 13 ECHR separately.

As for the damage invoked by the applicant association, the Court held that the Swiss confederation is to pay to it, within three months, EUR 80,000 (eighty thousand euros), plus any tax that may be chargeable, in respect of costs and expenses.

Unfortunately, as regards the other four applicants (older women who are particularly at risk), the Court considered that they did not fulfil the victim-status criteria under art. 34[31] ECHR - *Individual applications*, reason for which the Court declared their applications inadmissible.

These applicants' complaints concerned the adverse effects of climate change which they suffer as a result of the Swiss authorities allegedly inadequate action concerning climate change - the increasing occurrence and intensity of heatwaves[32].

But, we draw attention on the separate opinion of Judge Eicke which is annexed to this judgment, which is very interesting to explore in a future study. Judge Eicke does not agree with the majority of his colleagues "either in relation to the methodology they have adopted or on the conclusions which they have come to both in relation to the admissibility (and, in particular, the question of „victim" status) as well as on the merits."[33].

For now, we only resume ourselves to underline that judge Eicke concluded his analysis, by saying that:

«68. In light of the above, and *plainly recognising the nature or magnitude of the risks and the challenges posed by anthropogenic climate change and the urgent need to address them*, the Court would already have achieved much if it had focussed on a violation of Article 6 of the Convention and, at a push, a procedural violation of Article 8 relating in particular to (again) the right of access to court and of access to information necessary to enable effective public participation in the process of devising the necessary policies and regulations and to ensure proper compliance with and enforcement of those policies and regulations as well as those already undertaken under domestic law. However, in my view, *the majority clearly „tried to run before it could walk" and, thereby, went beyond what was legitimate for this Court*, as the court charged with ensuring "the observance of the engagements by the High Contracting Parties in the Convention" (Article 19) by means of "interpretation and application of the Convention" (Article 32), to do.

69. I also do worry that, in having taken the approach and come to the conclusion they have, *the majority are, in effect, giving (false) hope that litigation and the courts can provide „the answer" without there being, in effect, any prospect of litigation* (especially before this Court) accelerating the taking of the necessary measures towards the fight against anthropogenic climate change.

70. Consequently, while I understand and share the very real sense of and need for urgency in relation to the fight against anthropogenic climate change, I fear that in this judgment the majority has gone beyond what it is legitimate and permissible for this Court to do and, unfortunately, in doing so, *may well have achieved exactly the opposite effect to what was intended.*»[34].

3.2. The Case Carême v. France[35]

This case concerned a complaint brought by a former inhabitant and mayor of the municipality of Grande-Synthe (i.e. a municipality of around 23,000 inhabitants, situated on the coast of the English Channel), Mr Daniel Carême, who was also a member of the European Parliament.

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[30] *Idem*, § 639.

[31] Art. 34 ECHR provides that: „*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*".

[32] The applicants, on one part, provided data showing that the summers in recent years have been among the warmest summers ever recorded in Switzerland, and, on the other part, that heatwaves are associated with increased mortality and morbidity, particularly in older women.

[33] Partly concurring dissenting opinion attached to the Judgement, § 1.

[34] *Idem*, §§ 68-70.

[35] Grand Chamber, dec. from 09.04.2024, app. no. 7189/21, *https://hudoc.echr.coe.int/eng?i=001-233174*, last consulted on 12.05.2024.

The claimant submitted that the respondent State has not taken sufficient steps to prevent global warming and that this failure entails a violation of the right to life enshrined in art. 2 ECHR and of the right to respect for private and family life enshrined in art. 8 ECHR.

Referring to the general principles on the victim status of physical persons under art. 24 ECHR, in the context of climate change litigation, the Court declared inadmissible the application, on the ground that the applicant did not have victim status.

We consider relevant for this study to point out the following ideas of the Court:

«84. Holding otherwise, and given the fact that *almost anyone could have a legitimate reason to feel some form of anxiety linked to the risks of the adverse effects of climate change in the future*, would make it difficult to delineate the *actio popularis* protection - not permitted in the Convention system - from situations where there is a pressing need to ensure an applicant's individual protection from the harm which the effects of climate change may have on the enjoyment of their human rights.

85. *As regards the applicant's argument that he complained to the Court as the former mayor* of Grande-Synthe, the Court refers to its well-established case-law according to which decentralised authorities that exercise public functions, regardless of their autonomy vis-à-vis the central organs - which applies to regional and local authorities, including municipalities - *are considered to be „governmental organisations" that have no standing* to make an application to the Court under Article 34 of the Convention (…). Accordingly, leaving aside the fact that he is no longer the mayor of Grande-Synthe, the Court finds that the applicant *had no right to apply to the Court or to lodge a complaint* with it on behalf of the municipality of Grande-Synthe. (…).»[36].

It is well known, that from *ratione personae* perspective, public authorities[37] are not entitled to lodge a complaint in front of the Strasbourg Court.

3.3. Case *Duarte Agostinho and Others v. Portugal and 32 Others*[38]

This case concerned a complaint brought by six Portuguese nationals against the Portuguese Republic and other 32 States: the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Swiss Confederation, the Republic of Cyprus, the Czech Republic, the Federal Republic of Germany, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Estonia, the Republic of Finland, the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Hellenic Republic, the Republic of Croatia, Hungary, Ireland, the Italian Republic, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Latvia, the Republic of Malta, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, Romania, the Russian Federation[39], the Slovak Republic, the Republic of Slovenia, the Kingdom of Sweden, the Republic of Türkiye and Ukraine[40].

The claimants, relying on the relevant international documents, reports and expert findings regarding the harm caused by climate change to human health, argued „in particular, that there had been a breach of Articles 2, 3, 8 and 14 of the Convention owing to the existing, and serious future, impacts of climate change imputable to the respondent States, and specifically those in relation to heatwaves, wildfires and smoke from wildfires, which affected their lives, well-being, mental health and the amenities of their homes."[41]. In this respect, they underlined that „they were currently exposed to a risk of harm from climate change and that the risk was set to increase significantly over the course of their lifetimes and would also affect any children they might have."[42],

[36] *Carême v. France*, § § 84-85.

[37] See E.E. Ștefan, *Disputed matters on the concept of public authority*, in the Challenges of the Knowledge Society (CKS) Proceedings, 2015, Pro Universitaria Publishing House, Bucharest, p. 535 *et seq.*, *https://cks.univnt.ro/cks_2015.html*, last consulted on 12.05.2024.

[38] Grand Chamber, judgment from 09.04.2024, app. no. 39371/20, *https://hudoc.echr.coe.int/eng?i=001-233261*, last consulted on 12.05.2024.

[39] Although the Russian Federation ceased to be a member of the Council of Europe (16 March 2022), and a Party to the Convention (16.09.2022), and even though the Russian Government did not submit any observations on the case, having in view that the facts giving rise to the violations of the Convention alleged by the applicants took place before 16.09.2022, the Court decided that it has jurisdiction to deal with them.

[40] Please note that on 18.11.2022 the applicants informed the Court that they wished to withdraw their application as it concerned Ukraine citing „the exceptional circumstances relating to the ongoing war", reason for which the Court struck out of the list of cases for Ukraine, in accordance with art. 37 § 1 (a) ECHR.

[41] *Duarte Agostinho and Others v. Portugal and 32 Others*, § 3.

[42] *Idem*, § 14.

being already subject to „reduced energy levels, difficulty sleeping and a curtailment on their ability to spend time or exercise outdoors during recent heatwaves”[43].

In their view, all the respondent States bore responsibility for this harm, by permitting:

„(a) the release of emissions within the national territory, and offshore areas “over which they had jurisdiction”;

(b) the export of fossil fuels extracted on their territory;

(c) the import of goods, the production of which involved the release of emissions into the atmosphere; and

(d) entities within their jurisdiction to contribute to the release of emissions overseas, namely, through the extraction of fossil fuels overseas or by financing such extraction.”[44].

As regards jurisdiction, after a thorough analysis regarding all States, the Court decided that:

„213. (…) while also mindful of the constant legal developments at national and international level and global responses to climate change, together with the ever-increasing scientific knowledge about climate change and its effects on individuals, the Court finds that *there are no grounds in the Convention for the extension, by way of judicial interpretation, of the respondent States' extraterritorial jurisdiction* in the manner requested by the applicants.”[45].

Therefore, territorial jurisdiction was established in respect of Portugal on the grounds that the applicants were within the jurisdiction of those States, whereas no jurisdiction could be established as regards the other respondent States on the grounds that the applicants were not within the jurisdiction of those States. For this reason, the applicants' complaint against the other respondent States was declared inadmissible pursuant to art. 35 §§ 3 and 4 ECHR.

But, having regard to the fact that the applicants had not pursued any legal avenue in Portugal concerning their complaints, the applicants' complaint against Portugal was declared also inadmissible for non-exhaustion of domestic remedies, and therefore rejected.

4. Conclusions

Chamber rulings in the climate change cases, we must confess that we are willing to see the further developments of the Court on climate change cases.

It is regrettable that in two (and a half) out of these three cases, the Strasbourg Court rejected the complaints as inadmissible for one reason or another. But this is only the beginning, and we are positive that the arguments expressed by Judge Eicke in the Partly concurring dissenting opinion attached to the judgement given in the case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, shall be further exploited.

Of course that there are other cases in the case-law of the Strasbourg Court that have to be followed, for example, the following cases adjourned: *Uricchiov v. Italy and 31 Other States* (app. no. 14615/21) and *De Conto v. Italy and 32 Other States* (app. no. 14620/21), *Müllner v. Austria* (application no. 18859/21), *Greenpeace Nordic and Others v. Norway* (app. no. 34068/21), *The Norwegian Grandparents' Climate Campaign and Others v. Norway* (app. no. 19026/21), *Soubeste and four other applications v. Austria and 11 Other States* (app. nos. 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22), *Engels v. Germany* (app. no. 46906/22).

More complaints involving climate change litigation will be registered in the following years at the Court in Strasbourg (and not only here), and the cases will be huge, involving many claimants and many respondent States.

In parallel, other international courts of law will deal cases or will involving climate change issuer.

For instance, the International Tribunal for the Law of the Sea (ITLOS), in Hamburg, now deliberates on the case and it is expected to issue its advisory opinion on state responsibility[46] for the climate crisis by mid-2024[47].

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[43] *Ibidem*.

[44] *Idem*, § 13.

[45] *Idem*, § 213.

[46] On the responsibility principle, in general, see E. Anghel, *The responsibility principle*, in Challenges of the Knowledge Society (CKS) Proceedings, 2015, Pro Universitaria Publishing House, Bucharest, pp. 364-370, *https://cks.univnt.ro/cks_2015.html*, last consulted on 12.05.2024.

[47] Please see the Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), case available at *https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/*, last consulted on 12.05.2024.

More than fifty states and organisations were involved in this procedure, and submitted written submissions and/or oral arguments. The hearings in front of ITLOS marked the first time an international judicial body has been called upon to clarify States' obligations to protect the world's oceans from fossil fuel-driven climate change, which threatens human rights, biodiversity, and the very existence of many island nations.

The International Tribunal for the Law of the Sea was the first of the three international judicial bodies currently working to prepare advisory opinions on climate change (the Inter-American Court of Human Rights[48] and the International Court of Justice have also been asked to clarify states' responsibility with respect to climate change, beyond ethics).

From this perspective, we consider that the box of Pandora was already opened… We only have to wait in order to see what this box reserves to us for the future.

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[48] See R.-M. Popescu, *Drept international public. Noțiuni introductive*, Universul Juridic Publishing House, Bucharest, 2023, p. 182 *et seq*.

EXPLORING THE LEGALITY OF AI IN CUSTOMS PROCEDURES

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Abstract

This paper explores the complex interaction between AI and customs procedures, aiming to uncover the legal ramifications associated with the integration of AI technologies in this field.

With the rapid advancement of AI, customs authorities worldwide are increasingly adopting automated systems to improve the efficiency, accuracy, and security of cross-border trade operations. However, as AI systems take on significant roles in decision-making processes traditionally overseen by humans, concerns regarding legality, accountability, and transparency become prominent.

Through a thorough examination of existing legal frameworks, international agreements, and relevant case law related to AI implementation in customs procedures, this research conducts a comprehensive analysis. It seeks to shed light on the evolving legal landscape surrounding AI in customs operations through a comparative study of various regulatory approaches and interpretations.

Additionally, the paper scrutinises emerging ethical considerations and policy challenges arising from AI adoption, emphasising the necessity for coherent legal frameworks that uphold fundamental rights while promoting innovation and facilitating trade. By synthesising legal, ethical, and practical viewpoints, this study contributes to a nuanced comprehension of the intricate dynamics influencing the legality of artificial intelligence in customs procedures.

Keywords: *AI, customs, public international law, European law, administrative procedures.*

1. Introduction - Defining AI

Artificial intelligence (AI) has become an expanding technology that will help public authorities in tackling shortcomings in regards to human resources and overbearing administration procedures. This paper will focus on how AI has become a staple in the public administration and will analyse its legal status. Furthermore, we will outline how AI can help improve customs procedures seeing as how Romania and the European Union have started developing and implementing electronic means to monitor goods that are being shipped to EU states or are just transiting the joint customs territory.

Artificial intelligence, a term introduced by Stanford Professor John McCarthy in 1955, refers to the field dedicated to creating intelligent machines. Initially, AI focused on programming machines to execute tasks cleverly, such as playing chess. However, contemporary emphasis lies on developing machines capable of learning, akin to human cognitive processes.

A frequently cited definition of AI characterises it as a technology allowing machines to replicate intricate human abilities. However, this description lacks specificity, essentially rephrasing the term 'artificial intelligence'. Without detailing the specific 'complex human skills' involved, the essence of AI remains ambiguous. Similarly, defining AI as the execution of complex tasks by computers in intricate environments suffers from the same vagueness[1].

These definitions based on tasks do provide some insight into AI, but they still have their limitations. Terms like „some degree of autonomy”[2] remain ambiguous. Furthermore, these definitions are still quite broad, encompassing phenomena that many wouldn't typically associate with AI.

A legal definition for artificial intelligence has been consecrated in the European Union AI Law which states that: «„AI system” is a machine-based system designed to operate with varying levels of autonomy and that may

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[1] H. Sheikh, C. Prins, E. Schrijvers, *Mission AI - the new system technology*, Springer, The Hague, 2023, pp. 15-16.

[2] *Ibidem*.

exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments»[3].

This marks one of the most important legal definitions in the world, seeing as how a lot of states are steadily adopting AI yet have not adopted specialised legislation regarding this important technology. The EU have been regularly adopting legal means to ensure that AI will be available in a legal and controlled environment with the Coordinated Plan on AI[4] with which it will increase the pace of investment in AI technologies to foster a robust economic and social recovery, supported by the adoption of innovative digital solutions and harmonise AI policies to eliminate fragmentation and tackle global challenges.

It's also important to note that the EU AI Act has implemented an AI Office which will monitor, supervise, and enforce the AI Act requirements on general purpose AI models and systems across the 27 EU Member States[5] and will enforce the AI Act with decisions, implementing acts, delegated acts, guidance and guidelines and standardisation requests.

However, AI in the usage of customs authorities is still a long way towards truly attaining operational status seeing as how artificial general intelligence has yet to be achieved.

2. AI used by customs authorities

AI has been slowly integrated in some state's customs authorities, such as the Arab United Emirates, where Dubai has been seen by the World Customs Organization[6] as one of the most advanced customs hubs where an AI platform helps e-commerce companies and other beneficiaries with automated declaration preparation and immediate clearance. To help implement AI in its customs offices, national authorities integrated the iDeclare and Al Munasiq applications.

These two systems allow beneficiaries to scan objects with their phones so that the applications will help select the harmonised system code for their goods, while also filling in information in the customs import declarations.

The United States of America has also implemented AI for its border and customs offices[7] which can also improve screening time with facial recognition, image classification and object detection. However, China has been a leading state in regards to implementing AI in customs procedures as it has included biometric processing and placing a five checkpoint system that uses AI to identify possible goods that have a higher degree of risk (such as contraband goods). This means that customs agents can act alongside computer algorithms and robotic helpers, such as the ones already active in Hong Kong[8].

The General Administration of Customs of China have released public information regarding[9] the usage of AI and robotics in their activity in order to safely check the content of cargo containers. Similarly, the World Customs Organization has noted that Netherlands have used automated detection for X-ray scanners in order to identify hidden objects inside packages and cargo containers, we note that these types of procedures have yet to become a standard at an EU level[10].

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[3] Art. 3 para. 1 from the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (AI Act) and amending certain Union legislative acts published as 2021/0106(COD), *https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf*, last consulted on 25.03.2024.

[4] European Commission communication COM(2021)205final, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Fostering a European approach to Artificial Intelligence, 21.04.2021.

[5] According to its directives published on its own website, *https://artificialintelligenceact.eu/the-ai-office-summary/*, last consulted on 25.03.2024.

[6] A. Mahboob Musabih, *Transforming trade: how Dubai Customs is harnessing AI for enhanced trade facilitation and border control*, World Customs Organization - Panorama, issue 3/2023, 18.10.2023.

[7] As seen on the Homeland Security website, *https://www.dhs.gov/ai/using-ai-to-secure-the-homeland*, 29.02.2024, last consulted on 25.03.2024.

[8] A. Aleksandrovna Chebotareva, N. Gennadievna Kazantseva and others, *Digital transformation and artificial intelligence in the activities of customs services in Russia and foreign countries*, SHS Web of Conferences 118, RUDN LTMRP Conference 2021 04014 (2021).

[9] According to the official Chinese customs authority website last consulted on *http://english.customs.gov.cn/Statics/6483b197-5ea9-4f90-a04a-89bc9e28de74.html*, information was published at 01.09.2020, last consulted on 25.03.2024.

[10] World Customs Organisation, *Automated detection: Dutch Customs shares its experience*, Dossier: Disruptive Technologies, issue 3/2022, 12.10.2022.

A similar approach has also been noted in the USA, where US Customs and Border Protection have started using drones to identify possible illicit goods or unlawful border crossing incidents[11]. Researchers at the CATO Institute have determined that the US have used military grade and civilian grade drones in their customs procedures, but the costs outweigh the results with 32.000$ per arrest[12], where as drones had been used in only 8000 missions, where as in 2018 the Customs and Border Protection Agency had over 1.7 million operations.

Furthermore, the US Customs Artificial Intelligence Center of Innovation[13] has been established for video and image redaction in order to identify frames where objects are detected, label the detected object, and perform redaction on frames that contain sensitive information.

We would like to recall that the EU had funded a promising Intelligent Portable Border Control System (commercially named iBorderCtrl)[14] which was tested in three EU Member States. The project was supposed to allow border and customs agents to interact with incoming travellers, immigrants and economic operators so that they could evaluate if there were deceit attempts about the data specified during the pre-arrival registration, while also allowing face matching combined with palm vein scanning[15].

However, the iBorderCtrl project was heavily contested by Patrick Breyer, a European Parliament member, who filed a complaint against the European Research Executive Agency in which the Tribunal of the European Union (Case T-158/19[16]) and the European Court of Justice, in the appeal procedure (Case C-135/22P[17]) stated that the requirement for participants in the iBorderCtrl project was to adhere to fundamental rights and principles, as recognized by the Charter, and it was the Commission's responsibility to ensure such adherence, does not automatically imply that these rights have not been violated.

According to the World Customs Organization, only 10% of the member states that had responded to the study had adopted AI tools as of 2022[18] while another 12% of the respondents claimed they are planning to implement AI tools in the future. The study cites as main benefits of AI tools the following: better risk management, profiling, fraud detection and greater compliance; facilitated customs audits and anomaly identification; predict future trends; improved facilitation; improve revenue collection; and improved imaging (containers) and searches[19].

However, we would like to outline that such tools come with caveats such as costs, lack of good practices, lack of a governmental strategy and legal issues. The World Customs Organization[20] outlines that some member states have created special AI Departments in their customs authorities which ensures risk management, image processing and valuation of goods.

The World Customs Organization warns that AI has some risks such as malicious data generated with fake content and as such would render the harmonized classification tool inefficient, yet AI has been implemented more efficiently as chat bot helpers for interested parties when they search relevant information in the customs open-source data bases.

Researchers from McKinsey&Company[21] pointed out that growing e-commerce will force customs authorities to carry out extensive updates to their operational procedures seeing as it the declaration volumes require better risk management tools. The researchers found that a lot of the current risk identifying

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[11] As seen on the US Customs website *https://www.cbp.gov/frontline/cbp-small-drones-program*, information was published on 09.11.2020, last consulted on 25.03.2024.

[12] D.J. Bier, M. Feeney, *Drones on the Border: Efficacy and Privacy Implications*, CATO Institute, Immigration Research and Policy Brief no. 5/01.05.2018.

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[15] L. Endregard Hemat, *A Case Study of EU-funded Research with Experimental Artificial Intelligence Technology for Border Control*, Universitetet I Oslo - Norwegian Centre for Human Rights, master thesis, 07.11.2022, pp. 33-34.

[16] Judgment of the General Court from 15.12.2021, Case no. T-158/19, *Patrick Breyer v. REA*.

[17] Judgment of the Court from 07.09.2023, Case no. C-135/22P, *Patric Breyer v. REA and European Commission*, para. 105, 106 and 108.

[18] World Customs Organisation, *The role of advanced technologies in cross-border trade: A customs perspective*, WTO and WCO, WTO Publication, London, 2022, p. 34.

[19] *Ibidem*.

[20] World Customs Organisation, World Trade Organisation, *WCO/WTO Study Report on Disruptive Technologies*, published by World Trade Organisation,Publication Number: FAC 2022-2, June 2022, p. 67.

[21] A. Busheri, C. Marcati, S. Zaidi, *Using advanced analytics to improve performance in customs agencies*, McKinsey&Company, 21.09.2022, *https://www.mckinsey.com/industries/public-sector/our-insights/using-advanced-analytics-to-improve-performance-in-customs-agencies#/*, last consulted on 25.03.2024.

infrastructure is outdated when forced to tackle large quantities of declarations and physical inspections. The EU funded project PROFILE[22] which uses AI analytical data and shares the information with all the EU Member States in order to update, as fast as possible, the data bases regarding customs risks.

This could provide an improvement over the Customs Decisions System that was introduced in 2017 and updated in 2020[23], which focuses on customs cooperation inside the EU in order to allow economic operators to conduct imports and exports based on the classic EORI registration.

AI could be used to help traders to fill the customs declaration based on their needs, as this is not contrary to Regulation (EU) no. 952/2013[24] which ensures that electronic documents can be processed by authorities. However, without specialised AI tools licensed under the EU AI Act economic operators must rely on applications that could pose risks to both their infrastructure and that of the customs authorities.

We would like to recall that using emerging technology is not seen as frowned upon seeing as how the European Court of Justice[25] considers drones as viable tools to flag potential surveillance methods that can be used to help protect the EU borders.

Despite the trend of technology being adopted in certain procedures, taxpayer compliance and data publishing have yet to be addressed by customs authorities. Literature[26] outlines these drawbacks as cumbersome for public institutions as costs for personalised Big Data can affect the functionality of a customs database and its questionable as to why open-source information would not be better suited for such a task.

Furthermore, in customs, it's very important to be able to distinguish between origin and provenance which AI technology is not yet capable of as it requires extensive training in order to figure out particularities in the means of production that are accessible for each state.

We consider AI a very notable tool in risk management, as Regulation (EU) no. 952/2013[27] allows customs authorities, alongside the European Commission, to analyse risks in customs controls, meaning that economic operators are obliged to share data with the authorities in order to determine if goods are being correctly identified in the harmonised description and coding system. As such, a web-crawling AI application could help customs agents determine risks and whether or not to commit to a control by offering prices technical information for said goods[28].

AI used alongside other means of conducting customs controls, such as drones, can help achieve better tax compliance and fraud avoidance, as seen in Netherlands, where the customs authority identify drugs with the drone cameras, while all data is being filtered in order to respect data protection laws[29].

In summary, AI offers numerous advantages for customs agencies since it enhances efficiency and precision in handling customs data, while allowing agencies to streamline border control procedures, detect illicit activities like smuggling or trafficking more efficiently, and ensure adherence to trade regulations. Additionally, AI can automate routine tasks and so it allows public institutions to redistribute human resources towards more intricate and strategic endeavors, such as risk management.

We endorse Professor Karim Lakhani's conclusion regarding the utilisation of AI, which emphasises that „AI won't replace humans - but humans with AI will replace humans without"[30]. Consequently, customs agents should embrace AI adoption to enhance job performance and bolster tax compliance.

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[22] More information can be obtained on their website *https://www.profile-project.eu/*, last consulted on 25.03.2024. T. Mannisto, J. Hintsa, *PROFILE: Enhancing Customs Risk Management*, WCO, Panorama, 06.06.2019.

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2.1. Romania and AI integration

Romania has adopted a National Strategy regarding AI[31] in which it establishes some general objectives for the central authorities in order to ensure standardisation in this field. Romania will utilise AI in order to allow a green transition, digital transformation and productivity, rectitude, and most importantly, from our point of view, macroeconomic stability, meaning transitioning from "protective" fiscal measures - necessary in the short term as a response to the effects of the pandemic - to measures that facilitate resource reallocation and support recovery; there is an emphasis on the need to increase the efficiency of public administration and reduce private debt, as well as the introduction of fiscal instruments to support the green transition.

However, in an Ipsos study[32] it was found that Romania has a growing appetite for AI, yet Romanians oscillate between ignorance, pragmatism, and possibly, naivety out of the 31 countries that were targeted by the study. The study shows that 54% of Romanians had their lives impacted by AI. We consider that this research is very comforting when analysing the growing need for digitization in Romania and showcases that taxpayers are willing to work with AI better than with human agents, because technology does not discriminate or waste time.

The Romanian Government has adopted the Ministry of Research, Innovation and Digitization Order no. 20484/2023[33] which establishes the Romanian Committee for AI which will oversee implementation of AI tools in governmental agencies. With the help of the Committee, the Government will help the Ministry of Finance and its subsidiaries (including the Romanian Customs Authority) to create specialised AI tools and use them to collect taxes in a more efficient manner.

Without proper AI monitoring tools, Law no. 296/2023[34] regarding certain fiscal-budgetary measures to ensure Romania's long-term financial sustainability, which introduces the eSeal - a specialised monitoring tool for transports of goods and excise duty goods, will require a lot of manpower in order to ensure compliance. AI will help risk management and monitoring without an excessive amount of trained human resources.

The most recognized AI tool in Romania is Ion, a „governmental counsellor”[35]. Its makers hope that it will act as a front desk for people to send complaints or requests in order for the authorities to act faster and more efficiently. However, the project still has a long way from being a simple chat-bot, while the Government hopes it will act in a similar fashion to ChatGPT, meaning that it’s supposed to offer simple solutions or recommendations for interested parties.

A 2022-2023 AI map in Romania[36] outlines that a lot of companies face shortcomings when operating in this state. The primary hurdles confronting startup founders include difficulty in sourcing the right talent, struggles in attracting necessary financing, and challenges in maintaining sufficient cash flow for operations. Additionally, expanding internationally is perceived as arduous, and navigating bureaucratic processes, both in Romania and other countries where they operate, poses significant challenges.

In order to prepare specialised human resources, the Romanian Government adopted GD no. 650/2023 amending Annexes no. 1-6 to GD no. 367/2023 approving the Nomenclature of fields and specialisations/programs of university studies and the structure of higher education institutions for the academic year 2023-2024[37] which allows universities to prepare students in the field of AI and cybersecurity. This decision will be useful in the long term, but it does not provide a short-term solution as highly trained workers will most likely prefer other places with better offers. Romania's Prime Minister considers that AI will help recover the gaps in competitiveness and can be a crucial key in how public authorities will handle digitization[38].

It’s imperative that Romania implements AI for its fiscal and customs authorities seeing as how its candidature to the Organization for Economic Co-operation and Development has an AI national strategy

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[31] Ministerul Cercetării, Inovării și Digitalizării, *Strategia națională în domeniul inteligenței artificiale 2024-2027*, MCID, published at 01.02.2024, *https://www.mcid.gov.ro/wp-content/uploads/2024/01/Strategie-Inteligenta-Artificiala-22012024.pdf*, last consulted on 25.03.2024, p. 36.

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[38] The Prime Minister's speech can be read at *https://gov.ro/ro/media/comunicate/mesajul-premierului-nicolae-ionel-ciuca-pentru-evenimentul-inteligenta-artificiala-sursa-de-dezvoltare-pentru-romania-a-iv-a-editie-tehnologiile-bazate-pe-inteligenta-artificiala-pot-influenta-s*, was held at 15.03.2024, last consulted on 25.03.2024.

adoption checklist that must comply to the OECD AI Principles adopted in 2019[39]. Furthermore, Romania has contributed and learned a great deal of good practices from other states and the OECD through its participation in the preparation of the report titled „The State Of Implementation Of The OECD AI Principles Four Years On"[40] with the USA, Japan, Canada, Israel and the United Kingdom already having a proper administrative apparatus capable of using AI and acknowledging the risks associated with the technology.

3. Conclusions

AI represents a great stimulant for Romania to play catch-up with other states seeing as how the technology focuses on fast gains and quick adoption. A lot of companies have shown interest in adopting AI tools to help their bureaucratic processes. The World Customs Organization has shown a lot of interest to help states in order to implement AI solutions, even offering a free tool based on the Bacuda application[41], which offers an AI harmonised system code recommendations. The tools help users to identify goods based on description and number of harmonised system code. The more details offered to the AI algorithm the better the results are.

Yet, generative AI content and unlawful practices can create a disruptive environment[42] based on insecurity (terrorism, counterfeit goods, fiscal fraud and others) and organised crime. We agree with how literature portraits that[43]: *„(...) technologies are tools and not the objectives. They are ever- evolving, and today's disruptive technologies will become obsolete in the future. People are innovative: fraudsters can be beneficiaries of disruptive technologies; it is easily imagined that fraudsters will run artificial intelligence (AI) to find out how they can smuggle goods without being detected by customs.*"

Utilising AI represents an immense opportunity for the Romanian Customs Authority, especially considering the extensive data collection within customs. AI offers the capability to analyse the vast and continually expanding datasets, accurately detecting and predicting patterns at a faster rate than humans. The potential contributions of AI to customs are extensive, including modelling duty and tax collection patterns to ensure the accurate collection of duties and taxes at border crossings. Also, AI can help implement automatic classification of HS codes for commodities through natural language processing, leading to improved classification accuracy and the correct application of tariff rates.

This tied with robotic process automation which can be programmed to mimic most human- computer interactions to carry out error-free tasks at high volume and speed[44] will help beneficiaries and customs agents in thwarting frauds and commit to tax compliance, even if there is not a high number of agents on-hand. Technology can offer a proper solution to the lack of manpower and will speed up interactions, increasing performance and lessen human workloads.

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COUNCIL REGULATION (EU) 2019/1111: NEW PROGRESS IN INTERNATIONAL CHILD ABDUCTIONS

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Abstract

Council Regulation (EU) 2019/1111, recently entered into force, brought significant progress for EU Member States in the specific area of international child abductions.

In the context of freedom of movement within the European Union guaranteed by art. 21 TFEU, there is an ever-increasing number of transnational families, and an equally increasing risk of international child abductions when these families break up.

Strongly supporting the general principle according to which an abducted child shall promptly be returned to the state of habitual residence, Council Regulation (EU) 2019/1111 narrows the application of the most frequently encountered exception to this principle, namely the "grave risk" exception.

The purpose of the article is to analyse the child protection measures ensuring the application of the principle of prompt return, even when a serious risk is associated with the return of the child to the state of habitual residence.

Hence, the objectives of the present study are to identify the progress from private international law to EU law, and also the way in which the relevant EU regulations - Council Regulation (EC) 2201/2003 and Council Regulation (EU) 2019/1111 - have constantly evolved in relation to protection measures, intended to remove from application the serious risk defense.

Moreover, as these protective measures are not indicated even by the actual Council Regulation (EU) 2019/1111, the article will further examine the most significant procedural and substantive aspects, as they arise from legislation in force and the case-law of the courts in Member States.

Keywords: *EU regulations, international abduction, prompt return, grave risk, measures of protection.*

1. Introduction

The issue of international child abduction is not new, as it was already approached in private international law by the well-known Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[1].

Nevertheless, this phenomenon has grown exponentially in recent years all over the world and especially in the European Union, in the context of freedom of movement of EU citizens[2].

This led to adoption of specific instruments in European Union law - the former Council Regulation (EC) 2201/2003[3] and the actual Council Regulation (EU) 2019/1111[4], which took over and developed the experience gained through private international law.

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[1] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, entered into force on 01 December 1983.

[2] Art. 21 para. 1 TFEU (consolidated version) stipulates: „Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". European Union citizenship is afforded to all nationals of member states of the EU, was introduced by the 1992 Treaty on European Union (art. 3 para. 2 consolidated version) and is additional to national citizenship. Art. 45 para. 1 of the Charter of Fundamental Rights of the European Union confirms that: „Every citizen of the Union has the right to move and reside freely within the territory of the Member States".

[3] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L 338/1/23.12.2003.

[4] Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178/1/02.07.2019.

Both private international law and EU law acknowledge the evident tension between the principle of prompt return of the child to the state of habitual residence and the exceptions to this principle, of which the most disputed in practice is the „grave risk" exception.

Indeed, an order of return to the state of habitual residence issued in order to apply the prompt return principle might expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The subject has great importance, as the answer to the question how to accommodate the principle with the above-mentioned exception is difficult, especially as both EU law and private international law leave a large margin of discretion to courts dealing with international abduction cases.

Nevertheless, EU law conceived new means to harmonise the principle of prompt return with the "grave risk" exception, by introducing the concept of "protective measures" of the child.

The study intends to explore this concept, destined to remove from application the serious risk defense and thus ensure safe return of the child to the state of origin.

To reach this aim, the study will extensively engage with EU law and also the work of The Hague Conference on Private International Law, exploring the origin and evolution of protective measures.

The analysis will further focus on particularities of these measures of protection, as no definition is provided by EU law, and most of substantive and procedural aspects are left for the national legislations.

As Romanian juridical literature and case-law have not yet approached the subject in relation to Council Regulation (EU) 2019/1111, doctrinal opinions and jurisprudence identified abroad will be presented.

2. Content

2.1. Evolution of legal context

Private international law and EU law coexist in the area of international child abductions.

Eu law, adopted approximately 20 years after the private international law, represents nevertheless progress from several perspectives, as a response to the need to adapt legal norms to the new social realities (progressive increase of the number of international abductions).

The study will concentrate on a singular progressive aspect, namely the concept of „protective measures" of the child.

2.1.1. The beginning: private international law

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (to which Romania is a member state[5]) is the key juridical instrument of private international law, which seeks to protect children from the harmful effects of wrongful removal and/or retention across international boundaries.

The principle of prompt return of the child to the state of origin is stipulated form the very first article[6].

Exceptions to this principle are consecrated by art. 12 (integration of the child in the state of refuge), art. 13 (grave risk for the child in case of return to the state of habitual residence) and art. 20 (protection of human rights and fundamental freedoms) of the same 1980 Hague Convention.

These exceptions consist in situations when it is considered to be in the best interests of the child to remain in the state of origin, although the she/he has been wrongfully removed or retained.

The most problematic exception in practice is the "grave risk" exception, as it generates the majority of non-return orders and thus non-compliance with the prompt return principle.

The 1980 Hague Convention does not include any instrument intended to reduce the effects of the previously mentioned serious risk exception.

[5] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

[6] Art. 1: „The objects of the present Convention are: a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State (…)."

Nevertheless, the HCCH[7] has recently published a Guide to Good Practice regarding the application of the above-mentioned exception[8], where an important concept later conceived by EU law („protective measures") was acknowledged and extensively discussed.

2.1.2. A step forward: EU law

As already indicated, EU law intervened in the area of international child abductions as a progress compared to private international law, because it introduced the concept of the „protective measures" of the child.

In essence, these measures are destined to protect the child in the state of habitual residence and thus ameliorate or remove the serious risk, so that the prompt return principle may still be applied.

Council Regulation (EC) no. 2201/2003 of 27.11.2003 (also known in practice as Regulation Brussels IIa) is the first important progress in the area of protective measures of the child.

According to the Practice guide for the application of the Brussels IIa Regulation, the Regulation „goes a step further by extending the obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return"[9].

To this end, art. 11 para. 4 stipulates that: „A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return" (our underline).

As a novelty compared to the 1980 Hague Convention, Regulation Brussels IIa connected the grave risk defense to protective measures in benefit of the child returned to the state of origin. Practically, even if a grave risk exists, the court is still under the obligation to return the child, if adequate protective measures have been taken.

The mere fact that EU law enshrined the concept of „protective measures" (even if no other legal or practical elements were provided) is by itself sufficient to signify a step ahead compared to private international law.

We underline that measures of protection under Regulation Brussel IIa are to be taken in the state of the habitual residence to which the minor's return is ordered.

The present Council Regulation (EU) 2019/1111 (known as Brussels IIb) entered into force rather recently, starting from 01.08.2022.

Although the new regulation repealed Regulation no. 2201/20023, the latter is still of practical importance, as it continues to apply for different instruments (judgements, authentic acts, agreements) registered or concluded before 01.08.2022[10].

Regulation Brussels IIb strengthened and further expanded on the concept of „protective measures".

According to art. 27 para. 3: „Where a court considers refusing to return a child solely on the basis of point (b) of art. 13(1) of the 1980 Hague Convention, it shall not refuse to return the child if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return" (our underline).

By means of the previous provisions, Regulation Brussels IIb strengthened the concept, as new elements were addressed (burden of proof related to protective measures).

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[7] The Hague Conference on Private International Law is an intergovernmental organisation the mandate of which is "the progressive unification of the rules of private international law" (art. 1 of the Statute). To this end, HCCH elaborated different Guides to Good Practice, Explanatory Reports, Practical Handbooks or Brochures, in order to facilitate the application of different juridical instruments belonging to the area of private international law.

[8] Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), published by The Hague Conference on Private International Law, 2020, *https://www.hcch.net/en/publications-and-studies/details4/?pid=7059*, last consulted on 10.05.2024, 20.38.

[9] Practice Guide for the application of the Brussels IIa Regulation, published by Directorate-General for Justice and Consumers (European Commission), 2014, para. 4.3.3.

[10] According to art. 100 of Regulation Brussels IIb: „(1). This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022. (2). Regulation (EC) No 2201/2003 shall continue to apply to decisions given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements which have become enforceable in the Member State where they were concluded before 1 August 2022 and which fall within the scope of that Regulation."

Subsequently, art. 27 para. 5 indicates that: „Where the court orders the return of the child, the court may, where appropriate, take provisional, including protective measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk referred to in point (b) of Article 13(1) of the 1980 Hague Convention, provided that the examining and taking of such measures would not unduly delay the return proceedings" (our underline).

In this case, sphere of application of protective measures was significantly widened, as they may not only be taken in the state of origin, but also in the state of destination (specifically, buy the court dealing with the international abduction).

According to the Practice Guide for the application of the Brussels IIb Regulation: „Article 27(5) of the Regulation provides for additional possibility for the court of the Member State of refuge (…) The access to these provisional, including protective measures under Article 27(5) does not change the concept that the court of the Member State of refuge may decide only on the return"[11].

Moreover, art. 27 para. 5 of Regulation Brussels IIb overrun the limits of art. 20 of Regulation Brussels IIa.

While protective measures taken under the latter Regulation were not enforceable outside of the territory of the Member State where they were taken, those based on art. 27 para. 5 of Brussels IIb Regulation may be recognized and enforced in all other Member States (including the state of origin).

2.1.3. Relation between private international law and EU law: complementarity and progress

First, EU law did not replace private international law, not even in relation between Member States. Complementarity is articulated by art. 22 of Regulation Brussels IIb, according to which „Articles 23 to 29, and Chapter VI, of this Regulation shall apply and complement the 1980 Hague Convention".

Secondly, progress of EU law comes not only from introducing the new substantial concept of „protective measures" (as already pointed out), but equally from the mere nature of the juridical instrument chosen by the European legislator.

It is indeed quite relevant that regulations, and not directives, have been chosen to legiferate.

This comes as a corollary to the fact that, according to art. 288 para. 2 TFEU, EU regulations are directly applicable on the territory of all Member States (there is no need of transposition measures), and are also entirely binding (both goals to be achieved, and also means of achievement)[12].

Juridical literature[13] also underlined that: „the regulation, being binding in all its elements, is distinguished, on the one hand, from the directive, which is binding only with regard to the intended purpose, and, on the other hand, from acts without legal force (recommendation and opinion)."

Lack of transposition measures in case of EU regulations leaves no room for intervention of domestic legislation[14], and therefore regulations have the most important advantage of cancelling the deficiencies related to differences among national legislations of EU Member States.

Therefore, in aspects regulated by Brussels IIa and IIb Regulations, uniformity in the EU is ensured.

Moreover, various domestic legislations cease to apply, consequent to the principle of supremacy of EU law in its entirety, including regulations („priority is part of the very nature of European Union law, because its uniform application depends on it"[15]).

[11] Practice Guide for the application of the Brussels IIb Regulation, published by Directorate-General for Justice and Consumers (European Commission), 2023.

[12] Art. 288 para. 2 TFEU stipulates that a regulation „shall have general application. It shall be binding in its entirety and directly applicable in all Member States".

[13] A. Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți* , Universul Juridic Publishing House, Bucharest, 2016, p. 45.

[14] According to the European Court of Justice, „all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardising their simultaneous and uniform application in the whole of the Community" (ECJ, Decision adopted on 07.02.1973, C-39/72, case *Commission of the European Communities v. Italy*; para. 17 (3) in A. Fuerea, *Manualul Uniunii Europene*, 6th ed., Universul Juridic Publishing House, Bucharest, 2016, p. 235.

[15] R.-M. Popescu, *Specificul aplicării prioritare a dreptului European în dreptul intern, în raport cu aplicarea prioritară a dreptului internațional*, in Revista Română de Drept Comunitar no. 3/2005, p. 17.

E.g., while there are some states whose domestic legislation allows the courts dealing with international abductions to take measures to protect the child accompanying the return order[16], many other states do not recognize such possibility[17].

Due to the fact that the possibility to take protective measures was acknowledged by art. 27 para. 5 of Brussels IIb Regulation for courts in the state of refuge, all national courts dealing with abduction cases may issue such measures based on EU law, and independently of their domestic provisions.

2.1.4. What about national law?

EU Regulations do not include substantive provisions concerning the type of protective measures to be applied, and therefore it belongs to the national legislator to lay down the measures available in each domestic system.

Uniformity is thus not ensured in this substantial area, and national legislations differ significantly with respect to protection measures (which may cause some difficulties, especially where the specific protection measures adopted in one state do not even exist in other states).

Also, it is for the Member States/states parties to the 1980 Hague Convention to establish procedural rules applicable to issuance of protective measures.

2.2. Measures of protection in practice

There is an obvious tension between the inability of the court dealing with a summary international abduction process to determine factual disputes, and the risk that the child will be harmed if the disputed allegations are actually true.

Two main orientations were identified in juridical literature and case-law: the „protective measures approach" and the „assessment of allegations approach" [18].

According to the „protective measures approach", a court dealing with the serious risk defense will refuse to carry out a fact finding exercise to determine the truth of the allegations and will concentrate only on protective measures.

„(…) the court will take the allegations at their highest and decide, whether on that basis, there is a grave risk that if the child returns to the requesting State he/she will be exposed to physical and psychological harm or otherwise placed in an intolerable situation. Afterwards, the court will consider whether protective measures sufficient to mitigate the harm are available (…). This approach relies on the availability of adequate and effective protective measures as a substitute for determining facts."[19]

By contrast, the „assessment of allegations approach" will take into account both allegations of serious risk, and also protective measures.

In this case, the court will first seek to establish, to the extent possible (given the summary nature of return proceedings), the merits of the disputed allegations of grave risk. Only after having determined that a grave risk of harm exists, the court will afterwards proceed to assess the availability of protective measures.

We support the second orientation, arguing that existence of grave risk and protective measures are closely connected.

In our opinion, choice and effectiveness of the protective measures to be adopted may only be assessed *in concreto* related to the intensity and level of the actual risk of harm, as appreciated in the context of evidence in the case.

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[16] This is the case of USA. See, for example, United States District Court for the District of Maryland, case *Sabogal v. Velarde*, 106 F. Supp. 3d 689, decision from 20.05.2015, in Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), *op. cit*., p. 35, n.s. 60. The USA court was prepared to order the children's return subject to some specific conditions. In short, the return was to take place after the left-behind parent had arranged to have the temporary custody order in his favor vacated, so that the underlying temporary custody order in favor of the taking parent was reinstated, and after he had arranged to have the criminal charges against the taking parent dismissed or the investigation closed.

[17] This is the case of Romania. Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction (published in the Official Gazette of Romania no. 888/29.09.2004 and republished successively, last time in the Official Gazette of Romania no. 144/21.02.2023) makes no reference to protective measures in the competence of the Romanian court where the application for return is pending.

[18] See K. Trimmings, O. Momoh, *Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, in International Journal of Law, Policy and The Family, 2021, pp. 6-9, *https://research.abdn.ac.uk/wp-content/uploads/sites/15/2021/06/POAM-journal-article.pdf*, last consulted on 11.05.2024.

[19] Idem, pp. 6-7.

Also, this orientation seems to be supported by the jurisprudence of the ECtHR[20], as the Grand Chamber introduced the concept of „effective examination".

At the same time, this orientation corresponds with the HCCH Guide to good practice on Article 13(b)[21].

2.2.1. Connection to the grave risk defense

It cannot be emphasised enough that the minor's protection measures are related exclusively to the grave risk exception, without any correlation to the other exceptions to the principle of prompt return.

The mechanism is simple: where courts recognize the existence of serious risk, it is necessary to correlatively analyse the possibility of adopting protective measures.

„This does not amount to a two-stage test. Rather, the question of whether Article 13 (b) has been established requires a consideration of all the relevant matters, including protective measures". Subsequently, if „the court decides that the protective measures meet the risk, then the terms of Article 13(1)(b) will not be made out."[22]

2.2.2. Who is empowered to provide protective measures?

It follows from the previous conclusions that a double perspective must be taken into account, namely measures adopted in the state of origin and measures issued in the state of refuge.

In the first case, measures can currently be ordered by courts, competent national (other than judicial) authorities, as well as undertaken the left behind parent.

In the second case, it is only for the courts (particularly those where the international abduction case is pending) to issue the protective measures.

For this second hypothesis, art. 27 para. 5 of Brussels IIb Regulation indicates that „examining and taking of such measures would not unduly delay the return proceedings".

Procedurally, we do not see any impediment for these measures to be taken/proof of these measures to be submitted to the file both in the first instance, and also in subsequent phases of the case (depending on national law)[23].

The recent increase of competences for the abduction courts consisting in the possibility to order protective measures themselves is yet to be explored, given the relatively short period from entry into force of Regulation Brussels IIb[24].

2.2.3. How long do protective measures take effect?

Protection measures are provisional by their own nature, and therefore they cease to apply when the court of the Member State having jurisdiction on the substance has taken the measures it considers appropriate.

This is the conclusion resulting from specifications in the Practical Guide for the application of the Brussels IIb Regulation[25], and also from the Guide to Good Practice on art. 13(1)(B)[26].

Consequently, protective measures must be of limited duration (sufficient for the courts of the state of habitual residence to make a judgment by which to resolve these issues).

2.2.4. Identification of protective measures

Since no definition of protective measures is provided by EU law, there is a wide margin of appreciation of the courts upon this issue.

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[20] ECtHR, Decision adopted on 26.11.2013, app. no. 27853/09, Case *X. v. Latvia,* para. 106. As Judge Albuquerque explained in his concurring opinion, „effective examination" means a „thorough, limited and expeditious examination".

[21] Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), p. 33.

[22] J. MacDonald, *Article 13 Exceptions – Return and Best Interests of the Child in the Jurisdiction of England and Wales*, in The Judges' Newsletter on International Child Protection, vol. XXIII, Summer-Winter 2018, Spring 2019, pp. 18-19, 21 (*https://www.hcch.net/en/publications-and-studies/details4/?pid=6636*, last consulted on 10.05.2024).

[23] To the same conclusion, see Practice Guide for the application of the Brussels IIb Regulation, *op. cit*., para. 4.3.6.1.1: „Adequate arrangements may be considered by the court of first instance or by the court of the higher instance in the Member State of refuge. It is up to the national procedural law of that Member States (…)".

[24] Research of Romanian jurisprudence did not reveal any case in which the Romanian courts seized with international abduction cases have themselves ordered protective measures.

[25] Practice Guide for the application of the Brussels IIb Regulation, *op. cit*., para. 4.3.6.1.2.

[26] Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), *op. cit*., para. 61.

In practice, courts accepted any measure that could annihilate the serious risk given the specificity of the case, and not only certain specific measures proposed by the parties.

Among examples of such measures taken by the courts, as offered by Recital 45 of Regulation no. 2019/1111, there are court orders prohibiting the left-behind parent to approach the child. Also, there are measures allowing the child to stay with the abductor parent, who will ensure the effective care until upon the pronouncement of a decision by which the issue of custody is settled on the merits.

Also, some courts accepted that protective measures can take the form of voluntary undertakings assumed by the left-behind parent[27] (which should be incorporated in the court decision, or otherwise no enforceable character may be attached)[28].

However, increased awareness and careful consideration of this parent's behavior are recommended (for example, in the event of repeated previous breach of protective orders, the undertakings should not be considered adequate and sufficient[29]).

Some examples of undertakings offered by practice are providing separate housing only for the abducting parent and the child or the withdrawal of criminal proceedings initiated by the abandoned parent in the country of origin (this aspect, however, depends on the national law of the respective state, and these procedures, once initiated, might not be stopped by the simple will of the initiating parent)[30].

Among measures taken by authorities (other than judicial) in the country of origin, proof that medical equipment is available for a child in need of treatment is exemplified in the same Recital 45 already mentioned.

In the same sphere of the measures taken by the authorities, there are police interventions, offering a place to live or financial aid, assistance in various forms for victims of domestic violence (legal services etc.).

Consequently, protection measures may cover a wide variety of services, assistance mechanisms or judicial interventions, as legislated by the domestic law.

Determination of the type of measure considered appropriate in each particular case depends on the concrete serious risk to which the child might be exposed as a result of his return in the absence of such measures[31].

Finally, we point out that protective measures should not be confused with various practical provisions, sometimes adopted by courts in when ordering return, as their role is different.

Thus, practical provisions have the aim of facilitating practical aspects related to the return (e.g., identifying the person who will accompany the child on the return flight), while protective measures aim to remove the serious risk.

2.2.5. Burden of proof

In the context of art. 27 para. 3 of Regulation no. 2019/1111 („if the party seeking the return of the child satisfies the court by providing sufficient evidence"), the burden of providing that appropriate protective measures have been taken to ensure the protection of the child rests in principal with the party requesting the return of the child[32].

[27] Undertakings were described in juridical literature (K. Trimmings, O. Momoh, *op. cit.,* p. 12) as „promises offered or in certain circumstances imposed upon an applicant to overcome obstacles which may stand in the way of the return of a wrongfully removed or retained child".

[28] "The parent seeking the return of a child is often ready to provide undertakings required to facilitate the issuance of the return order (…) In most cases, the judge will make these undertakings as an integral part of the return order" (J. Camberland, *Domestic violence and international child abduction: some avenues of reflection*, in The Judges' Newsletter on International Child Protection - Vol. X / Autumn 2005, p. 71, *https://www.hcch.net/en/publications-and-studies/details4/?pid=3758*, last consulted on 10.05.2024).

[29] J. Camberland, *op. cit.*, p. 73.

[30] For an extensive presentation of undertakings accepted by British courts, see K. Trimmings, O. Momoh, *op. cit.,* p. 12. The author identified: non-molestation/non-harassment undertakings (*e.g.*, not to use violence or threats towards the abducting parent, nor to instruct anybody else to do so), undertakings related to financial support (e.g., to provide financial support/maintenance to the abducting mother and the child upon their return), undertakings related to access to the child (*e.g.*, not to seek contact with the child unless awarded by the court or agreed).

[31] „Which type of arrangement is adequate in the particular case should depend on the concrete grave risk to which the child is likely to be exposed by the return without such arrangements" (Recital 45 of Regulation no. 2019/1111).

[32] For the idea that the same applied in the context of Regulation Brussels IIa, see K. Trimmings, O. Momoh, *op. cit.*, p. 8: „He (the British judge – our note) pointed out that Article 11(4) of Brussels IIa placed on the left-behind parent the burden of demonstrating that adequate arrangements had been made to protect the child upon the return".

In subsidiary, the court may be „otherwise satisfied" and therefore take into consideration evidence provided by parties other than the applicant (*e.g.*, by the abducting parent) or may order evidence *ex officio*[33].

According to Recital 45 of Brussels IIb Regulation, the court may also consider to request the assistance of Central Authorities or network judges, in particular within the European Judicial Network in civil and commercial matters[34] and the International Hague Network of Judges[35].

Also, Recital 46 of the same Regulation indicates that, if necessary, the court seised with the return proceedings should consult with the court or competent authorities of the Member State of the habitual residence of the child.

2.2.6. Criteria to be fulfilled: adequate and effective character

The mere existence of the possibility of protective measures is not enough, as it is also compulsory that measures of protection should have an adequate and effective character.

In other words, the appropriateness and effectiveness of protective measures cannot be presumed or deducted, as it is necessary to be assessed *in concreto* for each individual case in relation to the particular circumstances[36].

We refer on this to the Practice Guide for the Application of the Brussels IIa Regulation, which states that „[i]t is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question".[37]

Similarly, the Practice Guide for the Application of the Brussels IIb Regulation underlines that „[t]he arrangements must be sufficiently established, so legally valid, proven and - if in doubt - also enforceable".[38]

Irrespective of whether the protective measures are adopted in the state of origin or refuge, their adequacy is assessed of the case by the court dealing with the international abduction.

In our opinion, adequacy and effectiveness should also be connected to enforceability, which implies executory decisions according to national law (and not necessarily definitive)[39].

2.2.7. And (some) limits of protective measures

A. Abduction to non-EU State Members

One limit related to measures of protection is that they are unavailable when the child is removed/retained in third states (contracting states to the 1980 Hague Convention, but not members to the EU).

This is because private international law embodied by the above-mentioned Convention has no provision formally acknowledging such measures.

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[33] See Bucharest Trib., 5th civ. s., dec. no. 1201/18.09.2017 pronounced in case no. 17837/3/2017, definitive, not published, where the court requested (based on art.11 para. 4 of Brussels IIa Regulation and via Romanian and Belgian authorities) information regarding the protective measures that can be taken to guarantee the minor's safety in the event of her return to Belgium.

[34] Established by Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters 2001/470/EC, OJ L 174/27.06.2001 (amended by Decision no 568/2009/EC of the European Parliament and of the Council of 18.06.2009).

[35] It was established in 1998, as a result of the first De Ruwenberg Seminar for Judges on the international protection of children, which had recommended that „the relevant authorities (*e.g.*, court presidents or other officials as appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States, in respect of issues relevant to the 1980 Hague Convention.

[36] Bucharest Trib., 5th civ. s., dec. no. 1201/18.09.2017, already cited: „(…) there was no mention of measures that could be ordered to prevent the risk of recurrence of domestic violence, such as protection orders or other similar procedures, the possibility of providing the mother and the minor a safe living environment, the limitation of the financial and residential dependence of the mother on the aggressor parent (possible facilities in obtaining/renting a house, a job, temporary support services for the mother and child until the situation is clarified and the method of exercising parental authority is established), so that it cannot be concluded, in the sense of art 11 para. 4 of the Regulation, that concrete, adequate and effective measures have been proven (…)."

Similarly, see CA Bucharest, 3rd civ. s. and for cases with minors and family, dec. no. 460/17.05.2023, definitive, not published: „(...) in this case, it was not proven that the return of the child to the United States of America would expose her to a serious risk, given that the American authorities have taken protective measures for the minor (by issuing the previously mentioned orders)".

[37] Para. 4.3.3.

[38] Para. 4.3.6.1.2.

[39] For the same opinion, see Practice Guide for the application of the Brussels IIb Regulation, *op. cit*., para. 4.3.6.1.2: „However, in case of court measures those only need to be enforceable, but not necessarily final".

Even if protective measures might be available under domestic law, there is no mechanism in the 1990 Hague Convention to render these decisions executory in the state of habitual residence of the child.

Outside of the EU, in cases where the requesting and the requested states are both Contracting Parties to the 1996 Convention[40], this instrument might be utilised to facilitate the cross-border recognition and enforcement of protective measures in return proceedings.

B. Lack of enforceability in the state of origin

Regardless of the method and form of protection measures, it is essential that they are enforceable in the state of habitual residence, inasmuch as otherwise the finality of removing the serious risk cannot be achieved.

„Since such measures are adopted on the basis of provisions of national law, the binding and executory nature of those measures must stem from the national legislation concerned"[41].

In order to overcome this difficulty, common law jurisdictions ask for a parallel order to be issued by courts in the state of origin[42].

However, „civil law jurisdictions are of the view that they do not have the authority to issue such an order"[43].

These difficulties are nevertheless encompassed when applying Brussels IIb Regulation, where Recital 46 indicates that protective measures should be recognized and enforced in all other Member States (including the Member States having jurisdiction), until a court of such a Member State has taken the measures it considers appropriate[44].

To this end, art. 2 para. 1 (b) of the same Regulation stipulates that, for the purposes of Chapter IV (Recognition and Enforcement), „decision" comprises „provisional, including protective, measures ordered by a court which by virtue of this Regulation has jurisdiction as to the substance of the matter or measures ordered in accordance with Article 27(5) in conjunction with Article 15"[45].

C. Undertakings from left-behind parent

The principal limit with undertakings is that they are generally ineffective as a means of protection outside the common law jurisdictions.

„This is because undertakings as a legal concept are practically unknown and thus unenforceable in civil law jurisdictions"[46], and this state of facts renders them as unsatisfactory remedies.

A solution to overcome this limit might be (as already stressed) to incorporate the undertakings in the return order itself, and thus change the legal nature from a promise of a parent to an obligation imposed by the court.

D. No reference to the protection of the returning parent

Recitals 45 and 46 of Regulation Brussels IIb make it clear that this juridical instrument is concerned solely with the protection of the child.

We consider it regrettable that the Brussels IIb Regulation, in contrast to the Guide to Good Practice 1980 Child Abduction Convention, missed the opportunity to point out that the risk to the child and the risk to the mother are often intertwined (especially in case of domestic violence).

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[40] Convention of 19.10.1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague, 19.10.1996.

[41] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A,* para. 52.

[42] „Mirror orders" or „safe harbor orders" have been indicated as a solution also in Guide to Good Practice 1980 Child Abduction Convention: Part VI – art. 13(1)(b), *op. cit*., para. 47. They are identical/similar judgments issued by the courts in the states of origin/destination, each of these judgments being enforceable in the state in which it was issued.

[43] J. Camberland, *op. cit*., p. 72.

[44] Juridical literature underlined that „no declaration of enforceability is required under the Protection Measures Regulation as this instrument allows for direct recognition of protection orders issued as a civil law measure between EU Member States." (K. Trimmings, O. Momoh, *op. cit.,* p. 16).

[45] The court in the Member State of refuge issues, at the request of a party, a certificate regarding decisions ordering the return of the child to another Member State under the 1980 Hague Convention and any provisional measures which accompany the decisions, instituted in accordance with art. 27 para. (5) of the regulation, using the form provided in Annex IV to the Regulation.

[46] K. Trimmings, O. Momoh, *op. cit.,* p. 12.

In such circumstances, in order to protect the child, the mother also needs to be protected, or otherwise the violence which probably was the cause of abduction will repeat and a new abduction can be envisaged.

3. Conclusions

Private international law and EU law continue to coexist in the area of international child abductions, in a process characterised by complementarity and progress.

In intraEU abductions, EU law (Brussels Regulations IIa and IIb) shall complement private international law (the 1980 Hague Convention).

Both private international and EU law rest on the principle that it is in the best interests of the child not to be removed from its place of habitual residence, safe for a number of exceptions, among which the „grave risk" exception[47].

As a response to progressive increase of the number of international abductions, Eu law (adopted approximately 20 years after the private international law and recently revised after another 20 years), presents significant aspects of progress.

A particularization of this progress is represented by the introduction of the substantive concept of „protective measures", conceived to remove the serious risk of harm to the child by securing protection upon his/her return and application of the prompt return principle.

The progress comes equally from the nature of juridical instruments chosen by the European legislator (namely, regulations) which have the advantage of cancelling the differences among national legislations, and thus ensure uniformity within the EU by means of principle of supremacy of EU law.

The mere existence of the possibility of protective measures is not enough. It is compulsory that such measures should have an adequate, effective and enforceable character, which is to be evaluated *in concreto* in each case, based on specific circumstances.

Protective measures may be issued in the state of origin or the state of refuge and are by nature provisional (they take effect only until courts of the Member State having jurisdiction on the substance taken the measures considered appropriate).

In the state of habitual residence, measures may be ordered by courts, adopted by competent national (other than judicial) authorities, as well as undertaken the left behind parent.

In the state of destination, it is only for the courts (particularly those where the international abduction case is pending) to issue the protective measures.

The role of abduction courts is enhanced in the context of the recent increase of competences consisting in the possibility to order protective measures themselves.

Yet, it remains to be explored, given the relatively short period from entry into force of Regulation Brussels IIb, and in this context, specialisation is a useful tool to gain better understanding.

A new revision of Regulation IIb on protective measures of the returning parent in case of domestic violence would be beneficial, all the more since this aspect has already been acknowledged in private international law with the adoption by HCCH of the Guide to Good Practice 1980 Child Abduction Convention.

Measures of protection provided by EU law remain nevertheless a valuable concept, destined to protect and put in practice the vector principle governing family law, namely the best interests of the child.

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[47] The prompt return mechanism, although generally appropriate and valuable, is not a solution for all cases and all children (see ECtHR, Decision adopted on 06 July 2010, Application no. 41615/2007, case *Neulinger and Shuruk* v. Switzerland, para. 138: „It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances.")

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LAW AND JUSTICE IN THE AGE OF POSTMODERNISM

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Abstract

This study represents an attempt to highlight, from a legal and philosophical perspective, the most significant contradictions that can affect justice during a period of social crisis, namely the era of postmodernism. The object of our analysis is: normativism and legal formalism, the ideology of globalisation, the contradiction between the consecration and guarantee of citizen rights and the restriction of their exercise through excess of power, the contradictions between law and justice; justice and society and the act of fulfilling justice and what we call the „outward fall of justice". In this context, we refer to some aspects that characterise the person and personality of the judge. This essay is a plea for the principles of law as a possible solution to solve and overcome the crisis of law and justice in postmodernism.

Starting from the difference between „given" and „constructed", we propose the distinction between „metaphysical principles" external to law, which through their content have philosophical meanings, and „constructed principles" elaborated and normatively consecrated. We emphasise the obligation of the legislator, but also of the judge, to refer to the principles of law, including those external to law, in the legislative activity, interpretation and application of the law.

Keywords: *Postmodernism, law and justice, contradictions of justice, the judge, principles of law.*

1. Introduction

Contemporary postmodernism is an era of great existential contradictions in the history of the salvation of man and the world: faith coexists with unbelief, value with non-value, progress with regression. The dominant tendency is recessive, of abandoning man's relationship to God, of dissolving the perennial values of right faith and culture, of transforming man into an individual dominated by technological rationalism and of changing his existential status from the purpose of creation to a mere means, of the perversion of freedom with the illusions of accumulation and consumerism.

We believe that postmodernism is not only a literal or artistic trend, a characteristic of philosophical thought, but more than that it is an existential era or aeon, which includes man, society, the state and law, in a word, an era in the evolution of man and of humanity of culture and civilization.

Postmodernism is the reference term applied to a wide range of developments in the fields of critical theory, philosophy, architecture, art, literature and culture. The various expressions of postmodernism originate from, transcend, or are a reaction to modernism. If modernism sees itself as a culmination of the search for a scientific and rational Enlightenment aesthetic, a rationalised and normative legal ethics and humanism, all of universal value, postmodernism is concerned with how the authority of these ideal entities (called metanarratives) is undermined by the process of fragmentation, the ideology of consumption and deconstruction. Jean-Francois Lyotard [1] described this current as a „distrust of metanarratives"; in his view, postmodernism attacks the idea of universal, monolithic, stable conceptions of man and monolithic existence and instead encourages fractured, fluid and multiple perspectives, promoting value relativism of a scientific, artistic or moral nature. Nothing makes sense, therefore everything is permitted. Existence is individual, concrete, without universals.

Essentially, postmodernism is defined by philosophers and sociologists as a trend in the culture of recent decades that has affected a variety of fields of knowledge, including philosophy. Postmodern discussions cover

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[1] See J.-F. Lyotard, *The Postmodern Condition. A Report on Knowledge*, Manchester University Press Publishing House, USA, 1984.

a wide range of socio-philosophical issues related to the external and internal life of the individual, politics, morality, culture, art, etc. The main characteristic of the postmodern situation was a decisive break with traditional society and its cultural stereotypes. Everything is subject to a reflexive review, evaluated not from the point of view of traditional values, but from the point of view of efficiency. Postmodernism is seen as the era of a radical revision of basic attitudes, the rejection of the traditional worldview, the era of breaking with all previous culture.

All representatives of postmodernism are united by a style of thinking, in which preference is not given to the constancy of knowledge, but to its instability; abstract results of knowledge are not valued, but concrete results of experience; it is stated that reality itself, *i.e.*, the „thing in itself" of which Kant speaks is inaccessible to our knowledge. Contrary to the Kantian conception, even phenomenal reality cannot be known, it cannot be said what reality is. The focus of postmodernist ideology is not on the objectivity of truth, but on its relativity. Therefore, no one can claim to know what the truth is, and moreover, neither a person nor God is the Truth. Every understanding is a human interpretation, which is never definitive. In addition, it is significantly influenced by facts such as social class, ethnicity, race, tribe, etc. belonging to the individual.

A characteristic feature of postmodernism is negativism, „the apotheosis of groundlessness"."[2]. Everything that before postmodernism was considered established, reliable and certain: man, mind, philosophy, culture, science, progress - everything was declared unstable and undefined, everything turned into words, reasonings and texts that can be interpreted, understood and 'deconstructed' but untenable in human knowledge, existence and activity.

However, some philosophers also identify positive aspects of postmodernism. The concern for the philosophical understanding of the problem of language, in its appeal to the humanitarian roots of philosophy: literary discourse, narrative, dialogue, etc., is appreciated as positive. His priority attitude towards the issue of conscience is also considered positive. In this sense, postmodernism is consistent with the development of the entire philosophy of the modern world, which takes into account the problems of cognitive science, including cognitive psychology.

We believe that postmodern society can be characterised by the following ideologies and at the same time ontological realities:

- systems convergence;
- zero economic growth;
- the ideology and practice of globalisation;
- gender ideology;
- the ideology of the superman;
- the ideology of artificial intelligence;
- normativism and legal formalism;
- the morbid contradictions of justice;
- the contradiction between the legal consecration of human rights and their abusive restriction.

Of course, they are not the only aspects. For example, another characteristic of postmodern society is the dominance of technologies over man and humanist values, including Christian ones. [3]

In this study we will analyse aspects of law and justice in the era of postmodernism, respectively: normativism and legal formalism; the ideology and practice of globalisation, supremacy of EU law[4]; the contradiction between the legal consecration of human rights and their abusive restriction, and we will identify what we call the morbid contradictions of justice.[5]

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[2] See L. Sestov, *Toate lucrurile sunt posibile (Apoteoza lipsei de temeiuri)* written in 1905, L. Şestov, *Apoteoza lipsei de temeiuri (Eseu de gândire adogmatică)*, Humanitas Publishing House, Bucharest, 1995.

[3] For developments see M. Andreescu, *Postmodernismul. Studii, eseuri și cugetări*, Paideia Publishing House, Bucharest, 2023.

[4] Also see R. Duminică, *A short reflection on the European constraint of domestic law,* in Agora International Journal of Juridical Sciences no. 2/2010, vol. 4, pp. 109-115, *https://univagora.ro/jour/index.php/aijjs/issue/view/84/102*, last consulted on 22.03.2024; R. Duminică, *Criza legii contemporane*, C.H. Beck Publishing House, Bucharest, 2014, pp. 58-67.

[5] Also see A. Neacșu, *Între statul de criză și statul de drept*, Universul Juridic Publishing House, Bucharest, 2010; O. Predescu, *Criză și democrație. Reziliența dreptului, a statului de drept și a drepturilor omului în contextul lumii contemporane*, Școala Ardeleană Publishing House, Cluj, 2022.

2. „Order", whatever its nature, expresses necessity, limit and even constraint, but which cannot be contrary to human freedom as an existential given

The relationship between freedom and necessity, between freedom and law, moral or legal, is a recessive one. Necessity as order, regardless of its nature and configuration, is the dominant term and freedom the recessive one. Of course, freedom does not follow from necessity being determined by such necessity as in the materialist conception. As existing freedom is different from necessity, but in relation to the order of which necessity is the expression, freedom is always recessive and unfulfilled.

In relation to the necessity of an existential order, as a recessive term, freedom is never complete, it is not fulfilled, but is always in precariousness.

The approach to the issue of freedom that we encounter in the legal sciences has multiple conceptual peculiarities and, we would say, many times more important than the philosophical conceptions of freedom, because the legal represents a state of human existence, a characteristic of the social state, distinct from the natural, material state. It is a contemporary state of human existence, namely 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 having freedom as an essential given.

But what kind of freedom can we talk about in legal normativism and in the categories and concepts of law? Inevitably, it is a freedom of the legal norm, a constructed freedom, and not an existential given. We must emphasise that the legal norm also implies coercion, like any existential order applied to human phenomenology. There is an important paradox that some authors in the field of Christian metaphysics have also pointed out, namely the coexistence of legal constraint, and on the other hand, human freedom, both of which are essential for the order specific to the legal state in which contemporary man finds himself.

Another aspect is also 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 limited. Moreover, it is good to note that, unlike metaphysics and ethics, the legal norm does not express or conceptualise 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 normative legal system could not even define freedom as such, because it remains only at the phenomenological and social aspect of existence. In the same way, legal doctrine postulates the freedom of man and highlights the content of legal freedoms and their limits, 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. Normatisation 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 implies a series of obligations exercised throughout his life cycle, embodied in a series of norms, some of which complement each other, others appear contradictory to the others, being specific to different interest groups. Sorin M. Rădulescu believes 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 appears re-regulated".

The very freedom and fundamental rights to be guaranteed and respected must be contained in normative systems, but which are based on coercion that is 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 status of man is based on the distinction between mine and yours that Kant also mentioned, which divides and limits. This is how the philosophical and legal concept of coexistence of freedoms and legal norms appeared.

The limits of social normativism, as opposed to the legal one, are obvious especially in relation to human freedom. Normativist social determinism cannot encompass nor 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, conditional freedom, possibly subject to restrictions imposed by the state. It is a freedom of the legal norm.

Regarding the complex relationship between the normative legal system, and society on the other hand, it can be noted that nowadays the legal system tends to have its own functional autonomy, apart from the objective or subjective determinations that society transmits. Legal autonomy 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, normatively established legal freedoms try to determine the existential freedom of man, explaining it, ordering it and conditioning it. It is a situation contrary to 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 the other way around. It is an expression of dictatorship by law even in democratic societies, because the legitimacy of the legal norm lies, in such an unnatural situation, only in the will and interests of the rulers who express themselves, paradoxically, in the name of the people[6].

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 that the normative order, the state or even justice, will grant him freedom that he needs. It can be said that, in such a situation, not being aware of his own freedom, contemporary man does not exist authentically, but lives by delegation, his existence being externally determined by state and legal normativism, abstract, impersonal and, often, devoid of value.

The legal norm, especially under the conditions of the will of „legal regulation" that contemporary society knows, is increasingly moving away from human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but a formal recognition within the normative system in mind. The abandonment of values, including Christian values, 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 an embodiment of what was shown above.

Normativist theory, as a current of legal positivism, is reflected in the main work of the American jurist Hans Kelsen, „Pure Theory of Law". In the given doctrine, the author proposes to study the law only in the hypothesis of its existence. According to Kelsen, the science of law must be limited to the research of law only in its pure state, without ties to politics and morality. Otherwise, it will lose its objective character and turn into an ideology.[7]

Kelsen analyses legal norms under the aspect of validity, and then of effectiveness, in a manner that can be called „pure" because it leaves aside any other extrinsic elements, which are not strictly legal (for example, politics).

The theory of law aims to eliminate the subjective law - objective law dualism, arguing that objective law represents 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 opposing branches of law. The notable difference between the two branches, Kelsen believes, can be analysed ideologically, not theoretically.

The central place in the pure theory of law is occupied by the legal norm, which, formally, has a pure character, unlike the moral norm, which has a content. Through his system of norms, Kelsen supports the theory of the creation of law in cascades. Thus, the authority of a judicial decision originates in a presidential decree; this, in turn, in a law adopted by the parliament, and this having its origin in 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 goal. The theory of law has the task of deciphering the relationship between the fundamental norm and the lower 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 pronounces itself in this regard.

Kelsen's normativist theory purifies the law of all foreign elements: psychology, ethics, sociology, theology. Thus, he determines the content of the law as totally normative. It can only be deduced from legal norms and not from social facts. Norms are broken by social life, by relationships between people.

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[6] Also see R. Duminică, *The legislative construction of reality. A short reflection,* in vol. The International Conference CKS, Pro Universitaria Publishing House, Bucharest, 2011, pp. 684-694, *https://cks.univnt.ro/cks_2011.html*, last consulted on 22.03.2024.

[7] For developments see H. Kelsen, *Doctrina pură a dreptului*, Humanitas Publishing House, Bucharest, 2000.

We appreciate that the „pure doctrine of law" as a theory is not convincing, since law cannot be separated from social reality, seen as objective reality, and above all it cannot be devoid of moral values, from its foundation which is the justice. The normative system cannot subordinate the man.

The principle „No one is above the law" is written in all democratic constitutions. This is valid only in the formal relations of man 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 numerous political, historical, economic and sociological implications that are intrinsic to it, arising naturally from human relations and from the citizen-state relationship. Although the status of law as an autonomous science cannot be denied, a rule of law cannot be analysed without placing it in a historical context, without correlating it with the political and economic factors that led to its promulgation, and without assessing the social impact which he produced among the population by applying it.

So for social normativism we believe that the words of Immanuel Kant are applicable: „Only the law of becoming really explains the permanence of existence, making it intelligible according to empirical laws".[8]

3. Ideology and practice of globalisation

The supremacy of European Union law are also features of state and legal postmodernism.

Globalisation in all its variants characterises society in the era of postmodernism. Is this the last stage in the evolution of humanity?

The traditional culture of societies is disappearing or turning into spectacle and merchandise. Humanist culture is increasingly eliminated by the invading techno-science and transformed into a pseudo-science. The world or globalised man, the man centered only economically, risks becoming the atomized man who lives only for production and consumption, emptied of culture, faith, politics, meaning, consciousness, religion and any transcendence.

Legal postmodernism can be characterised by formalism and positivism, but also by the dominance of supranational systems and organisations and supranational law over the domestic legal order. This reality leads to the drastic limitation of national sovereignty, the supremacy of the Constitution and the entire domestic legal order. CJEU has shown unequivocally in several recent decisions that the EU legal order is superior and applies as a priority to the internal legal order, including the Constitution.

EU legislation is mandatory for Romania, a fact that has not happened in our history. The legislation of the empires that dominated the Romanian countries was never imposed on their territory. The more important normative acts to be adopted by the Parliament must now first be approved by the bodies of the European Union. Romania's political independence is limited because Romania's internal and external policy is carried out in relation to the political decisions of this supranational organisation.

Decision no. 80/16.02.2014[9] is relevant to the legislative proposal regarding the revision of the Romanian Constitution. Concerning the interpretation of the provisions of art. 148 regarding integration into the European Union, the Court notes that: „constitutional provisions do not have a declarative character, but constitute mandatory constitutional norms, without which the existence of the rule of law, provided by art. 1 para. (3) of the Constitution, cannot be conceived".

At the same time, the Fundamental Law represents the framework and extent in 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, included in art. 1 para. (4) of the Fundamental Law, according to which in Romania „respect for the Constitution and its supremacy is mandatory".

In the opinion of our constitutional court, to consider that the law of the European Union is applied without any differentiation within the national legal order, not distinguishing between the Constitution and the other domestic laws, is equivalent to placing the Fundamental Law in a secondary plan compared to the EU legal order. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even if there are inconsistencies between its provisions and the European ones. Moreover, it was emphasized that Romania's accession to the European Union cannot affect the supremacy of the Constitution over the entire internal legal order.[10]

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[8] I. Kant, *Întemeierea metafizici moravurilor*, Humanitas Publishing House, Bucharest, 2007, p. 189.

[9] Published in the Official Gazette of Romania no. 246/07.04.2014.

[10] CCR dec. no. 80/16.02.2014, previously cited.

By the Decision of December 21, 2022,[11] CJEU ruled that Union Law opposes the application of a jurisprudence of the Constitutional Court to the extent that it, in conjunction with the national provisions on prescription, creates a systemic risk of impunity. The Court, gathered in the Grand Chamber, confirmed its jurisprudence resulting from a previous decision, according to which the CVM is binding in all its elements for Romania.[12]

According to the Court, the effects associated with the principle of the supremacy of Union law are imposed on all organs of a member state, without the internal provisions, including constitutional ones, being able to prevent this. National courts are bound to leave unapplied, *ex officio*, any national regulation or practice contrary to a provision of Union law which has direct effect, without having to request or wait for the prior elimination of that national regulation or practice by legislative means or by any other constitutional procedure.

On the other hand, the fact that national judges are not exposed to procedures or disciplinary sanctions for having exercised the option to refer the Court under art. 267 TFEU, which belongs to their exclusive competence, constitutes an inherent guarantee of their independence. Thus, in the hypothesis in which a national common law judge would come to consider, in the light of a Court decision, that the jurisprudence of the national constitutional court is contrary to Union law, the fact that this national judge would leave the mentioned jurisprudence unapplied cannot engage his disciplinary liability.

We consider that this legal act of the European court is a serious violation of national sovereignty, even exceeding the provisions of the accession treaty of Romania to the European Union.

The Constitutional Court of Romania, in a press release[13] stated the following, with reference to these Decisions of the European Court of Justice:

„According to art. 147 para. (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding.

Moreover, the CJEU also recognizes, in its Decision of December 21, 2021, the binding character of the decisions of the Constitutional Court. However, the conclusions of the CJEU Decision according to which the effects of the principle of the supremacy of EU law are imposed on all organs of a member state, without internal provisions, including those of a constitutional order, being able to prevent this, and according to which national courts are required to leave unapplied, *ex officio*, any regulation or national practice contrary to a provision of EU law, presupposes the revision of the Constitution in force.

In practical terms, the effects of this Decision can be produced only after the revision of the Constitution in force, which, however, cannot be done as a matter of law, but exclusively at the initiative of certain legal subjects, in compliance with the procedure and under the conditions provided for in the Romanian Constitution itself".

We fully agree with the opinion expressed by the Constitutional Court. Our Constitution enshrines the obligation to respect the Fundamental Law and its supremacy in art. 1 para. (5), „In Romania, compliance with the Constitution, its supremacy and laws is mandatory."

The provisions of art. 148 para. (2), regulates the principle of priority of EU law, „As a result of accession, the provisions of the constitutive treaties of the EU, as well as the other binding community regulations have priority over the contrary provisions of internal laws, in compliance with acts of accession."

Therefore, the supremacy of the Constitution and the principle of priority of EU law have different legal nature. The supremacy of the Constitution is a quality of it determined by the social, economic and political realities of the Romanian people and their traditions. It expresses and substantiates at the same time the characters and attributes of the Romanian State, national sovereignty. The supremacy of the Constitution and the obligation to respect it is not exclusively the embodiment of the will of the constituent legislator, but is determined objectively, historically.

In contrast, the principle of priority of EU law is derived from the supremacy of the Fundamental Law because it is established by the will of the constituent legislator and by the international treaties to which Romania is a party.

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[11] The decision in the related cases C-357/19 Euro Box Promotion and others, C379/19 DNA- Oradea Territorial Service, C-547/19 Association „Forumul Judecătorilor din Romania", C-811/19 FQ and others and C-840/ 19 N.

[12] See Decision of 18 May 2021, Association „Forumul Judecătorilor din Romania" and others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP no. 82/21).

[13] Press release of the Constitutional Court of December 23, 2021, *https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021*, last consulted on 22.03.2024.

Contrary to this reality, the CJEU jurisprudence establishes the principle of the supremacy of the EU law, and not only its priority, including in relation to the internal constitutional order.

These specific solutions cannot be accepted because they seriously affect the national sovereignty, the legislative independence of the Romanian State. That is why, in no case, the EU law in relation to the internal constitutional order cannot be supreme, and the generally binding legal force of the decisions of the Constitutional Court, including against the legislation and jurisprudence that makes up the EU law, does not cease.

The provisions of art. 147 para. (4) of the Fundamental Law enshrines the general binding nature of the decisions of the Constitutional Court, an aspect that results from the very supremacy of the Fundamental Law.

In accordance with the provisions of art. 142 para. (1), „The Constitutional Court is the guarantor of the supremacy of the Constitution". To accept the possibility of non-compliance by the state authorities with the decisions of the Constitutional Court in relation to the alleged and assumed supremacy of EU law is equivalent to an act of violation of the Fundamental Law and internal constitutional order, with a serious infringement brought to the supremacy of the Constitution.

The Constitutional Court correctly showed that these CJEU decisions can produce legal effects in Romania only, as a result of the amendment of the Fundamental Law through an internal constitutional procedure, but not through decisions of an international court.

4. The contradiction between the legal enshrinement of human rights and their abusive restriction is an important aspect of contemporary political and state reality

The restriction and abolition of human freedom by those who exercise government is as old as the world, since the days of slavery. Social postmodernism is characterised by a major contradiction between two realities: the first reality, the proclamation of fundamental rights, their consecration in constitutions and in international legal instruments, and on the other hand, the excess of power of the rulers who restrict these rights through legal and political means, thus violating the principles of legality and legitimacy of the supremacy of the Constitution.

The excess of power of the rulers in postmodernism regarding man as a person created in the image of God and the condition of man in society and in relation to the state is manifested by: the contradiction mentioned above, by restricting the exercise of fundamental rights and freedoms, including freedom of conscience and religious freedom, through discrimination, the goal being that the postmodern man becomes a „happy slave".

Exceeding the limits of discretion means violating the principle of legality or what is called „excess of power" in legislation, doctrine and jurisprudence.

The excess of power in the activity of the state bodies is equivalent to the abuse of law, because it signifies the exercise of a legal competence without a reasonable motivation or without an adequate relationship between the ordered measure, the factual situation and the legitimate goal pursued.

The exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there being obviously the danger of excess power.

The excess of power can be manifested in these circumstances at least through three aspects: a) the assessment of a factual situation as being an exceptional case, although it does not have this meaning (lack of an objective and reasonable motivation); b) the measures ordered by the competent state authorities, by virtue of their discretionary power, go beyond what is necessary to protect the seriously threatened public interest; c) if these measures excessively, unjustifiably, limit the exercise of constitutionally recognized fundamental rights and freedoms.

The existence of crisis situations - economic, social, political or constitutional - does not justify the excess of power. In this sense, professor Tudor Drăganu states: „the idea of the rule of law requires that they (exceptional situations, *n.n.*) find appropriate regulations in the text of the constitutions, whenever they have a rigid character. Such a constitutional regulation is necessary to limit the areas of social relations, in which the transfer of competence from the parliament to the government can take place, to emphasise its temporary nature, by establishing some terms of applicability and to specify the purposes for which it is carried out."[14]

[14] T. Drăganu, *Introducere în teoria și practica statului de drept*, Dacia, Cluj, 1992, p. 106.

The restriction of the exercise of some fundamental rights or freedoms, by law, represents an interference of the state in the exercise of these rights and freedoms, justified by the achievement of a legitimate goal. In order to avoid arbitrariness or excess of power on the part of the state authorities that adopt such measures, it is necessary to have guarantees provided by the state, which are adequate to the constitutional purpose pursued, that of protection of fundamental rights and freedoms, in the concrete situations in which they could be harmed. The principle of proportionality is such a constitutional guarantee that allows the sanctioning by the constitutional court of the arbitrary interference of the Parliament or the Government in the exercise of these rights.

Therefore, the measures adopted by the state restricting the exercise of some fundamental rights or freedoms in order not to be abusive must not only be legal, i.e. ordered by law, or by a normative act equivalent in legal force to the law, but also legitimate (fair), i.e. necessary in a democratic society, non-discriminatory, proportional to the situation that determines them and not affecting the substance of the right. Proportionality and necessity in a democratic society are criteria, both for the legislator and the judge, for assessing the legitimacy of restricting the exercise of some fundamental rights and freedoms.[15]

Discrimination, as the opposite of equity, is defined as the illegal practice of treating some individuals less favorably than others because they are different in sex, race, religion, etc. It means treating one group less favorably than another for an unjustifiable reason.

The Declaration of Equality Principles is a particularly important document adopted on April 5, 2008 in London by human rights lawyers and experts in international human rights law and equality law, which states, among other things:

- „The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of eco- nomic, social, political, cultural or civil life. All human beings are equal before the law".[16]

- „The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality."[17]

- „Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, eco- nomic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds".[18]

In Romanian legislation, the principles of equality and non-discrimination are enshrined in the Constitution:

- „Citizens are equal before the law and public authorities, without privileges and without discrimination".[19]

- „The state is based on the unity of the Romanian people and the solidarity of its citizens".[20]

- „Romania is the common and indivisible homeland of all its citizens, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin."[21]

5. Justice should be a harmonious system to be in its truth and reality

„Truth is real only as a system" said Hegel [22] and confirming this statement, justice is in its truth only to the extent that it fulfils this condition. The system means coherent order, functionality, suitability to the real and to its purpose, but above all unity in its diversity, a concrete universal in which each part expresses the whole and it legitimises the component parts through the created order. The system, including that of justice, manifests dialectically, transforms, becomes, has a historical being, without losing harmony and coherence. The thinker from Jena emphasised that „the truth is the whole. The whole is only the essence that is fulfilled through its development"[23]. Like any system, justice has components or subsystems: ideals, values; the normative,

[15] See M. Andreescu, *Principiul proporționalității în dreptul constituțional*, C.H. Beck Publishing House, Bucharest, 2007; M. Andreescu, A. Puran, *Drept constituțional. Justiția constituțională-garant al supremației Constituției. Doctrină și jurisprudență*, C.H. Beck Publishing House, Bucharest, 2023.

[16] Art. 1 of the Declaration of Principles on Equality, *https://www.equalrightstrust.org*, last consulted on 22.03.2024.

[17] *Idem*, art. 4.

[18] *Idem*, art. 5.

[19] Art. 16 para. (1) of the Constitution.

[20] Art. 4 para. (1) of the Constitution.

[21] Art. 4 para. (2) of the Constitution.

[22] G.W.F. Hegel, *Fenomenologia spiritului*, Romanian Academy Publishing House, Bucharest, 1965, p. 18.

[23] *Ibidem*.

jurisprudential (justice act), institutional subsystem and perhaps the most important component, the man as the creator but also as the beneficiary of the justice act. The truth of the judicial system presupposes the realisation in its entirety but also by each component of its own existential purpose which is also its being, namely *justice* as a value ideal but transposed into the concrete reality.

To the extent that the functions, we would say the purpose of justice, fulfil and express at the same time the functional harmony of a system, which at any moment tries to adapt to its purpose as a value, the realisation of justice, justice is found in the truth or, in other words, gives itself its own legitimacy, without waiting for it to be given to it, in sometimes inadequate forms, from the outside. Contradictions and, in general, any dysfunction in the coherence of the system or inadequacy for the purpose are diseases, deficiencies of justice, which distance it from its purpose and truth. When the diseases of justice become chronic, but with manifestations that lead to exacerbation, we can speak of a crisis of the justice system. Our justice system is obviously in such a chronic crisis with worsening tendencies. The main cause is the morbid contradictions of the system. In contrast to the beneficial contradictions that give the becoming, the unhealthy ones tend to further distance justice from reality and its truth. In what follows, we try to highlight the morbid contradictions of the justice system specific to the crisis in which it finds itself.

5.1. The fundamental contradiction of justice, the expression of the deep crisis in which this is between law and justice

There is an essential break between the value order that should constitute the purpose and essence of justice, and on the other hand the constructed order of norms and jurisprudence. Fairness, justice, no longer represent the goals and truth of justice, replacing these values with law, norms and jurisprudence, which want to find legitimacy in themselves, in abstract forms, ephemeral realities, precarious interests and goals, but not in the ideal and reality of justice. Of course, even in the situation of a justice system that is harmoniously functional and does not have this disease, there is not always a formal overlap between law and justice. Within the healthy justice system, between justice and law there is a one-sided contradiction in the sense that the law could contradict justice but it does not contradict the law. The crisis of the judicial system sometimes expresses in acute forms the inadequacy in absolute terms between justice and the law.

The mentioned contradiction gave free rein to the „will to power" of the governors to impose their own order and legitimacy on justice by regulating and legislating in the senseless and illusory attempt to create an „order of norms" that would replace the being and truth of justice: righteousness. Reality demonstrates that this false order often proves itself incoherent, contradictory and above all, inadequate to the realities for which it is intended. The simple accumulation of norms, even codified laws, does not lead to the establishment of man, the social and justice in their being and purpose if the norms do not express the essence as a phenomenon: the higher order of the values of justice, equity, truth, proportionality, tolerance. Jurisprudence is also manifested in the exclusive preoccupation to correspond to itself or norms, to be sufficient by itself and not by referring to the higher order of values mentioned above. The act of justice carried out by the magistrate obstinately seeks legitimacy exclusively through the legal norm and not through the value order that should be its own.

This morbid contradiction is confirmed, but not made aware by legal technique and formalism. A court decision is not pronounced in the name of righteousness, but „in the name of the law", that is, in the name of an order built by a temporary political will to achieve such temporary interests immersed in their particularity and often contrary to the common good, and not so as if natural in the name of the given and not constructed order of values external to justice but which represent its truth and purpose.

The doctrine states that the judge pronouncing a decision „says the law". It would be great to be so. In fact, most of the time, the magistrate through the pronounced court decision „says the law" - when he does it - trying to include his sentence in the order of the law, which is not necessarily the order of justice. The Judge, if he is aware of the realisation of an act of justice respecting his moral and professional status does not contradict the law, although there are situations when he should and could do it in the name of a higher order formed by the values subsumed by the concept of righteousness. For such an act, which is not only justice, but also righteousness, courage is needed. The magistrate must take the risk of overcoming the imperfect order built by the law in order to legitimise the act of justice he performs in the higher value reality of the metaphysical principles of law. Such a departure from the normality of forms inadequate to the concrete reality is risky for the judge because the constructed order of the law can impose its coercive force.

Contemporary justice is dominated by the order of normativity, of forms that are not abstracted from reality but abstract from it.

The morbid break between law and righteousness (the law as an expression of the will of the legislator, of the temporary power being the one that wants such a separation), should be reflected in the legal education plan. For a correct adaptation to the crisis of justice highlighted by this contradiction, but also to reflect the order of the law and not the law that is taught to students, the profile faculties should no longer be called „law schools", but „Faculties of Laws" as it used to be.

5.2. The contradiction between justice and „world", understanding by „world" both man in his individuality and society as a whole

It seems that the saying „*pereat mundus fiat justitia*" is more and more present in the actuality of justice and put in place of honor. It is not a simple saying; it is a tragic reality, a disease of justice consisting in the inauthentic legitimization of the separation of justice from man and the world. Justice cannot live, triumph, be if the world dies. There is a one-sided contradiction between the world and justice: justice can contradict the world, but the world cannot contradict justice, because the world is the environment, the element that justifies the manifestations of justice. Righteousness through justice involves man both as the creator of the act of justice and as the beneficiary.

In its contemporary manifestations, the justice in crisis realises more and more the saying „*pereat mundus fiat justitia*" trying to become a closed system, existing for itself, and in some cases even more seriously directed against man, the only beneficiary of the act of justice, thus denying his own reason for being. The crisis of justice, through this disease, is also found in the contentless rhetoric of the proclamation of the „abstract man" through equally abstract rights with the intention of giving a teleological form to his manifestations. But the true existential meaning of justice and its finality at the same time is man considered in his human dignity. The rhetoric specific to the separation between justice and the world in favor of the abstract, impersonal man has obvious manifestations. In front of the court, in a judicial decision, the man is no longer in the concrete of his dignity as a person, but becomes „*the named*", at most identified by an equally impersonal procedural quality.

The existential rupture between justice and the world, rather the attempt of justice to deny its own environment that justifies its reason for being, cannot confirm the natural, dialectical order that should characterise a good establishment of justice in its truth, but could it had, at the end of the road, nothingness, justice as an empty form, devoid of the fullness that „just" confers, existing only in relation to human dignity.

5.3. The contradiction between justice, understood even in the sense of the normative order of the law, and on the other hand the act of justice and the magistrate who carries it out

In philosophy we speak of an autonomous world of values existing in itself and for itself, independent even from man. As we stated, justice is indisputably a reality and a normative institutional system as well as a value. Unlike other value systems: moral, religious and in general cultural, the essence of justice consists in its achievement and fulfilment in and through the act of justice of the magistrate, without which the justice system cannot close. At most, we can talk about the autonomy of the law understood as a value system, but not the autonomy of justice outside of the act by which it is concretized. Unlike other value systems or other systems, justice is the clear example of a concrete universal achieved through the act of justice whose expression is primarily the judge's decision.

Therefore, the act of justice can confirm or deny the normative order of justice and, equally, law as a value system. It is a similar situation to the relationship between experiment and scientific theory, the first being able to deny or confirm the theory as the case may be. However, in the sphere of scientific theories, an experiment can disprove a theory by legitimising a new, higher order that includes the old one, as happened with the theory of relativity elaborated by Einstein. In contrast, the act of justice, if it is contrary to the normative order or the value order of the law, is nothing but a judicial error, intentional, necessary, or accidental by the magistrate who denies justice itself and implicitly the right thus abolishing the legal order and the legal order having as its finality not another order, but disorder, chaos. And how many judicial errors are today known or unknown?

It should also be emphasised that the act of justice cannot be dissociated from the person of the one who carries it out, the magistrate. Even an anonymized court decision is not anonymous: the act of justice includes in itself the person but also the personality of the magistrate. It can be said not only that the magistrate is the

author of the judicial act, but also that the judicial act „makes" the magistrate. When judicial errors become obvious - the cause being the magistrate's abandonment of the moral, social and professional status, this colluding with the disorder specific to existential non-values - there is a habit of saying that they are isolated cases that do not characterise the justice system and the order of law. Not true. Justice as a value system must be confirmed in its being, proven, by every act of justice, by every court decision. A single judicial error, a single corrupt or immoral magistrate, negates, sending into nothingness, into non-existence, the juridical and the legal order. Contemporary reality continues to offer far too many examples of such situations that you wonder if there is anything left of the valuable being of justice. Here is a chronic manifestation of the justice crisis.

Justice, found in its being and its truth, imposes on the magistrate, as a fact of conscience, the object of judgment: the deeds of man, not the man, that is, the phenomenal characteristic of the human in man. Being aware of the principles of law and implicitly justice as a specific value of a higher order than the normative one, the judge, performing the act of justice, must still relate teleologically to the concrete person even if he will pronounce only on his facts (actions and omissions). In contrast, in the case of a sick justice, the judge imagines that he has the power to judge the man and not only his deeds.

5.4. The fall in exteriority

Of course, the justice made by man and for man is profane, „according to man's standards", but sacred values are part of his being.

Being a component of the temporary human reality, justice understood in its value dimension involves the relationship between the transcendent and the transcendental referred to by Kant and Heidegger. As a reality of man and society, justice should not be transcendent, *i.e.*, „beyond" man and the world, nor beyond his own reason for being. If this happens, we are in the presence of a morbid manifestation specific to the crisis of justice, first of all by separating it from the „world" as we have shown above. Justice must be and remain in its transcendental being, *i.e.*, „beyond" the existential precarities of this world and outside conflicts and political interests of all kinds, without implications in the struggle for power or in power games. The transcendental of justice is its being in its value dimension, it is the law as righteousness manifested phenomenally through the act of justice.

The contemporary crisis of justice means the fall from the immutability of the own transcendental value and existence in the social and political externality with the consequence of the diminution or even the loss of the being, of the right as a value. The examples are unfortunately far too many: conflicts and contradictions within the institutional system of justice; the transformation of justice into a tool for political or other actors; the involvement in the struggle for temporary power or in the power games of both the judiciary as a whole and the magistrates; the transition from the mediatization of judicial acts, to media justice, carried out first by the mass media; the abandonment by the magistrates of the professional and moral status for the illusory gain conferred by the involvement in the precarities, sometimes the miseries of the world; the arrogant and aggressive rhetoric of baseless forms through the random use and especially for the satisfaction of often immoral selfish interests of the sacred name of justice and law: „in the name of the law", „in the name of the right" become simple formulas to legitimise which is illegitimate. The fall in externality is a painful manifestation of the crisis of justice felt perhaps not so much by the judicial system but especially by those who are its beneficiaries: man, people, society.

We talked about the justice crisis. There is also a justice of the crisis consisting in the illusion of the system to exist through the morbid contradictions exposed above in a world that is not in the realisation of „progress in the consciousness of freedom" as Hegel believed, especially in a process of dissolution, of abandonment of the valuable cultural being and its replacement by the elements of civilization, excessive technologization, in a word by the dominance of the forms of civilization over culture and not the other way around as would be normal. Socially and politically, the process of the dissolution of the world manifests itself through the democracy of the masses and democratic individualism with the consequence of ignoring man as a person and personality, man becoming an „individual" in a social, normative economic or political order in which he does not confirm his „self" because it has become a simple number taken over by the rhetoric of empty forms and ideals.

The justice of the crisis cannot exist because it is outside the truth and its purpose, as well as the society of the crisis, to which it tries to adapt. There cannot be an adequate relationship between the justice in serious morbid contradictions and a society in crisis with the aim of legitimising the existence of a justice of the crisis.

The justice of the crisis can still be a reality but devoid of truth, of being, because not everything that exists also *is*.

6. One of the possible ways to overcome the shortcomings of excessive normativism and postmodern legal formalism and to solve the morbid contradictions of justice, is to return to values and general principles of law, in the activity of developing legal norms and their application

We support the higher order, in the sphere of values, that the concept of justice should confer on justice and the act of justice so that they do not remain only in the formal order of the normative. Righteousness as a value is legally expressed primarily through the principles of law that must be found in the rules of law.

An argument for which the philosophy of law must be a present reality not only in the theoretical sphere but also for the practical activity of drafting normative acts or the administration of justice, is represented by the existence of general and branch principles of law, some of which are enshrined in the Constitution.

The principles of law, by their nature, generality and depth, are topics of reflection primarily for the philosophy of law, only after their construction in the sphere of the metaphysics of law, these principles can be transposed into the general theory of law, can be normatively enshrined and applied in jurisprudence . Moreover, there is a dialectical circle because the „meanings" of the principles of law, after the normative consecration and jurisprudential elaboration, are to be elucidated also in the sphere of the philosophy of law. Such a finding nevertheless imposes the distinction between what we could call: *constructed principles of law*, and on the other hand *metaphysical principles of law*. The distinction we propose has as its philosophical basis the distinction shown above between „constructed" and „given" in law.

The constructed principles of law are, by their very nature, legal rules of maximum generality, elaborated by legal doctrine or by the legislator, in all situations explicitly established by the rules of law. These principles can constitute the internal structure of a group of legal relations, of a branch or even of the unitary system of law. The following features can be identified: 1) they are elaborated within the law, being, as a rule, the expression of the will of the legislator, enshrined in legal norms; 2) are always expressed explicitly by legal norms; 3) the work of interpretation and application of the law is able to discover the meanings and determinations of the constructed principles of the law which, obviously, cannot exceed their conceptual limits established by the legal norm. In this category we find principles such as: publicity of the court session, the principle of adversariality, of the supremacy of the law and the Constitution, the principle of non-retroactivity of the law, etc.

Therefore, the constructed principles of law have, by their nature, first of all a legal connotation and only in the subsidiary a metaphysical one. Being the result of an elaboration within the law, the eventual metaphysical meanings are to be after their consecration established by the metaphysics of law. At the same time, being rules of law, they are binding and produce legal effects just like any other normative regulation. It is necessary to mention that the legal norms that enshrine such principles are superior in legal force to the usual regulations of the law, because they usually target social relations considered to be essential in the first place for the respect of the fundamental rights and legitimate interests recognized for the subjects of law, but also for the stability and fair, predictable, transparent conduct of judicial procedures.

In the situation of this category of principles, the dialectical circle mentioned above has the following appearance: 1) the constructed principles are elaborated and normatively consecrated by the legislator; 2) their interpretation is carried out in the law enforcement work; 3) the value meanings of these principles are later expressed in the sphere of metaphysics of law; 4) metaphysical „meanings" can constitute the theoretical basis necessary for broadening the connotation and denotation of principles or for the normative elaboration of such new principles. The number of constructed principles of law can be determined at a certain moment of legal reality, but there is no pre-constituted limit of them. The evolution of law is also manifested through the normative elaboration of such new principles. As an example, we mention the „principle of subsidiarity", a construction in EU law, adopted in the legislation of many European states, including Romania.

The metaphysical principles of law can be considered as a „given" in relation to legal reality and by their nature are external to law. At their origin, they do not have a legal, normative or jurisprudential elaboration. They are a transcendental and non-transcendent „given" of law, therefore, they are not „beyond" the sphere of law, but they are „something else" in the legal system. In other words, it represents the value essence of law, without which this constructed reality could not have an ontological dimension.

Since they are not constructed, but represent a transcendental, metaphysical „given" of law, it is not necessary to express them explicitly through legal norms. Metaphysical principles can also have an implicit existence, discovered or exploited in the work of interpreting the law. As an implicit given and at the same time as the transcendental essence of law, these principles must be found, after all, in the content of any legal norm and in any act or manifestation that represents, as the case may be, the interpretation or application of the legal norm. It must be emphasised that the existence of metaphysical principles also underpins the teleological nature of law, because any manifestation in the legal sphere, in order to be legitimate, must be appropriate to such principles.

In the specialised legal literature, such principles, without being called metaphysical, are identified by their generality and that is why they were called „general principles of law". We prefer to emphasise their metaphysical, valuable and transcendental dimension, which is why we consider them metaphysical principles of legal reality. As a transcendental „given" and not constructed by law, the principles in question are permanent, limited, but with determinations and meanings that can be diversified in the dialectical circle that encompasses them.

In our opinion, the metaphysical principles of law are: *the principle of justice; the principle of truth; the principle of equity and justice; the principle of proportionality; the principle of freedom*. In a future study, we will elaborate on the considerations that entitle us to identify the principles mentioned above as having a metaphysical and transcendental value in relation to legal realities.

The metaphysical dimension of these principles is indisputable, but the normative dimension remains under discussion. A broader analysis of this issue exceeds the scope of this study. However, some considerations are necessary. Contemporary ontology no longer considers reality by referring to the classic concepts of substance or matter. In his work, „Substamzbegriff und Funktionsbegriff" (1910), Ernest Cassirer opposes the modern concept of function to the ancient concept of substance. Not what the „thing" is or the concrete reality, but their way of being, their inner fabric, their structure interests the moderns. Concrete objects no longer exist in front of knowledge, but only „relations" and „functions". In a way, for scientific knowledge, but not for ontology, things disappear and give way to relationships and functions. Such an approach is cognitively operational for material reality, not for ideal reality, that „world of Ideas" that Platon spoke of.[24]

The normative dimension of legal reality seems to correspond very well to the findings formulated by Ernest Cassirer. What else is legal reality than a set of social relations and functions that are transposed into the new ontological dimension of „legal relations" by applying the rules of law. The principles built by applying to a sphere of social relations through the legal norm transform them into legal relations, so these principles correspond to a legal reality, understood as a relational and functional structure.

But there is a deeper order of reality than relationships and functions. Constantin Noica said that we must call „element" this order of reality, in which things are fulfilled and which makes them be. Between the concept of substance and that of function or relationship, a new concept is imposed, which preserves a substantiality and, without dissolving in function, manifests functionality.[25]

7. Conclusions

In conclusion, we would like to note the relevance of the words of the great German philosopher Kant, which we propose for meditation to a contemporary legislator: „Is old the desire which - who knows when? - it will be fulfilled sometimes: to discover once, instead of the infinite variety of civil laws, their principles, because only in this can lie the secret of simplifying, as they say, the legislation".[26]

Herman Hesse, laureate of the Nobel prize for literature, the author of the novel „The Glass Bead Game", remarks very wisely: „The more extensive a man's culture, the greater his privileges, the greater they must be in case of need the sacrifices he makes. But he is no less a coward and a traitor who betrays the principles of spiritual life for the sake of material interests, who, for example, is ready to leave it up to the holders of the power to decide how much two times two do. It is treason to sacrifice to any other interests a sense of truth, intellectual honesty, devotion to the laws and methods of the spirit. Times of terror and deepest disaster may come. If any happiness is still possible in the disaster, it can only be a spiritual one, which looks back with the desire to save

[24] For developments see C-tin Noica, *Devenirea întru fiinţă*, Humanitas Publishing House, Bucharest, 1998, pp. 332-334.
[25] *Idem*, pp. 327-367.
[26] I. Kant, *Critica raţiunii practice*, Univers Enciclopedic Publishing House, Bucharest, 1999, p. 186.

the culture of the past, which looks forward with the determination to represent serenely and steadfastly the spirit in a period that would otherwise could fall completely prey to matter".

The era of postmodernism is for man, for his social condition, for true faith, a period of fear, of deep disaster, of trial, as the writer Hermann Hesse anticipated.

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HUMAN RIGHTS AND FREEDOMS IN THE CONTEXT OF AI, GLOBALISATION AND THE IDEOLOGY OF TRANSHUMANIS

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Abstract

Artificial intelligence, globalisation and the ideology of transhumanism are contemporary realities that propose a new conception of man, his social status, likely to affect the fundamental rights and freedoms enshrined in constitutions and laws.

In this study we will present the content, definitions and meanings of globalisation, AI and the ideology of transhumanism, whereby the social status of man, his existence are subordinated to technology. In this context, we will insist on the risks and vulnerabilities that the new contemporary realities present for humans. We will refer to the legal means of guaranteeing human rights and to normative regulations regarding the use of AI in the context of world globalisation and the proliferation of the ideology of transhumanism.

Keywords: *human rights, AI, transhumanism, era of postmodernism.*

1. Introduction

The consecration in modern democratic constitutions and in international legal instruments of some human rights and freedoms is the result of a long historical process that includes philosophical, legal and political conceptions, theories, doctrines, but also different forms of recognition, normative consecration of them. The normative affirmation of human rights is the legal recognition of the human being in his existential individuality, man becomes a person in legal relations, the holder of rights and freedoms that he can oppose to the state and demand their guarantee and respect.

The scientific research of fundamental rights and freedoms must be carried out on three levels: legal, philosophical, sociological.

The constitutional evolution of human rights was characterised by the existence of two large categories of regulations: internal, of each state, and international. In constitutional law, the question of their correlation was raised and two principles were affirmed: 1. The application of conventions related to human rights must be done taking into account the need to harmonise international cooperation with the principle of state sovereignty and 2. International documents are the main means for their application, the assumption in good faith by the states parties of their obligations according to their normative content.

The fundamental rights and freedoms of man and citizen are a constitutional reality, with deep implications in the existence of each person, in his relations with the state. It also represents an existential reality of each person, of society as a whole and a dimension of democracy. Modern constitutionalism is based on the affirmation, recognition and guarantee of fundamental rights and freedoms, against which the notions of state, law, civil society, democratic regime, sovereign power would be inconceivable. Therefore, this institution has an important philosophical dimension, which characterises the existence of every human being, but also one of constitutional law and international law, expressing both conceptually and normatively the complex relations between man and the state.

The scientific research of fundamental rights and freedoms must be carried out on several levels: conceptual, philosophical, political and last but not least, legal, being at the same time a reality for contemporary constitutionalism.

Given the undeniable social and legal importance of enshrining human rights, one can speak of a new „religion" of fundamental rights enshrined by law. Is this concept justified? what are the theological,

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philosophical and legal meanings of human rights? To what extent are human rights constitutionally guaranteed in the context of globalisation, in the AI era and transhumanist ideologies? What are the risks and vulnerabilities that contemporary social realities represent for man and his rights?

2. Contents

What does *the contemporary globalisation process* mean and how useful or harmful is it for Romania and Romanians to participate in this process with an integrative purpose whose main exponent in Europe is the European Union? They are topical questions that can be answered with historical and contemporary realities.

History shows that social and state realities such as globalisation and integration have existed since the state organisation of society. All the empires of the world from antiquity to the present are the expression of the imposition of the dominance of a powerful state over other states or forms of social organisation and their integration into the political, legal, economic or cultural and religious order of the state that thus constitutes its empire. The empires of the world, as many as there have been in history, are forms of globalisation and integration.

Contemporary political ideas and theories materialised in political actions with the aim of achieving social and state universalism, in essence do not differ from the universalism of empires of another time. There is, however, a fundamental difference: the empires of the world that have existed in past historical epochs were, without exception, created by acts of armed conquest, by force. Globalisation and contemporary social and state integration are much more subtle social realities, built on the principles of democracy, the rule of law in order to achieve a declared noble goal, social and economic progress, collaboration, assistance, the affirmation and guarantee of human rights.

There are also forms of spiritual, religious globalisation present in contemporary postmodernism. The best example is the universalism imposed by Catholicism. The proclaimed principle is that of compelling Christians to come under the authority of the Pope. Many times in history, Catholicism was imposed on peoples by force, not by persuasion, which had tragic consequences for many. This form of spiritual globalisation is contrary and alien to the true Orthodox faith.

Contemporary globalisation is no longer based on armed force (at least not directly), but on the free adherence of states and societies to a supra-state institutional, political and legal system.

Ancient empires integrated the conquered states into the political, economic, and legal order of the conquering state. The social and political status of those integrated into the empire is always inferior to the state and society of the conquering state. In contrast, the contemporary forms of globalisation and integration are not related, at least declaratively and procedurally, to the political and social order of a dominant state, but organisational structures with a political and legal supra-state character, without them having their own social basis, so as the states have.

The methods and procedures of contemporary state and social integration, specific to postmodern society, are different from the past and, as we said, much more subtle, but all of them are forms of domination by those powerful, from an economic, military and political point of view, over the integrated ones . As examples, we refer to the economic, social but also political integration achieved by large companies and economic trusts, to the monopolisation of production and trade, to IT integration, to the emphasis placed in development programs on consumerism, on having and not on being, utilitarianism and moral pragmatism with the exclusion of the values of Christianity and especially of the right Orthodox faith, the exclusive belief in the power of capital and technologies, the construction of a rationalised and impersonal humanism, the abolition of the national, cultural, religious particularities of those who freely adhere to globalisation and the examples could keep going.

With all these differences, we affirm that the historical empires of the world, as well as the modern forms of globalisation and integration, have the same essence and existential purpose: the dominance of the politically, economically and socially powerful over integrated states and societies.

The European Union, a supranational organisation, has all the characteristics that we have briefly listed. It is obvious that the member states are not equal politically, economically and socially. The states, the powerful political and economic forces within this organisation are dominant, they create the political, economic and legal order that they impose on the other states under the guise of interstate equality, collaboration and assistance.

The political, economic and legal order of the European Union is not created by this organisation, as it apparently, declaratively and theoretically appears, but by the states, the political forces that dominate. The political and social pragmatism is clear. Through this apparent equality and aid provided, the states that dominate this organisation have easy access to cheap labor, the natural resources of the dominated states, and above all, they control the entire state, economic and social activity of the dominated.

The national sovereignty attributes of the dominated states are restricted, and their own existential features: economic, state, political, cultural, and faith are affected by the abstract state order created and imposed by those who dominate the EU. The EU is not a charity organisation but a supranational institutional instrument of domination.

Globalisation in all its variants characterises society in the era of postmodernism. Is this the last stage in the evolution of humanity?

Legal postmodernism can be characterised by formalism and positivism, but also by the dominance of supranational systems and organisations and supranational law over the domestic legal order. This reality leads to the drastic limitation of national sovereignty and the supremacy of the Constitution and the entire domestic legal order. The CJEU has shown unequivocally in several recent decisions that the EU legal order is superior and applies as a priority to the internal legal order, including the Constitution[1].

EU legislation is mandatory for Romania, a fact that has not happened in our history. The legislation of the empires that dominated the Romanian countries was never imposed on their territory. The more important normative acts to be adopted by the Parliament must now first be approved by the EU bodies. Romania's political independence is limited because Romania's internal and external policy is carried out in relation to the political decisions of this supranational organisation.

Here are some historic moments of our freedom. Through the Constitution of 1864, ruler Ioan Cuza conquered Romania's legislative freedom from the neighboring empires. In 1877 Romania became an independent and sovereign state from a political point of view, and in 1918 a unitary national and free state.

AI is the intelligence of intelligent machines, robots, that perceive their environment and take actions that maximise the chance of successfully achieving their goals. It is defined as „the ability of a system to correctly interpret external data, to learn from such data, and to use what it has learned to achieve specific goals and tasks through flexible adaptation" (Kaplan Andreas). The existential risk posed by strong artificial (or general) intelligence is the assumption that substantial progress in artificial (or general; abbreviated AGI) could one day lead to human extinction or some other unrecoverable global catastrophe.

In the era of postmodernism, within this ideology, there are already discussions about the superiority of artificial intelligence over human intelligence, about the competition between man and machine, about the need for legal regulation of social relations that have AI as their object, even about a unitary legal regulation of natural intelligence of man and AI, considering them to be phenomenologically equivalent.

The ethical aspects involved in computer systems, their use, storage and use of information are also topical. Many scientists, lawyers, people of culture, but also politicians are concerned about the risks for humans and society, the vulnerabilities and the elements of progress of artificial intelligence. We can talk about the ideology or philosophy of AI because it is a component part of postmodernist thinking and realities and the implications of artificial intelligence are profound for man, society, for the meaning and purpose of existence.

We do not intend in this study to analyse all these aspects of AI. In the following, we briefly present our opinion:

Definition of the notion of „intelligence":

- natural intelligence (there are authors, scientists who speak of an intelligence of matter);
- human intelligence. The concept is mainly studied by psychology as an applied science. Philosophy and theology rarely use this concept. Human intelligence is understood by psychology either as a function of the neural activity of the brain or as a behavioral aptitude as stated by behaviorist theories. In popular parlance intelligence is an aptitude of the resourceful enterprising man who adapts easily.

Human intelligence, both at the level of common sense and in philosophical or theological theories, is not assimilated to human reason or the cognitive capacity of man. The latter are attributes of man as a spiritual being, endowed with an immortal soul, rational, affective, cognitive and volitional capacity.

Research in the field of neural biology has demonstrated that neither rational capacities nor human intelligence can be fully explained by human neural functions alone. This is an objective limit of human knowledge, not a subjective one. In other words, human intelligence and reason are more and something else than the set of biological functions. At the same time, life is not the set of biological functions that support it. No scientific theory or hypothesis explains the origin of life or what life is, much less substantiates the possibility of artificial creation of life. We consider that psychologism should not be absolutized because its explanations regarding man's reason, intelligence and conduct are either incomplete or do not take into account much deeper realities than the phenomenality of psychological theories.

[1] For development see S. Usherwood, J. Pinder*, Uniunea Europeană*, Litera Publishing House, Bucharest, 2020.

The concept of „AI" must be defined, which in our opinion is much older than the time it was proposed. Thus the ancient civilizations of Egypt, Sumer or the Mayan civilisation, used tools and calculation techniques with the help of which they could create (see the pyramids), or they could make long-term calendrical and astronomical predictions.

The notion of „artificial" corresponds philosophically to the idea of inauthentic, a reality devoid of existential hypostasis.[2]

Undeniably, AI, in the form of computer systems, robotics, digitization, etc., in our opinion, is nothing more than a technology, just like so many others, created by man, in the service of man and obviously of great utility in achieving goals, cognitive rational and even volitional of man, excluding the affective ones. We believe that this aspect should also be emphasised.

Comparisons cannot be made between human intelligence and AI. The two realities have a different nature. Aristotle in „Organon - Definitions", says that only realities that have the same existential nature can be compared, a truth found today in all sciences. Man's intelligence is an existential attribute of him, while AI is a technology, of indisputable utility for man, but in no case is it of the same nature as man's intelligence. It is the absolute difference and separation between the creator and the created. In this case man is the creator of AI.

It is true that the AI expansion today has led to the strengthening of atheism and the refusal of faith (not always of religion). This phenomenon has its beginning not now but in the 18th century when man thought he could replace God with his reasoning. Since then, new „religions" have appeared, such as the „religion of human rights or the religion of artificial intelligence". It is a drama of contemporary man. We believe that this aspect should be approached critically. Notions of religion or theology are not confused with faith. Man relates to God through faith, not through religion or theology, much less through technology in the conditions in which it is considered sufficient by itself.

It is also good to discuss the AI limits. No system considered to be an artificially intelligent system can subrogate man's creative reason, his affective and volitional faculties. Any AI form must remain for man only a tool, a means and not a purpose. Kant says that man must always be considered as a purpose and never as a means.

Moreover, philosophy and science have highlighted objective limits of human reasoning considered by its cognitive capacity. We do not go into details, but we have in mind Heisenberg's uncertainty principle, Plank's constant or the theory of the incomplete or contradictory character of any axiomatic system, formalised by the mathematician Goodel.

We do not agree with politicians' statements that the future will mean the digitization of education, democracy, and decisions. Such a reality would be a great tragedy for man.

The risks of AI for humans and their rights should be better specified and domestic and international legal instruments should be adopted to guarantee, in this context in particular, the constitutional rights and freedoms of humans.

In our opinion, they are particularly aimed at trying to compare and replace human intelligence with AI, man could become a mere means and not a purpose, weakening and even distorting social and legal humanism. Einstein pointed out very well that technology has taken the place of humanism.

That is why it is not AI that is bad or harmful, but how people understand how to use it.[3]

Transhumanism is an international intellectual and cultural movement that supports the use of new science and technology to improve people's mental and physical skills and abilities and to ameliorate what it sees as undesirable and unnecessary aspects of the human condition, such as stupidity, suffering, disease , ageing and involuntary death. Transhumanist thinkers study the possibilities and consequences of developing and using human enhancement techniques and other emerging technologies for these purposes. The dangers and possible benefits of powerful new technologies that might radically change the conditions of human life are also concerns of the transhumanist movement.

Although the first known use of the term „transhumanism" dates back to 1957, the contemporary meaning is a product of the 1980s, when a group of scientists, artists and futurists based in the United States began organising what has since grown at the level of the transhumanist movement. Transhumanist thinkers postulate that human beings will sooner or later be transformed into beings with abilities so greatly expanded as to merit the label „posthuman". Transhumanist predictions of a profoundly transformed future humanity have attracted many supporters and critics from a wide range of perspectives. Transhumanism has been described by an opponent as „the most dangerous idea in the world", while a supporter counters that it is „the movement that

[2] See Plato, Aristotle, Kant, Hegel, but also contemporary rationalist and existentialist philosophy.

[3] See M. Andreescu, *Postmodernismul, Studii, eseuri și cugetări*, Paideia Publishing House, Bucharest, 2023 and A. Smibert, *Inteligența artificială,* Paralela 45 Publishing House, Pitești, 2020.

essentialises the most daring, courageous, imaginative and idealistic aspirations of humanity". Some authors believe that humanity is already transhuman because medical progress in recent centuries has significantly altered our species. However, it would not be in a conscious and therefore transhumanist way.[4]

In transhumanism, the main idea is that the technical manipulation of human nature can free us from the burden of our physical existence and make us immortal. It is a secularised eschatology that aspires to the total absence of constraints imposed by nature or society (which is the natural system resulting from human nature through the interaction of individuals in large groups). Liberation from the bonds of nature is part of the self-actualization concept of transhumanism, but the creed also contains the idea of social emancipation through technology. This view is completely broken from any realistic perspective on anthropology.

In the era of transhumanism, within this ideology there is already talk of the superiority of artificial intelligence over human intelligence, of the competition between man and machine, of the need for legal regulation of social relations that have as their object artificial intelligence, even of a unitary legal regulation of natural intelligence of man and artificial intelligence, considering them to be phenomenologically equivalent.

As we have shown above, transhumanism has been described by an opponent as „the most dangerous idea in the world", while a supporter counters that it is „the movement that essentializes the most daring, courageous, imaginative and idealistic aspirations of humanity". Some authors believe that humanity is already transhuman because medical progress in recent centuries has significantly altered our species. The philosophical component of this ideology examines the ethical implications of extending subjectivities beyond the human species, namely the machine to be considered a person.

These ideas about human transformation are realities of the present time and require, with caution, legal protection, including at the constitutional level, against technologies that can really endanger the very way of being human, that „human dignity" that Immanuel Kant talked about and proclaimed in contemporary constitutions, dignity based on the autonomy of the will guided by reason. Of course, Christianity has a much higher view of human dignity, but in the present study we will not analyse this topic in detail.[5]

One of the essential concerns of man, society and the contemporary state, in the context of the social and political realities we referred to above, is the consecration and guarantee of the essential values of the rule of law and a democratic society, an aspect that also includes the affirmation, the consecration and guarantee of fundamental human rights.

The issue of fundamental rights and freedoms and their constitutional regulation is a consequence of the evolution of the state and its functions, and on the other hand, it is the result of the social, economic and political demands of society. It is noticeable the constant legal concern for the consecration and especially the guarantee of fundamental rights, an aspect that also generates a variety of legal solutions with implications also in terms of public international law.

On the world level, concerns for the promotion of human rights have materialised in several documents of real value, among which we mention: the Universal Declaration of Human Rights - December 10, 1948; The International Covenant on Economic and Social Rights, the International Covenant on Civil and Political Rights, adopted by the UN in 1966; European Convention on Fundamental Human Rights and Freedoms - Rome, 1950; Final Act of the Conference for Peace, Security and Cooperation in Europe - Helsinki, 1975; Final Document of the Vienna Meeting, 1989; The final document of the Copenhagen Meeting - 1984 and the Paris Charter of 1990 and of course the European Union Charter of Human Rights entered into force in 2009.

There are also a number of regional international documents, such as the African Charter of 1981 or the Inter-American Convention of 1969.

The international control mechanism intervenes only in case of failure of the national guarantee regarding the respect of fundamental rights and freedoms.

In this sense, art. 20 of the Romanian Constitution establishes that: the constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights.

According to the provisions of art. 20 para. (2) of the Romanian Constitution, if there is inconsistency between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations have priority.

This stipulation does not represent a violation of the principle of national sovereignty, because the constitutional priority concerns only the treaties and pacts ratified by Romania and which, through this procedure, are part of the internal law.

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[4] For developments see J. Boboc, *Transumanismul decriptat - Metamorfoza navei lui Tezeu*, Doxologia Publishing House, Bucharest, 2021.

[5] See also A. Mărchidan*, Ce mai rămâne uman în transumanism*, *https://www.art-emis.ro/analize/ce-mai-ramane-uman-in-transumanism*, last consulted on 18.03.2024.

In the sense of compliance, these are also the provisions of art. 35 of Protocol no. 11 to the European Convention from 1950, which stipulates the following: „The European Court of Human Rights can only be referred to after the exhaustion of domestic appeals, as established, according to the generally recognized principles of international law and within a period of 6 months, starting with the date of the final internal decision".

In the legal literature it is specified that international control procedures have a limited and derogatory nature. At the same time, the moral force of international regulations is noted, the fact that they can be imposed and accepted by domestic law, if they defend human values understood even from the point of view of the theory of natural law.

Consecrating and guaranteeing human rights through domestic and international regulations does not exclude the possibility of limiting them. Moreover, the existence of unconditional rights, theoretically, cannot be admitted in a democratic constitutional system. The absence of limits and conditions of exercise, provided by law, constitutions or international legal instruments, can lead to arbitrariness or abuse of law, because it would not allow the differentiation of legal behavior from illegal behavior. This idea is expressed by art. 4 of the French Declaration of the Rights of Man and Citizen: „the exercise of the natural rights of each person has no other limits than those that ensure the other members of society the possibility of exercising these rights." Also, the legal doctrine held that in the relations between the rights holders „the freedom of one stops where the other begins, because the condition inherent to the person is his relationship with others".[6]

Social order and stability presuppose tolerance and mutual respect between subjects participating in social relations. The exercise of fundamental rights and freedoms must not contradict the existing order in social life: the coexistence of freedoms and social protection are the two commandments that underlie the limits dictated by positive law." The difficulty lies in finding the most appropriate solutions that harmonise individual interests and the public interest and at the same time guarantee fundamental rights and freedoms in situations where their exercise could be limited or restricted.

In the relationship between rights and freedoms, on the one hand, and society on the other, two extreme attitudes have emerged: the sacrifice of rights and freedoms in the interest of social order, or the pre-emission of rights and freedoms, even if in this way the interests and social order are sacrificed.[7] None of these solutions is justified by the imperatives of an authentic democracy and the requirement to achieve social balance and harmony. The constitutional regulations, to be effective, must achieve a balance between citizens and public authorities, then between public authorities and, of course, citizens. The individual must also be protected against arbitrary state interference in the exercise of his rights and freedoms.[8] That is why the limits imposed on fundamental rights and freedoms must be appropriate to a legitimate purpose, which could be: the protection of society, the social, economic and political order, the rule of law, or for the protection of the rights of others. The limits must not deprive the rights themselves of content, but guarantee their exercise in such situations.

The existence of limits for the exercise of fundamental rights is justified by the constitutional protection or the protection by international legal instruments of an important human or state values. However, it is not admissible that in the name of these values, the state authorities limit the discretionary and abusive exercise of the rights which in turn are constitutionally guaranteed. In this case, it could lead to the destruction of democracy under the pretext of its defense.

The principle of proportionality, understood as an appropriate relationship between the measures that limit the exercise of human rights and freedoms, the factual situation and the legitimate goal pursued, represents a criterion for determining these limits, avoiding excess power, but also a guarantee of constitutionally enshrined rights.[9]

In doctrine, legal instruments and jurisprudence, the limits of fundamental rights and freedoms have been differentiated according to several criteria. A first distinction is that between the limit and the limitation of fundamental rights.[10] Thus, the limit is an element of the content of the right and is necessary for its exercise. In contrast, the limitation (restriction) restricts the exercise of a right through measures ordered by the competent state authorities for a legitimate purpose. Another author[11] considers that there are limits imposed on fundamental rights and freedoms in order to facilitate their realisation, and on the other hand, limits that aim at „the protection of society, its socio-economic and political order, as well as the rule of law".[12] The limits deriving

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[6] I. Deleanu, *Instituţii şi proceduri constituţionale,* Servo-Sat Publishing House, Arad, 1998 vol. I, pp. 269-270.

[7] I. Deleanu, *op. cit*. vol. I, p. 205.

[8] I. Muraru, *Protecţia constituţională a libertăţilor de opinie*, Lumina Lex Publishing House, Bucharest*,* 1999, pp. 16-17.

[9] For developments see M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, C.H. Beck Publishing House, Bucharest, 2007 and M. Andreescu, A. Puran, *Drept constituţional. Teoria generală şi instituţii constituţionale. Jurisprudență constituțională*, 4th ed., C.H. Beck Publishing House, Bucharest, 2020, pp. 132-137.

[10] D. Micu, *Garantarea drepturilor omului,* All Beck Publishing House, Bucharest, 1998, p. 141.

[11] I. Deleanu, *op. cit*., vol. I, p. 205.

[12] *Ibidem*.

from such a purpose can be absolute, imposed by the exigencies of social life, in all situations for the protection of the essential values of the state and society, and on the other hand relative, those that are not applied in a general and permanent manner, but only to some of the rights and freedoms, or only in a certain time or in a certain situation, or only to certain subjects.[13]

In our opinion, we can distinguish: a) *conditions* for the exercise of rights and freedoms that can be found in the very legal content and in their constitutional definition; b) *restrictions, derogations, suspensions, loss of the right,* which have an exceptional and temporary character, being measures ordered by the state authorities in order to protect or achieve a legitimate purpose. State interference in the exercise of fundamental rights and freedoms can be achieved in principle by restricting and suspending the exercise of certain rights or through derogations. These methods are regulated in constitutions and international legal instruments. Avoiding any abuse of state authorities and guaranteeing fundamental rights and freedoms in such situations requires the constitutional regulation, but also in international legal instruments, of the conditions that justify the application of such measures.

There are differences between restrictions, and on the other hand, exemptions that can target the exercise of fundamental rights and freedoms. Restrictions are measures considered necessary in a democratic society, applied in order to achieve a public interest or to protect the rights and freedoms of others. In this sense, the provisions of art. 18 of the Convention show that: „restrictions ... can only be applied for the purpose for which they were provided".

There are also absolutely guaranteed rights (absolute rights) in the sense that no restrictions or derogations are allowed. Obviously, we are referring to the right to life; the right not to be subjected to torture, any kind of punishment or inhuman or degrading treatment. The principle of proportionality represents a guarantee in all situations where the exercise of a right or a fundamental freedom is subject to a condition, restrictions, suspensions or derogations. The principle of proportionality, applied in this matter, also aims to achieve a fair balance between individual interests and the public interest or between the various private interests that correspond to fundamental subjective rights, enshrined and constitutionally guaranteed.

The Romanian Constitution uses a simple and effective procedure to regulate the restriction of the exercise of certain rights and freedoms (common circumstances), through the provisions of a single article. The provisions of art. 53 allow the restriction of the exercise of some fundamental rights and freedoms, but only conditionally.[14] The issue of interpretation and application of the provisions of art. 53 presents a particular complexity because the restrictions may concern the exercise of any right or fundamental freedom enshrined and guaranteed by the Constitution, except for those considered as absolute. The complexity is also due to the diversity of concrete situations that justify restricting the exercise of certain rights.

The rules established by the provisions of art. 53 have the value of a constitutional principle, because they are applicable to all the fundamental rights and freedoms of citizens. In the case of a comparative analysis between the Romanian constitutional provisions and those included in some international legal instruments, which regulate the conditions for restricting the exercise of certain rights and freedoms, some differences can be found. It is of interest to our study the fact that the provisions of art. 53 para. (2) of the Constitution expressly enshrine proportionality as a condition that must be respected in the case of restricting the exercise of certain rights, while in most international legal instruments this condition results implicitly from the content of the regulations and is deduced, by way of interpretation, by the jurisprudence of international courts.

Artificial intelligence is increasingly used in the private and public sectors, affecting everyday life. Some see AI as the end of human control over machines. Others believe that this is the technology that will help humanity meet some of the most pressing challenges it faces. While neither picture may be correct, concerns about AI's impact on fundamental rights are clearly growing and its use deserves to be analysed by human rights actors.

Currently, there are no clear legal regulations at the international level regarding the use of artificial intelligence, its risks and vulnerabilities for humans, society and civilization, as well as the risks of the ideologies that promote it, one of the most important being the ideology of transhumanism.

However, within the EU there are important concerns for the adoption of legislation in this field. Thus, on April 21, 2021, the following form of the document entitled „*PROPOSAL FOR REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, whose object is the ESTABLISHMENT OF HARMONISED RULES REGARDING ARTIFICIAL INTELLIGENCE (AI ACT) AND THE AMENDMENT OF CERTAIN LEGISLATIVE ACTS OF THE UNION*".[15]

The preamble of this draft Regulation states: „The proposed regulation on artificial intelligence (AI) aims to harmonise the rules for products and services that use or are provided as AI systems in the EU, to ensure the

[13] *Idem*, pp. 205.

[14] I. Muraru, E.S. Tănăsescu, *Drept constituţional şi instituţii politice*, vol. I, All Beck Publishing House, Bucharest, 2003, pp. 174-176; M. Andreescu, A. Puran, *op. cit*., pp. 254-268.

[15] European Commision, Bruxelles, 21.04.2021, *https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52021PC0206*.

functioning of the internal market and respect for fundamental rights. The proposal sets out mandatory requirements for the design and development of certain AI systems and how they are supervised after they are placed on the market. The proposal also includes specific rules on the protection of personal data, in particular on the use of AI systems for remote biometric identification. The proposal is based on art. 114 and art. 16 of the TFEU. ”

The main objectives of the Regulation are: To ensure the ethical and responsible development and use of AI in the EU; To protect fundamental rights and European values; To promote innovation and European competitiveness in the field of AI; To help build a single European market for AI.

The proposal is based on the following basic principles:

- Respect for fundamental rights: AI must be developed and used in accordance with the Charter of Fundamental Rights of the European Union;

- Non-discrimination: AI must not be used to discriminate on the basis of race, ethnicity, religion, sex, sexual orientation, gender identity, disability or other personal characteristics;

- Accuracy: AI must be accurate and correct;

- Transparency: Users must be informed when they are interacting with an AI system;

- Liability: Natural or legal persons who develop or use AI systems must be responsible for their actions.

The principles of subsidiarity and proportionality are invoked. According to the principle of subsidiarity, the action of the European Union must be limited to what cannot be effectively achieved by the member states. In the case of artificial intelligence (AI), the European Commission believes that action at European level is necessary to avoid fragmentation of the single market and to protect the fundamental rights and safety of European citizens.

The European Commission considers its proposal to be proportionate and necessary to achieve its objectives. It follows a risk-based approach and imposes regulatory burdens only when an AI system is likely to present high risks to the fundamental rights and safety of the individual.

An important chapter of the draft Regulation refers to prohibited practices for artificial intelligence (Title II).

The regulation follows a risk-based approach, differentiating between uses of AI that create (i) an unacceptable risk, (ii) a high risk, and (iii) a low or minimal risk.

The list of prohibited practices in Title II includes all those artificial intelligence systems the use of which is considered unacceptable as a violation of Union values, for example by violating fundamental rights. The prohibitions cover practices that have a significant potential to manipulate people through subliminal techniques beyond their awareness or to exploit the vulnerabilities of specific vulnerable groups, such as children or the disabled, in order to materially distort their behavior in a way which is likely to cause them or others physical or psychological harm.

Other manipulative or exploitative practices affecting adults that could be facilitated by artificial intelligence systems could be covered by existing data protection, consumer protection and digital services legislation that ensures that individuals are properly informed and have the freedom not to be subject to profiling or other practices that could affect their behavior. The proposal also bans general purpose AI-based social scoring by public authorities. Finally, the use of „real-time” remote biometric identification systems in publicly accessible premises for law enforcement purposes is also prohibited, unless certain limited exceptions apply.

In Romania, a recent document entitled, *National Strategy for Artificial Intelligence* [16] was adopted, which was developed in the wider context provided by the project „Strategic framework for the adoption and use of innovative technologies in the public administration 2021-2027 - solutions for the efficiency of the activity”[17]. The general objective of the project consisted in the correlation of international strategies, regarding the use of innovative technologies in public administration, with the national context and the elaboration of strategic directions for the period 2021-2027. These strategic directions have as their main purpose the efficiency of public institutional activity in the relationship with citizens and a better development and coordination of these national institutions[18].

[16] *https://www.mcid.gov.ro/wp-content/uploads/2024/01/Strategie-Inteligenta-Artificiala-22012024.pdf*.

[17] See *https://www.adr.gov.ro/cadru-strategic-pentru-adoptarea-si-utilizarea-de-tehnologii-inovative-in-administratia-publica-2021-2027-solutii-pentru-eficientizarea-activitatii-cod-mysmis2014/*.

[18] For developments see R. Duminică, D.M. Ilie, *Ethical and legal aspects of the development and use of robotics and artificial intelligence. Protection of human rights in the era of globalization and digitisation*, Journal of Law and Administrative Sciences no. 19/2023, pp. 42-42, *https://jolas.ro/wp-content/uploads/2023/06/jolas19a3.pdf*, last consulted on 18.03.2024.

3. Conclusions

The constitutional evolution of human rights was characterised by the existence of two large categories of regulations: internal, of each state, and international. In constitutional law, the question of their correlation was raised and two principles were affirmed: the application of conventions relative to human rights must be done taking into account the need to harmonise international cooperation with the principle of state sovereignty; international documents have as the main means for their execution the assumption by the party states of the fundamental obligation provided in their content.

Summarising, it can be stated that, dominant in the set of theoretical, legislative and practical concerns regarding human rights, is the idea that their effective proclamation and guarantee rests with internal legal regulations, as an expression of the recognition of the sovereignty of states and their quality of membership equals of the international community. Only from this perspective should the correlation with the international regulations in the matter be understood.

Recently, the EU adopted a new worldwide legislation that regulates artificial intelligence. The „AI Law" was adopted, following intense negotiations. The text was unanimously approved, although some member states, such as France and Germany, expressed concerns, which were taken into account in the final version of the act, reports the France Presse agency, quoted by Agerpres. This „AI Law" is a fundamental step, which establishes the first rules on the planet on artificial intelligence, to make it safer and respectful of human rights**"**, announced the Belgian presidency of the European Union[19].

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[19] For developments, see *https://www.euractiv.ro/infosociety/legea-ue-privind-ai-un-reper-global-pentru-reglementarea-inteligentei-artificiale-64818*.

STRENGTHENING THE ROLE OF THE CONSTITUTIONAL COURT BY RESPECTING THE UNCONSTITUTIONALITY DECISIONS

Elena ANGHEL[*]

Abstract

As a result of the revision of the Constitution in 2003, art. 147 of the Basic Law strengthened the binding legal effect of decisions declaring the unconstitutionality of laws and ordinances, an aspect that was required to strengthen the role of the Constitutional Court. Thus, according to art. 147 para. (4) of the Constitution, the decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, decisions are generally binding and have force only for the future.

From the moment the decisions of the Constitutional Court are published in the Official Gazette of Romania, the legal norms declared as unconstitutional cease to have legal effects for the future.

As the Constitutional Court ruled, regarding the general binding effect of its decisions, jurisprudence must be taken into account by all authorities involved in the process of applying laws and Government ordinances. The constitutional consecration of the general binding character of the decisions of the Constitutional Court determines that they are imposed on all legal subjects, just like a normative act, unlike the decisions of the courts, which produce effects inter partes litigantes.

But, as I will highlight in this study, the effectiveness of unconstitutionality decisions depends on the behavior of public authorities after the moment Constitutional Court states a non-compliance with the provisions of the Basic Law.

Keywords: *Constitutional Court, decisions, unconstitutionality, authorities, effects.*

1. Introduction

According to art. 142 para. (1) of the Constitution, CCR is the is the *guarantor of the supremacy of the Fundamental Law* and, according to art. 1 para. (2) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, republished, this is the sole authority of constitutional jurisdiction in Romania.

By means of dec. no. 727/2012[1], CCR has highlighted the fact that one dimension of the Romanian state is constitutional justice, carried out by the Constitutional Court, a political and jurisdictional public authority that does not fall under the scope of the legislative, executive or judicial power, its role being to ensure the supremacy of the Constitution, as the fundamental law of the rule of law.

Furthermore, by means of dec. no. 377/2017[2], CCR pointed out that in Romania, the constitutional review is carried out by the Constitutional Court, the only authority of constitutional jurisdiction, and therefore neither the HCCJ nor the courts or other public authorities of the State have the power to review the constitutionality of laws or ordinances, whether or not they are in force.

2. Paper content

While there are still disputes as to whether the jurisprudence of the courts is creative, with specialists placing it between two limits - between de jure denial and de facto recognition - the jurisprudence of the Constitutional Court has been consistent, Starting with *Plenary Decision no. 1/1995*[3], in holding that the power of *res judicata* which accompanies judicial acts, and therefore also the decisions of the Constitutional Court, attaches not only to the operative part but also to the considerations on which it is based. Therefore - the Constitutional Court held that -, both the Parliament, and the Government, respectively public authorities and

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[1] CCR dec. no. 727/09.07. 2012, published in the Official Gazette of Romania no. 477/12.07.2012.

[2] CCR dec. no. 377/31.05.2017, published in the Official Gazette of Romania no. 586/21.07.2017.

[3] Plenary Decision no. 1/1995 on the binding nature of the decisions of the Constitutional Court pronounced within the constitutional review published in the Official Gazette of Romania no. 16/26.01.1995.

institutions must fully observe both the recitals and the operative part of the decisions pronounced by the Constitutional Court[4].

„The constitutional review is not a brake on democracy, but a necessary instrument, as it allows the parliamentary minority and citizens to ensure that the provisions of the Constitution are observed, and is a necessary counterweight to the parliamentary majority, should it deviate from the letter and spirit of the Constitution. The democratic legitimacy of this control derives from the election or appointment of constitutional judges exclusively by constitutional authorities directly elected by the people (Chamber of Deputies, Senate, President of Romania). It is therefore natural for the Constitutional Court to participate - in the forms determined by the Constitution - in the legislative process. In this process, however, the Constitutional Court is constrained by some external requirements, which mainly concern the fact that *it cannot replace the legislator*, and by some internal requirements, due to the fact that *its solutions must be justified by legal reasoning*. At the same time, as resulting from specialised literature review, „through the contribution of judicial practice, significant improvements have been made to legislation[5]".

Constitutional review is completed by decisions, which, according to art. 145 para. (2) of the Constitution, are binding and have force only for the future. If the unconstitutionality is found by decision, it shall have *erga omnes* effects, namely it has a general binding effect on all public authorities, citizens and private legal persons. Due to these grounds, a not inconsiderable part of the constitutional doctrine assimilates these decisions to acts having the force of law. (…)

Due to the general binding effect of the decisions of the Constitutional Court, its case law must be taken into account by all bodies involved in the process of drafting and implementing laws and government ordinances, as well as by the Chambers when drafting or amending Parliament's regulations".

Art. 147 para. (1) of the Constitution establishes, in what concerns laws and ordinances in force, found to be unconstitutional, that „they shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*".

The decision finding unconstitutionality[6] is part of the normative legal order, with the effect that the unconstitutional provision ceases to apply for the future[7]. It is incumbent on Parliament or, as the case may be, on the Government, to repeal or amend those legislative acts, bringing them into line with the Fundamental Law. The intervention of Parliament or the Government within the period during which the provisions found to be unconstitutional are suspended by operation of law, within the meaning of those laid down by the decision of the Constitutional Court, is an expression of the final and generally binding nature of the CCR decisions.

Therefore, as the Constitutional Court stated[8], if the Parliament or the Government does not intervene or delays, the decision of the Constitutional Court shall continue to have effect, being enforceable *erga omnes*, in order to ensure the supremacy of the Constitution.

By means of dec. no. 2/11.01.2012[9], CCR has stated that this binding nature does not apply to decisions finding the constitutionality of a legislative act because such an interpretation would mean that the Court could never go back on its own case law, being bound by its own previous findings. Furthermore, as the doctrine noted, „in the absence of express regulation of the meaning of certain legal institutions in the Constitution of Romania, it is incumbent on the Constitutional Court of Romania to establish, through its case law, by binding decisions, the manner of interpretation of constitutional texts"[10].

In order to capture the power of res judicata that accompanies the CCR decisions, we must distinguish in their typology between simple decisions and interpretative decisions.

Simple decisions are those which find either the law or the ordinance unconstitutional in whole or in part, or the constitutionality of these normative acts in relation to the objections of unconstitutionality raised. In the

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[4] We note that CCR has also invoked the *res judicata* power attached to the recitals of the Constitutional Court's decision in other decisions, for example: dec. no. 196/2013, published in the Official Gazette of Romania no. 231/22.04.2013; dec. no. 163/2013, published in the Official Gazette of Romania no. 190/04.04.2013; dec. no. 102/2013, published in the Official Gazette of Romania no. 208/12.04.2013; dec. no. 1039/2012, published in the Official Gazette of Romania no. 61/29.01.2013 and others.

[5] E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrative (Legal liability. A special look at liability in administrative law)*, Pro Universitaria Publishing House, Bucharest, 2013, p. 318.

[6] C. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in LESIJ - Lex ET Scientia International Journal no. XXIX, vol. 1/2022, p. 68.

[7] CCR dec. no. 847/08.07.2008, published in the Official Gazette of Romania, Part I, no. 605/14.08.2008.

[8] CCR dec. no. 71/08.02.2005, published in the Official Gazette of Romania, Part I, no. 380/05.05.2005.

[9] CCR dec. no. 2/11.01.2012, published in the Official Gazette of Romania, Part I, no. 131/23.02.2012.

[10] E.E. Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului (Brief considerations on the accountability of the members of the Government)*, in Public Law Magazine no. 2/2017, p. 83.

first case, the provisions of art.147 para. (1) of the Constitution become applicable: the legal norm is suspended by law and, insofar as the original or delegated legislator does not intervene, it ceases to have effect and thus no longer forms part of the active substance of the legislation.

The literature[11] stated that, in a broad sense, *interpretative decisions* shall mean all the decisions of the Constitutional Court which do not include a simple declaration of the constitutionality/unconstitutionality of the objected regulations. The authors point out that in distinguishing between simple and interpretative decisions, we consider both the structure and content of the recitals and the operative part, i.e. the circumstance of constitutionality or unconstitutionality, as the case may be, in the operative part of the decision. This is because, in most cases, the interpretations that the Constitutional Court makes only in the recitals are inherent to the examination of constitutionality, supporting the construction of the reasoning leading to the operative part of the decision. In other words, every decision of the Constitutional Court is based on a legal interpretation, but not every decision of the Constitutional Court is an interpretative decision. It should be noted that neither the Constitution nor Law no. 47/1992 on the organisation and functioning of the Constitutional Court makes any distinction in this respect, as they refer only to the constitutionality or unconstitutionality of normative acts[12]. Of course, interpretative decisions also find constitutionality or unconstitutionality, but in a certain interpretation of the wording of the law subject to constitutional review. In this way, the wording of the law is „saved", in the sense that it can continue to be applied, but in the mandatory interpretation established by the Constitutional Court, i.e. with the elimination of the interpretation found to be unconstitutional[13].

With regard to interpretative decisions, dec. no. 898/30.06.2011[14] pointed out that «where the Constitutional Court has found the constitutionality of the objected wording on a particular interpretation, resulting either directly from the operative part of the decision or indirectly from the correlation of the recitals with the operative part of the decision, raising again a plea of unconstitutionality with regard to the same wording and with identical reasoning, the trend is to defeat the generally binding nature of the decision of the Constitutional Court, which also applies to decisions finding the constitutionality of laws or ordinances or provisions thereof. If, in the second case, in order to give greater force to the decision and without marking a reconsideration of its case-law, the Court is competent to rule even in the sense of admitting the objection raised and finding that the challenged wording is unconstitutional on an interpretation contrary to the previous decision (dec. no. 536/28.04.2011, published in Official Gazette of Romania, Part I, no. 482/07.07.2011), in the first case, the provisions of art. 29 para.(3) of Law no. 47/1992 shall become applicable, namely „provisions found to be unconstitutional by a previous decision of the Constitutional Court cannot be the subject of the exception". The reason for the application of these legal provisions is that, irrespective of the interpretations that can be given to a wording, when the Constitutional Court has ruled in the operative part of its decision under art. 146(d) of the Constitution that only a certain interpretation is in conformity with the Constitution, the presumption of constitutionality of the wording is maintained in this interpretation, but all other possible interpretations are excluded from the constitutional framework. Therefore, the Court holds that in such a situation the plea of unconstitutionality was admissible.»

The Constitutional Court has held that its decisions are part of the normative legal order[15]. Therefore, „simple (or extreme) decisions to admit applications for unconstitutionality or those of interpretation represent a separate formal source of constitutional law, take over the legal force of the constitutional rules they interpret and are addressed to all subjects of law. Therefore, despite the jurisdictional nature, art. 147 para.(4) of the Constitution gives the above decision the force of the constitutional norms, which it does not limit to the given case, but gives it an *erga omnes* nature, which means that it must be observed and applied by all subjects of law to which it is addressed. Therefore, the Court considers that, although its decision is not identified with the rule/legislative act, its effects are similar to it, so that, by means of them, the decision lays down rules of conduct to be followed, so that it is part of the normative order of the State."

Raising a plea of unconstitutionality on grounds already clarified by the Constitutional Court in its case law tends to undermine the generally binding nature of the Constitutional Court's decision, which also applies to decisions finding the unconstitutionality of laws or ordinances or provisions thereof.

By means of dec. no. 536/2011[16], the Court has held that, „irrespective of the interpretations that may be given to a wording, when the Constitutional Court has ruled that only a particular interpretation is consistent

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[11] T. Toader, M. Safta, *Dialogul judecătorilor constituționali (Dialogue of constitutional judges)*, Universul Juridic Publishing House, Bucharest, 2015, p. 45.

[12] C. Ene-Dinu, *A century of constitutionalism,* in LESIJ - Lex ET Scientia International Journal no. XXIX, vol. 2/2023, p. 135.

[13] C. Ene-Dinu, *Rolul practicii judecătorești în elaborarea dreptului,* Universul Juridic Publishing House, Bucharest, 2022, p. 137.

[14] CCR dec. no. 898/30.06.2011, published in the Official Gazette of Romania no. 706/06.10.2011.

[15] CCR dec. no. 650/25.10.2018, published in the Official Gazette of Romania no. 97/07.02.2019.

[16] CCR dec. no. 536/28.04.2011, published in the Official Gazette of Romania no. 482/07.07.2011.

with the Constitution, thus maintaining the presumption of constitutionality of the wording in that interpretation, both the courts and the administrative bodies must comply with the decision of the Court and apply it as such".

Whether we are considering simple or interpretative decisions, in a state governed by the rule of law, as Romania is proclaimed in art. 1 para. (3) of the Constitution, public authorities shall not enjoy any autonomy in relation to law. The Constitution established in art. 16 para. (2) that no one is above the law, and in art. 1 para. (5) the observance of the Constitution, its supremacy and the laws shall be mandatory.

In this respect, by means of dec. no. 85 of 24 February 2020[17], the contentious constitutional court stated that „observing the supremacy of the Constitution, a corollary of the rule of law, is not limited only to observing its letter. If this were the case, a Constitution would never be sufficient, because it could never explicitly regulate solutions for all situations that may arise in practice, including relations between public authorities of constitutional rank." Therefore, „accepting a strictly literal and fragmented interpretation of the Constitution could lead to the conclusion that anything not expressly prohibited by the constitutional wording is permitted by it, even if it would obviously contravene the logic and spirit of the Constitution, and such a conclusion is unacceptable, as it is incompatible with the principles of the rule of law."

The specialised literature has pointed out that the violation by the legislative, executive or judicial power of the specific effects of constitutional law attached to the CCR decisions entails the following legal consequences/sanctions[18]: with reference to the legislative power, declaring the unconstitutionality of the legislative solution that reaffirms a legislative solution the unconstitutionality of which was previously established; with reference to the executive power, either the unconstitutionality of the legislative solution promoted, when the Government acts as a delegated legislator, or the direct censorship of administrative acts by the courts through contentious administrative, under art. 126 para.(6) of the Constitution; with reference to the judicial power, either the refutation in appeals of court decisions that do not observe the effects of the Court's decisions, or the potential triggering of a legal conflict of constitutional nature.

Therefore, the authority of the CCR's decisions loses face when there is a long delay by the Chambers of Parliament in reviewing provisions found to be unconstitutional.

Moreover, we mention, by way of example, the case in which the Constitutional Court was called upon to rule on the constitutionality of a legislative solution, *i.e.*, more than simply finding the unconstitutionality of the legal provision referred to it. By means of Decision no. 727/2012[19], the Constitutional Court ruled that the solution chosen by the Government to adopt, shortly before the Constitutional Court ruled on the constitutionality of the Law amending para. (1) of art. 27 of Law no. 47/1992, an emergency ordinance, which took over the entire normative content of the challenged law, called into question the unconstitutional and abusive conduct of the Government towards the Constitutional Court. In this regard, the Court finds that, according to its case law, subsequent primary legislation cannot preserve the normative content of an unconstitutional legal rule and thus being an extension of its existence.

In most of the cases, where public authorities have acted contrary to the CCR decisions, the Court has intervened within the limits of its constitutional jurisdiction. Therefore, in exercising *a priori* control, in finding the unconstitutionality of a legislative act which preserves a legislative solution declared unconstitutional, the Court held that „the adoption by the legislator of the rules contrary to those ruled in a decision of the Constitutional Court, which tends to preserve legislative solutions affected by defects of unconstitutionality, violates the Fundamental Law"[20].

By means of dec. no. 302 of 27 March 2012[21], the contentious constitutional court noted the following: „the finding, by means of a decision of the Constitutional Court, of the unconstitutionality of a legal wording entails *erga omnes* legal effects, a consequence deriving from the uniqueness and independence of the authority of constitutional jurisdiction. Otherwise, the decision of the Court - of dismissal - is still of a general binding nature and is binding only for the future, under art. 147 para. (4) of the Constitution, meaning that the public authorities involved in the case in which the exception was raised shall be bound to observe the decision, both the operative part and the grounds on which it was based, but the legal effect of such a decision is limited only to the procedural framework of the litigation in which the exception was raised, so it has an *inter partes* nature. Therefore, the same legal wording can be brought back to the Constitutional Court for examination, given that new aspects and constitutional grounds may be revealed, which may justify a different solution in the future.

[17] CCR dec. no. 85/24.02.2020, published in the Official Gazette of Romania no. 195/11.03.2020.

[18] See S.M. Costinescu, B. Károly, *Efectele deciziilor Curții Constituționale în dinamica aplicării lor (The effects of Constitutional Court decisions in the dynamics of their application)*, in Public Law Magazine no. 10/2012.

[19] CCR dec. no. 727/09.07.2012 published in the Official Gazette of Romania no. 477/12.07.2012.

[20] CCR dec. no. 1018/19.07.2010, published in the Official Gazette of Romania no. 511/22.07.2010.

[21] CCR dec. no. 302/27.03.2012, published in the Official Gazette of Romania no. 361/29.05.2012.

The possibility of repeating the same plea of unconstitutionality, in compliance with the legal conditions regarding its admissibility, can be converted, in the specific plan of constitutional proceedings, into an appeal, with its own physiognomy, the aim and end of this approach being, in reality, the same as that sought in the promotion of an appeal: the reintroduction before the Constitutional Court of a legal wording which it has previously rejected, but with the submission of new aspects likely to lead to a change in that case law".

With regard to compliance by the courts with decisions finding the unconstitutionality of a legal provision, the Constitutional Court noted in its case law that the court of law shall have the jurisdiction to apply the Constitution directly only in the circumstances and on the terms laid down in the decision finding the unconstitutionality[22]. Therefore, the courts of law may directly apply the Constitution only if the Constitutional Court has found a legislative solution to be unconstitutional and has authorised, by that decision, the direct application of constitutional provisions, in the absence of a legal regulation of the legal situation created by the decision upholding the exception of unconstitutionality.

3. Conclusions

Underlining the creative force of the case law, Vladimir Hanga wrote: „The law remains in its essence abstract, but the appreciation of the case law makes it a *living law*, due to the fact that, the judge, understanding the law, taking into consideration the interests of the parties and drawing inspiration from equity, ensures the ultimate purpose of the law: *suum cuique tribuere*"[23].

The compliance with the CCR case law is a desideratum so that the democratic and social rule of law is not just a fundamental principle, with purely theoretical values, but a reality correctly perceived by both public authorities[24], and the citizens.

As the doctrine noted, the binding nature of the CCR decisions is a factor for the stability of the Constitution, as well as for its development. Therefore, „if the multitude of social pressures exerted on the Constitutional Court by way of exceptions of unconstitutionality is a factor disrupting constitutional stability, this is opposed by the decision of the Constitutional Court which has the role of defusing conflict situations by indicating the legal wording on the basis of which civil, criminal or other cases are to be settled by the courts. To the extent that these decisions absorb in their content the transformations that have taken place at social level, they give new meanings to the terms of the Constitution, to the concepts with which it operates, paving the way for its perpetual renewal"[25].

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[22] In this respect, see CCR dec. no. 186/18.11.1999, published in Official Gazette of Romania, Part I, no. 213/16.05.2000, dec. no. 774/10.11.2015, published in the Official Gazette of Romania, Part I, no. 8/06.01.2016, or dec. no. 895/17.12.2015, published in the Official Gazette of Romania, Part I, no. 84/04.02.2016.

[23] V. Hanga, *Dreptul şi tehnica juridică (Law and legal technique)*, Lumina Lex Publishing House, Bucharest, 2000, p. 80.

[24] In what concerns the work of public authorities, in article E.E. Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice (Legality and morality in the work of public authorities),* in Public Law Magazine no. 4/2017, pp. 95-105.

[25] I. Vida, *Obligativitatea deciziilor Curții Constituționale pentru instanțele judecătorești – factor de stabilitate a Constituției și a practicii judiciare (Binding decisions of the Constitutional Court on the courts - a factor of stability of the Constitution and judicial practice)*, in Pandectele Române no. 3/2004, p. 202.

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THE POWER OF PATER FAMILIAS IN ROMAN LAW

Elena ANGHEL[*]

Abstract

In Roman law, the notion of „family" did not have the meaning we attribute today, a form of human community, but had a meaning that denoted the totality of slaves that were owned by a person or the totality of people and goods that were under the same person's power head of family. The head of the family was designated pater familias and exercised sole authority over all family members, but also over all their property.

In the primitive conception, the family was made up of the wife of pater familias, the sons and daughters born of the marriage, the grandsons of the sons (not the grandsons of the daughters), but also the slaves and persons in mancipio, as well as all the goods possessed by the head of the family. Considering the fact that the family also had the meaning of assets owned by the head of the family, we specify that a child could also become pater familias, in which case the family was made up of the assets owned.

*Thus, within the Roman family, the pater familias was **sui iuris**, having full legal capacity, and all other persons under his power were **alieni iuris**, having limited legal capacity.*

*Specific to the notion of parental power in Roman law is the fact that, as we will analyse in the present study, it was not exercised in the interest of the children, as prevails in modern law, but in the interest of the head of the family, which is why it did not end until his death, regardless of the age of the family son and his social position. Parental power named **patria potestas** was perpetual and unlimited.*

Keywords: *pater familias, sui iuris, alieni iuris, perpetual, unlimited.*

1. Introduction

The notion of „person" was very suggestively embodied in the ancient Romans. *Personna* designated the mask worn by an actor on stage, meaning that man plays various roles on the stage of life: head of a family, owner, landlord, creditor or debtor, etc. Therefore, in a legal sense, the role of the person is to undertake rights and obligations as a subject of law.

The capacity of a human being to participate in legal life, to have rights and obligations, is called personality or legal capacity. For the Romans, legal capacity was highly differentiated and was called „*caput*". In order for a person to have full capacity of use, 3 cumulative conditions had to be met: to be a free man - *status libertatis*; to be Roman citizen - *status civitatis*; to be head of the family - *status familiae*.

Therefore, only Roman citizens who were also heads of family had the full legal capacity, while all other categories of persons had limited legal capacity.

In Roman law, the head of the family - *pater familias* - is the central figure under whose power all the members of a family sit, as *alieni iuris* persons. The only one who has full legal capacity and does not depend on anyone's will, being *sui iuris*, is the pater familias[1].

From very ancient times, the Roman family was organised on a patriarchal basis. Specialised literature points out that the *domus* or the family, in a narrow sense, is a group with a religious nature because it implies a common cult; it is a political group because the pater familias is a kind of magistrate who has full authority over those who are in the house; it is also an economic group because, as we shall see, all the goods belong to the pater familias[2].

According to Jurisconsult Ulpian, the *pater familias* is the one who holds the power in the house, a power that brings under a single authority all the members, but also all the family assets. According to the information transmitted by means of the Digest of Emperor Justinian, „*the head of the family is the one who holds the power in the house, and is rightfully so called even if he has no son [...]: even an impuber can be called head of the family. And when the head of the family dies, all the individuals who were subject to him begin to own their own families, for they each fall into the category of heads of families*".

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[1] The notion of „*pater familias*" does not evoke the idea of descent, for the definition of which the Romans used the term „genitor", but of power. V. Hanga, M. Jacotă, *Drept privat roman*, Didactică și Pedagogică Publishing House, Bucharest, 1964, p. 126.

[2] G. Dimitrescu, *Drept roman. Isvoare. Procedură. Persoane. Drepturi reale*, vol. I, Independența Prints, Bucharest, p. 303.

We note that, considering the meaning we attributed to the notion of family at the beginning of the presentation, even a young, unmarried child could be *pater familias*, in this case the family consisting of all the property owned[3].

2. Contents

Originally, the power exercised by *pater familias* over persons and property had a unitary nature and was designated by the word „manus" (hand, highlighting the idea of authority of the *pater familias*). Over time, this unitary power broke down into several distinct powers, so that in the evolved law, manus meant only the power that the man exercised over the married woman. Therefore, the power over descendants was called *patria potestas*.

Patria potestas or parental power is, therefore, the power exercised by the *pater familias* over his descendants: sons, daughters and grandchildren of sons. Grandchildren of daughters are not included in this category because they are under their father's power. Therefore, the *pater familias* could be the father, grandfather or great-grandfather: as long as the grandfather is alive, the grandchildren of the sons, together with their parents, are under the same power, as *alieni iuris* persons.

The woman married with manus also falls under the power of the *pater familias*.[4] Therefore, for Romans, marriage took two distinct forms: with manus and without manus. Without going into the details of the conditions required for the conclusion of a marriage, it should be noted that in the case of marriage with manus, the woman left the power of the *pater familias* of her family of origin and passed under the power of her husband. Once under the power of the husband (manus), the wife was considered to be his daughter, in full obedience to the new *pater familias*.

Marriage without manus appeared later, towards the end of the Republic, motivated by the fact that under the influence of Eastern mores, some Roman women chose to live in illegitimate unions. To put an end to this custom, the Romans created a new form of marriage, whereby the woman no longer came under the power of her husband, but remained under the power of the *pater familias* in her family of origin.

We emphasise as a distinctive feature the fact that the power of *pater familias* was not exercised in the interest of the *alieni iuris* persons, as it is conceived nowadays, but in his own interest as head of the family, which is why it did not cease until his death, regardless of the age of the son of the family and his social position. Thus, even if the son of the family had a high position in the state or was old age, he was *alieni iuris* as long as the *pater familias* was alive.

For the same reasons, things have been established in the same way in matters of guardianship. Therefore, although guardianship is defined as a legal institution designed to protect the factually incapacitated, in fact, it was originally established in the exclusive interest of the family (of the *pater familias*), so that the incapacitated person's assets would not be wasted, but would remain in the family and would go to the civil relatives entitled to his succession. Proof of this is the fact that, according to the Law of the Twelve Tables, civil relatives (agnates) came to the guardianship in the order in which they came to the succession, and those who had no agnates had no guardian. Later, it was established that the praetor would appoint a guardian to the incapacitated person who had no heirs or no guardian appointed by will. It is only since then that guardianship has become a legal procedure to protect the incapacitated person's interests[5].

In ancient Roman law, guardianship of women was also established in the interests of the agnatic family, specifically in the interests of the woman's presumptive heirs. Therefore, woman always needed the guardian's consent to dispose of more valuable assets, to conclude her will or other important legal act, legal acts that could have diminished the inheritance[6].

The Roman family was therefore centered around this unilateral power, which the *pater familias* exercised over all relatives under his power. We refer here to civil relatives, called agnates, because blood kinship, at that time, did not produce legal effects.

Therefore, in ancient times, civil kinship, called agnation, derived from the idea of power exercised by the *pater familias*: all those who were under the same power were relatives, even in the absence of blood kinship,

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[3] Even a newborn child, the day after birth, if not subject to a power, is the head of a new family and is called *pater familias*. See G. Dimitrescu, *op. cit.,* p. 303.

[4] For further details, see C. Ene-Dinu, *Istoria statului și dreptului românesc,* 2nd ed., Universul Juridic Publishing House, Bucharest, 2023, p. 22.

[5] For further details, see E. Molcuț, *Drept privat roman. Terminologie juridică romană*, revised and supplemented ed., Universul Juridic Publishing House, Bucharest, 2011, p. 104; E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 173.

[6] E.E. Ștefan, *Drept administrativ Partea I*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023, p. 146.

just as a blood relative excluded from the family ceased to be a relative. For example, an adopted child became related to the members of the family in which he or she was adopted, even though he or she was not related to them by blood, whereas an emancipated child, i.e. removed from parental power, although related by blood to the members of his or her former family, was not a civil relative of them.

Agnation is, therefore, a kinship exclusively through men, because the power implied by this kinship can only be exercised by men; upon the death of the *pater familias* only the sons, *i.e.*, the male descendants of first degree, shall become *pater familias*, and not the daughters or the wife.

Agnation produced important legal effects in matters of succession because, for five centuries, it was the only basis of succession, in the sense that only agnates could inherit from each other, and the succession was conferred in the order of the three categories of agnates[7]. Therefore if a person died and had no direct descendants (*heredes sui*), the closest heirs (*adgnatus proximus*) were called to succession, according to the Law of the Twelve Tables. The civil kinship did not stop here, because if there were no heirs from the second category, the Gentiles were called to succession. The Gentiles were those who could not directly prove their descent from a common ancestor, but who, on the basis of presumptions (they had the same surname, the same family cult), were called to succession as distant relatives.

Once with the changes in Roman society, the agnation was gradually replaced by blood kinship, called cognation, which also weakened the power of the head of the family and increased the independence of family members[8].

Essentially, parental power had two characteristics: perpetual and unlimited.

By virtue of its perpetual nature, as mentioned above, the power was exercised by the *pater familias* until his death, regardless of the age of the son of the family and regardless of his social position (the son of the family could be a senator, consul, praetor, etc., but if his father was alive, he was under parental authority, which meant that he had no patrimony of his own and could not conclude legal acts in his own name). There was no adulthood age established in Roman law.

On the death of the *pater familias*, the legal effects will be different, as follows: *alieni iuris* persons shall become *sui iuris*, with the mention that each son of the family becomes a new *pater familias* in his family. However, the children of sons shall not become *sui iuris*, because they will pass from the power of a *pater familias* (grandfather) to the power of another *pater familias* (the father), by keeping the capacity of *alieni iuris*. Slaves and in *mancipio* persons shall not be freed, but shall pass under the power of another master.

By virtue of its unlimited nature, the *pater familias'* power was exercised both over the persons under the *pater familias'* power and over the assets. Therefore, *pater familias* exercised full power of life and death over their descendants (*ius vitae necisque*), of abandonment, the right to sell his son, to drive them out of the house, to marry them without asking their consent. *Pater familias* could also claim them back, by using the action for the recovery of possession, namely the action that belongs to the owner; this reveals the similarity of the position of the descendants with the things that were found in the patrimony of the head of the family[9].

Regarding the right to life and death, in the old law, prior to sentencing, the *pater familias* was required to initiate consultations with the closest relatives and receive their approval, but the *pater familias* was not required to respect this opinion of the relatives. However, few examples have been reported on the killing of persons under parental authority, and they have intervened for serious acts such as the daughter's lack of chastity[10].

Another right exercised by the *pater familias* is that of abandonment or exhibition, and consists in the fact that the newborn could be recognized by the *pater familias* in the first 7-8 days after birth, by being lifted in the arms, otherwise it was considered abandoned.[11]

According to the Law of the Twelve Tables, *pater familias* also had the right to sell his son three times, each sale being valid for a period of five years; after the third sale, the son was definitively removed from parental power.

Parental authority could be created by marriage, adoption and legitimation.

The effects of marriage are different, depending on whether we refer to marriage with manus or without manus. A wife married to a *manus* had the status of daughter in the new family, if her husband had the status of *pater familias*, and the woman was considered a sister to her children. She became part of her husband's family,

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[7] There were three categories of agnates: all who are now under the same power (for example: sons and daughters while their father lives); those who were under the same power in the past (for example: brothers after the death of their father); those who could be under the same power, if *pater familias* had lived (for example: two first cousins born after the death of their grandfather; if their grandfather had lived, first cousins would have been under the same power).

[8] For further details, see V. Hanga, M.D. Bocşan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 131.

[9] *Idem*, p. 132.

[10] *Ibidem*.

[11] C. Ene-Dinu, *op. cit.*, p. 22.

became an agnate of her husband's agnates and was under the discretionary power of her husband, who could claim her as a thing, sell her or even condemn her to death.

From a patrimonial point of view, the dowry property became the husband's property, as the woman could not have her own property. The woman came to inherit in her husband's family, having a share of the inheritance along with the other heirs (in consideration of the fact that she contributed to the increase of the family patrimony), but lost inheritance rights in the family of origin. She remained cognate with the family of origin but, as stated above, for a long-time cognation had no effect on the succession.

In case of marriages without *manus*, the woman remained under the power of the *pater familias* of the family of origin. Therefore, her assets remain with his father, who exercised unlimited power over her. From a civil point of view, a wife married without a manus is a stranger to both husband and children. However, although strangers to each other, the spouses had the obligation to respect each other and could not call each other to court without the approval of the magistrate. The rights of correction remain with the father, but in case of adultery, the wife was more severely punished than the man, and until the time of Augustus, the man could himself punish his unfaithful wife.

From an inheritance point of view, a woman married without a manus does not acquire inheritance rights in the new family, but retains the right to collect the inheritance in the family of origin. The mother and children are not related to each other, as they are considered to belong to different families, so they do not inherit each other.

As far as the effects of adoption are concerned, the adopted child leaves the family of origin and comes under the power of the *pater familias* who adopted him, so that he breaks the civil relationship with the family of origin and becomes agnate with the agnates of the adopter. Because the civil relationship with the family of origin ceases, the adoptee loses inheritance rights in that family, but will come to inherit in the new family.

Legitimation is the legal act by which the child born out of wedlock is assimilated to the legitimate child, *i.e.*, born in wedlock. However, in what concerned Romans, as long as agnation was the basis of the family, the child born out of wedlock was not related either to its natural father (since it did not result from a marriage) or to its mother (since agnation was transmitted only through the male line). After the cognation removed the civil relationship, it was possible to establish the child's relationship to his mother (they were cognates), but not to his father. In order to establish paternity, the presumption was that the child's father could only be the mother's husband. Therefore, a child born within 10 months as of the dissolution of the marriage was considered legitimate.

Later, the legitimation of the natural son was made by the marriage of the natural parents concluded after the birth of the child; by *oblatio* to *curia*, namely by raising the natural son to the rank of member of the municipal senate; by imperial rescript.

Parental authority was extinguished by the death of the person under parental authority or by the death of the *pater familias*; if *pater familias* or *alieni iuris* person lost freedom, citizenship or family rights, as well as by emancipation.

Thus, naturally, parental power ceased with the death of the head of the family or when the *pater familias* lost his freedom or citizenship by committing a serious crime. Furthermore, if *pater familias* was adrogated[12], parental power ceased.

By artificial means, parental power was extinguished by emancipation, a legal act whereby an *alieni iuris* person became *sui iuris*. While at first emancipation was a punishment, over time it became a measure taken in the best interests of the child when he or she proved that he or she had the capacity to manage his or her own property.

The emancipated son acquires full legal capacity, has his own property and can conclude legal acts in his own name. However, due to the fact he leaves the *pater familias'* power, the emancipated son loses inheritance rights based on agnation. To remove this injustice, the praetor established a series of reforms by which he called upon the emancipated to inherit as a blood relative, on one *condition*: to report the assets, i.e. to add fictitiously to the estate all the property he has acquired as a *sui iuris* person.

[12] Adrogation is a legal institution by which a *sui iuris* person passes under the power of another *sui iuris* person. Therefore, in case of adrogation, a *pater familias* takes under his power another *pater familias*. In what concerns the adrogated person, he passed under the power of the adrogator as son and become agnate to the relatives of the adrogator, but lost all civil kinship to his family of origin. After adrogation, all the assets of the adrogated person become the property of the adrogator, because the two estates merge. For further details, see E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021, p. 129.

3. Conclusions

We note from the above that, in ancient Roman law, the legal status of the son of a family was not very different from that of a slave. Furthermore, in terms of the assets held, the son was merely an instrument of acquisition for the *pater familias* as he was allowed to conclude certain legal acts only to improve the patrimonial situation of the head of the family. Therefore, the son could not conclude legal acts in his own name, but only by borrowing the capacity of the *pater familias* and only on condition that by the effect of those acts, the situation of the *pater familias* became better from a patrimonial point of view, *i.e.*, he became creditor or owner and not debtor.

The situation of the son of the family is improved in classical law when he is recognized as having the right to conclude legal acts in his own name, but, not having a right of ownership in his own right, he is liable only for the assets of his *peculium*. The *peculium* consisted of the assets that the *pater familias* offered him for use and management, but not for ownership, the head of the family being the sole owner of the entire estate. By the time, the son of the family also obtained the right to acquire title to his own property, consisting of *peculium castrense* (the assets acquired as a military man, which he could dispose of either by deed between living persons or on death), *peculium quasi-castrense* (the assets acquired as a civil servant, lawyer, priest or by imperial donation) or *bona adventicia* (assets acquired by the child from the mother or the mother's relatives).

In Justinian's time, it was accepted that whatever the son of the family received, he acquired for himself and not for the head of the family.

The right of life and death (*ius vitae necisque*) could be exercised, from the 2nd century A.D., only after the accused father and son appeared for a hearing before the prefect or provincial governor. Constantine incriminates the killing of the child by the father and thus puts an end to the right to life and death; the age of Justinian only knows the possibility for the parent to apply a correction to the child within reasonable limits, identical to that applied in master-slave relations.

Alieni iuris persons could complain to the magistrate about the conduct of *pater familias*; *pater familias* who killed his son for insulting him was deported, and the one who mistreated his child was obliged to emancipate him; the sale of the son of the family has become rare, with the practice of renting out his work instead; exhibition and marriage of children against their will is prohibited.

Once with the emergence of the idea of reciprocity of relations between parents and children, it was admitted that the power of the *pater familias* also entailed obligations towards *alieni iuris* persons and the obligation to provide food for the son in need, as well as the obligation to constitute a dowry for the daughter.

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COMPETITION ASPECTS IN THE AI ACT – NAVIGATING THE MURKY WATERS OF THE ABUSIVE PRACTICES IN A DECENTRALISED VIRTUAL WORLD

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Abstract

The whole European construction, based on the three initial European Communities (namely, the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community) were built with several goals in mind, one of them being the establishing of a fair competition, seen as an essential step in the making of an internal market. For this reason, several dispositions were enshrined in the Treaties that served as a comprehensive legal framework for prohibiting those agreements that could have distorted the competition in the community market. These provisions stand and produce important effects as we speak, but the emergence of the AI poses a new and hard to digest threat to them, as not all the dispositions regulating the competition can easily be adapted to such a new and complex reality. However, the so-called AI Act tries to tackle this issue in creative and adaptive ways that we will analyse in the following.

Keywords: *competition, EU law, artificial intelligence, abusive practices, content creators, AI Act.*

1. Conceptual aspects. The notions of collusion and data collusion

As partially stated in the abstract, the original European Communities (the European Coal and Steel Community[1] and the European Economic Community[2]) have both been established with several well-crafted goals. Among these, building a fair competition in the cartelized European economic environment, that characterised the continent before and in the aftermath of the Second World War stands as a particularly important one, given the deeply entrenched American guidelines about competition, on the one hand, and fair and free trade, on the other hand, can affect economic recovery after a cataclysmic event like the aforementioned one[3].

This cornerstone goal of the early European construction was given its law form by several dispositions enshrined in the Treaties, like the ones in art. 86 TEEC (which stated that it is incompatible with the internal market and prohibited, to the extent that it could affect trade between member states, the abusive use by one or more companies of a dominant position held on the internal market or on a significant part of it) - of direct interest for our research, along with the exemplificative enumeration of the aforementioned abusive practices, in the form of: imposing, directly or indirectly, sale or purchase prices or other unfair trading conditions; limiting the production, distribution or technological development to the disadvantage of consumers; applying, in relations with commercial partners of unequal conditions for equivalent services, thus creating a competitive disadvantage for them and, last but not least, conditioning the conclusion of contracts on the partners' acceptance of additional services which, by their nature or in accordance with commercial usages, are not related to the subject of these contracts.

However, the problem with such provisions is that they were designed to apply to enterprises with a much more pronounced concrete nature, like the big industrial conglomerates in France, Germany, and Belgium, mostly active in the coal and steel industries (hence the sectorial objectives of the first European Community, the Coal and Steel one). Such undertakings had an easy to identify object of economic activity and their eventual

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[1] Established by means of the Treaty establishing the European Coal and Steel Community, signed in Paris, 18.04.1951, by France, Italy, West Germany, Belgium, Luxembourg, and the Netherlands, effective from 23.07.1952.

[2] Established by means of the Treaty establishing the European Economic Community, signed in Rome, 25.03.1957, by the same states, effective from 01.01.1958.

[3] See, for example, E.B. Haas, *The Uniting of Europe: political, social and economic forces, 1950-1957*, University of Notre Dame Press, Notre Dame, Indiana, 2004, *passim*.

(and, as a matter of fact, quite frequent) agreements, concerted practices or all kinds of abuses were, as such, also relatively clear and easy to prove.

The emergence of the AI, however, probably changed the game forever. In the AI era, those practices that affect the competition may no longer take the form of agreements, may no longer involve more than one enterprise (although this was never a condition before, only a frequent situation) and may be even harder to identify than before. Their effects, needless to say, can be just as devastating for the ideal of fair competition. Nevertheless, if a creative enough interpretation is given to carefully read EU law provisions, the necessary tools for combating the harm that the use of AI can do to fair competition in the EU can if not easily, then at least efficiently be found, and this is what we are going to try and prove in this study, nor before considering a series of conceptual statements, before proceeding to review the primary EU law provisions regarding competition matters and applying them to the use of AI.

As can be found reviewing the doctrine, the simple term *collusion* defines *„a non-competitive, secret, and sometimes illegal agreement between rivals which attempts to disrupt the market's equilibrium. The act of collusion involves people or companies which would typically compete against one another, but who conspire to work together to gain an unfair market advantage*"[4]. Deriving from this, algorithmic collusion adds the capabilities conferred by the artificial intelligence to the various anticompetition conducts (therefore, it can be seen as *„the situation where algorithms are used to support or implement a (…) collusion*"[5], paving the way to that the European Commission has identified as the most threatening three possible results of algorithmic collusion, namely:

- *„algorithmic facilitation of traditional collusion: this involves the situation where algorithms are used to support or implement a pre-existing collusion*"[6];
- *„algorithmic alignment via a third party: this involves the situation where a third party provides the same algorithm or coordinated algorithms to different competitors resulting in an alignment between the parties with respect to competitive parameters such as pricing, output, customers etc. The difference between algorithmic alignment via a third party and the algorithmic facilitation of traditional collusion is that with algorithmic facilitation, the use of the same third-party software provider is not the consequence of an anticompetitive conduct*"[7];
- *„algorithmic alignment: the parallel use by competitors of distinct (pricing) self-learning/deep-learning algorithms that via their automatic, reciprocal interaction can lead to the alignment of the (pricing) behavior, without any direct contact between the competitors. This will be difficult to prove*"[8].

2. Possible breaches of fair competition resulting from each of the aforementioned hypothesis

The first hypothesis is susceptible of occurring within the spectrum of virtually all the provisions prohibiting the anticompetition agreements. It is particularly applicable within the scope of art. 101 TFEU[9], the usage of algorithmic tools facilitating practically all the arrangements forbidden by the aforementioned article.

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[4] J. Young, *Collusion: Explanation, Examples, Preventative Steps*, *https://www.investopedia.com/terms/c/collusion.asp, 28 December 2020*, accessed 20.02.2024.

[5] P. Kuipers, R. Rampersad, *Artificial Intelligence and Competition Law: Shaping the Future Landscape in the EU*, *https://www.lexology.com/library/detail.aspx?g=7383d6da-22f4-456e-a074-7ff2f2a0548c*, 17.01.2024, accessed 20.02.2024.

[6] *Ibidem*.

[7] *Ibidem*.

[8] *Ibidem*.

[9] Which states that: *„the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*", also stating a series of examples like *„those which: directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage* [and those which] *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

Of course, it can also be applied in the sphere of art. 102 TFEU[10], insofar as the algorithmic tools and devices help the abusive conducer to have a better view or even control of the data spectrum and/or to limit or even prohibit the access of smaller competitors to the market (as in the case of big data operators like Google, for example).

In our opinion, it is not, however, impossible to conceive the first hypothesis as applicable in the realm of art. 107 para. 1 TFEU[11], as data can be seen and in fact is a resource in its own right and if various types of data that a state, through one or more of its institutions, offices or agencies are placed at a private enterprise's disposal, they can create an advantage that is not easy, if even possible at all to overcome by the competition.

As far as the ability to prove the existence of such practices, that involve the use of algorithmic devices is concerned, in our opinion, their existence is not as hard to prove as it may seem at the first site. Virtually every single use of such mechanisms leaves its technical mark somewhere, a mark that can be found at a thorough, yet somehow not unusual inspection. The other two hypothesis, however, pose a far greater challenge on the Commission as far as proving their existence and usage is concerned.

„First, the viability of data, and market predictions can increase market transparency, which could cause companies to act less independently on the market but also make it easier for companies to communicate and detect any deviations from anti-competitive agreements. This is particularly relevant to online marketplaces where pricing and transaction data are readily available. Secondly, AI can enable price adjustments and interactions with competitors on e.g. platforms, which can facilitate the implementation and monitoring of anti-competitive behavior. In both scenarios, no direct communication between competitors needs to take place in order to have anti-competitive effects on competition. Lastly, the use of AI by companies that are dominant in a market can lead to the exclusion of competitors from the market. These identified risks will likely occur in markets that are already prone to collusion due to factors such as an oligopolistic market, product homogeneity and the presence of a small number of companies"[12].

Such situations have been observed and even sanctioned in the past, so their even more frequent and market disturbing occurrence in a future marked by the extensive use of the artificial intelligence is neither a surprise nor a happy development for the objective of ensuring a fair and economically healthy competition on the single market. As the specialized doctrine has pointed out, *„companies that have significant market power may use AI to exclude competitors. This can be done by programming the algorithm to give preferential treatment to their own products and services"*[13], which is a clear breach of the prohibition against the abuse of dominant position, set out in art. 102 TFEU.

For example, in a landmark decision[14], the Commission has imposed substantial fines (of EUR 2,42 billion) on Google (Google Shopping) for illegally favoring *„its own comparison-shopping service by displaying it more prominently in its search results than other comparison-shopping services"*[15]. Google sued the Commission before the EU Tribunal, introducing an action of annulment against the Commission decision, but the Tribunal only partially annulled the Commission decision, *„in so far as they concern the fourth element of the single and continuous infringement, consisting in having made the conclusion of revenue share agreements with certain original equipment manufacturers and mobile network operators conditional on the exclusive pre-installation of*

[10] Which states that: *„any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*", the examples of such abusive conduct provided for by art. 102 TFEU being *„directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage* [and] *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

[11] Prohibiting state aid and having the following content: *„save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".

[12] P. Kuipers, R. Rampersad, *op. cit*.

[13] *Ibidem*.

[14] See Commission Decision of 18.07.2018 relating to a proceeding under art. 102 TFEU and art. 54 of the EEA Agreement (Case AT.40099 - Google Android) (notified under document C (2018) 4761).

[15] R. Cardoso, Y. Ren, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service – Factsheet*, *https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785*, 27.07.2017, accessed on 03.03.2024.

Google Search on a predefined portfolio of devices upheld the aforementioned decision"[16], upholding the rest of the Commission's findings and setting the total fines to the amount of EUR 4.125.000.000.

In the same vein, the Commission has also opened and carried out an investigation against Amazon, on the grounds that the aforementioned company on the grounds that „*it has breached EU antitrust rules by distorting competition in online retail markets* (…) [by] *systematically relying on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third party sellers*"[17].

Amazon's behavior in this matter can be considered a classic example of data collusion. Practically, the Commission has found out, after carrying a series of thorough investigations, that „*very large quantities of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business, which aggregate these data and use them to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers. For example, it allows Amazon to focus its offers in the best-selling products across product categories and to adjust its offers in view of non-public data of competing sellers*"[18].

Quite unlike the previous example, the Amazon case has been settled before reaching the Court and, even more significant, before any sanctioning decision had to be issued by the Commission. In fact, Amazon has obliged itself to a series of commitments regarding „*usage of non-public data relating to the sellers' activities on Amazon marketplace for its own retail business and* (…) *treat*[ing] *all sellers equally on the Amazon marketplace when ranking offers*"[19];

However, as significant as they may be (after all, they are considered cornerstone cases by the specialised literature and not only), what these two cases have in common is the fact that they addressed anti-competitive behaviors that rely on the use of the information technology, yet do not yet employ the various tools provided by the artificial intelligence, as the aforementioned behaviors happened before the proliferation of the AI. What would the AI bring to an already crowded array of tools that make anti-competitive behaviors harder to identify and harder to distinguish from normal economic behavior as well, given the fact that «„*a purely unilateral measure without express or tacit acquiescence does not constitute an agreement*"[20]. *And a mere parallel conduct alone cannot be qualified as a concerted practice. An alternative explanation for such conduct might be that general changes in the market similarly affected all companies and led to an alignment of behavior*»[21];

What would be the right juridical treatment of the situation where AI algorithms reach the same conclusion, staying at the origin of a similar or even identical market behavior, in the absence of any agreement or even alignment? For example, what can be done if AI tools analyse the same pool of users' market preferences in order to determine an identical optimal price for whatever goods and services a company might provide to its customers, as it already happens?

The so-called AI act was hoped to answer these questions, whether it really does remains to be seen and, as far as we are concerned, analysed in the following section of our case study.

3. The AI Act[22]. What does it mean for the competition aspects of AI usage?

Apart from the general scoped provisions laid out in the TFEU applicable in the competition field, the so-called AI act should have regulated those specific aspects of anti-competitive practices that use or are facilitated

[16] Judgment of the General Court of 14.09.2022 *Google LLC and Alphabet, Inc. v European Commission*, Case T-604/18, EU: T:2022:541.

[17] A. Podesta, M. Tsoni, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices*, *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, 10.11.2020*, accessed on 03.03.2024.

[18] *Ibidem*.

[19] A. Podesta, M. Tsoni, *Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime*, *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777*, 20.12.2022, accessed 03.03.2024.

[20] Judgment of First Instance of 26.10.2000, *Bayer AG*, T-41/96, EU: T:2000:242, para. 71, apud F. Beneke, M.-O. Mackenrodt, *Artificial Intelligence and Collusion*, IIC - International Review of Intellectual Property and Competition Law, vol. 50, 2019, pp. 109-134, *https://link.springer.com/article/10.1007/s40319-018-00773-x*, accessed on 03.03.2024.

[21] *Ibidem.*

[22] 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, Brussels, 21.4.2021 COM (2021) 206 final, https://eur-

by the artificial intelligence algorithms. However, whether or not it really accomplished this aim is still and will probably be for a long time at least debatable.

As far as the AI act in concerned, its creation finds its roots in the EU Digital Strategy and its original aims were to „*regulate artificial intelligence (AI) to ensure better conditions for the development and use of this innovative technology*"[23], starting from the premise that the „*AI can create many benefits, such as better healthcare; safer and cleaner transport; more efficient manufacturing; and cheaper and more sustainable energy*"[24]. With this aim in mind, „*in April 2021, the European Commission proposed the first EU regulatory framework for AI. It says that AI systems that can be used in different applications are analysed and classified according to the risk they pose to users. The different risk levels will mean more or less regulation*"[25].

Its aim is even clearly enshrined in the very first provisions governing the field of appliance of the future AI Act, stating that it shall govern the functioning of all the AI systems covered by it, besides the fact that „*any reference to an economic operator under Regulation (EU) 2019/1020*[26] *shall be understood as including all operators identified in Title III, Chapter 3 of this Regulation; (b) any reference to a product under Regulation (EU) 2019/1020*[27] *shall be understood as including all AI systems falling within the scope of this Regulation*[28].

However, as far as the prevention of data collusion and its impact on the competition field is concerned, the specialised doctrine has stated, not without a hint of disappointment, that „*the Draft AI Act appears to have a contrasting approach as the threshold for sharing information collected by national supervisory authorities in the course of their activities with national competition authorities seems to be lower. The obligation to share information applies regardless of whether violations of EU competition rules are suspected or alleged.*"[29]

Overall, the future AI act „*establish*[es] *obligations for providers and users depending on the level of risk from artificial intelligence. While many AI systems pose minimal risk, they need to be assessed*"[30]. The first and most powerful category is that of AI systems that pose unacceptable risks, like, for example, the ones that engage in „*cognitive behavioral manipulation of people or specific vulnerable groups: for example voice-activated toys that encourage dangerous behavior in children; social scoring: classifying people based on behavior, socio-economic status or personal characteristics; biometric identification and categorization of people* [and] *real-time and remote biometric identification systems, such as facial recognition*"[31]. The usage of such systems will be outright forgiven, with several exceptions being allowed for law enforcement purposes,

The following category is the so-called „high risk" one. AI systems like the ones that „ *negatively affect safety or fundamental rights*"[32] fit into this category, *divided in „ AI* systems that are used in products falling under the EU's product safety legislation (…) [that] *includes toys, aviation, cars, medical devices and lifts* (…) [and] *AI systems falling into specific areas that will have to be registered in an EU database* [like the ones used for]:*management and operation of critical infrastructure; education and vocational training; employment, worker management and access to self-employment; access to and enjoyment of essential private services and public services and benefits; law enforcement; migration, asylum and border control managemen*t [and] *assistance in legal interpretation and application of the law*"[33]. Such systems will not be forbidden but will have to be „assessed before being put on the market and also throughout their lifecycle"[34].

As far as the general purpose and generative AI is concerned, AI systems like Chat GPT fall into the aforementioned category and will be bound to comply with a series of requirements regarding transparency, like

lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF, accessed 03.03.2024 (AI Act in the following).

[23] **** EU AI Act: first regulation on artificial intelligence. The use of artificial intelligence in the EU will be regulated by the AI Act, the world's first comprehensive AI law. Find out how it will protect you*, https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence, 19.12.2023, accessed 03.03.2024.

[24] *Ibidem*.

[25] *Ibidem*.

[26] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20.06.2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) no. 765/2008 and (EU) no. 305/2011

[27] *Ibidem*.

[28] Art. 63 of the AI Act.

[29] P. Kuipers, R. Rampersad, *op. cit*.

[30] K. Živković, D. Đurić, *The AI Act – EU's First Artificial Intelligence Regulation*, *https://www.kinstellar.com/news-and-insights/detail/2577/the-ai-act-eus-first-artificial-intelligence-regulation*, January 2024, accessed on 03.03.2024.

[31] *Ibidem.*

[32] *Ibidem.*

[33] *Ibidem.*

[34] *Ibidem.*

„*disclosing that the content was generated by AI; designing the model to prevent it from generating illegal content* [and] *publishing summaries of copyrighted data used for training*"[35] At least the second and third requirements of this enumeration have a limited, but not neglectable positive impact on the competition field, although they do not seem to be specifically designed to prevent anti-competitive behaviors, such an effect therefore being rather conjectural. However, „*high-impact general-purpose AI models that might pose systemic risk, such as the more advanced AI model GPT-4, would have to undergo thorough evaluations and any serious incidents would have to be reported to the European Commission*"[36], which may also investigate their use in relation to the Treaty provisions in the competition field.

Finally, pretty much the only serious requirement regarding the last category of AI systems, the ones that pose a limited risk, is for them to „*comply with minimal transparency requirements that would allow users to make informed decisions* [so that] [a]*fter interacting with the applications, the user can then decide whether they want to continue using it. Users should be made aware when they are interacting with AI. This includes AI systems that generate or manipulate image, audio or video content, for example deepfakes*"[37].

4. Conclusion: does the AI act do enough in the competition field? And if not, what is for us to do at the present time?

Although, as the specialised doctrine put it „the need for an effective legal framework to ensure the proper functioning of the European market has been felt since the beginning of the union construction"[38], what the AI act does in this matter is surprisingly feeble. Of course, there are certain provisions (that we, as a matter of fact, mentioned in our essay), but the overwhelming majority of the aspects that could, for now, be conceived as being brought about by the evolution of the AI and could affect the competition are not treated or are treated insufficiently. As a consequence, it will continue to be the role of the general provisions regarding competition aspects to regulate competition matters where the AI is present and employed. Therefore, only time will tell whether a creative interpretation of the already existing provisions will be enough to face the various and multiple challenges posed by the proliferation of the AI or the rapid, continuous and mostly unpredictable evolution of the aforementioned technology will prove to be more than the TFEU and the derived EU competition law can handle.

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[35] *Ibidem.*
[36] *Ibidem.*
[37] *Ibidem.*
[38] I. Lazăr, *Dreptul Uniunii Europene în domeniul concurenței*, Universul Juridic Publishing House, Bucharest, 2016, p. 18.

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SOME CONSIDERATIONS REGARDING CCR DEC. NO. 364/2022

Marta-Claudia CLIZA[*]

Abstract

The issue of plagiarism has raised many theoretical and practical discussions. Also, the legal basis was not clear enough and certain misunderstandings have created the premises for losing the title of doctor. Arrived in court, the trials were judged differently. In 2022, CCR pronounced dec. no. 364, one of the clearest decisions of the court, and the issue was settled in a transparent manner. The current study will analyse the implications of this decision.

Keywords: *CCR, administrative act, civil circuit, plagiarism.*

1. Introduction

The authenticity of a paperwork seeking a doctoral title has been a widely discussed topic. The title of doctor in itself represents the highest scientific qualification that a person can obtain, followed by scientific recognition in the academic world or in the field in which the person to whom this distinction is awarded works, which automatically entails the need for the work to be the fruit of an extensive personal contribution, marked by an arduous path of rigorous scientific documentation. Therefore, the writing of a doctoral thesis is subject to particular scientific rigor, designed to produce a work of real interest, written according to rules of content and form that cannot be questioned for its authenticity and personal contribution. This is why, this act of genuine scientific creativity is backed up by legal rules which should clearly stipulate the conditions under which a title of doctor can be awarded and the requirements which a work must meet in order to be considered a genuine doctoral thesis. Regulations in this area have fluctuated, from superfluous legislation with few rigorous rules, leading to scientific works of poor quality, to direct interventions of the Parliament, such as GEO no. 4/2016 on the amendment and supplementation of National Education Law no. 1/2011[1], the provisions of which were declared unconstitutional in 2016, as we shall indicate below. However, these regulations have not always been so rigorous, so that no later than 2022, CCR declared unconstitutional an extremely important text, with major implications for the practice of administrative courts dealing with plagiarism disputes in works for which the doctoral title had been awarded. Even though the legislation has been amended following the entry into force of the new education law, Law no. 199/2023[2] on Higher Education, the topic remains of the utmost interest, on the one hand due to the fact there are still disputes before the courts on this subject and, on the other hand, due to the fact the Constitutional Court is deciding certain issues applicable to future cases. Last but not least, CCR dec. no. 364/2002 regarding the unconstitutionality of the provisions of art. 170 para. (1) letter b) of National Education Law no. 1/2011 is a striking example of administrative law, which will be discussed in detail in this study.

2. Implications of CCR dec. no. 364/2022 on the doctoral title

2.1. Theoretical considerations on what CCR ruled in dec. no. 364/2022

As we have shown above, the question of the competence of the authority empowered to establish plagiarism was widely discussed and finally settled by the Constitutional Court. However, the discussion should not have been reduced to answering the question: was there plagiarism or not? And answering this question, can the competent authority (until dec. 364/2022, the Ministry of Education) revoke the doctoral title?

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[1] GEO no. 4/2016, published in the Official Gazette of Romania, Part I, no. 182/10.03.2016.

[2] Law no. 199/2023 on Higher Education, by the consolidation of 23.04.2024 is based on the publication in the Official Gazette of Romania, Part I, no. 614/05.07.2023.

„Lately, there is a tendency, when the question of violations of the rules governing good conduct in scientific research arises, to reduce this to plagiarism."[3]

The quoted author captures extremely well the administrative and judicial struggles that preceded the wave of litigations in court, litigations that had as object the revocation of the title of doctor by the Ministry of Education based on the suspicion of plagiarism.

These disputes have generated two forceful interventions of the Constitutional Court: the first one was in 2016, once with the pronouncement of dec. no. 624 regarding the admission of the objection of unconstitutionality of the provisions of the Law for the approval of GEO no. 4/2016 on the amendment and supplementation of National Education Law no. 1/2011.[4]

In this decision, the Constitutional Court has addressed certain ambiguities in GEO no. 4/2016 which aimed to amend Law no. 1/2011, questioning the issue of the individual administrative act, the principle of revocability, respectively the irrevocability of individual administrative acts that have entered the civil circuit.

Furthermore, in this decision, „the Court qualified the doctoral title as an act of administrative nature (para. 48 and 49), and the doctoral degree, as a document certifying the title, cannot be anything other than an act of an administrative nature (para. 48).

CCR also ruled by dec. no. 624/26.10.2016, para. 49 that „the provisions entail the legislative enshrinement of the principle of revocability of administrative acts, containing procedural rules establishing the means by which administrative acts that can no longer be revoked, since they have entered the civil circuit and have produced legal effects, may be subject to legality review at the request of the issuing authority. According to this text legal, the administrative acts which have entered the civil circuit and have produced legal effects can no longer be revoked by the issuing authorities, and their nullity or annulment can only be ordered by the competent court by filing a petition within one year as of the date of issuance of the act. The principle of revocability of administrative acts is, together with the principle of legality, a basic principle of the legal regime of administrative acts, having an implicit constitutional basis (art. 21 and 52 of the Constitution) and legal support [art. 7 para. (1) of Law no. 554/2004]. According to the case law, in principle, all administrative acts may be revoked, normative acts at any time, and individual acts with some exceptions; among the individual administrative acts exempted are also the administrative acts that have entered the civil circuit and have generated subjective rights guaranteed by law. However, the scientific title of doctor is an individual administrative act which, once it has entered the civil circuit, produces legal effects in the field of personal, patrimonial and non-patrimonial rights."

Subsequently, the Constitutional Court was vested with the exception of unconstitutionality of the provisions of art. 170 para. (1) letter b) of National Education Law no. 1/2011[5], currently repealed by Law no. 199/2023 on Higher Education, which read as follows:

„(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 (National Council for the Accreditation of University Degrees, Diplomas and Certificates), CNCS (National University Research Council), 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*:

[...]

b) *to withdraw the title of doctor*."

The solution of the Constitutional Court was to admit this exception and to note that the objected legal provisions are constitutional, provided that they refer to the withdrawal of the title of doctor which has not entered the civil circuit and has not produced legal effects. *Per a contrario,* the title of doctor which has entered the civil circuit and has produced legal effects can no longer be withdrawn (an operation equivalent to the impossibility of revoking it).

Given this context, it is worth analysing the legal notions that the CCR uses since they will be repeated in dec. no. 364/2022 and, as we have already mentioned, they represent a real lesson in administrative law.

The administrative act, since it is unquestionable to remove this qualification with regard to the doctoral title and the doctoral degree, represents "the main legal form of the activity of public administration bodies

[3] E. Stefan, *Etică și integritate academică*, 2nd ed., revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2023, p. 297.

[4] CCR dec. no. 624/2016, published in the Official Gazette of Romania, Part I, no. 937/22.11.2016.

[5] National Education Law no. 1/2011, published in the Official Gazette of Romania, Part I, no. 18/10.01.2011.

consisting of a unilateral and express manifestation of will to create, modify or extinguish rights and obligations, in the exercise of public power, under the main control of legality of the courts".[6]

This definition given by Professor Antonie Iorgovan to the administrative act and which has remained emblematic for the doctrine (the definition is quoted by most authors of administrative law) is complemented by the modern vision that Law no. 554/2004[7] of the contentious administrative gives to the administrative act. Law no. 554/2004 defines the administrative act in a similar way to the doctrinal definition, but expressly states that the administrative act is „a unilateral act of an individual or normative nature."

Law no. 554/2004 thus establishes that under the umbrella of the term „administrative act" stay in fact the individual acts and the regulatory acts, types of administrative acts, with a similar legal regime for certain aspects, but totally different for others.

In works dedicated to administrative law, there are authors who analyse comparatively the normative administrative act and the individual administrative act, precisely in order to capture their different legal regime and to outline the essential differences between these two types of administrative acts.[8]

The idea of „individual administrative act" is frequently repeated by the Constitutional Court, both in the substantiation of dec. no. 624/2016 (para. 48, 49, 50, 51), and in the substantiation of dec. no. 364/2022 (para. 21, 22 23, 26, 27, 28) precisely in order to highlight the difference in the legal regime, in terms of revocability/irrevocability of the individual administrative act.

The analysis of the Constitutional Court on the provisions of National Education Law no. 1/2011, as we have mentioned above, currently repealed, show that „according to art. 169 para. (2) of Law no. 1/2011, following the completion of scientific doctoral studies, the institution organising the doctoral studies confers the diploma and the title of Doctor of Science. Art. 168 para. (7) provides that the doctoral title is awarded by order of the Minister of Education, Research, Youth and Sport, after validation of the doctoral thesis by the National Council for the Accreditation of University Degrees, Diplomas and Certificates (CNATDCU). The doctoral degree is conferred after the successful completion of a doctoral degree programme, certifying the obtaining and possession of the title of doctor [art. 169 para. (1) of Law no. 1/2011]. Therefore, the law operates with two distinct terms, respectively „doctoral title" and „doctoral degree", each of which being subject to a different revocation procedure."[9]

By continuing the substantiation, CCR states, with reference to dec. no. 624/2016, that the title of doctor is an administrative act, in this case an individual administrative act, and from this moment on the great discussions on the revocation and annulment of individual administrative acts start.

In this constitutional and legal context, the Court ruled that a regulation which establishes that „the administrative act finding the scientific title is annulled from the date of the issuance of the act of revocation and produces effects only for the future" represents a violation of the irrevocability of individual administrative acts, with serious consequences on the subjective rights created as a result of the entry into the civil circuit of that act. The possibility of the revocation of the administrative act performed by the issuing authority violates the principle of stability of legal relationships, introduces insecurity into the civil circuit and leaves to the subjective discretion of the issuing authority the existence of the rights of the person who acquired the scientific title (dec. no. 624/2016, para. 50)."[10]

Based on these considerations of the Constitutional Court, we believe that certain theoretical aspects that have substantiated the decisions of the Court and that are cornerstones of administrative law should be highlighted.

With regard to revocation, this is the legal operation whereby the body issuing an administrative act or the superior hierarchical body abolishes that act. When pronounced by the issuing body, revocation is also called withdrawal.[11]

Revocation is therefore a particular case of nullity, but at the same time a rule, a fundamental principle of the legal regime of administrative acts.

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[6] A. Iorgovan, *Tratat de drept administrativ*, vol. II, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 25.

[7] Law no. 554/2004, published in Official Gazette of Romania, Part I, no. 1154/07.12.2004.

[8] See, in this respect, E.E. Ștefan, *Drept administrativ. Partea a II-a, Curs universitar*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, pp. 30-32.

[9] CCR dec. no. 364/ 2022, para. 19.

[10] CCR dec. no. 364/2022, para. 23.

[11] A. Iorgovan, *op. cit.*, p. 83.

This fundamental principle applicable to administrative acts results both from art. 21 and art. 52 of the republished Constitution and from the provisions of Law no. 554/2004 of the contentious administrative. This aspect was also noted by CCR in dec. no. 364/2022, as follows: „The principle of revocability of administrative acts has an implicit constitutional enshrinement in art. 21 and 52 of the Constitution, the exceptions thereto are also implicitly contained in the same provisions in conjunction with other values, requirements and principles with constitutional enshrinement. In this regard, the Court notes art. 1 para. (5) of the Constitution, in the legal certainty component, which outlines the content and limits of the revocability of administrative acts. Therefore, once an administrative act has entered the civil circuit and produces legal effects, the principle of legal certainty prohibits its revocation by the issuer itself."[12]

But what is the legal basis for revocation, the fundamental principle of the administrative law?

The term of „revocation" is found in art. 7 para. (1) of Law no. 554/2004 as further amended and supplemented, which states the following: *„Before approaching the contentious administrative court with jurisdiction, the person considering him/herself aggrieved with respect to a right or legitimate interest, by a specific administrative decision, shall request the issuing public authority, or the higher authority along the chain of command, within thirty (30) days of notice of such decision,* ***the revocation,*** *in full or in part of such decision."*

However, according to Professor Antonie Iorgovan, the principle of revocability of administrative acts appears as a natural effect of the features of public administration, of the very *raison d'être* of administrative acts. The organisational structure of public administration is based on certain rules, including hierarchical administrative subordination, which is not, however, of a dominant nature. We will thus understand *the revocation of administrative acts as a rule, a principle of the functional structure of public administration.*[13]

As regards the legal regime of revocation, in conjunction with the provisions of Law no. 554/2004, art. 7 which provides that „*in case of a normative administrative act, the preliminary complaint can be filed at any time*", the conclusion is that normative administrative acts are always and at any time revocable, while individual administrative acts are in principle revocable.

There is a whole series of exceptions from the principle of revocability of administrative acts, including the administrative act that has entered the civil circuit.

Regarding this exception, there have been divergent opinions in the doctrine, as regards the interpretation of art. 1 para. (6) of Law no. 554/2004, which provides as follows: „*The public authority that has issued an unlawful unilateral administrative act may request the court to declare it null and void, whenever such decision may no longer be revoked because it has already entered the civil circuit and has produced legal effects."*

According to a legal opinion, "art. 1 para. (6) of Law no. 554/2004 is understood by one author on the basis of the meaning of the notion of *civil circuit*, seen as the totality of legal acts through which goods (patrimonial assets) circulate from one person to another. Hence, the identification of five conditions „in order for an administrative act to be considered irrevocable by *ad litteram* application of art. 1 para. (6)", namely: to be individual; to create a patrimonial effect; the right must have been acquired in good faith by the beneficiary; the right acquired by the act must have already been transacted and there must be such a close link between the initial administrative act and the subsequent civil act that the revocation of the former entails the dissolution of the latter."[14]

Another opinion points out that there are reservations on the proposed definition of the civil circuit. The quoted author shows that „its meaning should not be forcibly restricted to the circulation of goods, as the scope of the concept is much wider". Furthermore, she considers that it concerns individual administrative acts the legal effects of which have left the applicable administrative law regime and entered another legal regime, which is that of civil law in the broad sense. It is not mandatory to conclude a subsequent civil act, but only to the extent that other such acts have been concluded.[15]

In our opinion, the solution of the CCR dec. no. 364/2022 is in line with the second opinion, which is correct because the situation under analysis takes into account other concepts, much more abstract than the limitation only to the concept of „good".

[12] CCR dec. no. 364/2022, para. 28.

[13] A. Iorgovan, *op. cit.*, p.84.

[14] O. Podaru, *Drept administrativ, vol. I. Actul Administrativ (I) Repere pentru o teorie altfel*, Hamangiu Publishing House, Bucharest, 2010.

[15] D. Apostol Tofan, *Drept administrativ*, vol. II, 5th ed., C.H. Beck Publishing House, Bucharest 2020.

The Constitutional Court sees the entry into the civil circuit as the deadline by which the issuing authority could revoke its act. After this moment, which in practice will have to be proved, as we shall show below, the only one in a position to rule on the legality of the individual administrative act granting the title of doctor remains the court, but by means of an action for annulment, the issuing authority losing any right of withdrawal. The theoretical argument of the Constitutional Court is fully sustainable since any other discretionary power left to the issuing authority beyond this moment (of entry into the civil circuit and implicitly of the production of legal effects) would be capable of deregulating legal security.

2.2. Practical considerations on the CCR rulings in dec. no. 364/2022

What the Constitutional Court underlines in the decision under review is that „The challenged text regulates the withdrawal of the doctoral title, regardless of whether or not the act in question has entered the legal circuit and produced legal effects. Since the issuing body withdraws it for reasons prior to its issue (failure to comply with quality or professional ethics standards), such withdrawal has the legal nature of a revocation. Notwithstanding the principle of the revocability of administrative acts is not an absolute one, but there are exceptions, including individual administrative acts which have entered the civil circuit and have generated subjective rights guaranteed by law, which cannot be revoked, but only annulled by an authority other than the issuing authority. Therefore, since the doctoral title and the doctoral degree which have entered the civil circuit and have generated subjective rights guaranteed by the law fall within the scope of this category, they cannot be revoked."[16]

In conclusion: „If they have entered the civil circuit and produced legal effects, both the doctoral title and the certificate accompanying it can be abolished only under a court decision, because, otherwise, if the institution issuing the document were left to abolish the title, insecurity on the legal relationship already established would be created."[17]

Starting from these two hypotheses, we must distinguish in practice between two equally possible situations:

- The title of doctor has not entered the legal circuit and has not produced legal effects, in which case the challenged text will continue to produce legal effects and the courts with jurisdiction in litigations concerning this hypothesis will continue the judgment by reference to the text of the law in force at the time of issuing the administrative act on the withdrawal of the title of doctor;
- The title of doctor has entered the legal circuit and produced legal effects, representing a condition for access to a position, being the basis for acquiring a professional qualification, a professional status or producing patrimonial effects in the form of benefits and remuneration rights for those who hold the title of doctor. In this case, the courts will apply dec. no. 364/2022 and will admit the actions/appeals brought by those whose title has been withdrawn.

If in the situation where the title of doctor has entered the civil circuit and evidence can be provided in this regard, things are somewhat simpler to analyse, practically having to provide evidence in this regard, things will be somewhat more complicated with regard to titles/degrees that have not entered the civil circuit and have not produced legal effects. In this case, these individual administrative acts may be revoked by the institutions issuing the act, but under the observance of certain principles. Thus, the issuing authority will not be able to intervene and will not be able to rule or review the scientific substance of the doctoral thesis. The issuing authority will have to limit itself in the revocation decision only to the analysis of the aspects related to the legality of the conferral/award procedure, by observing the deadlines provided by law for their revocation. Furthermore, the issuing authority will refer only to the analysis of the legality conditions in force at the time of the award of the title of doctor.

In the decision under review, the Constitutional Court argued for the security of the civil circuit, stating that if these principles are not observed „arbitration and permanent legal uncertainty regarding the holding of the title of doctor would occur".[18]

These implications must also be analysed from the perspective of the whole society on this phenomenon because, as an author of administrative law points out, „From our point of view, the stakes for leaders at the

[16] CCR dec. no. 364/2022, para. 26.
[17] *Idem*, para. 30.
[18] *Idem*, para. 37.

highest level in states today are huge and on the long-term, involving future generations, namely: identifying solutions and mechanisms to increase public confidence in state authorities (…)".[19] The circulation of doctoral theses of a high scientific level must concern the whole society and the mechanisms of verification of authenticity, as well as the authorities involved in this verification, must be clearly regulated by legislation in order not to create a dangerous phenomenon whereby works lacking authenticity and without an adequate scientific level enter the academic world and the people who wrote them wrongfully claim academic titles or patrimonial benefits that not only do not deserve them but that overshadow the idea of scientific act/scientific creation.

3. Conclusions

Although the text declared unconstitutional by CCR dec. no. 364/2022 is no longer in force, being repealed by Law no. 199/2023, the implications of this decision will still have effects in the future.

First of all, due to the fact the litigations started under the auspices of the texts declared unconstitutional and still *pending* will be judged in the light of the rulings of the Constitutional Court and the solutions to admit de actions are obvious, thus changing the practice of the courts which had registered a contrary trend until 2023.

Second of all, CCR dec. no. 364/2022 must be analysed in the light of the terms it uses and the way in which it has managed to integrate the theory of revocability/irrevocability of the administrative act to the practical situation under analysis.

Moreover, we have a clear analysis of the distinction between normative and individual administrative act in this decision, more than in any other coming from this authority. Starting from the legislator's idea of classifying the administrative act in two categories (normative and individual), we reach the practical illustration of this benefit. We are obviously talking about two distinct legal regimes, with different rules that the contentious administrative judge will have to analyse differently.

The Constitutional Court admirably makes a theoretical examination of these notions, explains them and analyses their practical implications in an accomplished manner, which shows the professionalism and legal culture of those called upon to oversee the observance of the Constitution.

Notwithstanding, beyond these aspects, the question which remains is the following: when are we fully capable of writing a doctoral thesis? What is the meaning of taking on the idea of a creative act without plagiarising, aiming only to bring an element of novelty to your chosen scientific field?

Because we can easily see that this is not an easy task. Firstly, we are talking about the idea of creation, about the idea of innovation, about the idea of putting a scientific product on the market with elements of novelty. Secondly, we are talking about compliance with a long string of substantive and formal conditions that the work in question must meet. Thirdly, we are talking about compliance with the relevant legislation. Last but not least, about the observance of certain moral values that the scientific work for which the author will finally be awarded with the title of doctor must fulfil.

One possible answer would be that the desire to receive this title must be beyond the direct benefits that might follow. There must be a desire to research, to innovate, to enrich the scientific world with valuable work. However, this desire should remain the one that motivates those who start on this path of research. These trailblazers should be joined by elements of the state that encourage research by establishing clear legislation, substantive and formal criteria that do not hinder the creative process but facilitate it.

Only when the desire to research is combined with a clear legislative framework will we have the idea of permanent legal security regarding the title of doctor and interventions such as those of the Constitutional Court will no longer be necessary.

All these challenges are coupled with the increasingly topical idea of artificial intelligence successfully competing with human creation. Further normative acts will have to be implemented to curb this phenomenon in which the authentic act of creation becomes irreplaceable by an act of creation coming from an overloaded software. New problems will arise, including legal ones, which will seek to enhance authentic human creation. So, here we are at the beginning of new paths in this matter and new legal solutions are expected.

[19] E.E. Ștefan, *Legality and morality in the activity of public authorities,* in Revista de Drept Public no. 4/2017, p. 96.

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GUARANTEES EQUIVALENT TO THE RIGHT TO A FAIR TRIAL IN THE MATTER OF CHALLENGES TO THE WITHDRAWAL OF SECURITY CERTIFICATES ISSUED BY THE OFFICE OF THE NATIONAL REGISTER OF STATE SECRET INFORMATION

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Abstract

Documents of a classified nature may be of a contentious nature, the paper focusing on those concerning the service relationships of active officers.

In the event of a dispute arising, the question arises as to the extent to which a plaintiff is able to mount an effective defence if he cannot know their content and whether he can be granted guarantees equivalent to respect for the right to a fair trial.

Restricting the lawyer's access to important documents in a case affects to a large extent the represented party.

In the European countries, the situation regarding conditional access to classified documents from the point of view of lawyers and parties against whom such documents are issued is similar, in that it is recognised that the principle of adversarial proceedings and the rights of the defence must be limited because of the need to protect national security.

From a procedural point of view, it is important that the general principles of adversarial proceedings, equality, orality, non-disclosure and publicity are respected in every dispute.

In this context, noting the difficulties that arise in the work of the court due to restricted access to classified documents, I have tried to identify guarantees equivalent to respect for the right to a fair trial in the cases referred to in the title of the paper, analysing national case law, that provided by the ECtHR and studies of doctrine.

In accordance with these, I have developed equivalent guarantees compatible with Romanian law: the possibility of challenging the classification of the document, the request for declassification of classified information, the right of the interested party to be assisted by an ORNISS-certified lawyer and the possibility for the accused to participate in proceedings which reveal the content of classified documents.

Keywords: *classified documents, fair trial, equivalent guarantees, access, defence.*

1. Introduction

Classified documents are subject to a special regime in view of the areas to which they relate and the need to protect the information they contain.

However, there are situations in which they become contentious, such as those relating to the service relationships of officers in the Ministry of National Defence, the Ministry of the Interior, the Romanian Intelligence Service and others.

In the event of a dispute arising, the question arises as to the extent to which a plaintiff is able to mount an effective defence if he cannot know their content and whether he can be granted guarantees equivalent to respect for the right to a fair trial.

Restricting the lawyer's access to important documents in a case affects to a large extent the represented party, who has to bear the consequences of this impediment and can thus only provide a poor defence, as the charges against him are based on evidence which is classified material.

In the European countries, the situation regarding conditional access to classified documents from the point of view of lawyers and parties against whom such documents are issued is similar, in that it is recognised that the principle of adversarial proceedings and the rights of the defence must be limited because of the need to protect national security.

From a procedural point of view, it is important that the general principles of adversarial proceedings, equality, orality, non-disclosure and publicity are respected in every dispute.

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In this context, noting the difficulties that arise in the work of the court due to restricted access to classified documents, I have tried to identify guarantees equivalent to respect for the right to a fair trial in the cases referred to in the title of the paper, analysing national case law, that provided by the ECtHR and studies of doctrine.

In accordance with these, I have developed equivalent guarantees compatible with Romanian law: the possibility of challenging the classification of the document, the request for declassification of classified information, the right of the interested party to be assisted by an ORNISS-certified lawyer and the possibility for the accused to participate in proceedings which reveal the content of classified documents.

2. Contents

Classified documents in Romania are divided in two classes, according to art. 15 of Law no. 182/2002 on the protection of classified information, namely state secrets and service secrets. In turn, according to art. 15 letter (f) of Law no. 182/2002 on the protection of classified information, state secret information has three levels, as follows: strictly secret of particular importance, being information whose unauthorised disclosure is likely to cause exceptionally serious damage to national security; strictly secret, being information whose unauthorised disclosure is likely to cause serious damage to national security; and secret, being information whose unauthorised disclosure is likely to cause damage to national security. A special category of information is represented by service secrets, which, according to art. 15 letter (e) of Law no. 182/2002 on the protection of classified information, are information whose disclosure is likely to cause damage to a public or private legal person.

According to art. 28 para. (1) of the Law no. 182/2002 on the protection of classified information, 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.

If, extrajudicially, the existence of objective limits on access to the content of classified documents is justified by the sensitive area to which they relate (national defence, communications systems, geospatial products, national mineral reserves, aerophotogrammetric records, systems and plans for the supply of electricity, heat, water and other agents necessary for the operation of objectives classified as state secrets, monetary policy, foreign relations, scientific research in the field of nuclear technologies, as provided for in art. 17 of Law no. 182/2002 on the protection of classified information), when the same documents are to be submitted as evidence in a dispute, the question arises as to the balance to be maintained between restricted access to these documents and the right to a fair trial.

According to art. 53 of the Romanian Constitution, restriction of the exercise of certain rights, such as the right of access to evidence on which the opposing party bases its defence, may be recognised, but only if all the conditions imposed by the constitutional norm are verified. Thus, the restriction of the exercise of certain rights must be imposed only by law, must pursue a legitimate aim, i.e. it must be necessary for the protection of national security, public order, public health or morals, the rights and freedoms of citizens; the conduct of criminal investigations; the prevention of the consequences of a natural disaster, a disaster or a particularly serious disaster; it must be necessary in a democratic society; and the measure must be proportionate to the situation which gave rise to it, it must be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom.

In the particular case under consideration, restricted access to documents containing classified information is established by law, namely Law no. 182/2002 on the protection of classified information, the restriction of the right of access pursues a legitimate aim, namely the protection of the areas described in art. 17 of Law no. 182/2002 on the protection of classified information, the measure is necessary and proportionate.

As a general rule, any interest in classified documents is subject to the need-to-know principle.

The principle is presumed to be verified only in respect of certain persons involved in the performance of the act of justice. Thus, judges[1], prosecutors and assistant judges of the High Court of Cassation and Justice,

[1] The need to recognise the judge's access to classified information, by virtue of the office he or she holds, was dictated by the imperative to respect the principle of random assignment. In this regard, Romanian doctrine has shown that, otherwise, the files assigned to a judge who does not have an ORNISS certificate or access authorisation would have been obliged to forward the file administratively to another court that has the legal clearance. M. Jebelean, *Classified information. Commented judicial practice,* Hamangiu Publishing House, Bucharest, 2022, p. 168.

under article 7 para. 4 of Law no. 182/2002 on the protection of classified information, have guaranteed access to classified information, only with the simple reservation of appointment and oath and with an underlying condition that such information be related to files in progress, which is another facet of the need-to-know principle.

The legislative solution has been criticised in the literature, arguing that „*the criteria for appointment as a magistrate cannot be equated with those required to obtain authorisations for access to classified information*"[2]. Although the authors' premise is correct, the possible consequences they foresee are not very plausible, *i.e.*, the possibility of a leak of information in the event that the magistrate's professional probity is questionable. I consider that in this case the party has access to the classic procedural guarantees, namely the formulation of a request for recusal, which prevents the magistrate from having access to classified information until the resolution of the incidental request. Obviously, if it is rejected, the presumptions of impartiality and independence are reinforced. On the other hand, magistrates do not have general access to all classified documents, but only to those relating to a case in progress, by virtue of the need-to-know principle.

The law ignores the situation of court auxiliary staff, of judges' assistants at tribunals[3], specialised tribunals and courts of appeal appointed under the terms of Law no. 393/2003, and of the defenders of parties involved in this type of litigation. While for the first two categories of persons the lack of access to classified information as of right generates only problems relating to the internal organisation of the court and the management of the act of justice, for the last category of persons there are major inconveniences relating to the impossibility of organising the defence effectively.

Art. 7 of Law no. 182/2002 on the protection of classified information has been the subject of numerous complaints of unconstitutionality[4], but the CCR practice was unanimous in rejecting the invoked exceptions, on the ground that[5] „*the strict regulation of access to classified information, including the establishment of conditions to be met by persons who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the resolution of the case, but creates precisely the regulatory framework in which two conflicting interests - the private interest, based on the fundamental right of defence, and the general interest of society, based on the need to defend national security - coexist in a fair balance which satisfies both legitimate interests, so that neither is affected in substance.*"

Undoubtedly, restricted access cannot equate to lack of access to classified information, but the time required to go through the legal procedures can sometimes have negative consequences that are difficult to remove in terms of the conduct of a trial, whether civil or criminal, especially from the perspective of the parties involved.

From the perspective of compliance with art. 6 ECHR, in addition to access to an independent and impartial court, it must be verified that the parties have benefited from procedural fairness, in other words, whether the evidence has been administered fairly, whether they have had access to the evidence on which the opposing party is building its defence.

The fact that the courts hearing a particular case have unlimited access to classified information is not such as to remove the obligation to produce evidence to the opposing party. However, in this case, in addition to the right to information, which is part of the right to a fair trial guaranteed by art. 31 para. (1) of the Romanian Constitution, there is also an active obligation to protect national security. In this hypothesis, although they are not binding[6], even for the signatory states[7], the Johannesburg Principles offer a way of acting.

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[2] M. Mareș, D. Lupașcu, *Protection of Classified Information. Lawyers' access to classified information in criminal proceedings*, Law Journal no. 6/2017.

[3] Access to classified information is also conditional for registrars and clerks involved in the work of the Classified Documents Department. The same conditions apply to the related staff of this department.

[4] CCR dec. no. 84 /18.02.2020, published in the Official Gazette of Romania no. 639/21.07.2020; CCR dec. no. 199/24.03.2021, published in the Official Gazette of Romania no. 640/30.06.2021; CCR dec. no. 810/07.12.2021, published in the Official Gazette of Romania no. 190/25.02.2022; CCR dec. no. 805/07.12.2021, published in the Official Gazette of Romania no. 247/14.03.2022; CCR dec. no. 183/31.03.2022, published in the Official Gazette of Romania no. 868/02.09.2022; CCR dec. no. 310/19.05.2022, published in the Official Gazette of Romania no. 922/20.09.2022; CCR dec. no. 498/02.11.2022, published in the Official Gazette of Romania no. 39/12.01.2023; CCR dec. no. 546/24.10.2023, published in the Official Gazette of Romania no. 140/19.02.2024.

[5] CCR dec. no. 546/24.10.2023, para. 15, published in the Official Gazette of Romania no. 140/19.02.2024.

[6] Protection of Classified Information, Practical Guide developed by the Romanian Intelligence Service, available online at *www.sri.ro*, p. 8, 9.

[7] V. Ojog, *Access to Information and Protection of Classified Information*, Moldoscopie, 2012, no. 4 (LIX), p. 40.

Principle 15: General rule on disclosure of secret information „No person shall be punished on national security grounds for disclosure of information if (1) the disclosure of the information has not in fact caused injury and is not likely to harm the legitimate interest of national security, or if (2) the public interest in knowing the information outweighs the injury caused by its disclosure".

The rule outlined above is certainly compatible with the principles of the rule of law, but it is vulnerable because of its high degree of abstraction. Thus, the absence of damage cannot always be assessed at the time when the secret information was disclosed. In addition to possible instantaneous damage, additional damage may occur over time, the magnitude of which may be much greater than the primary damage. Similarly, the probability of the degree of damage to national security is only an estimated and uncertain criterion, since what is improbable at one point in time may become certain at a later point in time. There is also a lack of concrete criteria to verify whether the public interest in knowing the information outweighs the harm caused by its disclosure, and the application of this principle on a case-by-case basis can be arbitrary.

In current judicial practice, in order to respect the right to a fair trial, courts have tried to identify adequate procedural safeguards to ensure an effective degree of access. The jurisprudential orientation was more accentuated after Romania was condemned at the ECtHR for not respecting the right to a fair trial, so that the courts no longer limited themselves to a very brief analysis of the application, but tried to explain in fact and in law the solution they opted for[8].

Thus, the claimant must be informed that he/she has the right to be assisted or represented by a lawyer who holds a security certificate and, if he/she wishes to do so, the UNBR may be requested to provide a list of lawyers who meet these conditions. Also, where the lawyer of the party concerned does not have an ORNISS certificate, he or she may be given the time necessary to obtain it by postponing the case. It is true that, even if the representative's approach were successful, he would be bound by the obligation not to disclose classified information to authorised persons, including his client. However, a qualified defence is not limited to the mere presentation of evidence, and the lawyer has the right and the obligation to propose to his client legal strategies, in relation to the charge made against him, which are likely to achieve his legal interest.

An attempt to improve lawyers' access to evidence representing classified documents took place in 2015, when a protocol was concluded between UNBR and ORNISS, the objective of which was to facilitate access to obtaining access authorisations. However, as the information gathered showed, in reality the situation of lawyers has improved only slightly. The local bar associations, to which the lawyers concerned belong to, collect the documents needed to obtain access authorisations from said lawyers and submit them to the UNBR. From there, the documents are sent to the ORNISS, which carries out all the checks required by the relevant legislation, and finally an opinion is issued[9]. If the opinion is positive, the National Union of Romanian Bars and Law Societies can issue an access authorisation, valid for 4 years.

As long as the same steps are required for the issuance of the access authorisation as for the issuance of the security certificate, the only positive aspect of the protocol remains the inclusion of the UNBR and local bar associations in the document circuit, which results in easier access to procedures for lawyers.

The interested party may also request the declassification of classified information.

According to art. 24 para. 4 of Law no. 182/2002 on the protection of classified information, state secret information may be declassified by Government decision, at the reasoned request of the issuer, in three generic situations referred to in art. 20 para. (1) of GD no. 585/2002 for the approval of the National Standards for the protection of classified information in Romania, i.e. the expiry of the classification period, the absence of damage caused by the disclosure of the information to national security, defence of the country, public order, or of the interests of the public or private persons holding the information; if the character of a classified document has been assigned by a person not empowered by law.

In the present analysis, the claims of interested persons should take into account the second hypothesis, the other two being in reality particular cases in which the claimant is unlikely to find himself. Thus, the classification periods are long, *i.e.*, 100 years for information classified strictly secret of particular importance, 50 years for information classified strictly secret and 30 years for information classified secret, as provided for in

[8] Regarding this matter, CA Alba Iulia, dec. no. 148/2024, Case 312/85/2021, CA Ploiești, dec. no. 46/2024, Case 6614/2/2018**, CA Alba Iulia, dec. no. 203/2023, Case 1436/97/2019*, accessed through rejust.ro application.

[9] *www.avocatura.com*, article date 13.08.2015.

art. 12 para. (2) of GD no. 585/2002 approving the National Standards for the Protection of Classified Information in Romania, and may even be extended under the terms of art. 12 para. (3) of the same Act.

The negative effects of withdrawing a safety certificate are immediate and it is hard to believe that the interest of the interested party can persist for so long. The interest to take legal action against an allegedly abusive action becomes actual as soon as the security certificate holder is notified of the withdrawal of the security certificate, at which point the service relationship changes due to the denial of access to classified information.

As regards the last hypothesis, although it may arise, no concrete situations have been identified in practice.

In the case of secret service information, its declassification is the responsibility of the heads of the units that issued it, in accordance with art. 23 para. (2) of the same Act.

We can see that the initiative for declassification lies with people who have no direct interest in the process. However, any delay or administrative silence may be sanctioned by the interested party by bringing a separate dispute, subject to proof of interest, i.e. that classified information is needed in another dispute.

However, as this is an administrative dispute, the conditions laid down by Law no. 554/2004 must be complied with: the preliminary procedure must be completed in accordance with art. 7 of Law no. 554/2004 and the specific time limits must be complied with. Obviously the dispute will go through two levels of jurisdiction, which will generate delays in clarifying the main dispute.

It should be emphasised that under no circumstances may the interested party directly request the court to declassify classified information, nor may the court automatically request the issuer of classified information to change the classification or declassify it. Such a legal remedy was briefly provided for in art. 352 para. 11 CPP, in, but it was declared unconstitutional by CCR dec. no. 21/2018[10]. It is therefore up to the applicant to initiate this dispute if the administrative action is not successful, *i.e.*, if, following a request to the issuer of the classified document, the latter refuses, implicitly or explicitly, to take legal steps to declassify or change the classification level.

It is also possible to challenge the necessity of classifying documents, as domestic law expressly provides for this remedy in art. 20 of Law no. 182/2002 on the protection of classified information, which stipulates that an appeal may be lodged against the classification of information, the duration for which it has been classified, and the manner in which one or other level of secrecy has been assigned, while respecting the procedural forms required by administrative litigation. However, the procedural rules imposed by Law no. 554/2004 have a dilatory effect on the process in which these documents are introduced as evidence.

A final remedy identified to give the complainant an effective opportunity to defend himself in the event of the withdrawal of his ORNISS certificate is the right to be heard on the charges made against him.

In this respect, before the ORNISS certificate is withdrawn, the holder is re-examined[11], including an interview to confirm or not the security-related suspicions it has raised. From the questions that the issuer of the certificate asks the interviewee, it is possible to identify, indirectly, the allegations that are made and thus an effective defence can be achieved. For example, if the interviewee is asked if he/she has been to certain places at a certain time, if he/she knows certain people, how he/she spends his/her free time, it is possible to identify security risks attributed to a certain person.

3. Conclusions

The right to a fair trial must be respected in all cases, even where there is evidence that is classified material.

However, the adversarial principle and the right to equality of arms may be subject to limitations, provided these are justified by the need to protect national security. In this case, however, the interested party must be provided with equivalent safeguards, this being the whole ECtHR practice, which confirms „the particular case in which overriding national interests are given priority in order to deny a party a fully adversarial procedure (Miryana Petrova, para. 39-40, and Ternovskis, para. 65-68)”[12]. It should be pointed out that Romanian courts, regardless of the level of jurisdiction, have unconditional access to classified information and can directly assess its relevance and merits in relation to the accusation made against the complainant.

[10] Published in the Official Gazette of Romania no. 175/23.02.2018.

[11] According to art. 167 para. (1) letter d) of GD no. 585/2002, revalidation may be carried out at the request of the unit in which the person carries out his activity, or of ORNISS, when security risks arise in terms of compatibility of access to classified information.

[12] *Regner v. Czech Republic*, para. 147. In the same sense, *Corneschi v. Romania*, *Muhammad and Muhammad v. Romania*.

I consider that the equivalent safeguards identified, namely the right of the party to be assisted by a lawyer who has access to classified information, the possibility to request declassification of classified information or to challenge its classification, the possibility to request unclassified extracts from documents or the right of the interested party to be heard on the allegations against him at the administrative stage, are capable of making up for the restrictions on classified documents.

The nominal identification of the equivalent safeguards described above may be of real help to legal practitioners and may constitute a starting point for further studies, given that to date, as has emerged from the material analysed, safeguards equivalent to due process in the matter of challenging the withdrawal of security certificates issued by the ORNISS have been briefly described in doctrinal studies.

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THE LEGAL REGIME OF THE DECISIONS PRONOUNCED IN THE APPEAL IN THE INTEREST OF THE LAW AND THEIR ROLE AS SOURCE OF LAW - CASE STUDIES

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Abstract

Currently, in the Romanian legal system, the judge interprets and adapts the law to the concrete realities, remedies the normative gaps and discovers remedies that can inspire the legislator. In this regard, the role of the judicial precedent materialised in the decisions of the High Court of Cassation and Justice, pronounced in the appeal in the interest of the law, must be emphasised, because these decisions create general rules for interpreting and applying legal provisions that generate non-unitary practices. The legal doctrine is unanimous in considering that the decisions pronounced in the appeal in the interest of the law are sources of law. Of course, there are also differences of opinion in this respect, but insignificant, in the sense that they are considered by some authors as main sources, and by other authors as secondary sources of law, as long as the character of source of law is recognized.

Keywords: *judicial precedent, appeal in the interest of the law, source of law, High Court of Cassation and Justice, judge, law.*

1. Introduction

The debate on the role of jurisprudence as a source of law is an old one and continues to be a controversial topic in the legal field. This is due, in part, to the fact that case law can play an important role in interpreting and applying the law in situations where legislative rules are vague or incomplete. On the one hand, the inevitable insufficiency of the written law and the need to adapt and update it to keep up with the changes in society is recognised[1]. Jurisprudence can help supplement and expand the interpretation of laws in accordance with social and technological developments. However, there are also concerns about the role of jurisprudence in the separation of powers framework[2]. In many states, legislative power is vested exclusively in Parliament, and some argue that accepting case law as a source of law could undermine this legislative authority and jeopardise the principle of separation of powers in the state. In this sense, there are fears that judges could become de facto „legislators", interpreting, and applying the law in ways that could be considered legislative.

The role of jurisprudence as a source of law is a complex and controversial subject that raises important questions about the balance of power in the state and how laws are interpreted and applied in practice. Although jurisprudence can bring necessary clarifications and adaptations to social developments, it is important to maintain a balance between legislative and judicial authority in a democratic society.

In the Romanian legal system, the judge plays an important role in interpreting and applying the law in accordance with the concrete realities of the case he is examining. Although the written law is the main instrument for regulating legal relations, there are situations in which it can be ambiguous or incomplete. In such cases, the judge has the authority to interpret and adapt the law to fit the specific circumstances of his case. Romanian judges can remedy normative gaps by extensive or analogical interpretation of the law or by applying general principles of law. They can also identify creative and inspired solutions to the legal problems they face, even if there is no explicit regulation in law for them. Therefore, in Romanian judicial practice, judges have a significant role in the development and evolution of law, contributing to its adaptation to social, economic, and technological changes. However, it is important to maintain a balance between legislative and judicial authority, so that the interpretation and adaptation of the law is done in accordance with the principles of the rule of law and respecting the separation of powers in the state.

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[1] E.E. Ștefan, *Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ*, in Journal of Public Law no. 3/2013, pp. 82-83.

[2] E. Anghel, *The reconfiguration of the judge's role in the romano-germanic law system*, in Lex ET Scientia International Journal - Juridical Series LESIJ no. XX, vol. 1/2013, p. 65-72; E. Anghel, *Reflections on the juridical system*, in CKS-eBook, 2013, p. 470-476, *http://cks.univnt.ro/cks_2013/CKS_2013_Articles.html*.

Without referring to the obligation provided by art. 124 point 3 of the Romanian Constitution and art. 2 para. (1) CPP, according to which the judge is independent and obeys only the law, without being bound by the court decisions pronounced in other similar cases by other judges or even by themselves, it is worth noting the role of the judge to cover, through the pronounced decisions, the possible legislative gaps, as well as to create proposals *de lege ferenda* in the process of interpretation and application of the law, collaborating with the legislative power, in the spirit of the principle of separation of powers in the state, to harmonise the legislation with social realities.

In this context, the role of the judicial precedent materialised in the HCCJ decisions pronounced during the appeal in the interest of the law, must be emphasised, because through these decisions, general rules for the interpretation and application of the legal provisions that generate non-unitary practices are created.[3]

2. Historical view on the appeal in the interest of the law

The appeal in the interest of the law was institutionalised in France by art. 3 of the Law of December 1, 1790. The reason for this appeal was to ensure the Court of Cassation's role of maintaining respect for the law, imposing it on all jurisdictions and establishing the unity of jurisprudence, a role that would not have been fulfilled if his action had been entirely subordinated to the action and interests of the parties concerned[4].

In our legislation, the appeal in the interest of the law was introduced by art. 13 of the Law on the Court of Cassation which entered into force in 1851. The appeal in the interest of the law was repealed by Decree no. 132 of April 2, 1949, for judicial organisation. This normative act repealed the entire chapter of special appeals and replaced them with the „request for correction". This extraordinary appeal was modified by finally receiving, by Decree no. 471/1957, the name „supervision appeal".

The doctrine of the time defined the appeal in supervision as an extraordinary way of appeal through which the general prosecutor of the Romanian People's Republic refers the Supreme Court to examine some final decisions in the supervision procedure[5].

The declared purpose of the supervisory appeal was to exercise the right of supervision over the judicial activity regarding the final judgments of any ordinary or special court.

Legal doctrine attributed to this extraordinary avenue of attack the characteristics of a „socialist type" institution with the aim of contributing to the consolidation and ensuring popular legality by abolishing those final decisions of any court, ordinary or special, decisions that were judged to be groundless or illegal.

Also, this appeal considered how both the former Supreme Court of the RPR and the General Prosecutor of the RPR exercised, under the law, the task outlined in the Constitution, namely, to supervise the judicial activity of all courts. The RPR Constitution of September 27, 1952 contained the following provisions: art. 72 "The Supreme Court of the Romanian People's Republic supervises the judicial activity of all courts in the Romanian People's Republic"; Art. 73 „The Prosecutor General of the People's Republic of Romania exercises superior supervision of the observance of laws by ministries and other central bodies, by local bodies of power and state administration, as well as by civil servants and other citizens".

The changes initiated by the socialist legislator came to replace the old regulations according to which the task of supervising the judicial activity of the courts was assigned to the former Supreme Court of Justice according to the provisions established by the Constitution of the RPR of April 13, 1948. According to the same constitutional provisions, the role of the prosecutor was to oversee compliance with criminal laws. The application of this constitutional principle was regulated by the Law on judicial organisation, respectively Law no. 341 of December 5, 1947. Later, by Decree 1/1948, along with the right of the first president of the Supreme Court, the right of the Prosecutor General of the Romanian People's Republic to request, through an extraordinary appeal, the annulment of final and irrevocable judicial decisions or acts contrary to the law was regulated[6].

As it was also shown, the appeal in the interest of the law was initially called „request for correction" (the amendments brought to the Code of Civil Procedure by Decree no. 132/1952). The rectification request deadline was replaced by the supervision appeal deadline by Law no. 2 of April 6, 1956, regarding the amendment of Law

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[3] E. Anghel, *Judicial precedent, a law source*, in Lex ET Scientia International Journal - Juridical Series LESIJ no. XXIV, vol. 2/2017, p. 68-76.

[4] V.M. Ciobanu, *Tratat de procedură civilă*, vol. II, Naţional Publishing House, Bucharest, 1997, p. 457-461 *apud* L.G. Gheorghiu, *Recursul în interesul legii – izvor de drept. Aplicarea deciziilor interpretative în timp*, Curentul Juridic Journal no. 3-4, 2006.

[5] G. Porumb, *Tratat de procedură civilă comentat şi adnotat*, vol. II, Scientific Publishing House, Bucharest, 1962, p. 112.

[6] Art. 33 of Decree no. 1 of April 22, 1948, published in Official Gazette no. 95/1948.

no. 5/1952, being taken over by the provisions of the Civil Procedure Code through the amendments brought to it by Decree 471 of September 30, 1957.

The appeal in supervision as it was regulated by Decree 470 of December 5, 1958, was analysed by the doctrine through the prism of the differences compared to the previous regulatory mode as well as through the prism of the particularities that this extraordinary way of attack had.

First, it was shown that the appeal in supervision is an extraordinary way of attack that can be exercised by a single body, namely the Prosecutor General of the RPR who had both the task and the responsibility of the superior supervision of compliance with legality.

Secondly, the General Prosecutor of the RPR could intervene when the cycle of the two levels of jurisdiction was closed, in other words, only final court decisions could be re-examined by way of supervision.

Thirdly, the right of the General Prosecutor of the RPR through the prism of the provisions of Decree no. 470/1958 became an exclusive right.

Fourthly, the supervisory appeal was not mandatory for the supervisory body, but it could exercise it when it found that the mistakes committed were essential, so that it is necessary to abolish the decision that was the subject of the referral (the bodies of the prosecution, of the Ministry of Justice as well as any interested person could petition the General Prosecutor asking him to exercise his right of supervision).

Fifthly, the final decisions did not enjoy absolute res judicata authority, being considered by the doctrine of the time as an interest cultivated by the „dominant exploiting classes".

Judicial Organization Law no. 58/1968 and Decree no. 27/1973 established a new name, namely that of extraordinary appeal. The extraordinary appeal could be introduced only by the general prosecutor, within 1 year of the decision becoming final, for the essential violation of the law or the manifest groundlessness of the contested decision[7].

Law no. 59/1993 for the amendment of the Civil Procedure Code, the Family Code, the Administrative Litigation Law no. 29/1990, and Law no. 94/1992 regarding the organisation and functioning of the Court of Accounts of Romania reintroduced the appeal in the interest of the law, it being regulated by the provisions of art. 329 Civil Procedure Code.

The Romanian legislator also fluctuated in the post-December period in the formulation of the text of art. 329 of the Code of Civil Procedure, in the sense that it, the text, underwent repeated changes.

In its current form, art. 329 CPC has the following content: *„In order to ensure the uniform interpretation and application of the law by all courts, the general prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, ex officio or at the request the Minister of Justice, the governing board of the High Court of Cassation and Justice, the governing boards of the appeal courts, as well as the People's Advocate have the duty to ask the High Court of Cassation and Justice to rule on legal issues that have been resolved differently by the courts judges".*

The decisions by which referrals are resolved are pronounced by the HCCJ United Sections and are published in the Official Gazette of Romania, Part I.

3. The appeal in the interest of the law - source or source of the right

The solutions are pronounced only in the interest of the law, they have no effect on the judicial decisions examined nor about the parties in those processes. The resolution given to the legal issues tried is mandatory for the courts. In essence, the appeal in the interest of the law has become an extraordinary way of attack designed to ensure the uniform interpretation and application of the law.

According to the legal provisions (art. 471 *et seq.* CPP and art. 516 *et seq.* CPC), the appeal in the interest of the law is not an appeal that has direct effects on the parties involved in a process. The main purpose of the appeal in the interest of the law is to ensure the uniform interpretation and application of substantive and procedural laws throughout the country. Therefore, when an appeal is brought in the interest of law, the supreme court has the right and responsibility to give a clear and uniform interpretation of the law in question. Decisions made following appeals in the interest of the law are important for establishing case law and for ensuring consistency and predictability in the application of the law. We believe that the legal nature of the appeal in the interest of the law does not result only from the criminal and civil procedural provisions that enshrine it. As I have shown, in accordance with the provisions of art. 126 para. (3) of the Constitution „The High

[7] G. Boroi, D. Rădescu, *Codul de Procedură Civilă – comentat şi adnotat*, ALL Publishing House, Bucharest 1994, p. 594.

Court of Cassation and Justice ensures the uniform interpretation and application of the law by the other courts, according to its competence."

The decisions pronounced in the appeal procedure in the interest of the law represent the main way by which the supreme court fulfils the constitutional attribution of ensuring the uniform interpretation and application of the law. Therefore, the appeal in the interest of the law is not only a civil and criminal procedural institution, but, at the same time, it is an institution that has its legal foundation in the constitutional norm mentioned above.

The constitutional nature of the appeal in the interest of the law has two important consequences.

The first consequence refers to the legislator's obligation to regulate in the civil and criminal procedure the legal instrument by which the High Court of Cassation and Justice can fulfil its constitutional attribute of ensuring the uniform interpretation and application of laws by all courts. In this sense, the legislator has two possibilities: the first would be to regulate the exclusive competence of the supreme court to resolve all appeals, and the second, to keep the currently regulated procedure of the appeal in the interest of the law. The constitutional provision contained in art. 126 para. (3) of the Constitution also represents a guarantee of the fundamental law. Given the principle of conformity of all law with constitutional norms, the legislator cannot regulate the material competence of the supreme court without also establishing the procedural instrument by which it ensures the uniform interpretation and application of laws by all courts.

The second consequence refers to the necessity of conformity of the decisions pronounced in this procedure with the constitutional norms. The HCCJ decisions must be strictly limited to the interpretation of the law. The supreme court cannot complete, modify, or abrogate the rules contained in the law. Otherwise, the principle of separation and balance of powers in the state, explicitly enshrined in the provisions of art. 1 para. (4) of the Constitution, because the court would exceed the limits of judicial power and would manifest itself as a legislative authority. The rule of conformity with the constitutional norms also considers the other provisions of the Constitution.

The decisions of the High Court of Cassation and Justice, by which appeals are resolved in the interest of the law, are binding and are published in the Official Gazette of Romania, Part I, being also brought to the attention of the Ministry of Justice. The unified interpretation and application of legal issues is pronounced only in the interest of the law, it has no effect on the court decisions that were pronounced differently in the matter under consideration, nor about the parties in the trial. The appeal procedure in the interest of the law does not resolve the case on its merits. The parties do not participate in judging the appeal in the interest of the law, and the procedure for solving the problem that generated the appeal in the interest of the law does not meet the features of a trial. According to the provisions of art. 471 *et seq.* CPP and art. 516 *et seq.* CPC, the solution given to the legal issues tried is mandatory for the courts. Therefore, according to the provisions of domestic law, the resolution given by the High Court of Cassation and Justice to the legal issues resolved by the decision given in the interest of the law are mandatory to be followed by the courts. The decision pronounced in the resolution of the appeal in the interest of the law is part of the category of *„norms" of domestic law, so it falls under the category of „provisions […] of domestic law*" referred to in art. 148 para. (2) from the Constitution.

The question arises whether the decisions pronounced by the supreme court in this procedure are formal sources of law. Constantly in specialised literature, the notion of the source of law is defined as „the forms of expression of legal norms that are determined by the way they are enacted or sanctioned by the state"[8]. In the light of this opinion, the decisions pronounced by the High Court of Cassation and Justice cannot be considered sources of law because they do not contain legal norms. Moreover, in our legal system, jurisprudence is not a formal source of law. However, the law stipulates the binding nature of these decisions. The courts must comply with the interpretation of the law made by the supreme court, otherwise, a judgment pronounced in violation of the solutions established by the decisions pronounced in the appeal procedure in the interest of the law, being illegal, with all the consequences arising from this. In this context, specialised literature sometimes distinguishes between the sources of law and the sources of law[9]. We appreciate that this discussion in the specialised literature does not make a clear differentiation because the two notions, that of „source" and that of „source", lead to the same finality, namely that the decisions pronounced by HCCJ in appeal in the interest of the law

[8] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, C.H. Beck Publishing House, Bucharest, 2003, vol. I, p. 26.

[9] In the doctrine, jurisprudence is analysed, as a source of administrative law. See in this sense, E.E. Ștefan, *Administrative law Part I.*, IVth edition, Revised and added, Universul Juridic Publishing House, Bucharest, 2023, pp.109-111.

interpreting the analysed normative act with a binding character shapes social relations in the sense of the interpretation offered to that normative act.

4. Case studies

In the light of what has been stated, we propose to study some decisions pronounced on appeal in the interest of the law, which are both novel and of particular importance in the process of interpretation and uniform application of the provisions of the Civil Code, the Code of Civil Procedure as well as the Criminal Code.

a. The governing board of the CA Bucharest notified the High Court of Cassation and Justice with the resolution of the appeal in the interest of the law aimed at the interpretation and application of the provisions of art. 253 para. (1) lit. c) CC and art. 94-point 1 letter h) and k) and art. 95 point 1 CPC, the meaning of establishing the material competence to resolve cases with the object of requests to establish the illegal character of the act that affects non-patrimonial rights, requests based on the provisions of art. 253 para. (1) lit. c) CC, when they are formulated simultaneously with requests based on the provisions of art. 253 para. (4) CC to grant compensation for the non-patrimonial damage caused that does not exceed the value of 200,000 lei inclusive.

The legal provisions subject to interpretation were: art. 253 CC regarding means of defense „(1) The natural person whose non-patrimonial rights have been violated or threatened may at any time ask the court: (...) c) to ascertain the illegal nature of the committed act. , if the disorder it caused survived. (4) Also, the injured person can ask for compensation or patrimonial reparation for the damage, even moral, that was caused to him. him, if the injury is attributable to the author of the prejudicial act. In these cases, the right to action is subject to the limitation period."; Art. 94 CPC, regarding the material competence of the Court „(...) h) requests regarding obligations to do or not to do assessable in money, regardless of its contractual or non-contractual source, except for those given by law in the jurisdiction of other courts; (...) k) any other claims evaluable in money up to 200,000 lei inclusive, regardless of the quality of the parties, professionals or non-professionals" and the provisions of art. 95 CPC regarding the substantive jurisdiction of the court "Courts judge: 1. in the first instance, all requests that are not given by law in the jurisdiction of other courts".

By dec. no. 1/13.03.2023[10], HCCJ decided that in the interpretation and uniform application of the provisions of art. 253 para. (1) lit. c) CC and art. 94-point 1 letter h) and k) and art. 95 point 1 CPC, the tribunal is the materially competent court regarding the settlement of cases with the object of requests to establish the illegal character of the act that affects non-patrimonial rights, requests based on the provisions of art. 253 para. (1) lit. c) CC, when they are formulated simultaneously with requests based on the provisions of art. 253 para. (4) CC to grant compensation for the non-patrimonial damage caused that does not exceed the value of 200,000 lei inclusive.

To rule in this way, the court found that it is necessary to clarify the following aspects with priority:

A first aspect takes into account the relationship between the end of the claim with the object of ascertaining the illegality of the deed, on the one hand, and the award of compensation to cover the non-pecuniary damage caused, on the other hand, *i.e.*, if the claim with the object of ascertaining the illegal nature of the deed that affects a non-patrimonial right, based on the provisions of art. 253 para. (1) lit. c) CC, has the nature of an autonomous claim, distinct from others, whose object is the payment of compensation for moral damages, based on the provisions of art. 253 para. (4) CC or represents only a species of tortious civil liability action regulated by art. 1349 CC, which cannot be dissociated from the compensations requested to repair the damage caused, since this requires, implicitly, the establishment of the existence of the illegal act, which is one of the necessary conditions for incurring tortious civil liability. HCCJ retains the request to establish the illegality of the act committed, in the case of the violation or threat of the non-patrimonial rights of the natural person, based on art. 253 para. (1) lit. c) CC, constitutes a claim distinct from that concerning the obligation of the author of the prejudicial act to grant patrimonial compensation for the non-patrimonial damage caused, based on art. 253 para. (4) CC. The request, based on art. 253 para. (1) lit. c) CC, it cannot be considered a type of tortious civil liability action, since the finding of the illegal character of the act, based on the mentioned legal text, is considered by the legislator to be one of the defense methods provided in favor of the person whose non-patrimonial rights were violated or threatened, while, in the case of tortious civil liability action, the illegal nature of the deed constitutes only one of the cumulative conditions that must be met for the admission of the action,

[10] HCCJ, RIL dec. no. 1/2023, *Competence. Requests regarding the illegal nature of the acts affecting non-patrimonial rights. Moral damages*, published in the Official Gazette of Romania no. 337/21.04.2023.

the aim being to cover the damage caused by the commission of the illegal deed, damage that can be patrimonial or non-patrimonial .

Thus, the supreme court ruled that the request to establish the illegal nature of the act committed, in the case of the violation or threat of the non-patrimonial rights of the natural person, based on art. 253 para. (1) letter c) CC, constituting by itself a reparative measure (of a non-patrimonial nature) for non-patrimonial damages, regulated separately from the other legal means of protecting non-patrimonial rights contained in art. 253 para. (3) and (4) CC, is independent from the request regarding the obligation of the author of the prejudicial act to grant patrimonial compensation for the non-patrimonial damage caused, based on art. 253 para. (4) CC.

The second aspect concerns the hypothesis in which it would be considered that there are two distinct and autonomous heads of request; it is necessary to establish what is the legal nature of the request based on the provisions of art. 253 para. (1) lit. a)-c) CC, respectively if this has the legal nature of a declaratory action (in defense of a non-patrimonial right) which, not being part of the category of actions listed in art. 94 point 1 letter a)-k) CPC to enter the court's settlement competence, will be the jurisdiction of the tribunal, according to art. 95 point 1 CPC, or if it refers, in a broad sense, to obligations to do or not to do, which fall within the jurisdiction of the court, according to art. 94 points 1 lit. h) CPC. Which is the materially competent court when the two heads of claim (establishment of the illegal nature of the act and payment of compensations that do not exceed the value of 200,000 lei inclusive) are formulated simultaneously in the action based on the provisions of art. 253 para. (4) CC, one under discussion, regarding the legal nature of the request based on the provisions of art. 253 para. (1) lit. c) CC, the High Court of Cassation and Justice holds that the action to establish the illegal nature of the deed is a non-patrimonial action (in defense of a non-patrimonial right), which seeks to restore the violated non-patrimonial right, which, not being part of the listed actions category of art. 94 point 1 letter a)-k) CPC, does not fall within the jurisdiction of the court, so it will be within the jurisdiction of the court, as a court of common law, according to art. 95 point 1 CPC, which provides that the courts judge in the first instance all claims that are not given by law to the jurisdiction of other courts.

Considering the analysis carried out, by dec. no. 1/2023, HCCJ admitted the appeal in the interest of the law formulated by the Board of Directors of the CA Bucharest and established that in the interpretation and uniform application of the provisions of art. 253 para. (1) lit. c) CC and art. 94-point 1 letter h) and k) and art. 95 point 1 CPC, the tribunal is the materially competent court regarding the resolution of cases with the object of requests to establish the illegal nature of the act that affects non-patrimonial rights, requests based on the provisions of art. 253 para. (1) lit. c) CC, when they are formulated simultaneously with requests based on the provisions of art. 253 para. (4) CC to grant compensation for the non-patrimonial damage caused that does not exceed the value of 200,000 lei inclusive.

b. The Prosecutor General of the Public Prosecutor's Office attached to the High Court of Cassation and Justice promoted an appeal in the interest of the law regarding the following legal issue if the act of theft committed by using an improvised device that blocks the activation and centralised closing system of the doors of a motor vehicle by jamming the signal related to this system meets the typical conditions of the crime of theft provided by art 228 para. (1) CP or those of the crime of qualified theft committed by using a false key provided by art 228 para. (1) CP related to art 229 para. (1) letter d) CP.

In a first jurisprudential orientation, the courts appreciated the circumstantial element of aggravation provided by art. 229 para. (1) letter d) CP with reference to the unauthorised use of a false key in the event of a theft by using a device that blocks the activity of the centralised closing of the doors of a motor vehicle by jamming the signal related to this system. In support of this opinion, it has been shown that according to consistent doctrine and practice a false key is an unauthorised multiplied counterfeit key or any device that can act on a locking mechanism without destroying it used by the active subject to open the locking mechanism interposed between the active subject and the stolen property. Or, in relation to the factual situation described as a rule in the referral act consisting in the fact that the defendant blocked the operation of the signal emitted by the remote control of the car, the central locking being thus operated and taking into account the principle of strict interpretation of criminal law, the court considered that the retention of the aggravating circumstantial element would constitute an application by analogy to the defendant's disadvantage, another argument is that the improvised remote control device used to jam the signal related to the central locking system of passenger cars having the effect of blocking the activation of this system which no longer goes from the open position to the closed position does not fall under the notion of a false key in the sense of the criminal law so that the

detention instead of the crime of simple theft of the crime of qualified theft considering that the provisions of art. 229 para. (1) letter d) CP violates the principle of the legality of incrimination provided by art. 1 para. (1) CP.

A second jurisprudential orientation is in the sense that the courts retained the aggravating circumstantial element provided by the provisions of art. 229 para. (1) letter d) CP considering that the specially made device for blocking the activation of the central locking system constitutes a false key within the meaning of the criminal law.

In justifying this opinion, the courts have shown that the action of the defendant of aces up and the goods belonging to the injured persons inside their vehicles, using in this sense specially complex ionic devices of the remote control type to jam the command of the centralised closing signal of a vehicle, achieves the material element of the crime of qualified theft by using a false key provided by art 228 para. (1) related to art. 229 para. (1) letter d) CP. In a single ruling, the court showed that the electronic device used to jam the electronic key lock of the injured person's vehicle constitutes both a means of burglary in relation to the electronic vehicle door locking system and a false key within the meaning of the aggravating circumstance provided for by art. 229 para. (1) letter d) CP. In support of the expressed opinion, it was highlighted that there is no legal definition of the notion of a false key, but the doctrine was invoked which showed that by this is meant the false key multiplied by unauthorised or any other device that can be used to act on a mechanism of closing without destroying it, damaging it, or rendering it unusable.[11]

In another opinion, it was shown that by false key is meant a counterfeit fake key or a passepartout, *i.e.*, speracle or any tool with which the opening mechanism of the device can work without being destroyed or degraded.[12]

It is also shown that the aggravation exists no matter how rudimentary the key used is[13], because the legislator understood to punish more severely the theft committed by using a false key, taking into account not the skill of making even a false one, nor its similarity to the real one, but the fact that the lock intended to ensure increased protection of the locked goods was violated[14]. Another author[15] shows that in relation to the new technological realities and according to an evolutionary interpretation, keys in the meaning of the aggravating circumstance and access cards in a building, the access code of a person's fingerprint or his voice can be keys.

An act of theft committed by blocking the activation of the locking system is substantially different from an act of simple theft because it involves the perpetrator also committing an action other than that of taking by which he aims to make the centralised locking system inoperable and thus to- and facilitate access to good circumstances that give the act an increased gravity and that justify its inclusion in a more serious crime. In relation to the purpose pursued by the perpetrator by using the jamming device and the concrete way in which it acts on the centralised locking system by retaining art. 229 para. (1) letter d) CP regarding the act of theft committed by using an improvised device that blocks the activation of the central locking system of the doors of a motor vehicle by jamming the signal related to this system, the extension of the norm of incrimination by analogy to another act is not carried out c the application of the norm to a new way of committing the criminal act.

This interpretation is in accordance with the substance of the crime and the text of the legal provision because it updates the content of the rule and applies it to another situation which is nothing more than a new form of existence of the aggravating circumstantial element provided by art. 229 para. (1) letter d) CP.

Taking into account the aspects set out above, the High Court of Cassation and Justice pursuant to art. 471 related to art. 474 CPP, by dec. no. 7/29.03.2023[16], admitted the appeal in the interest of the law filed by the general prosecutor of the prosecutor's office attached to the High Court of Cassation and Justice and, in the interpretation and application of the provisions of art. 228 para. (1) related to art. 229 para. (1) letter d) final sentence CP will establish that the act of theft committed by using an improvised device that blocks the activation of the system of centralised closing of the doors of a motor vehicle by jamming the signal related to this system

[11] M. Udroiu, *Drept penal, Partea specială*, 6th ed., C.H. Beck Publishing House, Bucharest, p. 287.

[12] T. Vasiliu, *Codul penal comentat şi adnotat, Partea specială*, vol. I, Scientific and Encyclopedic Publishing House, Bucharest, 1975, p. 209.

[13] V. Cioclei, *Drept penal, Partea specială I*, C.H. Beck Publishing House, Bucharest, 2021, p. 274.

[14] V. Papadopol, M. Popovici, *Tribunalul Suprem Secția penală, Decizia nr. 3229/1970 - Repertoriu alfabetic de practică judiciară în materie penală 1969/1975*, p. 182.

[15] S. Bogdan, D.A. Șerban, *Drept penal. Partea special*, Universul Juridic Publishing House, Bucharest, 2020, p. 48.

[16] HCCJ RIL dec. no. 7/2023 regarding the interpretation and uniform application of the provisions of art. 228 para. (1) related to art. 229 para. (1) letter d) the final sentence CP, published in Official Gazette of Romania no. 559/21.06.2023.

meets the typical conditions of the crime of qualified theft committed by using a false key provided by art. 228 para. (1) CP referred to art. 229 para. (1) letter d) final sentence of the same code.

5. Conclusions

As decided by CCR dec. no. 1014/2007[17]: «By ruling on an appeal in the interest of the law, the supreme court contributes to ensuring the supremacy of the Constitution and the laws, through their uniform interpretation and application throughout the country, a fact likely to materialise another fundamental principle, provided in art. 16 of the Constitution, regarding the equal rights of citizens. That is why it is inadmissible for people in equal legal situations to be subject to different legal regulations. (...) The Court considers that the institution of the appeal in the interest of the law gives the judges of the supreme court the right to give a certain interpretation, thus unifying the differences in the interpretation and application of the same legal text by the lower courts. Such interpretive, constant and unitary solutions, which do not concern certain parties and do not have an effect on previously pronounced solutions, which entered the power of *res judicata*, are invoked in the doctrine as „judicial precedents", being considered by the legal literature „secondary sources of right" or „interpretive sources" (...)».

The statement that decisions in the interest of the law are true sources of law, due to their mandatory and general characteristics, is one commonly accepted in the theory of law. Decisions in the interest of the law are issued by judicial or administrative authorities and are considered binding on citizens and other authorities. They set standards and rules that must be respected and applied by all those affected. This obligation derives from the legal authority of the institutions that issue them and from the fact that they are intended to ensure the correct and uniform application of the law. Decisions in the interest of law are formulated in a general manner so that they apply to a wide range of similar situations. They are not specific to an individual case but are designed to provide guidelines and rules that apply generally. This generality is important to ensure predictability and consistency in the interpretation and application of the law. Therefore, because decisions in the interest of law fulfil these two characteristics - bindingness and generality - they are considered genuine sources of law.

The decisions of the supreme court may contain interpretations and clarifications of the law that are not normative acts in themselves but are considered sources of law. These decisions can provide important guidance and understandings of the law, which are subsequently applied in legal practice. The appeal in the interest of law does not create new law but explains the meaning and application of existing laws[18]. Thus, even if supreme court decisions are not considered normative acts per se, they may provide binding interpretations of the law or interpretive norms that are binding on lower courts and other legal authorities. Therefore, they are considered as important sources of law, which contribute to the formation and development of law in each jurisprudence.

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[18] E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 318.

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LEGAL RESPONSIBILITY OF THE LAWYER. GENERAL ASPECTS REGARDING THE RESPONSIBILITY FOR LEGAL REPRESENTATION AND ASSISTANCE

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Abstract

In this article, we aim to present essential aspects regarding the legal responsibility of the lawyer, with a particular focus on the activity of legal representation and assistance, without claiming to comprehensively address the chosen topic. According to art. 3 para. (1) of Law no. 51/1995 on the organization and exercise of the lawyer profession, the lawyer's activity is carried out through: a) legal consultations and requests; b) legal assistance and representation before the courts of law, the bodies of criminal investigation, authorities with jurisdictional attributions, public notaries, bailiffs, public administration bodies, institutions, as well as other legal entities, in accordance with the law; c) drafting legal documents, certifying the identity of the parties, the content, and the date of the documents submitted for authentication; d) assisting and representing natural or legal persons before other public authorities with the possibility of certifying the identity of the parties, the content, and the date of the concluded acts; e) defending and representing, with specific legal means, the legitimate rights and interests of natural and legal persons in their relations with public authorities, institutions, and any Romanian or foreign person; f) mediation activities; g) fiduciary activities carried out under the conditions of the Civil Code; h) temporary establishment of the registered office for companies at the lawyer's professional office and registering them, on behalf and for the account of the client, the interested parties, the shareholders, or the company shares thus registered; i) fiduciary activities and activities of temporary establishment of the registered office for companies at the lawyer's professional office and registering them, on behalf and for the account of the client, the interested parties, the shareholders, or the company shares thus registered can be carried out under a new legal assistance contract; j) special guardianship activities according to the law and the Statute of the lawyer profession; k) any means and methods for exercising the right of defense, in accordance with the law.

Regarding the activity of legal representation and assistance, the lawyer shall not be held criminally liable for oral or written statements made, in proper form, before the courts of law, bodies of criminal investigation, or other administrative bodies of jurisdiction, nor for consultations provided to litigants or for formulating the defense in that case, or for statements made during verbal consultations or written consultations provided to clients, provided that they are made in compliance with the rules of professional ethics. However, during their activity, the lawyer may be held criminally, civilly, disciplinarily, or administratively liable, depending on the nature of the unlawful act committed, which we will assess to what extent by referring to the legal provisions mentioned above. Therefore, through this article, we aim to provide, in a general manner, information regarding the legal responsibility of the lawyer that may arise in the exercise of legal representation and assistance activity.

Keywords: *lawyer, law, legal responsibility of the lawyer, criminal liability, civil liability, disciplinary liability.*

1. Introduction

Art. 1 of the Romanian Constitution[1] provides that the Romanian state is a state of law, democratic and social, organised according to the principle of separation and balance of powers - legislative, executive, and judicial - within the framework of constitutional democracy. The judicial power is composed of the High Court of Cassation and Justice and all other courts established by law. In the administration of justice, judges, prosecutors, lawyers, bailiffs, public notaries, experts, witnesses, as well as litigating parties play important roles.

The lawyer is an essential partner of justice in Romania, contributing to ensuring a legal system that is fair, equitable, and transparent, where the fundamental rights and freedoms of citizens are protected and respected. Law no. 51/1995 regarding the organisation and exercise of the lawyer profession in Romania regulates the activities of lawyers in Romania, as well as the conditions under which they can carry out their activity.

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[1] From a historical standpoint, states have been concerned with incorporating the issue of human action responsibility into both Constitutions and common acts using various terminologies. (See E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, p. 12).

Thus, Law no. 51/1995 establishes the ethical principles and professional rules that lawyers must respect in the exercise of their profession, including admission procedures into the profession, the regime of incompatibilities and prohibitions in the exercise of the lawyer profession, the rights and obligations of lawyers, the organisation and functioning of the Bar Associations in Romania, the role and attributions of the UNBR, the rules regarding advertising in the exercise of the lawyer profession, disciplinary sanctions for violations, and so on.

The principles of the legal profession represent the values upon which the lawyer bases and defends both in the exercise of the profession and in social life, and in relation to which any ethical norm and behavior in or outside of the profession are interpreted.

In doctrine, it has been established that professional ethics entail „standards and rules that guide professional behavior and entail moral rights and obligations of individuals involved in certain professions".[2]

Regarding the legal profession, the principles governing the exercise of the profession are the principle of legality, the principle of freedom, the principle of independence, the principle of autonomy and decentralisation, and the principle of professional secrecy. [3]

Additionally, art. 8 para. (2) of the Romanian Lawyer's Code of Ethics outlines principles governing the exercise of the profession: the principle of freedom and independence of the lawyer, the principle of legality and respect for the rule of law, the principle of professional secrecy, the principle of avoiding conflicts of interest, the principle of dignity, honor, and probity, the principle of professionalism and loyalty to the client, the principle of professional competence, the principle of respect for colleagues and all individuals with whom the lawyer enters into professional relationships, the principle of autonomy and self-regulation of the legal profession, and the principle of loyalty to the legal profession.

In relation to the topic we aim to address in this article, namely the legal responsibility of the lawyer with particular regard to the activity of legal representation and assistance, we note several principles with a direct influence on what constitutes the activity of legal assistance and representation of natural or legal persons of public or private law before the courts, bodies of criminal investigation, authorities with jurisdictional attributions, public notaries, bailiffs, public administration bodies and institutions, as well as other legal entities, in accordance with the law.

Thus, in the activity of legal assistance and representation, with regard to the analysis of the legal responsibility that could be attributed to the lawyer, the principles that become particularly relevant are: the principle of freedom and independence of the lawyer, the principle of legality and respect for the rule of law, the principle of avoiding conflicts of interest, the principle of dignity, honor, and integrity, the principle of professionalism and loyalty to the client, the principle of professional competence, and the principle of respecting colleagues and all individuals with whom the lawyer enters into professional relationships.

2. Content

Freedom and independence in the legal profession are principles under which the lawyer advocates and defends the rights, freedoms, and legitimate interests of clients in accordance with Law no. 51/1995 regarding the organisation and exercise of the lawyer profession and the Statute of the Lawyer Profession. These principles define the professional status of the lawyer and ensure their professional activity.

Moreover, „the freedom and independence of the lawyer allow them to interpret and request the application of the law in a specific case according to their own professional belief, without seeking or fearing to please or displease the judicial, executive, legislative, political, hierarchical, economic, media, or public opinion".[4]

By exercising the rights conferred upon them by Law no. 51/1995 regarding the organisation and exercise of the lawyer profession and the Statute of the Lawyer Profession, the lawyer fulfils their duties and obligations towards the client in relation to the authorities and institutions with which they assist or represent the client, towards their profession in general and towards each colleague in particular, as well as towards the public.

[2] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, 16th ed., vol. I, C.H. Beck Publishing House, Bucharest, 2023, p. 12.
[3] See art. 1 of the Lawyer Profession Statute.
[4] Gh. Florea, *Libertatea și independența avocatului în exercitarea profesiei. Între aparență și realitate*, article published on 25.10.2021, *https://www.juridice.ro/essentials/5014/libertatea-si-independenta-avocatului-in-exercitarea-profesiei-intre-aparenta-si-realitate*, last consulted on 25.03.2024.

The lawyer has a duty to fulfil conscientiously, with honor and professional integrity, their obligations towards the client, in relations with individuals, public or private authorities and institutions, other legal entities, other lawyers, as well as in their relationship with the public.

The lawyer has the right to assist and represent individuals and legal entities before the courts of law and other judicial bodies, law enforcement authorities, public authorities, and institutions, as well as before other individuals or legal entities, who have the obligation to allow and ensure the lawyer's unhindered conduct of their activities, in accordance with the law.

For the purpose of providing legal assistance and representation to the client, under the legal assistance contract concluded, the lawyer may provide legal advice, draft legal documents, represent the client, based on the granted mandate, before judicial or non-judicial bodies, law enforcement agencies, public institutions and authorities, as well as before legal or natural persons, while respecting all participants in a civilised manner.

The lawyer's tools of the trade include not only speaking but also writing. More precisely, they first write, drafting requests, actions, responses, counterclaims, third-party notices, requests for evidence, etc., and only then speak. They must write well so that the judge can easily understand the matter at hand.[5]

Advising and representing a client obliges the lawyer to view the respective case from their own perspective and to provide disinterested advice to the client.

Advising the client involves not only the exposition of legal provisions but also considers the moral, economic, social, and political consequences that may be relevant in the given situation.

Assisting and representing the client encompass all acts, means, and operations permitted by law and necessary for the protection and defense of the client's interests.

In the event they engage to assist and/or represent a client in a legal procedure, the lawyer assumes obligations of diligence. The lawyer must assist and represent the client with professional competence, utilising appropriate legal knowledge, specific practical skills, and reasonable preparation necessary for the concrete assistance or representation of the client.

Assisting and representing the client require appropriate professional diligence, thorough preparation of cases, files, and projects, with promptness according to the nature of the case, experience, and professional belief.

Thus, „to write well, the lawyer must research, study, and then make connections, establish the factual situation, identify applicable legal provisions, determine what evidence is necessary to support the claim they are making, the arguments that can be invoked, their strength, and the order in which they should be presented. Then they must deal with drafting, the words used, legal terminology, style. Legal writing is ultimately an art. It must be fluent, expressive, and engaging."[6]

Moreover, „the system of selection operations is superior to that of establishing arguments, as the latter has a strong note of spontaneous improvisation, through a supposition characterised by impression, imbued with the subjectivity of basic affective temptation and passionate preferences. Establishing aims to form a primary mass of possible arguments, while selection aims to distinguish and retain only what is the actual argument and, at the same time, admissible from a legal perspective and necessary from a logical-formal point of view for the alternative chosen by the subject".[7]

Furthermore, we point out that "the lawyer must not forget that he is an auxiliary of justice, and for this purpose, he must make himself clearly understood, express himself in appropriate terms, avoid vague or equivocal formulas, eliminate from the expression the incidents that burden the sentence, rephrase in a different form what he thought was not well understood."[8]

However, the lawyer does not incur criminal liability for the oral or written statements made, properly, before the courts, the prosecutorial bodies, or other administrative jurisdictional bodies, nor if they are related to the consultations provided to litigants or with the formulation of the defense in that case or for the statements made during verbal or written consultations provided to clients, if they are made in compliance with the rules of professional ethics.

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[5] A. Țiclea, *Oratorie și procese celebre*, 2nd ed., revised and expanded, Universul Juridic Publishing House, Bucharest, 2023, p. 439.

[6] *Idem*, p. 439.

[7] Gh. Mihai, *Elemente constructive de argumentare juridică*, Academy Publishing House of the Socialist Republic of Romania, Bucharest, 1982, p. 116.

[8] Y. Eminescu, *Pledoarii celebre (Antologie de oratorie judiciară),* Academy Publishing House of the Socialist Republic of Romania, Bucharest, 1973, p. 18.

The lawyer has the obligation to ensure professional liability, pursuant to art. 42 of Law no. 51/1995 regarding the organisation and exercise of the lawyer's profession.

Professional liability covers the actual damages suffered by the client resulting from the exercise of the profession without respecting the provisions of Law no. 51/1995, the Statute of the lawyer's profession, and the deontological rules.

According to art. 38 para. (4) of the Statute of the lawyer's profession, the parties may establish the limits of the lawyer's liability by contract. Clauses totally exempting professional liability are considered unwritten.

The lawyer may be civilly liable for the damages caused to his client in the exercise of the lawyer's profession for acts such as negligence or professional error in the exercise of the profession, non-performance or defective performance of contractual obligations assumed towards the client, failure to respect the confidentiality of information received from the client, conflict of interest, etc. The lawyer has the obligation to ensure professional liability.

Professional liability covers the actual damages suffered by the client resulting from the exercise of the profession without respecting the provisions of Law no. 51/1995 regarding the organisation and exercise of the lawyer's profession, the Statute of the lawyer's profession, and the deontological rules.

In practice, the civil liability of the lawyer is contractual, occurring in the execution of a legal assistance contract, for acts such as: missing the procedural deadline for filing an action or exercising a remedy, failure to respect the conflict of interest, failure to respect the confidentiality clause, ignorance of the legal provision or insufficient legal research, providing a consultation that contravenes the provisions of the law, etc., without excluding the lawyer's tort civil liability for unlawful acts committed outside the sphere of exercising the profession of lawyer.

As an example, we mention the retention in a lawsuit of the considerations according to which the lawyer showed negligence in the execution of the legal assistance contract, negligence resulting from the erroneous substantiation of the lawsuit on the principle of undue payment and on tort liability when contractual civil liability was applicable in the case file.[9]

The lawyer may be held disciplinarily liable for acts provided and incriminated as disciplinary offenses or serious disciplinary offenses, according to the applicable normative acts governing the organisation and exercise of the legal profession. Thus, the lawyer is disciplinarily liable for failure to comply with the provisions of Law no. 51/1995 regarding the organisation and exercise of the legal profession or the Statute of the legal profession, for failure to comply with mandatory decisions adopted by the governing bodies of the bar association or the UNBR, as well as for any acts committed in connection with the profession or outside it, which are likely to prejudice the honor and prestige of the profession, the body of lawyers, or the institution, according to art. 85 of Law no. 51/1995.

By way of example, we note that the lawyer is obligated to thoroughly study the cases entrusted to them, whether retained or appointed ex officio, to appear at each hearing before the courts of law or the prosecution authorities or other institutions, according to the mandate entrusted to them, to demonstrate conscientiousness and professional integrity, to plead with dignity before the judges and the parties to the proceedings, to submit written conclusions or session notes whenever the nature or difficulty of the case requires it or the court orders it, the attributable failure to perform these professional duties constitutes a disciplinary offense, respectively, the unjustified absence of the lawyer who is a member of the governing bodies of the profession and has the obligation to participate in meetings constitutes a serious disciplinary offense.[10]

Expressions of legal opinions, exercise of rights, fulfilment of obligations provided by law, and the use of legal means for the preparation and effective implementation of the defense of the freedoms, rights, and legitimate interests of their clients do not constitute disciplinary offenses and do not give rise to other forms of legal liability for the lawyer.

The lawyer is not disciplinarily liable for oral or written submissions made before the courts of law, other judicial bodies, prosecution authorities, or other authorities if they are made in accordance with the rules of professional ethics.[11]

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[9] See also *https://www.legal-land.ro/raspunderea-avocatului-pentru-invocarea-unui-temei-juridic-eronat/*, last consulted on 25.03.2024.

[10] See art. 30, art. 41^1, art. 43, art. 53, art. 54 of the Statute of the Legal Profession.

[11] See art. 7 of the Statute of the Legal Profession.

Administratively, the lawyer may be held responsible for non-attendance if they have not ensured their substitution by another lawyer, representative, or assisting party, or for failure to comply with the duties established by law or by the court if such conduct causes adjournment of the trial, punishable by judicial fine ranging from 50 lei to 700 lei, according to art. 187 para. (1) point 2 letter c) CPC.

The lawyer may be criminally liable for committing acts provided and incriminated by criminal law in the exercise of the legal profession, as a qualified active subject of the committed offense.

However, it is noted that the lawyer may commit unlawful acts provided and incriminated by criminal law outside the exercise of the legal profession, in which case they shall be liable for them like any other person.

The criminal liability of the lawyer involves certain particularities that are noticeable from the stage of criminal prosecution, namely, criminal prosecution is carried out, obligatorily, by the prosecutor in the case of offenses for which the jurisdiction in the first instance belongs to the High Court of Cassation and Justice or the court of appeal.[12]

Moreover, offenses committed by lawyers, notaries public, judicial executors, financial controllers of the Court of Auditors, as well as external public authors are settled in the first instance by the court of appeal.[13]

Furthermore, in the exercise of the profession, the lawyer is an indispensable partner of justice, protected by law, without being assimilated to a public official, except in situations where they certify the identity of the parties, the content, or the date of a document.

According to art. 175 para. (2) CP, a public official, for the purposes of criminal law, is considered to be a person who performs a public service for which they have been invested by public authorities or who is subject to their control or supervision regarding the performance of that public service.

Therefore, from the combination of the above, it follows that the lawyer is not a public official, but as an exception, they are assimilated to a public official in situations where they certify the identity of the parties, the content, or the date of a document.

In doctrine, it has been established that, „if in the period prior to 1989 the lawyer was assimilated by case law decisions with the category of officials, at present there is no doubt that the lawyer is a freelance professional".[14]

Art. 284 CP provides that the act of a lawyer or representative of a person who, in fraudulent collusion with a person having conflicting interests in the same case, within a judicial or notarial procedure, harms the interests of the client or the represented person is punished with imprisonment from three months to one year or a fine. Moreover, the same penalty is imposed for the fraudulent agreement between a lawyer or representative of a person and a third party interested in the decision to be rendered in the case, with the aim of harming the interests of the client or the represented person.

3. Conclusions

In a society[15] founded on the values of democracy and the rule of law, the lawyer plays an essential role. The lawyer is indispensable to both justice and the litigants and is tasked with defending their rights and interests. The lawyer is both the advisor and advocate for their client.

In legal doctrine, *the legal profession is considered the archetype of liberal professions*[16], thus, in the activity of legal representation and assistance, the lawyer must benefit from all rights and guarantees recognized by the current normative acts.

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- The Constitution of Romania;

[12] See art. 56 CPP.

[13] See art. 38 CPP.

[14] L. Dănilă, *Organizarea și exercitarea profesiei de avocat,* 2nd ed., C.H. Beck Publishing House, Bucharest, 2008, p. 13.

[15] Human society is based on a diversity of individuals, grouped according to various criteria into various forms and social structures. Rarely is the social body fully homogeneous; most often it is composite, characterised by pluralism and sometimes even fragmentation. (See I. Muraru, E.S. Tănăsescu, *op. cit*., p. 2.

[16] Al. Țiclea, *op. cit.,* p. 430.

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EXCEEDING THE BUDGET DEFICIT AND ADOPTING MEASURES FOR DIFFERENT RECIPIENTS WITHOUT TAKING INTO ACCOUNT THE EFFECTS THEY MAY GENERATE OVER TIME

Beatrice NICULAE[*]

Abstract

With this article, we propose to analyse the way in which the implementation of the measures to reduce the budget deficit was decided in Romania. Thus, we are particularly concerned with the provisions of Law no. 296/2023 on some fiscal-budgetary measures to ensure Romania's long-term financial sustainability, a normative act that at first glance positions itself correctly towards its recipients, but on closer reading, has the potential to generate negative effects, at least with regard to economic operators with state capital that can be considered profitable. We will analyse, for example, the bans imposed, in relation to their generality, without taking into account the long-term effects, and here we have in mind the fluctuation and ageing of staff, but also the lack of any means of encouraging production. However, as long as employees are aware that the company has made a profit, if it is not reflected at the salary level (bonuses, meal vouchers), even though this has happened in previous years, they will become dissatisfied, with the direct consequence being a drop in productivity and, implicitly, in the current year's profit. That is why, having analysed the above-mentioned normative act, we have come to the conclusion that it needs to be amended, at least with regard to some measures, especially those related to the granting of bonuses at salary level. We admit that measures to reduce the budget deficit are necessary, but this cannot be achieved by imposing bans that apply to different categories of recipients, without taking into account possible, well-justified exceptions. If the legislation does not change, surely memoranda will be formulated regarding the exemption of the economic operators concerned from the total/partial application, as the case may be, of the provisions of Law no. 296/2023.

Keywords: *deficit, budget, economic operators, reduction measures, state capital.*

1. Introduction

As it is already well known, Romania has exceeded the budget deficit, adopting during 2023 a series of normative acts, which aim to reduce the budget deficit and, implicitly, to avoid the negative consequences that may occur[1]. One such example is Law no. 296/2023 on some fiscal-budgetary measures to ensure Romania's long-term financial sustainability[2].

The adoption of legislation aimed at reducing the budget deficit in Romania has included a number of measures, but without differentiating between recipients who produce and make a profit and those who typically make a loss and are unable to generate sufficient revenue to sustain their activity. This approach has led to inequalities, as even profitable recipients have been affected by measures that can make their work more difficult, and their staff have been the most affected.

For example, some cost-cutting measures have put pressure on profitable businesses, affecting their ability to maintain their level of activity or invest in development. At the same time, these measures have also hit businesses that are consistently making losses and need support to stay in business.

In addition, the lack of appropriate differentiation between different categories of recipients can accentuate social and economic inequalities, amplifying the divisions between those who have and those who do not have access to the resources needed to maintain their activity or improve their financial situation.

It is therefore essential that any legislative measures adopted to reduce the budget deficit are equitable and take into account the particularities and needs of different target groups, so as to minimise the negative impact on the most vulnerable or on economic activities important for the sustainable development of the country.

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[1] Such as, for example, the risk of losing European funds.

[2] Published in the Official Gazette of Romania no. 977/27.10.2023, entering into force on 30.10.2023.

It is true that Law no. 296/2023 represents an imperative step, at least by simply reading the explanatory memorandum, namely: *„as regards budgetary policy, the excessive deficit procedure (...) has been triggered for Romania (...) as the deficit (...) exceeded the threshold set by European regulations of 3% of GDP in 2019*"[3].

However, reading art. XXXII (1), (2), art. XL (1), (2), art. XLI (1), art. XLII (1), (2), (3), at first glance these seem to be welcomed measures in the public sector, but we should not forget that there are also state-owned economic operators that are profitable, but will run into the same regulatory reality. One cannot equate a local public authority, whose aim is to meet the needs of the municipality in question, which is usually not financially sustainable, with an economic operator in the defence industry, for example, which ended 2023 on profit. Also, not to be excluded are economic operators who, although they ended 2023 with a profit, in one of the previous years have an unrecovered loss, well below the level of the profit made.

2. Analysis of the relevant articles of Law no. 296/2023

We will analyse each of the articles mentioned, to see if they can really be considered beneficial in the true sense of the word or if they have the potential to undergo a series of modifications, as follows:

2.1. Art. XXXII para. (1), (2) - Law no. 296/2023

„(1) Vacancies existing in the organisational structures of economic operators at the date of entry into force of the provisions of this Law, for which the procedures for filling them have not been triggered, shall be filled by competition or according to the methodology existing at the level of economic operators on the basis of the decision of the board of directors, within the maximum limit of 7.5% of the vacancies existing at the end of 2023.

(2) The remaining vacancies existing on the date of entry into force of this Law after the application of the provisions of paragraph (1) shall be abolished and may not be re-established for a period of 6 months from the date of entry into force of this Law".

This provision is a perfect example of the need to amend Law no. 296/2023. Thus, as the text of the law itself suggests, the economic operators to whom it is addressed, *i.e.*, those with state capital, may have methodologies established at their level, regarding the method of employing staff. Unlike public institutions and authorities, where the organisation of a competition or an examination involves a series of steps that must be strictly followed, the procedures being carried out over a long period of time, an economic operator has a wider and faster range at hand, precisely because the provisions of the Administrative Code do not apply to it[4].

Consequently, excluding the speed of hiring that an economic operator can benefit from, it is imperative to bring into question the fact that the latter usually has a production activity, such as, for example, the subsidiaries of the National Company ROMARM S.A., being *„the main producer and direct exporter of military products in Romania (...) is the main supplier of military equipment, ammunition and maintenance services in Romania*"[5]. Note that the scope of activity of this economic operator is quite narrow and in need of specialised staff or that it can specialise later, depending on its needs.

By imposing a ban of this nature on employment, for example in view of the ageing of staff and staff fluctuation, the long-term effects will certainly be seen, in that the whole company, together with its subsidiaries, will suffer, through a reduction in production and, implicitly, in the related profits. In addition, the legal article under review contradicts GD no. 134/2024[6] on the approval of the maximum average number of personnel for the year 2024 for economic operators in the national defence industry, carrying out activities according to the provisions of art. 24 of Law no. 232/2016 on the national defence industry[7].

[3] According to the Explanatory Memorandum of Law no. 296/2023, *https://www.cdep.ro/proiecte/2023/500/40/6/em546.pdf*, last consulted on 10.03.2024.

[4] GEO no. 57/2019 on the Administrative Code, published in the Official Gazette of Romania no. 555/05.07.2019, with subsequent amendments and additions.

[5] According to the official website of the National Company ROMARM S.A., *https://romarm.ro/informatii-despre-companie/*, last consulted on 11.03.2024.

[6] Published in the Official Gazette of Romania no. 140/19.02.2024.

[7] Published in the Official Gazette of Romania no. 972/05.12.2016, with subsequent amendments and additions.

Thus, although reference is made to the strategic importance of the national defence industry[8], but also to the difficulties in filling jobs, in relation to the niche skills and security clearances required[9], at the same time there is Law no. 296/2023 which makes no differentiation or exception for this industry. It is well known that the personnel in this industry is getting older every day, and by applying art. XXXII para. (1), (2) of Law no. 296/2023, in the long term all the effects will be felt at production level. Thus, a subsidiary of ROMARM, which is profitable at the moment, may in the future, due to a lack of staff, have to either refuse orders, delegate the orders in question to other subsidiaries, or take them over, at the risk of having to pay not inconsiderable late payment penalties if it cannot cope.

2.2. Art. XL para. (1), (2) - Law no. 296/2023

„(1) Expenditure on food entitlements/feeding allowances/meal vouchers/feeding allowances, irrespective of their designation, established in accordance with legal regulations or collective labour agreements, may not exceed annually the equivalent of two gross minimum wages per country/year/person valid on 1 January 2019, updated with the consumer price index communicated by the National Institute of Statistics. These rights are updated from January 2025.

(2) Expenditure on holiday vouchers or other entitlements granted in accordance with legal regulations or collective labour contracts may not exceed annually, in the period from 1 January 2024 to 31 December 2026, the equivalent of 1,600 lei/year/person".

Again, we just read an article that imposes restrictions on the bonuses that benefit employees, without making any distinction between public institutions and authorities that do not produce, respectively economic operators whose main activity is the production of weapons. The more so, as the economic operator has made a profit, imposing such a measure will only lead to the demoralisation of staff and possibly to a migration of employees to the private sector.

2.3. Art. XLI para. (1) - Law no. 296/2023

„(1) From the date of entry into force of this Law, economic operators, including their subsidiaries, shall be prohibited from granting awards, bonuses and other similar rights of a salary nature, if they have recorded unrecovered book losses from previous years and/or record book losses in the current year".

The difficulty with this section of the law is that it does not refer to a specific accounting loss. Thus, it is perfectly possible that the economic operator to whom the act applies will close the year 2023 with a considerable profit, but will have a loss from a previous year, not yet recovered. Note that the notion of accounting loss, as used by the law, does not have a specific definition, and can be anywhere between 1 RON and 10.000 RON. Also, the reasons for which the accounting loss was not recovered are not taken into consideration, as described by this particular law, although there are quite a few cases in which the recovery of the loss is impossible. We are referring here in particular to situations where the debtor of an economic operator has gone bankrupt and the latter has filed a claim, but the debtor's assets have covered the debts guaranteed by the bank, for example. In the case of a debtor who is a natural person, this could be a former employee who has retired and has not repaid certain salary-related rights received unduly.

Thus, whether the debtor has died without heirs or whether we are simply talking about a criminal or tortious act of a debtor, the latter not having assets in his name that can be enforced, the accounting loss will still be unrecovered. Although it is impossible to recover the accounting loss in the situations described above, an economic operator who has done everything possible will be punished to the same extent as another economic operator who has not taken any steps to recover the loss. However, such an approach cannot be considered fair from a social point of view, especially as the article of the law refers to rights of a salary nature which may include, for example: meal vouchers, social expenses[10] (funeral allowances or bonuses for special

[8] See the content of the Explanatory Note to GD no. 134/2024, *https://gov.ro/ro/print?modul=subpagina&link=nota-de-fundamentare-hg-nr-134-16-02-2024*, last consulted on 12.03.2024.

[9] L. Gheorghe, *Industria de apărare din UE și SUA se confruntă cu un mare deficit al forței de muncă*, *https://cursdeguvernare.ro/industria-de-aparare-din-ue-si-sua-se-confrunta-cu-un-mare-deficit-al-fortei-de-munca.html*, last consulted on 12.03.2024.

[10] Art. 25 of Law no. 227/2015 on the Fiscal Code, published in the Official Gazette of Romania no. 688/10.09.2015, as subsequently amended and supplemented, lists social expenses, some of which are: expenses representing meal vouchers and holiday vouchers granted by employers, according to the law; expenses representing: gifts in cash or in kind, including gift vouchers given to employees and their minor

events in the employee's life - marriage, birth of a child, etc.), statutory holiday bonuses. Nor is employee profit-sharing excluded, and the situation becomes all the more frustrating because, although there is a significant profit, for an accounting loss of a few hundred RON, no employee will be able to benefit from that money. Again, the article does nothing but promote a disloyal attitude on the part of employees, who are tempted to change their jobs, and in the end the whole economic operator suffers, unjustifiably.

2.4. Art. XLII para. (1), (2), (3) - Law no. 296/2023

„(1) From the date of entry into force of this law, the purchase of mobile telephony devices by economic operators may not exceed a maximum amount of 500 lei excluding VAT/mobile telephony device purchased.

(2) The monthly expenses for the mobile phone subscription paid from the funds of economic operators shall not exceed 35 lei excluding VAT/month/mobile phone set.

(3) Any excess of the purchase cost of mobile telephony devices or the cost of monthly mobile telephony subscriptions shall be borne by the employed staff benefiting from the mobile telephony services".

This legal provision has a largely beneficial rationale, but completely omits the fact that, as a rule, telephone subscriptions are not made for a period of 1 month or two months, but for 1 year or even two years. The telephone operator, being 100% private, is under no obligation to comply with measures that do not apply to it, especially as the law also specifies that any cost overruns will be borne by the beneficiaries. In this situation, we bring into question the fact that employees do not have the power to negotiate directly with the telephone operator, this being done by the legal representative of the economic operator. However, no one can deny the fact that such purchases of subscriptions, that exceed the value of 35 RON per month, are often made, and the subscriptions are shared within the economic operator precisely in order to carry out its activity in optimal conditions. Perhaps some telephone operators will agree to change the price of subscriptions, but if this does not happen, the only ones who will be charged for subscriptions purchased by the operator will be its own employees.

Again, this consequence, along with the other articles of law outlined above will be a major issue whereby existing employees will no longer consider their current job to be beneficial and will either migrate to the private sector, retire or reduce their productivity, all of which will affect the profitability of the economic operator. However, it is worth mentioning that things do not stop here, and if a state-owned economic operator becomes unprofitable for the reasons mentioned so far, the Romanian state will have to intervene. Consequently, inadequate salaries and benefits[11] are a major cause of staff turnover, which cannot be denied. Thus, we believe that it would be more beneficial to prevent such a situation, rather than budgeting some initially profitable economic operators, who will suffer staff shortages due to the application of Law no. 296/2023 in its current form.

3. Conclusions

It is crucial that the process of drafting legislation includes consultation and active dialogue with stakeholders, including representatives of business, trade unions, non-governmental organisations and experts in various relevant fields. By involving these parties, the potential impact of legislative measures can be better identified and more effective solutions for reducing the budget deficit can be proposed.

It is also important that the government is open to feedback and willing to adjust fiscal policy and legislation in line with changes in the economic and social environment. This can ensure that the measures adopted are tailored to the needs and realities of businesses and workers, thereby helping to promote sustainable economic growth and reduce social inequalities.

Finally, a crucial issue is the fair and equitable application of legislation and the constant monitoring of the effects of these measures on the economy and society. By regularly assessing the impact and adjusting policies

children, health services provided in the event of occupational diseases and accidents at work up to admission to a health facility, cultural vouchers and crèche vouchers granted by the employer in accordance with the legislation in force, the cost of tourist and/or treatment services, including transport, granted by the employer to his employees and their family members, and contributions to the intervention funds of miners' trade associations.

[11] *„To retain talent, companies need to offer competitive salary and benefits packages and regularly review these offers to ensure they remain competitive in the marketplace*". A. Gherman*, Fluctuația de personal în companii: cauze și soluții*, *https://www.hr-consultinglab.com/post/fluctuatia-de-personal-in-companii-cauze-si-solutii*, last consulted on 12.03.2024.

according to the results achieved, it can be ensured that the legislation adopted to reduce the budget deficit really serves the general interest and contributes to the balanced and sustainable development of Romania.

In conclusion, there are several measures that the Romanian government can take to reduce the budget deficit:

- Increasing tax revenue: The government can increase its revenue by increasing taxes or improving tax collection. This may include reviewing and adjusting tax rates, broadening the tax base or combating tax evasion;
- Pension and health care reform: Reviewing and reforming pension and health care systems can help reduce government spending in the long run. These reforms may include adjusting the retirement age, strengthening private pensions or introducing more sustainable financing mechanisms for the health system;
- Promoting economic growth: Stimulating economic growth can generate additional revenue for the government by increasing tax revenues and reducing social spending. This can be achieved through policies that support investment, innovation and entrepreneurship, as well as by removing bureaucratic obstacles and improving the business climate;
- Strengthening the public sector: The government can optimise and reorganise its public sector to reduce administrative expenditure and improve the efficiency and transparency of public spending.

Of course, there are other measures that can be adopted[12], which can be implemented individually or in combination, depending on the specific economic and social circumstances and the policy objectives of the government. It is important that these measures are balanced and that the impact on economic growth and social welfare is taken into account. As such, Law no. 296/2023 can certainly be amended, but it is not the only way for Romania to reduce the budget deficit.

Legislation that is not adapted to economic realities and does not take into account the particularities of those it is aimed at can create difficulties in the development of a country and create bottlenecks in the labour market. When laws and regulations are not updated to reflect changes in the economy or to meet the needs and requirements of different sectors and social groups, serious problems can arise.

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[12] Al. Milcev, *Deficit bugetar actual și în următorii ani. Cum face rost Guvernul de bani?*, *https://www.universuljuridic.ro/deficit-bugetar-actual-si-in-urmatorii-ani-cum-face-rost-guvernul-de-bani/*, last consulted on 12.03.2024.

THE ROAD TO FISCAL DECENTRALISATION OF MUNICIPALITIES IN REPUBLIC OF BULGARIA

Vanya PANTELEEVA[*]

Abstract

This publication is dedicated specifically to local taxes, given their importance for the actual achievement of local self-government in the Republic of Bulgaria. Here, financial decentralisation is understood as a way to strengthen the legal role and economic power of local government. An expression of financial decentralisation de lege lata are the tourist tax and the patent tax.

Keywords: *local taxes, competence, enforcement procedure, fiscal decentralisation.*

1. Introduction

The determination and collection of local taxes by local government bodies derives from the principle of local self-government. As a form of increasing the efficiency of state administration and solving important problems with local importance in art. 2 para. (1) of the Constitution of the Republic of Bulgaria, it is declared that the Republic of Bulgaria is a unitary state with local self-government. The financing of municipalities in practice creates, gives meaning and guarantees the manifestation of local authority. Therefore, local taxes have a key importance, through them that the autonomy of the local fiscal is formed and defended. It is no coincidence that dec. no. 9/21.09.2000 of the Constitutional Court of the Republic of Bulgaria summarises that „the legal possibility to perform certain functions would become meaningless, given that the local self-government bodies are deprived of financial resources for their implementation...". This publication is dedicated specifically to local taxes, given their importance for the actual achievement of local self-government in the Republic of Bulgaria. Here, financial decentralisation is understood as a way to strengthen the legal role and economic power of local government. An expression of financial decentralisation *de lege lata* are the tourist tax and the patent tax.

2. Contents

Local self-government, therefore, imposes the need for the municipality to have its own financial revenues. In 2007, with the Act to Amend and Supplement the Constitution of the Republic of Bulgaria (promulgated SG no. 12/2007), a significant change was made affecting the organisation of taxes in the Republic of Bulgaria. In the amended art. 84, item 3 provides that the National Assembly establishes taxes and determines the amount of state taxes. The new created para. (3) of art. 141, decrees that the municipal council determines the amount of local taxes under the conditions, according to the order and within the limits established by law. The rules introduced by art. 60, para. (1) and para. (2) of the Constitution, that citizens are obliged to pay taxes and fees established by law, according to their income and property and that tax reductions and burdens can only be established by law, remained unchanged. In all Bulgarian constitutions until the adoption of these amendments, the tax matter was regulated solely, explicitly and invariably by the legislative power.

According to the reasons for the Act to Amend and Supplement the Constitution of the Republic of Bulgaria, „the purpose of the changes is to achieve real financial decentralisation, to achieve compliance between the functions and responsibilities of the municipalities, on the one hand, and the financial possibilities for their realisation - on the other , as well as to create opportunities for municipalities to fully participate in the absorption of the structural and cohesion funds of the European Union". With the changes made, the legislator introduced a distinction in determining the amount of republican and local taxes. The establishment of all taxes is reserved as the sole authority of the National Assembly, which determines the amount of republican taxes, and the municipal councils are assigned the competence to determine the amount of local taxes under conditions and procedures determined by law. These constitutional changes are also part of the implementation of the Decentralization Strategy 2006-2015 adopted by dec. no. 454 of the Council of Ministers dated 02.07.2010. By

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granting the municipalities the right to determine the amounts of local taxes, the process of financial decentralisation continues and local self-government is strengthened, since the greatest importance for the development of the process is the strengthening of the financial independence and autonomy of the municipalities. Local taxes are involved in the formation of revenues for the local budget, they are only one of its budgetary sources. However, the municipality cannot unilaterally and arbitrarily establish the local taxes themselves, this, as correctly noted in dec. no. 9 of the Constitutional Court of the Republic of Bulgaria, always remains within the powers of the National Assembly.

However, the normative granting of authority to the municipal council to determine the amount of local taxes (of those determined by the National Assembly for such taxes) even within the framework of the law is an important guarantee for the real achievement of local self-government, because the independent budget strengthens and maintains the independence of the local power, i.e. makes possible its separation from the central government. Thus, if it is admitted that local self-government is a form of decentralisation of state power, it must be admitted, and that the determination and collection of local taxes by local self-government bodies is an expression of decentralisation of state finances. Moreover, it must be assumed that financial decentralisation fosters and ensures the decentralisation of state power itself.

Financial decentralisation includes the way of distribution of financial responsibilities at the central and local level in the field of public revenues and expenditures. It is a specific process of transferring powers and responsibilities from the central government to the municipalities regarding the financing of local budgets.

Taxes are the main source of budget revenue. In the conditions of a market economy, taxes achieve not only fiscal goals, but also economic and social ones. Taxes affect economic activity and the income from them is an indicator of the development of the economy, as well as of the society itself. The tax reductions provided for in the legislation are a tool for achieving a fair distribution of the tax burden.

With the adoption of the Public Finance Act (promulgated SG no. 15/15.02.2013, in force from 01.01.2014), which repealed the Law on the Structure of the State Budget in force until then (SG no. 54/15.07.2011, repealed by SG no. 15/15.02.2013) and the Law on Municipal Budgets (SG, no. 33/24.03.1998, repealed by SG no. 15/15.02.2013) , the regulation of the general arrangement and structure of public finances with one common normative act became a fact. The adoption of this law is an expression of the desire to consolidate all aspects of the management and use of public resources, both at the national and local levels. Public finance is considered as a unified system for provision and financing of public goods and services, redistribution and transfer of income and accumulation of resources by budget organisations. According to art. 45 para. 1 item 1, b. "a" of the Public Finance Act, the revenue from local taxes is also included in the structure of the municipal budget, under conditions, according to the order and within the limits established by law.

As a result of the expanded powers of the Municipal Councils in 2007 for a more active tax policy at the local level, it did not lead to a significant change in the revenue structure and greater autonomy of the municipalities:

- The budgets of most Bulgarian municipalities remain strongly dependent on state transfers - more than half of municipal expenses are financed through state transfers;
- The municipal budget continues to be abstractly rather than functionally related to the economic processes (for example, investments and the labor market) taking place in the municipal territory - with the exception of the real estate market;
- The implementation of an independent fiscal policy is greatly hampered by the lack of sufficient own revenues, which limits the role of municipal councils as conduits of the democratic will of the voters and deprives them of the necessary tools for forming local policies;
- The access to the European funds of the Bulgarian municipalities both concealed and deepened the lack of own resources, and the increased obligations of the local authorities from the requirement to co-finance the projects proved the importance of the problem;
- There are examples of fiscally anemic municipalities with mounting debts, periodically frozen accounts and dysfunctional administrations unable to meet any emergencies.[1]

According to a report by the National Association of Municipalities in the Republic of Bulgaria (NSORB), municipalities in Bulgaria are mainly financed by transfers from the national budget (71%), local taxes (15%) and fees, rents, fines and non-tax revenues (14%). Transfers from the national budget finance the activities delegated

[1] *https://www.regionalprofiles.bg/var/images/IME-Fiscal-Decentralization.pdf*.

by the state, mainly public education (94% of local spending is on education) and social services (85%). Matching the delegated functions with the relevant state budget leads to a low ratio of state transfers to public works and communal services, and more than half of the municipal administration's expenses are financed by the state budget.[2]

One of the proposals made by the NSORB has a plan to set aside 20% of personal taxes and 10% of corporate tax as shared local revenues, redistributed according to their place of origin. These shared revenues will create significant new resources for municipalities: 37% own revenues or 12.1% expenditures for activities delegated by the state. Both types of shared revenue are concentrated in large urban centers.

The revenue sharing method of financing municipalities has several advantages: it is a significant source of revenue, personal income taxes (excluding corporate taxes) are a stable source and predictable revenue. Indirectly, the sharing of tax revenues binds the local economy and the municipal budget. Revenue sharing can be introduced by replacing some of the state subsidies allocated to state-delegated activities. The apportionment method should be based on the actual place of residence of the taxpayer or by using an alternative method - apportionment based on formulas. Tax distribution also offers a good opportunity for equalisation based on the per capita income redistribution mechanism. Shared taxes enhance local autonomy if they provide discretionary local sources of revenue.

In the Strategy for Decentralization 2016-2025, it is reported that financial decentralisation is currently not perceived as a means of improving the financial situation of municipalities. The main problem that led to the suspension of the reform in the field of financial decentralisation was the lack of resources for financing municipal services. In general, it can be said that functions are preemptively transferred to the municipalities with a normative act, without providing the necessary financial resources, which is contrary to art. 9 of the European Charter of Local Self-government. Bulgaria ratified the Charter with the Law on Ratification, adopted by the 37th National Assembly of the Republic of Bulgaria on 17.03.1995. With the adoption of the Law on Ratification of European Charter of Local Self-government, according to art. 5 para. (4) of the Constitution of the Republic of Bulgaria, the Charter becomes part of the domestic legislation and takes precedence over it. In this regard, it should be borne in mind that when it comes to the provision of public services that are not provided with financial resources, their quality and access to them deteriorate.

The other unresolved issues in the field of financial decentralisation:

- Activities delegated to local authorities still exceed their own activities in volume. There is no clarity in the division between delegated powers and own powers of the local government bodies, which is one of the key findings in the Second Monitoring Report of the Council of Europe;
- The processes of administrative reform and financial decentralisation should continue to be carried out in a coordinated manner. With its development, the decentralisation process has clearly reached a point where continued financial decentralisation will be critical, i.e. without the implementation of financial decentralisation measures, other decentralisation measures would not be realistically feasible. Currently, public investment decisions are concentrated in the Ministry of finance. Municipalities have the right to make independent decisions on a small percentage of the revenues and expenditures of the local budget;
- Own sources of income are limited and represent an insignificant share of municipal budgets for the majority of municipalities. This makes them unreliable partners of European funds in the co-financing of local projects. Financial decentralisation is a necessary condition for the development of a municipal credit market and for increasing the ability of municipalities to receive financing outside the central budget;
- Some imperfections in the formula for financing local authorities and difficulties in securing financial resources from the state sometimes allow bypassing the objective mechanism for financial regulation and switching to „manual management", *i.e.*, distribution of available resources „to each a little" and thus the state continues to be the guarantor of local deficits. Municipalities must have control over their revenues in order to be able to analyse the effectiveness of one or another of their activities;
- There are a number of legal possibilities and prerequisites for increasing the revenue part of municipal budgets by using bank loans, issuing municipal bonds, creating conditions for the municipality's participation in national and international programs, attracting investors and others that are not sufficiently well known and used by local authorities;

[2] *https://www.namrb.org/uploadfiles/news/11418/Technical%20Report_fiscal%20decentralisation_FINAL%202761-6228-9416.2_BG.pdf*.

- Local authorities do not have the authority to determine tax reductions for certain taxpayers, as well as the ability to determine user fees for optional services provided by municipalities;
- The spending powers of the municipalities are limited in relation to the delegated services;
- The lack of regulation for determining the total amount of the capital subsidy, led to its formation on a residual basis, with the amount of additional subsidies for capital costs distributed among the municipalities being determined without any rules and often exceeding 50% of the actual amount of capital subsidies granted.

The path to fiscal decentralisation in Bulgaria can happen in several ways. The transfer of part of the income from the VAT to the municipalities cannot and should not be an isolated, self-serving and unconditional change in the structure of the tax system. In order to ensure the success of such a change, a number of additional steps need to be taken, including:

- Transition to effective program budgeting at the local level, which will lead to greater efficiency and transparency at the local level;
- Improving the efficiency and transparency of the finances and management of municipal enterprises and municipal property;

Territorial-administrative reform to guarantee the long-term sustainability of the territorial structure.

A real change in terms of the financial independence of the Bulgarian municipalities is possible only by restructuring the existing tax system. The imposition of new taxes (for example, on turnover) carries the risk of duplication of taxation, and the increase of existing local taxes will not solve the problem of incentives for local authorities and implies an overall growth of the tax burden on the economy.

Revenue sharing from indirect taxes such as VAT seems difficult to implement, and giving municipalities the power to determine its level or even the tax base of this tax would lead to absolute administrative chaos and create the conditions for the emergence of tax arbitrage where consumption is artificial aimed at municipalities with a lower tax burden.

Thus we arrive at the most likely and widely applied in the EU model of fiscal decentralisation in the form of direct revenue sharing or the transfer of powers in relation to already existing direct taxes - on the income of individuals (general income tax) or on profit (corporate tax).

The vast majority of policy challenges and administrative hurdles seem easily surmountable in revenue sharing or devolution of personal income taxes to local authorities:

- The resulting link between taxation and democratic representation at the local level will create incentives for local authorities to work to create jobs (mainly by attracting investment) and will link the financial situation of municipalities to the social and economic processes taking place at their territory;
- Incentives for tax arbitrage can be removed by applying the "money follows the identity card" principle, whereby revenues from personal income taxes are distributed among individual municipalities based on the individuals' permanent address;
- The relationship between taxation and democratic representation in personal income taxes is much more pronounced than in corporate taxation and creates incentives for real tax competition between municipalities;
- The vast majority of personal income tax revenues are monthly transfers from employers to the tax authorities. The timely redirection of these funds to municipal authorities will provide an additional source of liquidity and can help meet extraordinary expenses;
- The legislative effort and follow-up involved in implementing such a system are significantly lighter than existing alternatives. Taxes on the income of natural persons can be collected in the same order (by the National Revenue Agency), after which the relevant part of them can be redirected to the accounts of the municipalities.

3. Conclusions

In this regard, I consider it is correct to strengthen and further develop the tendency to increase the local fiscal by transferring part of the revenues from national taxes to the local budgets of the municipalities, the so-called financial decentralisation. Currently, legal and factual manifestations of the same are the tourist tax and the patent tax. This is undoubtedly positive, but it is not enough, as it did not achieve financial autonomy of the municipalities.

The transformation of more national taxes into local taxes is useful and fair, not least because the possible increase in the amount of the current local levies will create an excessive burden on the taxpayers, thereby deepening the collection problem and there was an overall increase in the tax burden in the country's economy.

It is important to emphasise that in the process of financial decentralisation an optimization between local and national interest should be achieved. It is harmful that the financial independence of municipalities is realised arbitrarily and entirely at the expense of the national interest. The demeaning of the national interest should not be explained as a way to understand and develop the local interest. From this point of view, for example, the direct sharing with the municipalities of a part of the income from taxes on the income of individuals appears to be adequate and balanced.

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PROPERTY RESTITUTION IN LITHUANIA, AN REPARATORY TOOL IN THE PROCESS OF TRANSITIONAL JUSTICE?

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Abstract

In Lithuania, the 90s marked the beginnings of a transitional period toward the reconstruction of a democratic state. On the one hand, it emerged as the ideal model, a new societal and state project, a democratic society, with a state founded on respect for the law and for human rights. On the other hand, the past made its presence felt as a result of administrative and judicial heritage, but also of a pattern socially reproduced at the level of human interactions between those whose rights were violated and those who violated these rights. Among those whose rights were abusively violated in the old regime were those dispossessed of properties and of their right over them, during the communist period. The old regime's abusive seizing of properties was a prejudice brought to the dispossessed. The present paper intends to analyse whether property restitution in Lithuania was part of a more extensive process, entitled transitional justice in the literature. The first part of the paper describes the theoretical lens as well as conceptual aspects. The second part focuses on property legislation and on the function laws fulfilled in the reparations process. The paper has a heuristic value and constitutes itself as part of the research in the field of transitional justice and property restitution.

Keywords*: transitional justice, reparations, property, Lithuania, ECtHR.*

1. Introduction

The main function of transitional justice is to ensure the basis for an early plan to move from one regime to the next, in order to prevent recurrence. In Central and Eastern Europe, the methods of transitional justice used to confront the past with the abuses committed by previous regimes differ from that of other regions of the globe. The countries chose to select and apply either laws of lustration or access to the files of the Securitate and less the tool represented by Truth and Reconciliation Commissions, the central mechanism of transitional justice. There were two Truth and Reconciliation Commissions created in Germany, two in Romania and three in former Baltic countries, one for each of the countries: Lithuania, Latvia and Estonia. „Transitional justice involves people coming together to address the legacies of horrendous atrocities, or to end recurring cycles of violent conflict, by developing a range of responses ... transitional justice is more like a map and network of roads that can bring you closer to where you want to go: a more peaceful, just, and inclusive society that has come to terms with its violent past and delivered justice to victims."[1]

Property implies a complex system of rights and represents the product of a legal and social evolution; the property cannot exist outside the law.[2] On the other hand, we must not omit the fact that law is a social creation that is in a permanent and constructive connection with the interests of social structures.[3]

The intention of this paper to approach property restitution in the theoretical and methodological frame outlined by the process of transitional justice has, at its basis, a series of arguments that I will mention subsequently. When I mention the theoretical and methodological frame of the process of transitional justice, I refer to the fact that this process of transitional justice presupposes that reparations are part of a more ample, transitional process, which quantifies abuses and recognises them at the official level, so that it makes sense for future generations. *First of all*, these actions of dispossessing properties were not isolated but concerted, organised by the authorities of former totalitarian regimes and had a *systematic* and *generalised* character. *Second of all*, establishing a new regime foreshadowed, at least at a theoretical level, the dimension of *official recognition of prejudices and sufferings done to victims*. In this context, the restoration of legal rights would have represented both a correction of the injustices and a measure to legitimise the new form of society, the new type of government. In this sense, property restitution is considered a component of the rule of law ... that could

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[1] ICTJ, *What is transitional justice? https://www.ictj.org/what-transitional-justice*, accessed April 2024.

[2] N. Popa, *Teoria generală a dreptului*, 6th ed., C.H. Beck Publishing House, Bucharest, p. 63.

[3] *Idem*, p. 61.

lead to „public vindication and maintain the legitimacy of the new democracies by establishing moral principles through the identification of wrongdoing and the righting of wrong."[4] *Third of all*, property restitution sets in motion processes such as establishing a legislative frame, the activity of the courts, which have the responsibility[5] to conceive reparatory programmes. Such an approach allows for the present research endeavour to reflect on the one hand on whether the legislation adopted facilitated or, respectively, hindered property restitution, compensatory measures, victim rehabilitation and, on the other hand, on whether the activity of national courts was in accordance with the interests of the victims, and whether the form and quantum of the reparations covered the suffered damages. *Fourth of all*, it is about the final result, namely the restitutions, reparations themselves. *The implementation* of reparatory measures/property restitutions is a result of a society's particularities at a given moment, being influenced by a series of factors *of legal configuration*, among which the *social and political frame*. Thus, the manner in which the transition to the new regime happened, the evolution of the post-dictatorship political life, political will, interests of actors belonging to civil society, the influence exercised by the international community, all have a determining role in the process of implementing a set of reparations for the victims or their descendants. A more encompassing perspective on reparations, within the more ample frame of transitional justice, allows for an articulated understanding of property restitutions, by taking into consideration the complexity of the factors that participate in this process.

2. Lithuania. Socio-historical and political context

Lithuania was under Soviet occupation during two periods, namely 1940-1941 and 1944-1990. It was annexed at the end of World War II becoming, together with Estonia and Latvia, one of the 15 USSR republics. Between the two periods of Soviet control, in 1941, Germany occupies Lithuania, which it incorporates in the Reichskommissariat Ostland, a civil German administration[6]. In 1990, Lithuania declared its independence and became the Republic of Lithuania, joining the European Union in 2004. In 1993, it became a member of the European Council and in 1995, it ratified the European Convention on Human Rights. As a result, violations of the Convention committed by Lithuania can be attacked at the ECtHR.

Starting with the 14th century, Jews settled in Lithuania and the Jewish community substantially developed throughout the centuries, the country being considered a centre for the Yiddish speaking civilization. Toward the end of 1941, Jews in German occupied Poland found refuge in Lithuania, thus the number of the Jewish Population settled in Lithuania rising to 250 000[7]. The decimation of the Jewish population started in 1939 and continued until the beginning of 1944, Nazi groups having Lithuanian support to this end. Thus, 90-95% of Jews were killed, and another 40 000 were sent to concentration camps.[8] It is estimated that around 4 000 Jews currently live in Lithuania.[9]

Snyder considers that Lithuania is one of the bloodiest countries in Europe, arguing that during the Soviet and German occupation periods 200 000 Lithuanian Jews were killed and a similar number of Lithuanian ethnics were deported or killed under the Stalinist regime.[10] The number of deported children rose to 39 000 and that of those arrested to 282 000, of which 200 000 were imprisoned.[11] By 1954, Lithuania had lost a sixth of its population.[12]

On 7 September 1998, president Valdas Adamkus -former member of the anti-Soviet resistance movement from World War II- established a Truth and Reconciliation Commission entitled the *International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania* (*Tarptautine komisija Naciu ir Sovietinio okupaciniu rezimu nusikaltimams Lietuvoje ivertinti*) that was reconfirmed through a Presidential

[4] J. Borneman, 1997, apud L. Stan, The roof over our heads: Property restitution in Romania, in Journal of Communist Studies and Transition Politics, 22(2), p. 180-205.

[5] Regarding the concept of responsibility, see also E.E. Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, pp. 11-16.

[6] For more details on public administration, see E.E. Ştefan, *Drept administrativ Partea I, Curs universitar,* 3rd ed., revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 16-27.

[7] Institute for Jewish Policy Research, *https://www.jpr.org.uk/countries/how-many-jews-in-lithuania*, accessed April 2024.

[8] *Ibidem*.

[9] *Ibidem*.

[10] T. Snyder, *Bloodlands: Europe between Hitler and Stalin*, Vintage Book, London, 2011, p. xviii.

[11] D. Sagatiene, *The Transformation of Lithuanian Memories of Soviet Crimes to Genocide Recognition*, in The International Journal of Transitional Justice, 2022, 16, p. 396-405.

[12] Lithuanian Soviet Encyclopedia, vol. 6 (Vilnius: Leidykla 'Mokslas', 1980), 570. (3.1. millions in 1940, 2.6 million in 1953).

Decree in May 2005.[13] In order to fulfil its intended purpose, namely investigating the historical truth from the repressive period of the country, two sub-commissions were established with the purpose of investigating the abuses to which the two Nazi and Soviet occupation forces resorted.

Emanuelis Zingeris, signatory to Lithuania's independence from the Soviets in March 1991, coordinated the activity of the commission formed from 12 members. Together with historians, academics, the Roman-Catholic bishop Antanas Vaicius and Kestutis Girnius, the director of Radio Free Europe for the Baltic space, were also members. The international component of the commission was ensured, among others by a representative of the Yad Vashem Holocaust History Museum in Jerusalem, a German historian and a British one. The sub-commission, whose task was to investigate the abuses committed during the Nazi occupation, published three volumes for the 1941-1944 period (Truskas & Vareikis, 2004; Dieckmann, Toleikis & Zizas, 2005; Dieckmann & Suziedelis, 2006).[14] In turn, the commission who investigated the first Soviet occupation published three volumes regarding the first Soviet annexation from 1940-1941 (Jakubcionis, Knezys & Streikus, 2006; Anusauskas, 2006; Maslauskiene & Petraviciute, 2007).[15]

3. Lithuania: legislative frame for property restitution

Lithuania is a signatory of the Terezin Declaration from 2009[16] and of the Guidelines and best practices starting with 2010. Private property is defined in the Terezin Declaration and in the Guidelines and Best Practices as follows[17]: „property owned by private individuals or legal persons, who either themselves or through their families owned homes, buildings, apartments or land, or who had other legal property rights, recognized by national law as of the last date before the commencement of persecution by the Nazis, Fascists and their collaborators, in such properties".

Moreover, the Declaration states that: „Where restitutions and/or compensations for the Jewish population did not materialised, this should be rectified, through fair and non-discriminatory process and tools, according to current national laws and regulations, as well as international agreements."

Laws that articulate the legal frame for restitutions/compensations for private properties.

In 1991 the Law on Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property, also called the 1991 Restitution Law was voted, while in 1997 the Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property, also called the 1997 Restitution Law was voted.

The 1991 Restitution Law stipulates both, the restitutions in kind and also compensations, where restitution in kind is not possible. The compensation offered as properties whose value is equal to the initial property or vouchers -monetary compensations-. The types of properties that can be reimbursed under this law are: agricultural and forest lands, houses, residential and commercial buildings, as well as land around buildings and houses. Applicants were offered the possibility to submit requests at the *Service for land reform* together with documents that show the size and location of the asset as well as paperwork that proves their heir status.[18] In the case of owners of agricultural lands there is, according to art. 4, a need to prove that they worked that land or that they will recover it with the purpose of conducting agricultural activities. Land records from the 40s were valid when the law came into effect, reason for which most applicants did not encounter any issues in bringing proof regarding their former ownership.[19]

In the cases in which the proof was lost or land records were never made (for instance in Vilnius) the task of presenting evidence proved more difficult. The records comprised of sale contracts -buying, mortgage loans or documents from archives. In the cases where no proof of document could be made, the chosen path was that

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[13] International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania, *https://www.komisija.lt/en/body.php?m=1194863084*, accessed April 2024.

[14] E.-C. Pettai, V. Pettai, *Transitional and Retrospective Justice in the Baltic States*, Oxford University Press Publishing House, Oxford, 2015, p. 48.

[15] International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania, *https://www.komisija.lt/en/body.php?m=1194863084*, accessed April 2024; L. Stan, *Truth Commission in Post-Communism: The Overlooked Solution?*, in The Open Political Science Journal, 2009, 2, p. 1-13.

[16] Tezerin Declaration, *https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/*, accessed April 2024.

[17] Tezerin best practices, *https://www.state.gov/2010-terezin-guidelines-and-best-practices/*, accessed April 2024.

[18] Commission on Security and Cooperation in Europe, *Property Restitution and Compensation in Post-Communist Europe: A Status Update*, pp. 23-25, *https://www.csce.gov/briefings/property-restitution-and-compensation-post-communist-europe-status/*, accessed April 2024.

[19] W. Valetta, *Completing the Transition: Lithuania Nears the End Of Its Land Restitution and Reform Programme, https://www.fao.org/fileadmin/user_upload/legal/docs/lpo11.pdf*, accessed April 2024.

of hearing those who had information about the situation of the owner in the 40s.[20] Owners and inheritors had the right to submit requests to recover properties under the 1991 Restitution Law. However, applicants had to be Lithuanian citizens who could prove their citizenship. Many of the former owners no longer had Lithuanian citizenship.

The 1991 *Law on Citizenship*[21] stipulates that individuals who had Lithuanian citizenship before 15 June 1940, their children and grandchildren are citizens, if they do not have the citizenship of another country. However, many of the survivors of the Holocaust and their inheritors had to settle in other countries whose citizens they became. As a result, they did not fulfil the legal conditions to recover properties or to obtain compensations, even though in 1940, before forced expropriation, they owned both the status of Lithuanian citizens and that of owners.

The 1991 law regarding property restitution, with various changes, stipulates two forms of restitution: property restitution in certain situations and compensation in others. A series of cases from the Lithuanian Constitutional Court examined the constitutionality of the restitution measures stipulated in the 1991 Restitution Law. In 1994, the Lithuanian Constitutional Court examined if internal property restitution laws were compatible with the Constitution. One such example is the decision in case no. 12/93 from May 1994[22] regarding re-establishing property rights over lands. In its decision, the Court considered that possessions nationalised by the Soviets starting with 1940 should be considered as properties under the *de facto* control of the state. In the decisions from June and October from the same year, the Court mentions that reparations can be *partial* in terms of property right restitution, a decision defended by the fact that the new state structures cannot be responsible for the decisions of the Soviet occupation. The partial reparation has in view special social and political conditions, in other words, the new property relations that were formed in the years since the Soviet occupation.

The Court emphasised that the rights of former owners are rehabilitated only when the property is returned or when appropriate compensations are given. The law itself does not offer rights apart from when it is *applied to a person* who was abusively deprived of specific goods. In this situation, the decision of the competent authorities[23] to return the property or to offer compensations has a legal effect only when the former owner obtains property rights for a specific property. In *Jurevicius v. Lithuania*,[24] the ECHR decided that if a property cannot be returned in kind, an equitable compensation needs to be paid. Moreover, the Court stated that it is impossible *to objectively reconstruct the entire system of property relations* that was specific in Lithuania in the 40s.

In the 15 June 1994 decision regarding the restitution of a property right over residential homes (11-1993/9-1993)[25] as well as the one from 19.10.1994, which had the same topic as the previous one (10/1994),[26] the Lithuanian Constitutional Court emphasised the idea that property restitution in Lithuania was *partial*. The Court described how the Lithuanian government was not responsible for either the Soviet occupation that was established in the 40s or the consequences resulting from this occupation. Starting with the 40s, private individuals acquired, according to laws in effect at the time, properties that had been previously nationalised. As a result, the 1991 Restitution Law had to take into account not only the rights of the initial owners but also the ones of those who bought the goods after 1940. This was the reason why the concept of *partial restitution* was considered as reflecting the reality of the facts.

Another example to this end is Case no. 14425/2003, *J. Kalpokas & V. Kalpokas v. Lituania*,[27] where the applicants, under art. 1 from Protocol no. 1 and art. 6 and 13 from the Convention, appealed to the ECtHR, claiming that their property rights are not fully recognised. In this case, the petitioners, brothers Jonas Kalpokas and Vaclovas Kalpokas, demanded the full restitution, in kind (under the 1991 Restitution Law) of 31,82 hectares of land that had been nationalised during the first Soviet occupation. However, parts of this land could not be

[20] P. Jaskunas, V. Lost, *https://www.legalaffairs.org/issues/January-February-2003/story_jaskunas_janfeb2003.msp*, accessed April 2024.

[21] Republic of Lithuania, Law on citizenship, *https://www.refworld.org/docid/3ae6b5960.html*, accessed April 2024.

[22] The Constitutional Court of the Republic of Lithuania, *https://lrkt.lt/en/court-acts/search/170/ta973/content*, accessed April 2024.

[23] Regarding the activity of public authorities, from the point of view of the doctrine, see also E.E. Ştefan, *Legality and morality in the activity of public authorities,* in Revista de Drept Public no. 4/2017, pp. 95-105.

[24] ECtHR, app. no. 30165/02, *https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-173058%22]}*, accessed April 2024.

[25] The Constitutional Court of the Republic of Lithuania, *https://lrkt.lt/en/court-acts/search/170/ta972/content*, accessed April 2024.

[26] *Ibidem*.

[27] ECtHR, Case *J. Kalpokas &. V. Kalpokas v. Lithuania*, app. no. 14425/03, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-79838%22]}*, accessed April 2024.

returned to the two brothers, which determined the latter to consider the occupation of the unreturned parts illegal and to address the courts on 16.08.2001. The Kalpokas brothers' legal action was partially accepted by the Kaunas Court in September, 2002 that decided that within three months property rights should be returned over the parts of land that had not been occupied. On the other hand, the court decided that the parts of land that are occupied by other private individuals could not be recovered under the 1991 Restitution Law. The Supreme Court maintained this decision so that it remained definitive in October, 2022.

The competent authorities resorted to carrying out the decision so that, in March 2004, the brothers received the property title as follows: Jonas Kalpokas, 6,86 hectares from the given land and 4,85 hectares of forest area; Vaclovas Kalpokas 7,09 hectares of land and 4,86 hectares of forest area.[28] However, in 2004, the regional administration reduced the plots given to the applicants who, being dissatisfied, reclaimed in the court the entire land, in the initial form owned by their father. Their request was rejected by the Kaunas Court in 2004 and partially accepted in 2005 by the Supreme Court, which established the March 2004 decision as defective.

The ECtHR established that the September 2002 decision guaranteed the Kalpokas brothers the restitution of the land that had not been occupied by other individuals. In order to implement the decision, the authorities had to measure, delimit the lands and to offer land plots in exchange to the individuals who occupied the parts from the initial property owned by the applicants' father. The two brothers did not attend any of the actions organised to this end. Similarly, in the case of *Užkurėlienė et al v. Lituania*, no. 62988/00, April 2005,[29] the initial land owned by the father had to be measured, delimited and evaluated, which needed time and complex actions. The Court considered that there was no intentional delay meant to undermine the essence of the applicants' right. For instance, in Case 41510/98 *Jasiūnienė v. Lituania*, state authorities did not take no appropriate executive decision for nearly seven years, which goes against art. 6. In this regard, the Court found that the execution of the decision from September 2022 did not represent a violation of the applicants' right based on art. 6. The Court found that there is no interference in the applicants' assets in the sense of art. 1 of Protocol nr.1 regarding the execution of the decision. To this end, the Kalpokas brothers' request is unfounded under art. 35 para. 3 and 4 ECHR. The ECtHR found that the state authorities took the steps to implement the court decision from when it went into effect in October 2002 until March 2005, when the decisions for implementation were quashed. To this end, the applicants benefitted, due to a writ of execution, from *possession* in the sense from art. 1 from Protocol no. 1, being no interference with the applicants' goods.

In regards the non-restitution of the original land in kind in its entirety, the Court established that the applicants are not the owners of *any possession*, especially if their request does not have a basis in internal law. The Lithuanian Constitutional Court argued, as previously mentioned -considering the contextual realities generated by social and political conditions-, that the land plots were not available for restitution in their initial form. This can only be applied to available, free and unoccupied land plots, which did not generate new property relations. The unconditional and full restitution in kind is not in agreement with *ratione materiae*, with the dispositions from art. 1 from Protocol no. 1 (art. 35 para. 3).

Another internal law that regulates private property restitution is the *1997 Restitution Law*[30]that repealed the previous 1991 law. The law's preamble emphasises that: *the rights of ownership acquired by the citizens of the Republic of Lithuania before the occupation are not revoked and have continuity* [31] In accordance with article 1, the law applies to goods that were nationalised under the USSR law ... including land, forests, water bodies, structures used for economic and commercial purposes and residential properties (art. 3) up to 150 hectares (art. 4-6).

The compensations for properties that could not be returned by the state could be done under art. 12-16. The compensations were paid as stock in state-owned companies. Under para. 1 from art, 9, the applicants could prove their ownership status based on land registries, heir certificates, court decisions, archive documents, certificates of transmission, authorization documents from the government etc. If documented evidence through

[28] *Ibidem*.

[29] ECtHR, Case *Užkurėlienė and Others v. Lithuania*, app. no. 62988/00, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-68739%22]}*, accessed April 2024.

[30] Republic of Lithuania, *Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property*, *https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.44404?jfwid=rivwzvpvg*, accessed April 2024, *Lithuania: Law no. VIII-359 of 1997 on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property*, 01.07.1997, *https://www.refworld.org/legal/legislation/natlegbod/1997/en/14506*, accessed April 2024.

[31] *Ibidem*.

which the right of reclaiming the goods could be reconstituted were not available, the applicants had the right, under para. 2 art. 9, to regain their ownership or heir status according to Civil Code procedure.

The law covered the restitution requests that had been formulated under the 1991 law and that were, thus, on hold. Moreover, under art. 10, it offered the possibility to submit requests to people who did not fulfil the eligibility conditions under the previous law or who missed the deadline. A new deadline for submitting restitution requests was established under the new law for 31.12.2001. The subsequent changes in the law allowed the applicants who had not presented proof that attested their status as Lithuanian citizens or that as former owners, to do this until 31.12.2003.

The 1997 Restitution Law represented the legal basis for owners and their heirs to reclaim the properties. However, according to art. 2, the recovery was limited to Lithuanian citizens, a condition included in the old 1991 law as well. Unlike the 91 law, the 97 one eliminated the permanent residence and citizenship criteria.

Under these conditions, even if the law's preamble mentions that property rights from before the occupation continued, this is not valid in the case of the Jewish population. The former Lithuanian citizens of Jewish ethnicity who survived the policy of systemic decimation had to leave the country after the war. Thus, in this case, there is no continuity of property rights since the former Lithuanian citizens of Jewish ethnicity do not fulfil the criteria regarding citizenship, based on objective reasons.

A series of amendments and Court decisions facilitated the process for foreign citizens to reclaim their Lithuanian citizenship. Despite this, former Lithuanian citizens of Jewish ethnicity have continued to be excluded from requesting the restitution of confiscated private properties from Lithuania.

The 1995 Amendment[32] *regarding citizenship law in the Republic of Lithuania* revised the restrictions imposed by restitution laws, restrictions owed to the imposed condition for applicants to be Lithuanian citizens. Based on the changes, only those individuals who were *repatriated from Lithuania* to their native country were excluded from reacquiring citizenship. Another important legislative aspect was the introduction of certain compensation mechanisms for the situations where restitution in kind was not possible.[33] These mechanisms included financial compensations or offering other types of properties as substitute.

In the cases where land restitutions were not possible, for instance because of subsequent infrastructural or urban developments, compensation mechanisms were implemented such as: alternative lands, financial compensations or, in certain cases, stock in state-owned companies. Although pragmatic, this approach did not lack criticism, since not all compensations were considered equitable by everyone involved.

In 2004, there were changes brought to the 1997 Restitution Law. Seemingly, the changes had as a purpose unlocking restitution processes, so that the courts would have the possibility to accept the requests submitted by individuals who before 31.12.2001 -the established deadline for submissions- were not eligible. However, the Supreme Court in Lithuania finally decided that the 2004 amendment, introduced with the purpose of making the reparation process more flexible, should not apply to citizens who at the deadline for submission of restitution case-files were not Lithuanian citizens. As a result, Lithuania remains without a clear mechanism that would allow individuals who did not *reclaim* their citizenship after 2001 to have access to the process of restitution of goods that were expropriated illegally by previous regimes.[34]

In May 2015 however, the state established a commission with the purpose of resolving the blockages that arose as a result of former Lithuanian owners reclaiming Lithuanian citizenship. A part of the 2011 Law on Good Will Compensation for the Immovable Property of Jewish Religious Communities stipulates symbolic payments to Lithuanian victims of totalitarian regimes. These sums came from a common property fund. Thus, what appears is a situation where the true problem was not dealt with, namely the restitution of overdue sums corresponding to the value of unreturned *private* properties from throughout the country.[35]

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[32] *Lithuania: Law no. I-1004 of 1995 on Refugee Status*, 04.07.1995, *https://www.refworld.org/legal/legislation/natlegbod/1995/en/18205*, accessed April 2024.

[33] US Department of State, Property Restitution in Central and Eastern Europe, *https://2001-2009.state.gov/p/eur/rls/or/93062.htm*, accessed April 2024.

[34] C.E. Stovall, *Former-Citizenship Restitution: A Proposal for an Equitable Resolution of Confiscated Lithuanian Property*, in Chicago-Kent Journal of International and Comparative Law, *https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1071&context=ckjicl*, accessed April 2023.

[35] Faina Kukliansky, "Works in Progress: Examples from Communities – The Case of Lithuania", available athttps://www.mzv.cz/public/65/e7/87/4810880_2934377_PublicationPragueConferenceProceedings_2009.pdf, accessed April 2024.

Legislation adopted with the purpose of recovering common properties: the Law on the Procedure for the Restoration of the Rights of Religious Associations to the Existing Real Property (1995) and the Law on Good Will Compensation for the Immovable Property of Jewish Religious Communities (2011).

Law on the Procedure for the Restoration of the Rights of Religious Associations to the Existing Real Property - May 1995[36]

This law's art. 2 stipulates that religious associations that functioned starting with 1 January 1940 in Lithuania *have the right to request the return of goods confiscated by the state.* The restitution is applicable only for religious properties, which represents a limitation if considered that before the war the common Jewish properties were not limited just to synagogues, but also included hospitals, libraries, theatres, public baths etc. Moreover, under the same article, the community successors established by religious authorities also had a right to restitution. Establishing successors was a true challenge, especially for Jewish communities who found it difficult to prove that they were legitimate successors of some communities that had been completely decimated. The government did not intervene to this end. Religious communities were offered the possibility of restitution of the actual property or, under article 3, the possibility to buy the property, the equivalent value being chosen by the beneficiary from the four options provided by the law: another property of the same value, cash, financial support for repairing cult monuments, renting the land without auction.

The deadline for the submissions of requests was limited to the end of 2001. Only the Orthodox Jewish communities (which represented 5% of all religious communities) fulfilled the conditions to request restitution. One-time payments were also distributed to 1550 individuals residing in various parts of the globe until 2014.[37]

In 2002, blockages were analysed by a governmental commission made up of officials from the Government and representatives of local communities, local and international Jewish organisations. Rabi Baker was the representative of the Jewish community who carried out the discussions on common properties with the Lithuanian government.[38]

As a result of these debates, there were amendments introduced in the law on religious associations. Under these amendments, on the one hand changes were made regarding the definition of communal properties, while on the other hand a fund was created for paying compensations where the properties/goods could not be returned. A list of 438 buildings was compiled by the Jewish community, but only 152 were retained by the Lithuanian government as being eligible for compensation/restitution.[39]

The following example emphasises the relevance of the May 1995 Law on Religious Associations in the process of property restitution. In Case 44548/98, *the Synod College of the Evangelical Reformed Church v. Lithuania*[40] it can be noticed how the religious association -the plaintiff- did not exhaust internal appeals.

The Evangelical Reformed Church of Lithuania owned a residential building -an apartment building- which was nationalised after the Soviet invasion. During 1992-1993, after Lithuania became independent, the Vilnius Municipal Council transferred the property rights over 12 apartments to the renters under the law on privatising apartments. At the end of 1993 however, the Local Council adopted the decision to return the property to the Evangelical Reformed Church. The renters introduce an appeal to the courts to annul this decision; in turn, the Evangelical community request the court to annul the contracts to privatise the apartments.

Under the 1990 Law on the restitution of church property[41], which stipulated that renters should be offered housing when property rights are re-established for religious communities, the Vilnius district court annulled the December 1993 decisions and the renters won the case. In 1996, the Church of the Evangelical community transferred the right and the claims over the building to the Synod College of the Evangelical Reformed Church of Lithuania. In August 1996, the renters rights were again annulled by the regional court, so that the privatisation contracts were considered invalid.

In 1997 the Appeals Court maintained the decision of the first court arguing that the nationalisation of the building was made under a Soviet regulation from the 40s, so that the 1990 Law could not be applied in the given

[36] Republic of Lithuania, *Law on the Procedure for the Restoration of the Rights of Religious Associations to the Existing Real Property,* Nri.-822, amendment 04.07.2002, no. IX-1035, *https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.387010?jfwid=*, accessed April 2004.

[37] Good Will Foundation, *https://gvf.lt/en/payments/*, accessed April 2024.

[38] AJC, Andrew Baker, *https://www.ajc.org/bio/andrew-baker*, accessed April 2024.

[39] European Shoah Legacy Institute, Immovable Property Restitution Study, *https://wjro.org.il/wp-content/uploads/2019/05/immovable.pdf*, accessed April 2024.

[40] ECtHR, app. no.44548/98, Case *The Synod College Of The Evangelical Reformed Church Of Lithuania v. Lithuania*, *https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-22917%22%5D%7D*, accessed April 2024.

[41] *Ibidem*.

situation. The Court's decision was that the right of the Evangelical Reformed community over the building is restored once the renters had bought their apartments, especially since the law regarding the privatisation of apartments did not forbid acquisition from nationalised houses.

Under art. 1 from Protocol I, together with art. 14 from the Convention, the church claimed that its right to recover the entire building in kind, the right to be adequately compensated for this prejudice was jeopardised. Moreover, it accused that it could not claim compensations from the Government for the damages brought in the restitution case and it cannot pay the various expenses such as legal fees, expenses with the building's heating and maintenance.

Regarding the first charge, namely the restitution of the entire building, in kind, it should be mentioned that art. 1 from Protocol no. 1 states the following: „Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

However, these dispositions do not affect a state's right to enforce these laws in accordance with the general interest. To this end, the Court re-iterated that under the Convention the right to property restitution is not guaranteed as such. Even if the decisions of the district court from December 1993 temporarily created certain rights and obligations, the church cannot count on these. Moreover, the Appeal Court did not invalidate the church's right to property regarding the building. It, however, mentioned that according to the 1995 Law on Restoration of Church Property restitutions in full are not possible.[42] In terms of the adequate property compensation, the Court re-iterates that in accordance with the 1995 Law on Restoration of Church Property, the Evangelical Reformed Church has the legal means to address national courts to recover compensations for the 12 apartments and the restitution in kind of the rest of the building. The Court thus invites the Evangelical Reformed Church to exhaust all internal appeals. In terms of the inability to access means of appeal against the government for the alleged inadequate action in the case, the Court mentions that under the 1995 Law on Restoration of Church Property it can demand compensation. The Court concludes that the request is unfounded under art. 35 para. 3 ECHR. The last charge brought by the Church before the ECtHR regards taxes for heating the building and legal fees. The Court determined that the church did not appeal the decision of the regional court and, as a result, it did not exhaust all internal appeals to this end, according to art. 35 para. 1 ECHR.

The 2011 Law on Good Will Compensation for the Immovable Property of Jewish Religious Communities[43] is the second law adopted for the recovery of communal properties. Under article 2 from this law, any future restitution request from the Jewish community is null and void. Moreover, it approves, starting with 2013 and over a 10-year period, the payment of approximately 128 million LTL/53 million Euro, a sum that represents 30% of the official value of the 128 properties considered eligible by the Lithuanian governmental authorities.[44] The sums of money are distributed by the Good Will foundation that, under the present law, had the obligation to function as a governmental agency.

The Good Will Foundation has two other central missions as well. The first consists in making single symbolic payments of approximately 870.000 EUR for the Jews who resided in Lithuania and who were submitted to abuses during totalitarian periods. In order to benefit from these payments, the potential beneficiaries had as an obligation to submit casefiles with the documents that were requested until 30 June 2013. According to Good Will, payments toward 1550 individuals were made until 31 December 2014.[45] Another mission of the foundation consists in the support for cultural and religious projects, so that 5,75 million LTL were allocated to this end, for Lithuanian Jews residing in Lithuania.

Another object of restitutions and/or compensations is represented by *heirless properties*. The disappearance without a trace of Jewish communities produced a void in terms of property heirs, especially since legislative regulations are inconclusive to this end. Although according to the 2009 *Terezin Declaration* this type of property should be materialised in service of the community of Holocaust survivors, Lithuania did not propose any coherent measure to this end.

[42] Republic of Lithuania, *Law on the Procedure for the Restoration of the Rights of Religious Associations to the Existing Real Property*, *op. cit.*

[43] Republic of Lithuania, *Law On Good Will Compensation For The Immovable Property Of Jewish Religious Communities*, *https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=bkyibn3o6&documentId=TAIS.406297&category=TAD*, accessed April 2024.

[44] D. Sprintzer, *On restitution, a rundown of where they stand in Eastern Europe*, *https://www.jta.org/2012/12/03/global/on-restitution-a-rundown-of-where-they-stand-in-eastern-europe*, accessed April 2024.

[45] Good Will Foundation, Payments, *https://gvf.lt/en/payments/*, accessed April 2024.

4. Property restitution as reparatory measure

Even though there is no standard frame for property restitution in international law, one cannot deny the existence of states' obligation to repair the abuses of previous regimes. Moreover, the general principles of international law invoke the request for actual compensations for the cases where properties were abusively seized. The situation becomes more complicated as the procedures that were at the basis of the seizes and nationalisations are controversial. Property nationalisations/seizes did not respect the legal demands of those periods. As the Lithuanian Constitutional Court determined: „nationalisation and other illegal acts regarding property were initiated by the Soviet Union".[46] However, even if the post-communist government cannot be held responsible for the actions of the occupation forces, it cannot withdraw from re-establishing for people the rights that had been violated.

Lithuania is one of the few European countries that adopted legislation on property restitution the moment the *Terezin Declaration* came into effect in 2009. Despite this, in 2011, private and heirless property restitutions recorded no progress. In comparison to Estonia and Latvia, the restitution process was blocked because of the demand for eligible applicants to be Lithuanian citizens at the moment when restitution laws came into effect.

In terms of private property, according to information provided by the Lithuanian government, since 2011 there have been made restitutions or compensations for 98% of the individuals who submitted request at the rural level and 72% at the urban level.[47] These restitutions had as a judicial basis the two laws from 1991 and 1997, respectively, whose object was the restitution or compensations from the Holocaust and subsequent seizes. However, these percentages do not reflect reality since individuals who did not hold Lithuanian citizenship at the moment when these laws came into effect were not allowed to submit restitution requests. Around the 2000s, changes were made in citizenship laws so that former Lithuanian citizens were allowed the possibility to reclaim their Lithuanian citizenship and to also maintain their citizenship from the country where they had settled.

In terms of *communal property restitutions*, the situation was protracted for over 10 years. As a result of debates between political elites (in a 10-year period three different governments came to power) and representatives from Jewish communities, they finally agreed on Law on Good Will Compensations from 2011. There was no question of in kind property restitution. The value of compensations amounted to 38 million Euro, money that the Jewish community received, as previously mentioned. The law also stipulated the impossibility of the Jewish community to formulate possible restitution or compensation requests after the former came into effect. This new law was needed since the *1995 Law on Religious Associations* had substantial shortcomings in terms of reparations given to both Jewish communities and Jews as individual entities.

5. Conclusions

It can be ascertained that property restitution in Lithuania only partially fulfilled the characteristics of reparatory measures. *A first characteristic* of property restitution in Lithuania is the overlap between this procedure and programmes for economic development and collective structural reform. *The restitutions were directed* toward *social desiderata*. The Lithuanian Court emphasises the social purpose of reparations as follows: *reinstating rights to those who were abusively dispossessed by the previous regimes means nothing more than agrarian reform. The two stages are inseparable*.[48] *The second characteristic* of property restitution is related to certain aspects regarding the interpretation of European/national legislation, especially to the manner in which they were *speculated* by the Lithuanian government. Property is always uncertain in internal law due to the government having the right to regulate it at any moment.[49] *The third characteristic* is related to a series of limitations in the restitution process, limitations imposed by the Lithuanian government itself. Among these limitations there are: having citizenship at the moment of filing the submission, imposing thresholds; the manner in which competent authorities defined the past, namely the period covered by the reparation programme; the lack of agreement regarding the types of goods -moveable/immoveable-; unrealistic deadlines for submission of

[46] The Lithuanian Constitutional Court, LiCC, Ruling of 27.05.1994, and Ruling of 20.06.1995, *https://lrkt.lt/data/public/uploads/2015/03/1995-06-20_n_ruling.pdf*, accessed April 2024.

[47] D. Sprintzer, *On restitutio, a rundown of where they stand in Eastern Europe*, *https://www.jta.org/2012/12/03/global/on-restitution-a-rundown-of-where-they-stand-in-eastern-europe*, accessed April 2024; W. Valetta, *Completing the Transition, op. cit.*

[48] The Lithuanian Constitutional Court, dec. no. 8.03.1995, *On restoration of citizens' ownership rights to land*, *https://lrkt.lt/en/court-acts/search/170/ta1175/content*, accessed April 2023.

[49] E.A. Posner, A. Vermeule, *Transitional Justice as Ordinary Justice*, in Harvard Law Review, 2003, 117(3), p. 761-825.

case-files. Lithuanian experts in the field agreed that the imposed deadlines were unconstitutional. [50] In this regard, the professor Nicolae Popa emphasised that, as time passes, a right can be extinguished.[51]

As a result of what has been presented in the current research endeavour, it can be concluded that property restitution in Lithuania was not part of the process of transitional justice, meaning of a process to uncover the truth and to officially recognise it at the national level. Although a Truth and Reconciliation Commission was formed to this end, property restitution was not stipulated in the reports as a priority. The logic behind these reparation programmes is that the sums of money/restitutions themselves satisfy the needs of those who were dispossessed/abused by the former regime. The perspective of connecting the reforms with property restitutions would target on the one hand the reparation of injustices individuals were submitted to in the previous regime but also a reset of property relations. The reset of property relations means that the possession of property re-becomes a precondition of reforms, of the reconfiguring of the modern economic and of democratic states.

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INTEGRITY WHISTLEBLOWERS IN THE ROMANIAN LEGAL SYSTEM

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Abstract

Illegal activities and abusive practices can occur in any organisation, public or private, small or large. They can take many forms, such as corruption or fraud, unfair business practices or negligence. If no action is taken, they may cause serious damage to the public interest.

A law itself gives the appearance of a safety instrument for situations in which an official public or contract employee intends to refuse the execution of an order that he considers illegal. Although this provision is theoretically included in the legislation, any employee who does not fulfils an order outside of legality was subject to a series of unsustainable behaviors that resulted in removal or withdrawal from the system.

At this moment, in the Romanian landscape, we lack a culture of integrity whistleblowers, and those who find the strength to report they are seen rather as an exception and idealised as heroes of the system. Perhaps we could rather say that there is a culture strongly marked by the traumas of the past in terms of reporting. Starting from the culture of the country which, at the moment, discourages integrity whistleblowers, we note that, just as in the European directive that we were obliged to transpose, this proposed law encourages and prioritises internal reporting.

We can understand the reasons behind this encouragement, however, in the Romanian context, we believe that the prioritisation of internal reporting can and must be corroborated with subsequent instrumentation actions a anonymous reports.

Seen as a measure that comes to consecrate the modernism of the Romanian legal system, but also as a measure of the legislative maturity it has reached after countless reforms, the initiation of investigations regarding integrity whistleblowers has become a reality. What will be the impact on Romanian society? How will they integrate into the judicial system? What will be the value as proof?.

Keywords: *freedom of speech, freedom of expression in a professional context, whistleblowers in interest, Romanian legal system.*

1. Introduction

According to the doctrine, „although it seems an easy thing for a person to do, the activity of disclosing information on actions or facts that can endanger public interest, is in fact difficult to achieve, due to the fact it entails certain legal consequences”[1]. At the EU level, we have recently witnessed the norming of an increased protection of whistleblowers. These legislative measures are welcome in the context in which, in this matter, domestic regulations are generally fragmented (in October 2019, it was found that only 10 of the totals of 28 Member States benefited from comprehensive legislation for the protection of integrity whistleblowers) and limited to certain sectors of activity (such protection being predominantly found in the field of financial services). This is also the case of Romania, which, at this moment, does not benefit from a comprehensive legal framework regarding the protection of integrity whistleblowers, but it is limited to the protection of personnel from public entities that report violations.

Ever since the current Whistleblower Directive was at the proposal stage, the integration of these rules into the whole of the Union's policies was envisaged in the Explanatory Memorandum[2], as follows: „The introduction of sound whistleblower protection rules will help protect the budget Union and to ensure a level playing field which is necessary for the proper functioning of the single market and for businesses to operate in a fair competitive environment.” Also, the same document [3]mentions the role of prospective whistleblower protection

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[1] E.E. Ștefan, *The topical nature of the Whistleblowing Directive transposition in our country,* in Journal Legal and Administrative Studies no. 2 (25), Year XX, C.H. Beck Publishing House, Bucharest, 2021, p. 78, *https://www.upit.ro/_document/222369/jlas_2_2021.pdf*, accessed on 04.04.2024.

[2] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of persons who report violations of Union law, *https://ec.europa.eu/commission/presscorner/detail/en/MEX_19_6032*.

[3] *Ibidem*.

rules, consisting of: (i) contributing to the prevention and detection of corruption that slows down economic growth, creating economic uncertainty, slowing down procedures and incurring additional costs; (ii) increasing the transparency of the business environment, contributing to the EU strategy on sustainable financing; (iii) providing additional support to the actions taken by the European Commission to ensure fairer, more transparent and more effective taxation in the EU; and, in particular (iv) complementing recent initiatives to protect national budgets against harmful tax practices, as well as the proposed strengthening of rules on money laundering and terrorist financing. The new influences of these European regulations on the protection of whistleblowers will inevitably affect the national criminal law as well.

2. Contents

2.1. The origin of legislation

As doctrine pointed out „in its daily work, public administration is dominated by the regime of public power, i.e. the legal regime in which the public interest takes precedence over the private interest[4]". Part of the modernization package of the Romanian judicial system, Law no. 361 of December 16, 2022 regarding the protection of whistleblowers in the public interest (referred to as the „Law") is actually a transposition of European legislation into national legislation as a result of the member state. Therefore, Directive (EU) 2019/1937 on the protection of persons who report violations of Union law („Directive"), adopted on October 23, 2019, entered into force on December 16, 2019.[5]

The main objective of this act written in art. 1 of the Directive, is to provide the unique framework for the uniform application of EU law and policies in specific areas by establishing common minimum standards that provide for a high level of protection for persons who report violations of Union law.

The scope of application of this normative act is quite extensive, being rendered both materially (art. 2) and personally (art. 4).

From a material point of view, it concerns the reporting of three categories of violations, namely:

a) violations aimed at violating the EU acts contained in the annex to the Directive and which concern the following areas: (i) public procurement; (ii) financial services, products and markets, as well as the prevention of money laundering and terrorist financing; (iii) product safety and compliance; (iv) transport safety; (v) environmental protection; (vi) radiological protection and nuclear security; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data and security of networks and computer systems;

b) violations affecting the Union's financial interests, as referred to in art. 325 TFEU and as detailed in the relevant Union measures;

c) Violations related to the internal market, as mentioned in article 26 para. (2) TFEU, including violations of the Union rules on competition and state aid, as well as regarding acts that violate the rules on corporate taxation or mechanisms whose purpose is to obtain a fiscal advantage that is contrary to the object or purpose of the applicable law in matters of corporate taxation.

From the perspective of the personal field of application, this normative act considers the following:

a) if they operate in the private or public sector and have obtained information regarding violations in a professional context, such as, but not limited to: (i) persons who have the status of worker, within the meaning of art. 45[6] para. (1) TFEU, including civil servants; (ii) persons carrying out an independent activity, within the meaning of art. 49 TFEU[7]; (iii) shareholders and persons who are part of the administrative department, management or supervisory body of an enterprise, including non-executive members, as well as volunteers and paid or unpaid interns; (iv) any person working under the supervision and direction of contractors, subcontractors and suppliers;

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[4] E.E. Ștefan, *Public Interest – Essential Concept of Administrative Law*, in Proceedings of the 33rd International RAIS Conference on Social Sciences and Humanities, Princeton, NJ, USA, 03-04.08.2023, *https://rais.education/wp-content/uploads/2023/09/RAIS-Conference-Proceedings-August-2023.pdf*, accessed on 04.04.2024.

[5] The directive was published in the OJ L 305/26.11.2019 and entered into force on the twentieth day from the date of publication (art. 28 of the Directive).

[6] Consolidated Version of the TFEU, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT*.

[7] *Ibidem*.

b) if they report or publicly disclose information related to violations, obtained in an employment relationship concluded in the meantime;

c) whose employment relationship has not yet begun, if the information regarding the violations was obtained during the recruitment process or other pre-contractual negotiations.

The protection measures for persons who make reports, according to the Directive, also apply, as the case may be, to: (i) facilitators (defined in art. 5 point 8 of the Directive as natural persons who assist the person making the report in the reporting process in a professional context, and whose assistance should be confidential); (ii) to third parties who are connected to the reporting persons and who may suffer retaliation in a professional context, such as their colleagues or relatives; or (iii) the legal entities that the reporting persons own, work for or have other types of connections with in a professional context.

Reporting, understood as „oral or written communication of information regarding violations", can be internal, when it takes place within a legal entity in the private or public sector, or external, in the situation where it is addressed to the competent authorities (art. 5 points 3-5 of the Directive). With regard to internal reporting[8], the Directive stipulates the obligation for Member States to ensure that legal entities in the private and public sectors establish channels and procedures for this type of reporting, as well as for undertaking subsequent actions. In terms of external reporting, Member States designate competent authorities to receive reports, provide feedback and take action on reports and ensure that they, among other measures, establish independent and autonomous external reporting channels for receiving and handling information regarding violations. The subsequent actions may consist, for example, in internal investigations, investigations, criminal prosecution, and actions for the recovery of funds or the conclusion of the procedure, according to the definition contained in art. 5 point 12 of the Directive. Public disclosure means „making information about violations available in the public domain" (art. 5 point 6 of the Directive).

One of the support measures provided for the benefit of the previously mentioned persons, according to art. 20 para. (1) lit. (c) of the Directive, is legal assistance in cross-border criminal and civil proceedings in accordance with Directive (EU) 2016/1919 and Directive 2008/52/EC.

In art. 21 para. (3) of the Directive, the rule is provided that the persons who make reports are not responsible for acquiring the information that is reported or publicly disclosed or for access to it. However, in the event that such acquisition or access constitutes an autonomous crime, this rule becomes inapplicable, and criminal liability continues to be governed by applicable domestic law. in the event of the liability of the reporting persons, arising from acts or omissions that are not related to the reporting or public disclosure or that are not necessary for the disclosure of a violation under the Directive, it is further governed by EU law or by applicable domestic law, as provides art. 21 para. (4) of the Directive.

The deadline for the Member States to transpose the provisions of this Directive was December 17, 2021, this deadline being extended by two years, by way of derogation, until December 17, 2023, in order for the Member States to comply with the obligation to adopt the normative framework regarding the establishment of internal channels in respect of legal entities in the private sector that have between 50 and 249 workers (art. 26 of the Directive). Term at which Romania also acquired the latter.

2.2. New legislation

At the EU level, on October 23, 2019, Directive (EU) 2019/1937 was adopted by the European Parliament and of the Council on the protection of persons who report violations of Union law and was published in the OJ L no. 305/26.11.2019.

As a member state of the European Union, Romania has the obligation to transposition by December 17, 2021.

According to art. 26 para. (2) of the Directive, Member States have the obligation to adopt the normative framework regarding the establishment of internal channels in what viewing private sector legal entities that between 50 and 249 de workers until December 17, 2023.

By law, the institution of whistleblower protection is in the public interest regulated by Law no. 571/2004 on the protection of personnel from public authorities, public institutions and other signalling units violations of the law, published in the Official Gazette of Romania, Part I, no. 1214/14.12.2014.

[8] *Idem*, part II.

Regulation of the institution measures to protect the staff employed in public authorities and institutions, which report certain irregularities or facts illegal acts committed within these entities, being a tool intended to encourage reporting and, by way of consequence, discovery and the sanctioning of these acts, as well as to protect these persons by granting the whistleblower status in the public interest, against eventualities negative professional or personal consequences to which they may be exposed as a result of the transmission of a session.

The person making the report must be classified in one of public authorities, public institutions or in other units that need it the law is relevant, namely the authorities of the central public administration and local, the apparatus of the Parliament, of the Presidential Administration and others The Government, but also within the autonomous administrative authorities, national companies, autonomous governments of national and local interest and national companies with state capital. Analysing the law, it can be observed that it is based on the principles of the Romanian Constitution regarding 'freedom of conscience' (art. 29)[9], 'freedom of expression' (art. 30)[10] and „the right to information" (art. 31)[11], as well as the principles of the European Charter of Rights Fundamentals regarding „freedom of thought, conscience and religion" (art. 10 para. 2), „freedom of expression and information" (art. 11), „the right to protection against the dismissal and abusive termination of the employment contract" (art. 30) and „The right to good administration" (art. 41).

I think that it is essential in the continuation of our approach to have some terminological clarifications, namely what whistleblower in the public interest meant in the sense of Law no. 361/2022, the definition is regulated in art. 3 point 7. The notion used in the Directive, the Romanian version „person who carries out the reporting" (art. 5 point 7); in the English version, the notion is reporting person (art. 5 point 7). The directive, the version in Romanian, also uses the notion of „warning" (Consideration no. 1, no. 14); in the English version, the notion is whistleblower (Recital no. 1, no. 14). We prefer to consider the terms „public interest whistleblower", „whistleblower" and „reporter" as synonyms. In other official documents in the Romanian language, the notion of whistleblower has other forms. For example, in the context of the translation of CJEU decisions, we can identify the notions of „whistleblower"5), „warner"6), „official who sent an alert"7) [12]or „informant".

Returning to Law no. 361/2022 on the protection of whistleblowers in the public interest, with subsequent amendments, outlines the general framework for the protection of persons who report violations of the law, which have occurred or are likely to occur, within the authorities, public institutions, other legal entities of public law, as well as within legal entities of private law.

As I pointed out Law no. 361/2022 transposed into national legislation Directive (EU) 2019/1937 on the protection of persons who report violations of Union law. This obligation also constitutes Milestone 430 of the National Recovery and Resilience Plan (PNRR). The European framework has established a common minimum standard at the level of all European Union states to provide for a high level of protection for whistleblowers, Romania, as a member state of the European Union, having the obligation to transpose its provisions into national legislation.

2.3. Purpose of the law

From the point of view of the scope of application, this law applies to all persons who obtained/considered/knew situations/information regarding the violation of the legislation in a professional context. Thus we can identify the following active subjects of the legislation: - workers;

- persons carrying out an independent activity, as provided by art. 49 TFEU;

- shareholders and all persons who are part of the administrative, management or supervisory body of a company, including non-executive members of the board of directors, as well as volunteers and paid or unpaid interns;

- any person who works under the supervision and direction of the natural or legal person with whom the contract was concluded, its subcontractors and suppliers;

- persons whose employment relationships have not yet begun and who make reports through internal or external reporting channels or publicly disclose information regarding violations of the law obtained during the

[9] Constitution from 21.11.1991, republished in the Official Gazette of Romania no. 767/31.10.2003. *https://legislatie.just.ro/Public/DetaliiDocument/47355?isFormaDeBaza=True*.

[10] *Ibidem*.

[11] *Ibidem*.

[12] D. Ionescu, *Public interest Whistleblower 2.0. Law no. 361/2022 In the European context*, Cluj Bar Journal no. 2/2022 *https://www.baroul-cluj.ro/wp-content/uploads/2023/03/ionescu.pdf*.

recruitment process or other pre-contractual negotiations or if the employment relationship or the employment relationship has ended;

- People who report or publicly disclose information about violations of the law anonymously.

Romanian legislation has extended the scope of the Directive, so that protection is to be granted to whistleblowers who report non-compliance with the legal provisions that represent deviations from the rules provided in the annexes to the law.

It is well known that the first to learn about the existence of illegal activities and abusive practices are the people who work for an organisation/authority or who are in contact with them in their professional activities, therefore they are in a privileged position to inform those that can solve the problem.

Whistleblowers or whistleblowers in the public interest[13], *i.e.*, people who report or disclose (to the public) information regarding an illegal fact obtained in a professional context, contribute to the prevention of harm and to the detection of the threat or harm to the common public interest. There is a presumption that if they did not do this, it is likely that the respective information would not come to light.

2.4. Which facts can constitute the subject of an integrity warning?

Trying to define the concept of „violations of the law", we understand facts that consist of an action or inaction that constitute non-compliance with the legal provisions set out in annex no. 2 of Law no. 361/2022, and consider areas such as: financial services, products and markets, prevention of money laundering and terrorist financing; public procurement; product safety and conformity; transport safety; environment protection; radiological protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer's protection; the protection of privacy and personal data and the security of networks and IT systems.

The legislative provisions also focus on other objects of interest:

- violations related to the financial interests of the European Union (as mentioned in art. 325 TFEU and as detailed in the relevant measures of the European Union);

- violations related to the internal market [referred to in art. 26 para. (2) TFEU], including violations of the European Union rules on competition and state aid. are of deep interest and violations related to the internal market in terms of acts that violate the rules on corporate taxation or mechanisms whose purpose is to obtain a fiscal advantage that is contrary to the object or purpose of the law applicable in matters of corporate taxation, which represent disciplinary violations, misdemeanors or crimes, or contrary to the object or purpose of the law.

2.5. Procedural provisions in case of infringement reporting

The law establishes certain reporting procedures for persons reporting violations of the law that have occurred or are likely to occur within authorities, public institutions, other legal persons under public law, as well as within legal persons under private law. Thus we identify 3 modalities:

1. Internal reporting, which takes place within the public or private entities in which the entity operates;

2. External reporting, to the National Integrity Agency or to other public entities that, according to special legal provisions, receive and resolve reports of violations of the law in their area of competence;

3. Public disclosure of information - making available, in any way, in the public space of information related to violations of the law (*e.g.*, press, professional, trade union or employer organisations, non-governmental organisations, parliamentary committees, etc.).

For entities with at least 50 private employees and public authorities and institutions and their unincorporated structures, which have at least 50 employees, the obligation to identify or establish internal reporting channels and to establish procedures for internal reporting and for subsequent actions is established according to the normative act.

A report on breaches of the law is mainly made through existing internal reporting channels, but in some cases whistleblowers may directly use external reporting channels or even public disclosure (via social media, media, press, etc.). However, in situations where there are grounds for obstruction of rights with a risk of retaliation against the whistleblower or where it is impossible to effectively remedy the breach of the law thus

[13] CJEU, Guide regarding art. 10 ECHR, prepared by the Court's Jurisconsult Directorate.

reported, the whistleblower in the public interest has the option of reporting breaches through external channels.

The law establishes the possibility for the whistleblower in the public interest to resort to public disclosure of information in the situation where he has first reported internally and externally or directly externally, and assesses that appropriate measures have not been ordered with respect to the legal deadlines set for this purpose. The same procedure may also apply where the breach may constitute an imminent or obvious danger to the public interest or there is a risk of damage that cannot be remedied or in the case of external reporting there is a risk of retaliation or a low likelihood that the breach will be effectively remedied given the specific circumstances of the reporting.

The external reporting channel is also useful in the absence of internal reporting channels for private legal entities with less than 50 employees, the public interest whistleblower wishing to report a breach. In this case, according to the law, the person reporting on violations of the law may report by name or anonymously.

Analysing from a procedural point of view, we identify differences between the two ways of reporting. Thus for nominal reporting there is the possibility of communication to clarify certain issues presented in the report between the whistleblower in the public interest and the person designated by the entity (with powers to receive, record, examine, carry out subsequent actions and resolve reports in the interest of the law); We must point out a flaw in the law, namely that the person who reports violations of the law anonymously cannot benefit from exemption and protection under the provisions of Law no. 361/2022; On the other hand the person who reports violations of the law anonymously cannot be notified about the registration of the report, the progress made and the way of resolution.

For the Report in the interest of the law, the referral shall contain the following: name and surname, contact details of the whistleblower in the public interest, the professional context in which the information was obtained, the person concerned, if known, a description of the fact likely to constitute a breach of the law within the public or private entity, evidence in support of the report, date and signature. By exception, entities are also required to review and address anonymous reports that do not include the name, surname, contact details or signature of the whistleblower in the public interest to the extent that they contain indications of violations of law.

The law also establishes the material method of making the report, namely it is made in writing, on paper or electronically, by communication on telephone lines or other voice messaging systems or by face-to-face meeting, at the request of the whistleblower in the public interest.

2.5.1. Internal reporting

At the level of each entity there is an obligation to nominate a person, referred to by law as a „designated person", whose duties shall be to receive, record, examine, take follow-up action and resolve reports in the interest of the law and to ensure that employees are informed of the internal reporting procedure. The duties of the designated person include:

– maintaining the confidentiality of reports received,

– informing the whistleblower of the registration of the report within 7 calendar days of receipt,

– maintaining contact with the whistleblower in the public interest to request further information and intelligence,

– informing the whistleblower in the public interest within a reasonable period of time, not exceeding 3 months or, in justified cases, 6 months after receipt of the report, and whenever there are developments in the conduct of the follow-up action, unless informing the whistleblower could jeopardise the conduct of the follow-up action.

In all cases, the designated person is obliged to draw up a report comprising the following elements: presentation of the situation which was the subject of the report, including a description of the information brought to the attention of the competent authority by the registered report and, where appropriate, communication to the authorities, public institutions, other legal persons governed by public law concerned, as well as to legal persons governed by private law, of conclusions and recommendations which may include references to possible protective measures,

The law establishes the obligation to communicate, within 5 days of the completion of the examination, to the whistleblower and the person concerned the manner of the resolution of the report.

Following the conclusion of the analysis process the designated person may decide to close the procedure if after examining the report it is found that it is clearly a minor violation and does not require further subsequent action other than closing the procedure.

The law also identifies cases in which the report is classified. Thus when it does not contain the elements prescribed by law, other than the identification data of the whistleblower in the public interest, and the designated person has requested its completion within 15 days, without this obligation being fulfilled; In the case where the report is submitted anonymously and does not contain sufficient information on violations of the law, which would allow the analysis and resolution of the report, and the designated person has requested its completion within 15 days, without this obligation being fulfilled. At the same time and when a new report is received with the same subject matter, without providing additional information justifying a different subsequent action, the report is closed.

Taking the example from the civil code, if a person makes several reports with the same subject matter, they are linked, the public interest whistleblower will receive only one information.

2.5.2. External reporting

The law identifies the external reporting channel for persons reporting violations of the law and names the National Integrity Agency (ANI)[14].

At this institution, the procedure involves several steps. Thus, the registration of reports and confirmation of their receipt by the specialised structure within ANI is done immediately, but no later than 7 calendar days from the date of receipt, unless the whistleblower in the public interest has expressly requested otherwise or when ANI reasonably considers that a confirmation of receipt of the report would jeopardise the protection of the identity of the whistleblower in the public interest.

At the level of the National Integrity Agency the review process provides for several steps to be completed. Thus this institution has the right to request the submission of documents from the entity and to collect and process data and information on the registered report, with the obligation to maintain confidentiality, and the entity has the obligation to respond to ANI's request within a maximum of 15 working days from receipt of the request.

It must inform the whistleblower within a reasonable period, not exceeding 3 months or, in justified cases, 6 months from receipt of the report, and whenever there are developments in the conduct of subsequent actions, unless the information could jeopardise their conduct,

The Agency also has a duty to provide confidential advice, on request, to persons wishing to make reports and to assist in protecting such persons against reprisals before any authority. Through its special structures, the NIA detects and punishes offences provided for by law.

2.6. Protective measures for whistleblowers in the public interest

As we have pointed out, the legislation under discussion proposes protective measures for whistleblowers in the public interest. Thus, the Law provides for three cumulative conditions to be met for public interest whistleblowers to benefit from protection measures.

In the first phase, the whistleblower must be one of the persons who makes reports according to the provisions of the law (employee, former employee, shareholder in a company, volunteer, etc.) and who has obtained information about violations of the law in a professional context. Then the whistleblower must have had reasonable grounds to believe that the information relating to the reported breaches was true at the time of reporting. Another main condition is that the whistleblower must have made an internal report, an external report or a public disclosure.

When there is a suspicion that there might be retaliation at the level of the institution/entity, whistleblowers benefit from protective measures.

Thus the whistleblower is not liable for the reporting or public disclosure of such information if a report or public disclosure was made under the terms of the law and the whistleblower had reasonable grounds to believe that the reporting or disclosure was necessary to disclose a violation of the law.

[14] ANI, Information regarding the operationalization of the external reporting channel - integrity whistleblowers, *https://www.integritate.eu/Avertizori-%C3%AEn-interes-public.aspx*.

The whistleblower is also not liable if the access to or acquisition of data and information of which they have knowledge by virtue of their duties or employment relationship is for the purpose of reporting or publicly disclosing a violation of law and the public reporting or disclosure was made under the terms of the law. Also, in legal proceedings concerning violations such as image infringement, copyright infringement, breach of professional secrecy, breach of data protection rules, disclosure of trade secrets or actions for damages, liability cannot be incurred as a result of public reporting or disclosure made in accordance with the law.

Where a person reports or publicly discloses information relating to breaches of the law under the terms of the law and such information includes trade secrets, such reporting or public disclosure shall be deemed lawful under art. 3(3). (2) of GEO no. 25/2019[15]on the protection of know-how and undisclosed business information constituting trade secrets against unlawful acquisition, use and disclosure, as well as on the amendment and completion of some normative acts,

Whistleblowers shall be entitled to full compensation for the damage suffered as a result of public reporting or disclosure. if they have made a public reporting or disclosure under the terms of this Law.

The new legislative framework in force since 2022 but implemented in 2023 also provides for other direct protection measures especially against reprisals against the whistleblower leading to suspension of the whistleblower's individual employment contract or employment relationship, dismissal or dismissal from public office, modification of the employment contract or employment relationship; reduction of salary and change of working hours, demotion or prevention of promotion in employment or public office and professional development, including through negative evaluations of individual professional performance, including public servants, or negative recommendations for the professional work performed.

They are prohibited by law:

– the application of any other disciplinary sanction;

– coercion, intimidation, harassment;

– discrimination, creation of another disadvantage or unfair treatment;

– refusing to convert a fixed-term employment contract into a contract of indefinite duration if the worker had a legitimate expectation that he or she would be offered a permanent post;

– refusal to renew a fixed-term employment contract or early termination of such a contract;

– causing damage, including damage to the reputation of the person concerned, in particular on social media, or financial loss, including loss of business opportunities and loss of income;

– inclusion on a negative list or database, based on a formal or informal sectoral or industry-wide agreement, which may imply that the person concerned will not find a job in that sector or industry in the future;

– unilateral extra-judicial termination of a contract for goods or services without the conditions for such termination being met;

– cancellation of a licence or permit;

– a request for a psychiatric or medical assessment.

The public nuisance whistleblower may challenge the measures taken in retaliation against him by applying to the court having jurisdiction, depending on the nature of the dispute, in whose district he is domiciled.

It should be pointed out that infringements of the provisions of Law no. 361/2022 entail civil, disciplinary, contravention or criminal liability, as appropriate.

3. Conclusions

There are international legal instruments for the defence of the rights and freedoms of citizens, such as conventions, agreements, treaties, etc.[16] At the level of the Romanian state we still feel the wounds of the Cooperation and Verification Mechanism, even if today raised, the implications in the Romanian judicial and institutional system have not materialised in a definitive institutional reform. We cannot conclude that we have modern institutions where the rights of the European citizen are respected, and with an identity crisis the European institutions are also suffering.

[15] GEO no. 25/2019 on the protection of know-how and undisclosed business information that constitute trade secrets against illegal acquisition, use and disclosure, as well as for the amendment and completion of some normative acts. *https://legislatie.just.ro/Public/DetaliiDocumentAfis/212998*.

[16] E.E. Ștefan, *News and perspectives of public law*, in Athens Journal of Law, vol. 9, Issue 3, July 2023, p. 396, *https://www.athensjournals.gr/law/2023-9-3-4-Stefan.pdf, DOI: 10.30958/ajl.9-3-4*, accessed on 04.04.2024.

Under the umbrella of Romania's National Recovery and Resilience Plan. The National Integrity Agency has taken all steps to fulfil its legal obligations under the organisational aspect. Thus ANI is the main hub of warnings resulting from the application of the law. We hope that time will show whether this solution corresponds to reality and whether this institution, which appeared after Romania's integration into the EU area, will manage to implement the requirements of Law no. 361/2022 adequately, *i.e.*, to be able to improve prevention as the main purpose of this law. We see a very useful need for a coordinator of this component to avoid institutional chaos.

It is known at this point the plethora of reports faced by most public institutions, which receive reports on violations of the law that have occurred or are likely to occur within them (including in subordinate/coordinated entities. These reports will be analysed in the light of the applicable legislation and will be forwarded to the competent institutions, the ANI, the Public Prosecutor's Office or other entities with legal competence in this field. However, until the practice is stabilised, confusion will arise, especially as regards jurisdiction. We hope that when all the actors of society will sit down at the table and will be actively involved to support the citizens. Let's not forget that this law is only to protect the common interest and support the active involvement of citizens.

The best conclusion: „Whistleblowers are courageous people who dare to bring illegal activities to light and stand up on their own to protect the public from wrongdoing.[17]" Frans Timmermans, First Vice-President of the European Commission).

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[17] Whistleblower protection in the EU: Commission welcomes adoption by the Council, 07.10.2019, *https://ec.europa.eu/commission/presscorner/detail/en/MEX_19_6032*.

AUTONOMOUS CENTRAL SPECIALISED AUTHORITIES

Elena Emilia ȘTEFAN[*]

Abstract

Within the public administration organisation system, a special place is given to the autonomous specialised central authorities, regulated by the Constitution. Such a constitutional rank authority is the Economic and Social Council. In view of the fact that, according to the Constitution, the Economic and Social Council is an advisory body of Parliament and the Government, without detailing the areas of expertise in which it is consulted, there is a question in what concerns the way in which it fulfils its role established by the legislator. Therefore, the scope of this study is to know the legal regime of this autonomous central specialised authority, according to the legislation and specialised doctrine.

Furthermore, the analysis will place the Economic and Social Council in an international context, in the sense that we will research in comparative law what is provided for in the constitutions of other European countries regarding this authority. From this point of view, we consider the topic to be of interest to legal specialists as it provides information about a public authority of constitutional rank.

In this respect, by means of law-specific researched methods, such as documentary method, comparative method and logical-deductive method, we will underline the conclusion of our paperwork, that, among other duties, the Economic and Social Council, being involved in the broad legislative process, according to its organic law, issues opinions and carries out an activity in the public interest.

Keywords: *Administrative Code, Economic and Social Council (ESC), autonomous central public authority, Law no. 248/2013 on the organisation and functioning of the Economic and Social Council, opinion.*

1. Introduction

Considering the complexity of the daily activity carried out in public administration, combined with the fact that, according to the law, there are certain public advisory authorities, curiosity urged us to document the subject in order to be able to know as much as possible about the activity of the various public authorities, in this respect. According to the doctrine, „*the dynamism of modern life does not in many cases allow the conduct of social life to be shackled to certain fixed patterns, predetermined by law*"[1]. Therefore, we consider that the legislator has regulated the possibility for certain advisory bodies to operate at public administration level. In this respect, one of the public authorities involved in the legislative process is the Economic and Social Council.

Among autonomous administrative authorities of constitutional nature, being provided for first by the Constitution, their organisation and functioning being performed by means of organic law, we hereby list the following: „the *Ombudsman, Court of Audit, Supreme Council, Legislative Council, Economic and Social Council, public radio and television services, intelligence services with duties in the field of national security*[2]". According to the doctrine, the organisation in our country of such authorities, with control or coordination powers, independent of the Government, „*are part of the general trend that characterises Western legislation in recent years, namely the numerical increase of independent administrative authorities, created at the central level, autonomous towards the Government and sometimes towards the Head of State*[3]".

Therefore, this paper aims to provide as much information as possible on the legal regime of the Economic and Social Council by answering questions such as*: „What are the areas of expertise of the Economic and Social Council?"* or *„What is the role of the ESC in the pyramid of public authorities?"*. In this respect, a structure organised on two levels is proposed, the national and the comparative law, and the content of the study will analyse the relevant legislation and doctrine in order to formulate a conclusion.

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[1] T. Drăganu, *Introducere în teoria și practica statului de drept (Introduction to the theory and practice of the rule of law),* Dacia Publishing House, Cluj-Napoca, 1992, p. 184.

[2] C.S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public (Administrative law. Fundamental problems of public law)*, C.H. Beck Publishing House, Bucharest, 2016, pp. 648-649. Also see E. Anghel, *Involvement of the Ombudsman institution of Ombudsman in the mechanism of constitutional justice*, in the proceedings CKS-eBook, 2021, pp. 559-563.

[3] R.N. Petrescu, *Drept administrativ (Administrative law),* Hamangiu Publishing House, Bucharest, 2019*,* p. 127.

2. Legal regime of the ESC

2.1. Legal nature and role of the ESC

According to art. 141 of the Constitution, „the Economic and Social Council shall be an advisory body of the Parliament and Government, in the areas of expertise stated by the organic law for its establishment, organisation, and functioning". The organic law referred to in the Constitution[4] is currently Law no. 248/2013 on the organisation and functioning of the Economic and Social Council[5]. Prior to 2013, Law no. 107/1997 on the organisation and functioning of the Economic and Social Council was in force[6].

Art. 1 of previous Law no. 107/1997 provided the following: „the Economic and Social Council, a tripartite, autonomous body of public interest, shall be set up for the purposes of the social dialogue between the Government, trade unions and employers and a climate of social peace". Currently, according to art. 1 para. (1) of organic Law no. 248/2013, ESC „is a consultative body of the Parliament and of the Government of Romania within the areas of expertise established by means of this law".

Furthermore, ESC is a „*public institution of national interest, tripartite, autonomous, set up for the purpose of conducting dialogue between employers' organisations, trade union organisations and representatives of non-governmental civil society associations and foundations*" [art. 1 para.(2)]. Moreover, ESC has legal personality and registered office in Bucharest[7].

The administrative law literature discusses the ESC in a separate chapter devoted to the autonomous authorities of the specialised central public administration. In this respect, there is an author that states that „*being autonomous authorities, but exercising administrative duties, they are not subject to public guardianship regime, such as the autonomous authorities of the local government (county councils, local councils, city halls, etc*.)"[8]. In the same context, the doctrine states that the autonomous administrative authorities, „*whether or not expressly provided in the Constitution, are organised and function based on certain organic laws*[9]". Therefore, „*the legal regulation requires acceptance of and compliance with the prescribed conduct* [10]".

According to the Administrative Code, art. 2 para.(1) „the central public administration authorities are: the Government, ministries, other specialised bodies subordinated to the Government or ministries, autonomous administrative authorities". The Administrative Code regulates the structure of the specialised central public administration in art. 51 para. (1) as consisting of „ministries, other structures in the subordination or coordination of the Government or of the ministries and autonomous administrative authorities". Furthermore, „in accordance with the current body of law, whether constitutional or infra-constitutional, two categories of administrative law relationships can be distinguished: subordination relationships and collaboration relationships."[11]

In what concerns the administrative law relationships arisen between the Government and the autonomous administrative authorities, the Administrative Code establishes them as being collaboration relationships[12] (art. 27). Furthermore, the doctrine states that „*public administration comprises central public administration bodies and their deconcentrated services, as well as local public administration bodies*[13]."

Title III of the Administrative Code regulates the autonomous administrative authorities, in art. 69-74. With regard to the specific names of the authorities, it has been stated that „*they differ from one authority to another: council, service, commission, court*[14]*".* The doctrine shows that these autonomous specialised central authorities

[4] For more about constitutionalism, see C. Ene-Dinu, *A century of constitutionalism,* in Lex et Scientia International Journal no. XXIX, vol. 2/2023, p. 129-138, *https://lexetscientia.univnt.ro/download/2023_XXX_2_10_LESIJ.pdf*, accessed on 07.03.2024.

[5] Published in the Official Gazette of Romania no. 456/24.07.2013, as further amended and supplemented.

[6] Published in the Official Gazette of Romania no. 141/07.07.1997.

[7] Public information, *https://www.ces.ro/consiliul-economic-si-social/ro/1*, accessed on 10.02.2024.

[8] I. Corbeanu, *Drept administrativ (Administrative Law)*, Lumina Lex Publishing House, Bucharest, 2010, p. 291.

[9] D. Apostol Tofan, *Drept administrativ (Administrative law)* vol. I, 2nd ed., C.H. Beck Publishing House, Bucharest, 2008, p. 246.

[10] N.E. Hegheș, *The non - retroactivity of' new legal norms-fundamental principle of law. Exceptions,* in International Journal Of Legal And Social Order (1), p. 153, *https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60*, accessed on 03.03.2024.

[11] M.C. Cliza, C.C. Ulariu, *Drept administrativ, Partea Generală (Administrative Law, General Part),* C.H. Beck Publishing House, Bucharest, 2023, p. 300.

[12] See also N. Popa (coord.), E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar Booklet)*, 4th ed., C.H. Beck Publishing House, Bucharest, 2023, p. 227.

[13] M.C. Cliza, C.C. Ulariu*, op. cit.,* p. 154.

[14] D. Apostol Tofan*, op. cit.,* p. 246.

„are the work of the constituent legislator, which means that they can only be abolished by means of a constitutional law amending the fundamental law by repealing the articles or changing their content[15]*”*.

According to the doctrine, „the difference between autonomous central specialised authorities with constitutional status and those with legal status is not only in terms of the legal act by which they were created, but also in terms of their degree of dependence[16]”. Therefore, „the autonomous authorities of constitutional rank are subject to the Government only to the extent that it adopts ordinances or regulatory decisions which are binding on them like any other subject of law”[17]. On the other hand, „for the autonomous authorities created by organic law, the rule established by art. 102 para. (1) according to which the Government exercises the general management of public administration has a higher degree of extension and applicability[18]”.

With regard to ESC role, the Court noted the following in its case law: *„art. 141 of the Constitution merely enshrines the role of the Economic and Social Council as an advisory body of the Parliament and the Government, and for details of the areas of expertise in which it is consulted, the text refers to its organic law of establishment, organisation and functioning*[19]*”*.

2.2. Areas of expertise - duties - management

According to its organic law, art. 2 para. (2), the areas of expertise of the ESC are: “economic policies; financial and fiscal policies; labor relations, social protection, wage policies and equal opportunities and treatment; agriculture, rural development, environmental protection and sustainable development; consumer protection and fair competition; cooperation, liberal professions and self-employment; citizens' rights and freedoms; health policies; education, youth, research, culture and sport policies”.

Furthermore, regarding *ESC duties*, the law provides the following:

„a) approves draft normative acts of the areas of expertise referred to in art. 2 para. (2) initiated by the Government, as well as the legislative proposals of the deputies and senators, inviting the initiators to the debate of the normative acts;

b) draws up at the request of the Government, the Parliament or on its own initiative, analyses and studies on economic and social realities;

c) notifies the Government or the Parliament of the appearance of economic and social phenomena that require the appearance of new normative acts”.

According to art. 6, *the types of opinions* issued by the Economic and Social Council are: favorable opinions, opinions with observations and proposals, unfavorable opinions. From another perspective, in the administrative law doctrine, the opinions are analysed as procedural operations prior to the issuance of administrative acts[20]. Returning to the analysis carried out, annual activity reports can be found on the institution's website[21], as well as information on the granted opinions[22].

Regarding the personnel, the organic law provides information on how this public authority works. According to the doctrine, „like any state body, in general like any social body, public administration bodies consist of individuals who make up the personnel of the respective bodies[23]”. The ESC management consists of the president and vice-presidents.

According to art. 20 of the law, the *plenary* ensures the ESC general management and, among other duties, approves draft normative acts. According to the organic law, ESC plenary consists of 45 members, each member being elected for a 4-year term which cannot be renewed, the law expressly establishing the cases of termination of the term of office.

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[15] V. Vedinaș, *Drept administrativ (Administrative Law)*, 14th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023, p. 189.

[16] *Ibidem.*

[17] I Muraru, E.S. Tănăsescu (coord.), *Constituția României.Comentariu pe articole (The Constitution of Romania. Comments on the articles)*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2022, p. 1013, *apud* V. Vedinaș, *Drept administrativ (Administrative Law), op. cit.,* pp 189-190.

[18] V. Vedinaș, *Drept administrativ (Administrative Law), op. cit.,* p. 190.

[19] CCR dec. no. 391/2021, published in Official Gazette of Romania no. 719/22.07.2021.

[20] M.C. Cliza, *Drept administrativ (Administrative Law), Part II*, Pro Universitaria Publishing House, Bucharest, 2010, pp. 30-32.

[21] Public information, *https://www.ces.ro/rapoarte-de-activitate-ale-ces/ro/27*, accessed on 19.02.2024.

[22] For example: *https://www.ces.ro/avize-ces-2024/ro/276*, accessed on 19.02.2024.

[23] D. Brezoianu, M. Oprican, *Administrația publică în România (Public administration in Romania)*, C.H. Beck Publishing House, Bucharest, 2008, p. 209.

In interpreting[24] the legal norm regulated by art. 17 para.1) letter e) of the organic law, the High Cort of Cassation and Justice, in its case law, in a case concerning the revocation of members of the Economic and Social Council, has analysed the legality of administrative acts revoking their membership of the Economic and Social Council.

Therefore, the High Court of Cassation and Justice noted the following: „the issue in the present case is not whether or not the applicants have performed the work for which they were appointed, but the legality of the administrative acts revoking their membership of the Economic and Social Council, and if the decisions to revoke their membership are found to be unlawful, the applicants shall be entitled to receive the allowance even if they were prevented from performing their work (…)"[25].

The Constitutional Court points out the following[26]: „*Law no. 248/2013 does not provide for the revocation of members of the Economic and Social Council for failure to perform their duties or for conduct that violates legal or constitutional rules, but establishes the possibility for the Prime Minister to request the revocation, arbitrarily, of the member of the Economic and Social Council whom he has appointed, without specifying the public authority that could approve such revocation* (para. 33)"[27]. Furthermore, the Court noted that „*the legislative solution provided for in art. 17 para. (1) letter e) which does not specify the cases and grounds for dismissal of members of the Economic and Social Council or the procedure for their dismissal, is unconstitutional.* (para. 38)[28]".

3. ESC - comparative law patterns

The information in this section is based on a selection of European constitutions, by analysing work *Codex constituţional. Constituţiile statelor membre ale Uniunii Europene (Constitutional Codex. Constitutions of the Member States of the European Union)*[29]. According to the administrative law doctrine, „European constitutions are formal laws that include the fundamental rules of the state (...)"[30]. Furthermore, „the Constitution commands the whole of law, by its content and position in the legal system"[31].

By reading the Constitution[32] of the Republic of Austria, it appears that the legislator does not develop information about the ESC but merely nominates it in relation to the Government. Therefore, according to art. 23 letter c) „*The Austrian participation in the nomination of members of the Commission, the Court of Justice, the Court of First Instance, the Court of Accounts, the Administrative Council or the European Investment Bank, the Economic and Social Committee, as well as the Committee of the Regions within the framework of the European Union is incumbent upon the Federal Government* (...)".

In the Constitution of the Hellenic Republic[33] instead, the legislator refers to the law organising the ESC which it regulates under the name of Economic and Social Committee. In this respect, we indicate art. 82 para. (3) which provides as follows: „*Matters relating to the establishment, functioning and competences of the Economic and Social Committee whose mission is to conduct social dialogue for the overall policy of the Country and, especially, for the orientations of the economic and social policy, as well as to formulate opinions on Bills and law proposals referred to it, shall be specified by law*".

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[24] On the legal interpretation, see M. Bădescu, *Teoria generală a dreptului (General Theory of Law)*, Sitech Publishing House, Craiova, 2018, pp. 167-187 or I. Boghirnea, *The interpretation – obligation for the judge imposed by the application of the law*, Journal in Legal And Administrative Studies, Year XVII, no. 2 (19) 2018, pp. 50-57, *https://www.upit.ro/_document/31012/jlas_2_2018_r.pdf*.

[25] HCCJ, contentious administrative and fiscal s., dec. no. 81/13.01.2022, *https://www.universuljuridic.ro/jurisprudenta-prelucrata-consiliul-economic-si-social-revocare-membrii-legalitatea-actelor-administrative-de-revocare-a-acestora-din-calitatea-de-membri-ai-ces-plata-indemnizatiei/*, accessed on 13.02.2024.

[26] C. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in Lex ET Scientia International Journal no. XXIX, vol. 1/2022, pp. 66-74, *https://lexetscientia.univnt.ro/download/2022_XXIX_1_6_LESIJ.pdf*, accessed on 07.03.2024.

[27] CCR dec. no. 69/2023, published in Official Gazette of Romania no. 23/11.01.2024.

[28] *Ibidem*.

[29] Şt. Deaconu, I. Muraru, E.S. Tănăsescu, S.G. Barbu, *Codex constituţional. Constituţiile statelor membre ale Uniunii Europene (Constitutional Codex. Constitutions of the Member States of the European Union),* vol. I and II, Publishing House of the Official Journal, Publishing and Printing, Bucharest, 2015, pp. 23-748.

[30] D. Apostol Tofan*, Instituţii administrative europene (European Administrative Institutions),* C.H. Beck Publishing House, Bucharest, 2006, p. 12.

[31] I. Muraru (coord), A. Muraru, V. Bărbăţeanu, D. Big, *Drept constitutional şi instituţii politice. Caiet de Seminar (Constitutional law and political institutions. Seminar Booklet)*, C.H. Beck Publishing House, Bucharest, 2020, p. 60.

[32] Public information, *https://constitutii.files.wordpress.com/2013/02/austria.pdf*, accessed on 15.02.2024.

[33] Public information, *https://constitutii.files.wordpress.com/2013/01/grecia.pdf*, accessed on 15.02.2024.

In what concerns the Constitution of the French Republic[34], we note a difference from our Constitution, in that the legislator has regulated in Title XI - the Economic, Social and Environmental Council, art. 69-71. Therefore, according to art. 69 para. (1) of the Constitution „*The Economic and Social Council, on a referral from the Government, shall give its opinion on such Government Bills, draft Ordinances, draft Decrees, and Private Members' Bills as have been submitted to it*". Furthermore, according to art. 71 „*The composition of the Economic, Social and Environmental Council, which shall not exceed two hundred and thirty-three members, and its rules of proceeding shall be determined by an Organic Law*". We note that although the legislator regulates this public authority, the name is more complex, by also including environmental issues.

Moreover, the Constitution of the Portuguese Republic[35] regulates the ESC in art. 92. According to the constituent legislator, the Economic and Social Council is „*the body with responsibility for consultation and concertation in the economic and social policy domain, shall take part in drafting the Major Options and the economic and social development plans, and shall exercise any other functions allocated to it by law*". Furthermore, according to the constitutional provisions, "*the law shall also define the way in which the Economic and Social Council is organised and its modus operandi, together with the status and role of its members*."

In the Constitution of the Republic of Slovenia[36], the ESC is known under the name of the National Council. According to art. 96 of the Constitution: „*The National Council is the representative body for social, economic, professional, and local interests. The National Council has forty members"*. Furthermore, the law regulates the organisation and functioning of this body.

Romania, like the other countries referred to above, by regulating ESC in the Constitution, has harmonised domestic law with European legislation. As the doctrine has revealed, regarding the application of European Union law in our country, „*the provisions of article 148(4), according to which the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfilment of the obligations arising from the Act of Accession and the provisions of art. 148(4), are relevant[37]".* At the same time, Romania has transposed European legislation in various fields of activity, as it is well known that failure to comply with European legislation entails Member State liability.

We note that the European Economic and Social Committee operates at the EU level, a body which „*advises the Council and the Commission and is actively involved in the decision-making process*[38]". According to art. 300 TFEU, there are two consultative bodies of the Union: the Council of the Regions and the Economic and Social Committee - EESC.

According to art. 300 para. (2) TFEU, EESC shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas. Furthermore, „*EESC is a consultative body of the European Union, based in Brussels and composed of 329 members. Its opinions are required on the basis of a mandatory consultation in the fields established by the Treaties or a voluntary consultation by the Commission, the Council or Parliament, and the EESC may also issue opinions on its own initiative[39]".* At the same time, an analysis of the legislation shows that EESC members exercise their functions with complete independence, in the general interest of the Union, by delivering opinions on European Union matters to the European Commission, the Council of the European Union and the European Parliament.[40]

3. Conclusions

The Economic and Social Council - ESC, as a constitutional rank authority, was analysed in this study in order to find out as much as possible about the applicable legal regime, in which sense the applicable legislation, doctrine and the institution's website were analysed. The great number of public information revealed by means of the IT method[41] increasingly underlines that „*mankind is globally connected by high-speed digital data*

[34] Public information, *https://constitutii.files.wordpress.com/2013/02/franta.pdf*, accessed on 15.02.2024.

[35] Public information, *https://constitutii.files.wordpress.com/2013/01/portugalia.pdf*, accessed on 15.02.2024.

[36] Public information, *https://constitutii.files.wordpress.com/2013/01/slovenia.pdf*, accessed on 15.02.2024.

[37] R. M. Popescu, *Drept internațional public (International Public Law),* Universul Juridic Publishing House, Bucharest, 2023, p. 34.

[38] A. Fuerea, *Manualul Uniunii Europene (The European Union Handbook)*, Universul Juridic Publishing House, Bucharest, 2010, p. 129.

[39] Public information, *https://www.europarl.europa.eu/factsheets/ro/sheet/15/comitetul-economic-si-social-european*, accessed on 19.02.2024.

[40] CCR dec. no. 679/2023, published in Official Gazette of Romania no. 23/11.01.2024, para. 39.

[41] On quantitative research methods, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar (General theory of law. Seminar booklet)*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 29.

networks[42]". This has led the doctrine to rightly state that „*the regulation of the digital domain entails the formation of new paradigms in the legal space*[43]".

On this occasion, the analysis showed that the ESC is a consultative body of the Romanian Parliament and Government in the areas of expertise established by the organic law on the establishment, organisation and functioning thereof, respectively Law no. 248/2013. At the same time, from the documentation of the legislation, it can be said that the ESC falls under the scope of the autonomous authorities of the specialised central public administration and the activity carried out is a public service[44] in the public interest. With regard to draft normative acts of its areas of expertise, it appears that ESC issues several categories of opinions, as follows: favorable opinions, opinions with comments and proposals, unfavorable opinions.

At the European level, the documentation carried out revealed that this body is established in the Fundamental Law of several European countries, often with different names such as the Constitution of the French Republic (Economic, Social and Environmental Council) or the Constitution of the Republic of Slovenia (National Council). At the same time, our country is also represented at the Economic and Social Committee - EESC, an European advisory body.

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[42] G. Manu, O. Predescu*, Dreptul public în fața provocărilor inteligenței artificiale (Public law facing the challenges of artificial intelligence)*, Universul Juridic Magazine no. 6/2023, p. 17, *https://revista.universuljuridic.ro/wp-content/uploads/2023/08/01_Revista_Universul_Juridic_nr_6-2023_PAGINAT_BT_G_Manu.pdf*, accessed on 19.02.2024.

[43] A. Conea, *Politicile Uniunii Europene (European Union Policies),* Universul Juridic Publishing House, Bucharest, 2020, p. 10.

[44] On public services in: V. Negruț, *Drept administrativ. Serviciul Public. Proprietatea publică (Administrative Law. Public Service. Public Property)*, C.H. Beck Publishing House, Bucharest, 2020, pp. 1-18.

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- CCR dec. no. 391/2021, published in the Official Gazette of Romania no. 719/22.07.2021;
- CCR dec. no. 679/2023, published in the Official Gazette of Romania no. 23/11.01.2024;
- HCCJ, Contentious Administrative and Fiscal s., dec. no. 81/13.01.2022, https://www.universuljuridic.ro/jurisprudenta-prelucrata-consiliul-economic-si-social-revocare-membrii-legalitatea-actelor-administrative-de-revocare-a-acestora-din-calitatea-de-membri-ai-ces-plata-indemnizatiei/;
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- https://constitutii.files.wordpress.com/2013/02/franta.pdf;
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- https://constitutii.files.wordpress.com/2013/01/slovenia.pdf.

DISCUSSIONS REGARDING A POSSIBLE GOVERNMENT GUARDIANSHIP CONTROL OVER ADMINISTRATIVE ACTS

Constantin Claudiu ULARIU[*]

Abstract

The Government, as an emblematic and fundamental exponent of executive power within the framework of the rule of law, alongside the President of Romania, constitutes a determinant structure of representative democracy. It is the result of the Parliament's act of choice, as the supreme representative body of the Romanian people and the sole legislative body in the state.

Considering this prestigious DNA inherited by the Government, combined with the fundamental role played by this essential administrative authority in executing and organising the activities of all public institutions in Romania, it follows that it assumes a responsibility for coordination and administrative patronage over all state authorities, regardless of the level at which they operate, whether at the central or local level, and regardless of their intrinsic functionality.

In this sense, the Government must be recognized with a series of attributions for harmonisation, elaboration of strategic policies, verification, and taking of necessary measures to complete the governance program to which the Cabinet has committed, whose component elements presuppose a political and institutional strategic function from the Government's part. Only in this way can the achievement of all levels of social, economic, educational, military, investment, etc., development targeted by the Government's activity be ensured.

However, one of the fundamental questions that arises in this context is whether the Government can be recognized, within the current legislative and jurisprudential framework, with a competence to verify the legality of administrative acts issued/adopted by various state authorities and institutions, which are in various legal relationships with the Government.

Therefore, it is to be discussed whether the general control role exercised by the Cabinet over administrative activities in Romania, on various levels of their manifestation, as well as the functions of strategy, coordination, implementation, regulation, representation, and coherent administration of the country, can be objectified even in a legal authorization of legality control that this executive organ can justify at some point in the society's development and the manifestation of social relations, in an increasingly accelerated dynamism.

Although the vocation of coordination that the Government can exercise within a representative democracy can be admitted in principle, where the Cabinet is called upon to realise a strategic policy and vision regarding the country's development and all its institutions, the requirement of the incidence of essential and sufficient guarantees must also be considered to ensure the balance of powers in the state and the democratic evolution of state institutions.

Hence, a series of elements must be considered to ensure a minimum institutional and legislative coherence, which guarantees the correct and predictive functioning of all state institutions, as well as a coherent and correct coordination by the Government over administrative activity in Romania.

This objective involves a systematic analysis of the domestic normative framework and the identification of elements relevant to the domain subject to analysis through this legal initiative.

Keywords: *Government, administrative guardianship, coordination, balance, strategy*.

1. The role of the Government in Romanian society, as relevant within the current normative framework

The Government represents that authority of the central public administration that has the competence to realise an integrative vision regarding not only its own activities but also those of all public institutions of the state, an indispensable element for the optimal and integral realisation of its public policies assumed by the Cabinet through its governance program assumed before and approved by Parliament.

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In this sense, doctrine has highlighted that „the Government has the task of realising the nation's policy, it is the initiator, shaper, and executor of measures for economic recovery, inflation reduction, and economic stability, responsible for public order, national defense, or the state's relations with other states it governs"[1].

From another perspective in doctrine, it has been noted that "the Government, the other pole of the bicameral executive power, has as constitutional priorities the exercise of leadership and general control over the authorities of public administration, as well as the administration of functional, economic, administrative, and social activities of Romania"[2].

Therefore, the Executive, by its very reason for existing and by its intrinsic functionality, fulfils a series of fundamental duties in society, some standardised, and others related to insidious legal detail.

This role of institutional leadership, based on the legitimate competences recognized to it by the provisions of art. 62 and following of the Constitution, grants legitimacy to the Government to carry out management, legal, and factual duties of the Romanian state institutions, leadership, coordination, as well as the elaboration of fundamental policies related to the comprehensive development of various areas of activity included in the Cabinet's governance plan.

For example, concerning the construction of the consolidated general state budget project, the Government not only represents the repository of the constitutional competence to allocate the financial resources of the state among various ministries and further among various public institutions of the state but is also authorised and, at the same time, obliged to pursue a coherent and visionary financial policy of prioritising various areas of national interest and prioritised and rational funding, thoroughly economically justified, for achieving the strategic and projected development objectives of the areas of interest from the governance plan approved by Parliament.

In this regard, it has been rightfully pointed out in French specialist literature that the strategic governance policy elaborated and followed by the Government „presupposes an arbitration power, in budgeting, between the credits requested by ministers and those that the Minister of Finance intends to grant: the difference is often significant and gives rise to close discussions. Moreover, coordination between the actions of the different ministers must be ensured: this is generally done through sectoral meetings or government seminars”[3].

Indeed, the Government has a wide range of competencies and responsibilities, which confer it a preemptive role in the national institutional framework and, on the other hand, provide it with credibility and efficiency in the legal measures it is required to undertake, aiming at achieving macroeconomic and institutional policies or the current management of „public affairs”.

Additionally, the Government has broad discretionary power regarding the nature of public services it intends to enhance and prioritise financing, as well as regarding the „personnel policies” it intends to undertake. In this regard, except in cases of proving an abusive and illogical attitude on the part of the Cabinet, no other public institutions can exercise any opportunity control over how the Government intends to expand or, conversely, restrict the personnel structure within the state's public institutions.

Any restructuring policy by the Executive of the number of public servants, especially if such a proactive management approach is carried out through the issuance of Government decisions, cannot be censured even by Parliament[4].

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[1] A. Iorgovan, *Drept administrativ*, vol. 2, IVth ed., All Beck Publishing House, Bucharest, 2005, p. 358.

[2] M.-C. Cliza, C.-C. Claudiu, *Drept administrativ. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 477.

[3] A. Legrand, C. Wiener, *Le droit public. Droit constitutionnel. Droit administratif. Finances publiques. Institutiones Européennes*, La documentation française, Paris, 2017, p. 37.

[4] Regarding this aspect, the constitutional court ruled that „parliamentary control over government decisions in terms of approval/rejection/modification does not appear among the constitutional mechanisms established to regulate relations between public authorities within the system of separation and balance of powers in the state, and government decisions constitute - as specified - the expression of the government's original competence, by excellence of an executive nature. By approving/modifying measures adopted by government decisions, Parliament ends up accumulating legislative and executive functions, a situation incompatible with the principle of separation and balance of powers in the state, enshrined in art. 1 para. (4) of the Constitution. Parliament's interference in a specific government act, intended to implement the law, signifies an intrusion of the legislative power into the secondary regulation for the execution of laws, which belongs exclusively to the government. However, Parliament cannot exercise its competence as a legislative authority arbitrarily, anytime and under any conditions, by adopting laws that would encroach upon the constitutional competences that belong exclusively to other branches of the state" – CCR dec. no. 251/2014, published in the Official Gazette of Romania, Part I, no. 376/21.05.2014, para. 50, and no. 672/2021, published in the Official Gazette of Romania, Part I, no. 1030/28.10.2021.

Furthermore, a simple or emergency ordinance, in this area, cannot be the subject of a criminal investigation by competent authorities unless the commission of an illicit, concrete, and effectively individualised act related to this legislative initiative delegated by the Government is called into question[5].

Regarding this aspect, it has been noted that, „in principle, the state has discretionary power to create public services. The Constitutional Council clearly reminded this in Decision no.86-207 DC of June 26, 1986, the Law authorising the Government to take various economic and social measures (the so-called 'privatisation' decision, Rec. p. 61). The Council specifies that 'if the need for national public services arises from principles or rules with constitutional value, the determination of other activities that must be established as a national public service is left to the discretion of the legislator or the executive authority, as the case may be"[6].

Therefore, the Government is the one called upon to realise economic, social, educational, security policies, etc., which means that it must manifest an active role not only in elaborating these coherent policies but also in manifesting a diligent attitude in verifying all institutional factors involved in implementing these policies.

In French specialist literature, it has been noted that „power is exercised at the intersection of heterogeneous logics: that of totalization and that of individualization, that of collective action and that of distributive action, that of dualisms of power and that of power differences, that of centralization and decentralisation"[7].

Regarding the role of verifying the implementation of the government program, it has been noted in Romanian doctrine that the Government fulfils „an administrative role, which materialises in exercising general leadership of public administration; from this point of view, the Government establishes three types of relations with other authorities of public administration, namely:

- subordination relations, as a higher hierarchical body, towards the prefect, ministries, and other central bodies subordinate to it;
- collaboration and coordination relations with autonomous central authorities;
- administrative guardianship relations towards autonomous local bodies, which operate at the level of administrative-territorial units based on the principles of autonomy, decentralisation, and deconcentration of public services"[8].

Regarding these competencies to verify how public policies are implemented, in French doctrine, the term „administrative police" has been conceptualised.

In this regard, it has been highlighted that „this area covers activities aimed at maintaining public order. This, according to old laws that have determined the holders of general police power, includes three components: security, health, and public peace"[9].

„By its Labonne decision of August 8, 1919, the Council of State defined the general police power of the Prime Minister, which is exercised to preventively fight against the threat of public order disturbance, 'outside any legislative delegation and by virtue of [its own] powers [of the executive]' (CE, August 8, 1919, Labonne, Rec. p. 737)"[10].

[5] The Court held that „regarding the control of compliance with the procedure for adopting a government emergency ordinance or ordinance, and the normative content thereof, from the perspective of opportunity, the Court notes that the primary regulatory act (law, government emergency ordinance, and ordinance) as a legal act of power, is the exclusive expression of the will of the legislator, who decides to legislate according to the need to regulate a certain area of social relations and its specificity (...) The Court notes that the assessment of the opportunity of adopting a emergency ordinance, from the perspective of legislative decision-making, is an exclusive attribute of the delegated legislator, which can only be censored under the conditions expressly provided by the Constitution, namely only through parliamentary control exercised in accordance with article 115 paragraph (5) of the Constitution. Therefore, only Parliament can decide the fate of the government normative act by adopting a law of approval or rejection. During parliamentary debates, the supreme legislative body has the competence to censor the government emergency ordinance, both in terms of legality and opportunity, the provisions of article 115 paragraph (8) of the Constitution stating that, through the law of approval or rejection, the necessary measures will be regulated, if necessary, regarding the legal effects produced during the application of the ordinance. Considering the constitutional provisions invoked, the Court finds that no other public authority, belonging to a power other than the legislative one, can control the government normative act from the perspective of the opportunity of legislative action". CCR dec. no. 68/2017, published in the Official Gazette of Romania, Part I, no. 181/14.03.2017, para. 86, 89, and 90.

[6] M. Houser, V. Donier, N. Droin, *Le droit administratif aux concours*, La documentation française, Paris, 2015, p. 34.

[7] M. Lazzarato, Le *gouvernement des inégalités. Critique de l'insécurité néolibérale*, Éditions Amsterdam, Paris, 2008, p. 101.

[8] M.-C. Cliza, C.-C. Claudiu, *op. cit.*, 2023, p. 478.

[9] A. Legrand, C. Wiener, *op. cit.*, 2017, p. 116.

[10] M. Houser, V. Donier, N. Droin, *op. cit.*, 2015, p. 41.

The role of administrative control exercised by the Government must be one carried out within constitutional and legal limits; it must be one that is conforming and balanced, coherent, and proportional, so as to avoid any excess of power in this area of extremely important social relations.

The verification carried out by the Government falls within the institution of „administrative control", which „is a form of control carried out by the authorities of public administration within the same organisational and functional system within the competence provided by law. This form of control is divided into internal control and external control. Internal administrative control is carried out by officials within the public authority and has a general or specialised character. General control is the result of hierarchical subordination. In the case of specialised control, persons or structures are appointed who have training and qualifications in the areas subject to control. External control is carried out by higher hierarchical public administration bodies and by bodies of specialised public administration in the case of external control"[11].

From the reiterated considerations above, it can be assumed that in any modern society, a prominent coordinating role of the Government over the authorities of public administration must be recognized, stemming from the need.

2. Administrative guardianship exercised by the prefect and the ANFP, within the current internal normative framework

Regarding the legal expression of „administrative guardianship", it designates a requirement to safeguard the principle of legality and that of opportunity in issuing/adopting administrative acts, through control carried out, under the law, by a public administration authority over other bodies, authorities, or administrative institutions, from the perspective of the procedure and form of adopting an administrative act, the intrinsic content of that act, which must be correlated with the principle of the hierarchy and force of normative acts, as well as the inherent effects of these legal acts.

In this regard, in judicial practice, it has been noted that „administrative guardianship represents a limit imposed on local administrative authorities, for the purpose of safeguarding legality and defending the public interest. Therefore, this form of control of administrative acts has been considered as specific to administrative litigation objective (... ref.) Administrative guardianship consists of a special administrative control, different from hierarchical control, the limit of which arises from its specificity, namely the fact that administrative guardianship control is carried out between public authorities that do not have hierarchical subordination relations"[12].

In other words, administrative guardianship represents a control carried out by central public administration authorities over the legality of acts issued by local public administration authorities, between which there is no hierarchical subordination[13].

It is noted that, generally, from the provisions of art. 3 para. (1) and (2) of Law no. 554/2004, the administrative guardianship exercised by the prefect or by the ANFP is optional and not mandatory regarding the administrative acts issued[14].

Regarding the nature of the legal acts covered by administrative guardianship, the following have been retained in jurisprudence: „According to textual interpretation, the provision of art. 3 para. (1) of Law no. 554/2004 stipulates that the prefect can only challenge typical infra-legislative acts in court, without being able to intervene on this legal basis to request judicially the obligation of local public authorities to put on the agenda of the meeting and to take note of the automatic termination of the mandate of a local councillor before the term"[15].

Therefore, the legal regime of the administrative guardianship institution is particular and well-characterised in the current administrative litigation legislation. However, the question arises whether an extension of the legal hypotheses established by the provisions of art. 3 para. (1) and (2) of Law no. 554/2004

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[11] A. Cazacu, *Controlul asupra activității administrației publice*, *https://www.juridice.ro/716597/controlul-asupra-activitatii-administratiei-publice.html*, accessed on 20.03.2024.

[12] CA Bucharest, cont. adm. and fisc. s., dec. civ. no. 2738/21.12.2023, *https://www.rejust.ro/juris/ded52d6d4*, accessed on 29.03.2024.

[13] Bucharest Trib., cont. adm. and fisc. s., sent. civ. no. 279/07.02.2024, *https://www.rejust.ro/juris/4e8336678*, accessed on 29.03.2024.

[14] CA Timișoara, cont. adm. and fisc. s., dec. civ. nr. 5458/24.09.2015, *https://www.rejust.ro/juris/3693e2d4*, accessed on 29.03.2024.

[15] HCCJ, dec, CDCD no. 26/2016, published in the Official Gazette of Romania, Part I, no. 996/12.12.2016.

can operate by recognizing a true administrative guardianship competence in favor of the Government regarding the various types of administrative acts issued by the institutions with which the Government is in legal correlation.

3. Administrative guardianship exercised by the Government, reality or legal fiction?

Regarding the Government's competence in coordinating public activities in Romania, the provision of art. 102 para. (1) of the Constitution is emblematic, according to which „The Government, according to its program of governance accepted by Parliament, ensures the implementation of the country's internal and external policies and exercises general management of public administration”[16].

In connection with this attribution, specialised doctrine has highlighted that „in the current Romanian constitutional system, the Government is in the following administrative relations: of superiority over ministries (or other specialised bodies with ministerial rank), of collaboration with autonomous administrative authorities, and administrative supervision over the deliberative authorities elected at the territorial level. Thus, the Government has a general material competence”, so that „public administration is entirely under the influence and control of the executive power”[17].

In connection with these doctrinal remarks, it should be noted that, according to the provisions of art. 14 para. (2) of the Administrative Code, the Government is recognized as an integrative and synergistic role in relation to other administrative authorities, ensuring „balanced functioning and development of the national economic and social system.”

As a preliminary note, it should be emphasised that for there to be genuine specific control specific to administrative guardianship, it is necessary, as can easily be distinguished from the mere title of the institution in question, that the object of legality control must target an administrative act, and furthermore, one of typical nature, in the sense of the provisions of art. 2 para. (1) letter c) of Law no. 554/2004 on administrative litigation.

In this context, judicial practice has established that „administrative guardianship is limited to those acts that can be challenged before the administrative courts and does not target legal acts belonging to other branches of law”[18].

Regarding the exhibition of a possible supervisory role of the Government regarding the activity of public administration authorities, particularly in its main form of activity, namely the issuance/adoption of typical administrative acts, it should be noted that there are a series of legal norms regulated by the provisions of the Administrative Code, which at least formally raise the question of a possible apparent control of legality that the Executive can exercise over the activity of a series of administrative authorities.

For example, in accordance with the provisions of art. 15 letter f) of the Administrative Code, a provision with extremely precise content, from the perspective of the specialty study, the Government exercises „the function of a state authority, ensuring the monitoring and control of the application and observance of regulations in the field of defense, public order and national security, as well as in the economic and social fields and the functioning of institutions and organisations that carry out their activity under the authority of the Government.”

It can be observed that this legal provision establishes a general principle of structural organisation of the determining institutions in the Romanian state, in the sense that it recognizes to the Government only a coordinating role over the activity of public institutions under its direct or indirect subordination or coordination of the Executive.

However, from the recognition of a coordinating and supervisory competence over the activity of public administration authorities and to the establishment of an administrative guardianship competence, manifested in the recognition in favor of the Government of procedural legitimacy in administrative litigation, aiming at the annulment action of administrative acts issued by various public institutions in a functional relationship with the Government, there is a very long way to go.

Therefore, the special legal norm does nothing but reiterate, in a more extensive and detailed formulation, the fundamental attribution of the Government, established by the provisions of art. 102 para. (1) of the

[16] D. Apostol Tofan, *Organizarea administraţiei publice româneşti în context european, http://www.rsdr.ro/Art-6-1-2-2008.pdf*, accessed on 29.03.2024.

[17] M.-C. Cliza, C.-C. Claudiu, *op. cit.*, 2023, p. 426.

[18] CA Cluj, cont. adm. and fisc. s., dec. civ. no. 27/16.01.2020, *https://www.rejust.ro/juris/88245624*, accessed on 29.03.2024.

Constitution, in the sense that it manages the administrative-economic activity of the country, in which it can elaborate synoptic policies.

By no means can it be interpreted from the cited legal provision that the Executive could justify a certain procedural legitimacy in administrative litigation to obtain judicial control over certain administrative acts that it considers illegal.

A different conclusion cannot be reached even from the perspective of the provisions of art. 26 para. (2) of the Administrative Code, norms according to which, „in exercising the control provided for in paragraph (1), the Government may request the revocation of illegal, unfounded, or untimely administrative acts issued by the authorities provided for in para. (1) that have not entered into civil circulation and have not produced legal effects and that may prejudice the public interest."

This legal text must be interpreted integrally and teleologically, by correlation with paragraph 1 of the same article, an important exegetic step, which reveals, however, that the Government only performs a specialised control, which targets the manner of fulfilling the duties of the ministries and specialised bodies under its subordination, as well as of the prefects, as an evaluation factor of the activity of these public law bodies.

It cannot be inferred from these legal norms that the Prime Minister or the Government as a whole could initiate legal proceedings against these institutions to provoke a legality control and, ultimately, to determine the annulment of administrative acts issued/adopted by these administrative bodies.

However, the competence of the Government, in the context of hierarchical control exercised over administrative bodies under its direct or indirect subordination, to request these entities to revoke administrative acts considered illegal or untimely, exceeds the meaning of the phrase „administrative guardianship" and translates into the competence of the Cabinet to impose a mandatory conduct of respecting the supremacy of the Constitution and laws, in implementing the provisions of art. 1 para. (5) of the Constitution, and, if necessary, to impose to the issuing authorities the retraction of their own administrative acts issued in conditions of disregarding the laws and general principles of public law.

It should be noted that, in accordance with the legal norm of art. 26 para. (2) of the Administrative Code, the Government cannot recognize any specific and explicit competence to revoke the administrative acts issued/adopted by the aforementioned authorities, but only to request and impose the retraction of these legal acts by their issuers.

Of course, this legal reality cannot lead to the extreme and legally unjustified conclusion that the Government could exercise in any context an administrative guardianship role in Romania, in the sense of referring the competent judicial authority to annul a certain administrative act deemed illegal.

This legal authorization is circumscribed by the special provisions of art. 3 para. (1) and para. (2) of Law no. 554/2004 exclusively to the prefect and to the National Agency of Civil Servants.

This conclusion is confirmed by judicial practice, which has established that „the notion of 'administrative guardianship' is expressly regulated by art. 3 of Law no. 554/2004 and concerns exclusively actions initiated by the prefect or by the ANFP, as it has been established, with compulsory character, both in the CCR and HCCJ jurisprudence, which means that it cannot be applied, for identity of reason, in other hypotheses"[19].

4. Conclusions

Although the Government is recognized to have a competence of coordination, structuring, filtering, verification, and implementation of a comprehensive strategy for implementing its governance program, which also implies a genuine role of verification and control over the activities of various authorities under its subordination or coordination, however, this does not in any way entail the justification in favor of this central executive authority of a role of administrative guardianship, based on which the Executive would have an active role in administrative litigation, to determine an objective and full judicial control over any administrative act issued/adopted by these authorities, even in cases where the Government's activity is not targeted and does not harm it in any way.

Therefore, the role of institutional patronage of the Government does not translate into a genuine function of administrative guardianship, capable of engaging in a specific administrative litigation.

[19] Bucharest Trib., cont. adm. and fisc. s., sent. civ. no. 279/07.02.2024, *https://www.rejust.ro/juris/4e8336678*, accessed on 29.03.2024.

As a consequence, the Government cannot bring a lawsuit to court to request a principle control over administrative acts.

Such an action would be rejected due to an obvious lack of procedural legitimacy justification of the Cabinet, and on the other hand, because of the Cabinet's failure to justify a specific and particular interest in bringing the case to court, which would add to a generic goal of protecting the public interest, purportedly pursued by the Government.

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ETHICAL PRINCIPLES AND AI IN INTELLECTUAL PROPERTY LAW

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Abstract

Many researchers are concerned with how new technologies, especially those using AI, will change society as we know it. There are evident benefits that will facilitate our current activities. Still, there are also elements whose impact we do not know, or have a character that can limit or restrict our rights and freedoms. Probably, it will not be the technologies that will determine certain limits, but those who own them and those who will establish the rules by which these new technologies will be guided.

I consider that any concern related to the use of new technologies, based on the use of AI, must be approached with great care, and must be reported to respect the values provided by art. 2 and 3 TEU and the Convention for the Protection of Human Rights and Fundamental Freedoms. There are significant concerns related to the ethical implications of the use of AI at the EU level, which will be analysed in this article.

At the European level, it is the role of the European Commission to deal with the „ethical interests" regarding the observance of the five principles that will be a challenge for cyberjustice: respect for fundamental rights, non-discrimination between individuals and groups of individuals, quality and security, transparency, neutrality and intellectual integrity and user control.

Keywords: *AI Ethics, AI, AI Principles, Intellectual Property Law, AI Ethics and Principles.*

1. Introduction

„William Blake's favorite work, The Ancient of Days, 1794, depicts the god Urizen as he creates the second Enlightenment. Blake believed that Urizen was an evil god because he invented science to force mankind to think in one way."[1]

When we analyse the evolution of society in the last two centuries, we cannot, but notice that there is more and more discussion about the four industrial revolutions that fundamentally changed the way people live, the way they understand the world and the way they look to the future: the first industrial revolution took place from the mid-18th century to the mid-19th century, when the steam engine was widely used, which mechanised some production processes, and the result was that some products became made cheaper and faster, some workers were better paid, and the standard of living began to rise.[2] The second industrial revolution took place at the beginning of the 20th century, when electricity began to be used in production processes, assembly lines became more efficient (the most relevant example is Henry Ford's)[3], and the work was concentrated on the realisation of a single segment of the manufacturing chain, which led to a rapid increase in productivity and generated a mass distribution of the manufactured products. The third industrial revolution began to take place in the last decades of the 20th century, with the invention of the Internet, which made it possible for products and services to be distributed and consumed globally, and digital technology made its way across the planet . The fourth industrial revolution is happening nowadays, since the early 2000s, when digital technologies connect people and other technologies: AI begins to make its presence felt in our lives through computer programs that perform routine tasks made in the past of people, automatic translations, speech recognition, making automatic decisions, or other concepts of digitised technologies: *Internet of things (IoT)*, *Cloud computing*, etc.[4]

The present study aims to analyse the ethical principles on which the EU legislation is based regarding the regulation of technologies that use AI. This analysis is very important especially because it refers to a legislative framework that will be regulated in the coming years, or some studies and works do not make any reference to the ethical approach to AI or the ethical principles that govern AI, in time that in French legal literature, the first chapters begin with the presentation of ethical principles and their analysis. That is precisely why we considered it relevant to have in Romanian legal studies a first approach related to the presentation and analysis of the

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[1] E.O. Wilson, *The origins of creativity*, Publisher London, UK: Allen Lane, 2017, p. 122.

[2] J.R. Reagan, Madhusudan Singh, *Management 4.0. Cases and Methods for the 4th Industrial Revolution*, Springer Nature, Singapore, 2020, p. 8 *et seq*.

[3] *Idem,* p. 8.

[4] *Ibidem*.

ethical principles that will be the basis of the regulation of AI, starting with the AI Act of the EU or the legislative resolution of the European Parliament of March 13, 2024 on the proposal for a regulation of the European Parliament and of the Council establishing harmonised rules on artificial intelligence (AI Law) and amending certain legislative acts of the European Union [COM(2021)0206 - C9-0146/2021 - 2021/0106(COD)][5]

2. The evolution of technologies

Some researchers and analysts anticipate the fifth industrial revolution, in which robots and other forms of AI will co-exist and work in harmony with humans („cobots")[6], technology will be a part of our bodies and in which probably - for example, we will no longer use smartphones, but we will hear directions whispered in our ears, and factories will be able to communicate directly with customers to offer them customised products according to their needs and desires.

The terms AI were first used by John McCarthy in 1956 as a definition of „*the science and engineering of making intelligent machines*"[7] and follows the architecture of the human brain in artificial neural networks.[8] We cannot fail to note that the challenges launched by new technologies have drawn the attention of the European Commission and the European Parliament so that they respect the basic principles regarding the recognition of man as the only one who can enjoy intellectual property rights according to the European Parliament's Proposal for a Resolution on to intellectual property rights for the development of technologies in the AI field [2020/2015(INI)], art. 17 whereby: *„considers that works produced autonomously by artificial agents and robots may not be eligible to benefit from copyright protection, in order to respect the principle of originality, which is linked to a natural person, and whereas the concept of 'intellectual creation' refers to the personality of the author."*[9]

There are many researchers who are concerned about how new technologies, especially those using AI, will change society as we know it. There are obvious benefits that will make our day-to-day activities easier, but there are also elements whose impact we do not know, or are of a nature that may limit or restrict our rights and freedoms. It is probably not the technologies themselves that will determine certain limits, but those who own them and those who will set the rules by which these new technologies will be guided: *„Those who master these technologies will master us more and more. They will have power, which means they will have a constant and vast ability to get us to do meaningful things that we would not otherwise do. They will increasingly establish the limits of our freedom, deciding what is allowed and what is forbidden. They will determine the future of democracy, its progress or decay. In addition, based on algorithms, they will make decisions on vital issues of social justice, distributing social benefits and dividing us into hierarchies, depending on our status and what others think of us."*[10]

It is true that in the last two centuries, many technologies have proposed and proposed to find solutions to bring peace to the world and deter war, but they have not succeeded: Jules Verne imagined that the invention of the submarine would determine peace because fleets of ships would be useless, Guglielmo Marconi thought that the invention of the radio would stop any war because he could communicate easily and whatever he found out if the enemies had troop movements, Alfred Nobel imagined that dynamite would deter war more than „*a thousand international conventions"*,[11] and Orville Wright assumed that the airplane „*will make the war powerless*."[12] These are just a few examples, which show us that what we want to achieve, does not mean that it cannot be used in a destructive way.

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[5] *** Amendments adopted by the European Parliament on 14.06.2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (AI Act) and amending certain Union legislative acts [COM(2021)0206 - C9-0146/2021 - 2021/0106(COD)], *https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html*, accessed on 15.04.2024.

[6] *Idem,* p. 114.

[7] G. Surblytė-Namavičienė, *Competition and Regulation in the Data Economy. Does Artificial Intelligence Demand a New Balance ?,* Elgar Studies in Law and Regulation, Edward Elgar Publishing Limited, Glos, UK, 2020, p. 8.

[8] *Ibidem*. «AI follows the architecture of human brains in artificial neural networks (ANNs). On the basis of „machine-learning" or „deep learning" algorithms, intelligent systems are supposed to learn, and the learning material for such machines is data. The latter is processed in a number of layers of ANNs.».

[9] European Parliament, *REPORT on intellectual property rights for the development of artificial intelligence technologies https://www.europarl.europa.eu/doceo/document/A-9-2020-0176_EN.html*, accessed on 15.05.2024.

[10] J. Susskind, *Politica viitorului. Tehnologia digitală şi societatea,* translation from English by Adina Ihora, Corint Books Publishing House, Bucharest, 2019, p. 15.

[11] *Idem*, p. 34.

[12] *Ibidem*.

3. The concerns of the EU Institutions and in the world for the regulation of AI

In a study requested by the Legal Affairs Committee (JURI) of the European Parliament, entitled: „Artificial Intelligence and Civil Liability", from July 2020,[13] several hypotheses regarding the definition and definition of what the concept of „AI" means are evaluated. Because the regulatory proposal also involves the need to define what is to be regulated, the author of the study notes that there is no consensus regarding the definition of the term „AI" in the first place, including in the United States of America, there are controversies related to technical and literal meanings. Andrea Bertolini proposes in this study the introduction of the notion of the „electronic person", a fiction that, like the terminology of a commercial company, allows coordination between different parties (in commercial contracts, prima facie identification – a single person responsible for cases with victims), the separation of assets and limiting liability (rather than using a maximum compensation ceiling, through specific legislation), imposing registration and regulating liability to facilitate stakeholder access to AI services (*e.g.*, AI-based stock exchange software).[14] The same author claims that the ontological distinction must be made in defining the notion of an „electronic person": it is not a subject, but an object.

From the point of view of intellectual property law, there are concerns regarding the protection of productions generated by AI, at the level of the European Union. Thus, in the European Commission's communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions dated 25.04.2018, entitled „Artificial Intelligence for Europe", the interest in clarifying ambiguities is mentioned: *„Reflection will be needed on interactions between AI and intellectual property rights, from the perspective of both intellectual property offices and users, with a view to fostering innovation and legal certainty in a balanced way."*[15] France aims to become a world leader in the use of AI and even establish a network of institutes on AI as it appears in the Villani Report,[16] while Germany wants to be known as the one that creates „AI made in Germany", in this sense the Ministry of Education and Research in this country created the „Lernende Systeme" platform to bring together the most advanced research and applications in this field.[17] Great Britain wants to achieve the most innovative economy through digitization, in this sense the British government has developed several documents in this regard: in November 2017 a document was published defining AI as the foundation of economic and industrial growth,[18] and the most ambitious project from January 2022 is to create global standards for AI,[19] establishing an Office for AI [20] and creating a Guide for the acquisition of AI by state institutions.[21] In China, the Minister of Industry and Information Technology presented the national plan and strategy for AI, the objective being that by 2030, China will become a global leader in the research, development and application of AI, surpassing the United States of America.[22]

3.1. Ethical principles of AI in Japan

The Japanese government established an „Artificial Intelligence Technology Strategic Council" in June 2018 to officially make AI a component of the „integrated innovative strategy".[23] The document issued by the Japanese

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[13] A. Bertolini, PhD, LLM (Yale), *Artificial Intelligence and Civil Liability*, *https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621926/IPOL_STU(2020)621926_EN.pdf*, accessed on 10.04.2023.

[14] *Idem,* p 33.

[15] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Artificial Intelligence for Europe COM/2018/237 final *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0237* in note 52 it is mentioned: „Using AI to create works can have implications on intellectual property, with questions arising for instance on patentability, copyright and right ownership." (accessed on 09.02.2023).

[16] C. Villani, *Donner un sens à L'Intelligence Artificielle*, 2017, *https://www.aiforhumanity.fr/pdfs/9782111457089_Rapport_Villani_accessible.pdf*, accessed on 12.02.2023.

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[18] UK Government, *Policy paper Build Back Better: our plan for growth*, 03.03.2021, *https://www.gov.uk/government/publications/build-back-better-our-plan-for-growth/build-back-better-our-plan-for-growth-html*, accessed on 12.02.2023.

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[22] The State Council, The People`s Republic of China, *Plan focuses on digital economy development during 14th Five-Year Plan period*, *http://english.www.gov.cn/policies/latestreleases/202201/12/content_WS61de9a35c6d09c94e48a385f.html*, accessed on 15.02.2023.

[23] G. Garcia, *Artificial Intelligence in Japan. Industrial Cooperation and Business Opportunities for European Companies*, *https://www.eu-japan.eu/sites/default/files/publications/docs/artificial_intelligence_in_japan_-_guillermo_garcia_-_0705.pdf*, accessed on

government on July 28, 2017 „Draft AI R&D GUIDELINES for International Discussions" recognized the enormous benefits that AI will bring to people, society, and the economy, making important contributions to solving various difficulties that people, the different communities, countries and the world in general, face each other.[24]

In this document[25] the nine principles by which the developers of AI must be guided are mentioned:

1) the principle of collaboration (IT engineers will have to pay attention to the interconnectivity and interoperability of AI systems).

2) the principle of transparency (developers will have to pay attention to the verifiability of AI systems and the explanation of their judgment and decisions).

3) the principle of controllability (developers will have to pay attention to the controllability of AI systems).

4) the principle of safety (developers will have to take into account that AI systems will not harm the lives, bodies or property of users or other parties through other actions or devices).

5) the principle of security (developers will have to pay attention to the security of AI systems).

6) the principle of privacy (developers will have to consider that AI systems will not violate the privacy of users or other parties).

7) the principle of ethics (developers will have to respect human dignity and individual autonomy in the research and development of AI systems).

8) the principle of user assistance (developers will have to consider that AI systems will support users and make it possible to offer them opportunities to make choices in appropriate ways).

9) the principle of responsibility (developers will have to make efforts to fulfil their responsibilities towards interested parties, including AI users).

3.2. EU Expert Group (AI HLEG) - Ethical Principles for AI

At the level of the European Union, there is the High-Level Expert Group on AI (AI HLEG), a group of independent experts, which was appointed by the European Commission in June 2018 as part of the AI strategy. A relevant document prepared by this group (AI HLEG) in April 2019 and entitled „Ethical Guidelines for Trusted Artificial Intelligence (AI)"[26] refers to the respect of the fundamental rights provided by the EU Treaties and the EU Charter regarding the development and use of systems based on AI:

1) Respect for human dignity, and by this it is understood that every human being has an „intrinsic value" that should not be suppressed, compromised, or diminished „*In the context of AI, respect for human dignity implies that all people are treated with the respect they deserve as of moral subjects and not just objects to be selected, sorted, graded, herded, conditioned or manipulated. So, AI systems should be developed in a way that respects, serves, and protects people's physical and mental integrity, their personal and cultural sense of identity, and the satisfaction of their essential needs*"[27] Therefore, any attempt to harm human dignity is rejected, and the manipulation of information to influence people's decision-making capacity is excluded.

2) Freedom of the individual, in the context of AI: *„Freedom of the individual for instance requires mitigation of (in)direct illegitimate coercion, threats to mental autonomy and mental health, unjustified surveillance, deception and unfair manipulation. In fact, freedom of the individual means a commitment to enabling individuals to wield even higher control over their lives, including (among other rights) protection of the freedom to conduct a business, the freedom of the arts and science, freedom of expression, the right to private life and privacy, and freedom of assembly and association."*[28] Of course, there will be interventions and limitations imposed by governments and even by non-governmental organisations to ensure access to people exposed to risks of exclusion to have equal access to the benefits and opportunities of AI.

3) Respect for democracy, justice, and the rule of law. Any government institution and power must be limited by law, but also authorised from the point of view of legislation: *„AI systems must not undermine democratic processes, human deliberation or democratic voting systems. AI systems must also embed a commitment to ensure that they do not operate in ways that undermine the foundational commitments upon which the rule of law is founded, mandatory laws and regulation, and to ensure due process and equality before the law.*"[29]

16.02.2023.

[24] *Idem*, p. 29.

[25] *Idem*, p. 30.

[26] The Independent High-Level Expert Group on Artificial Intelligence established by the European Commission in June 2018, *Ethical Guidelines for Trusted Artificial Intelligence (AI),* April 2019, *https://ec.europa.eu/futurium/en/ai-alliance-consultation/guidelines.html*, p. 13 *et seq*., accessed on 15.02.2023.

[27] *Idem*, p. 12.

[28] *Ibidem*.

[29] *Ibidem*.

4) Equality[30], non-discrimination and solidarity, including the rights of people at risk of exclusion. The operations carried out by AI must not be biased, favouring some persons and groups and disfavouring others, all the more. *In an AI context, equality entails that the system's operations cannot generate unfairly biased outputs (e.g., the data used to train AI systems should be as inclusive as possible, representing different population groups). This also requires adequate respect for potentially vulnerable persons and groups, such as workers, women, persons with disabilities, ethnic minorities, children, consumers or others at risk of exclusion.*[31]

5) The rights of citizens. The wide range of rights enjoyed by citizens must not be limited, influenced, and manipulated through the use of technologies based on AI, including the right to vote, the right to be elected, the right to access public documents, and the right to address the petition to the administrations.

At the level of the European Union, there is another body responsible for creating ethical frameworks for the use of AI, namely the „European Group for Ethics in the Field of Science and New Technologies" (EGE), whose mission is *„to identify, define and analyse the ethical issues raised by developments in science and technology; (b) provide essential guidance for the development, implementation and monitoring of Union policies or legislation, in the form of analyses and recommendations, presented in opinions and statements, aimed at promoting ethical conduct in Union policy-making, in accordance with the Charter fundamental rights of the European Union"* [32] and which in February 2021 received a new 5-year mandate from the European Commission.

3.3. The set of four ethical principles proposed by the High-Level Expert Group on AI

There are also a set of **four ethical principles** enunciated by the High-Level Expert Group on AI, which are specified as ethical imperatives for AI practitioners and developers that they should wish to adhere to:

1) The principle of respecting people's autonomy: *„AI systems should not unjustifiably subordinate, coerce, deceive, manipulate, condition or herd humans. Instead, they should be designed to augment, complement and empower human cognitive, social and cultural skills. The allocation of functions between humans and AI systems should follow human-centric design principles and leave meaningful opportunity for human choice. This means securing human oversight28 over work processes in AI systems. AI systems may also fundamentally change the work sphere. It should support humans in the working environment, and aim for the creation of meaningful work"* [33]. Any experiment in the use of AI that violates this principle must be prohibited, as one that is in flagrant contradiction with fundamental human rights.

2) The principle of damage prevention refers to the protection of human dignity and physical and mental integrity: *„AI systems and the environments in which they operate must be safe and secure. They must be technically robust and it should be ensured that they are not open to malicious use. Vulnerable persons should receive greater attention and be included in the development, deployment and use of AI systems. Particular attention must also be paid to situations where AI systems can cause or exacerbate adverse impacts due to asymmetries of power or information, such as between employers and employees, businesses and consumers or governments and citizens."* [34]

3) The principle of equity. Although this principle may have nuances of interpretation, the group of experts wanted to clarify these aspects: *„While we acknowledge that there are many different interpretations of fairness, we believe that fairness has both a substantive and a procedural dimension. The substantive dimension implies a commitment to: ensuring equal and just distribution of both benefits and costs, and ensuring that individuals and groups are free from unfair bias, discrimination and stigmatisation. If unfair biases can be avoided, AI systems could even increase societal fairness"* [35]. This principle is also in full agreement with the White Paper „Artificial Intelligence – A European approach focused on excellence and trust" elaborated by the European Commission on 19.02.2020 which presents the need to create a regulated framework for AI, on the one hand to ensure full compliance with the values and principles of the European Union, and on the other hand, to be prepared for the fruition of all the opportunities offered by new technologies, to become a leader in the world and to find reliable solutions including for the challenges generated by climate change and environmental degradation.[36]

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[30] A. Fuerea, *Manualul Uniunii Europene*, 3rd ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2006, p. 163.

[31] *Idem*, p. 12.

[32] Commission Decision (EU) 2021/156 of 09.02.2021 renewing the mandate of the European Group on Ethics in Science and New Technologies, *https://beta.op.europa.eu/en/publication-detail/-/publication/e185d59b-6b42-11eb-aeb5-01aa75ed71a1/language-ro/format-PDFA2A*, accessed on 15.02.2023.

[33] The Independent High-Level Expert Group on Artificial Intelligence established by the European Commission in June 2018, Ethical Guidelines for Trusted Artificial Intelligence (AI), April 2019, *https://ec.europa.eu/futurium/en/ai-alliance-consultation/guidelines.html*, p. 13 *et seq*., accessed on 15.02.2023.

[34] *Idem*, p 14.

[35] *Ibidem*.

[36] *Idem*, p. 6.

4) The principle of explainability is essential „*is crucial for building and maintaining users' trust in AI systems. This means that processes need to be transparent, the capabilities and purpose of AI systems openly communicated, and decisions – to the extent possible – explainable to those directly and indirectly affected. Without such information, a decision cannot be duly contested. An explanation as to why a model has generated a particular output or decision (and what combination of input factors contributed to that) is not always possible. These cases are referred to as 'black box' algorithms and require special attention. In those circumstances, other explicability measures (e.g., traceability, audibility, and transparent communication on system capabilities) may be required, provided that the system, as a whole, respects fundamental rights*"[37].

3.4. EP Resolution [2020/2012(INL)]

In the European Parliament Resolution of 20.10.2020 containing recommendations to the Commission on the framework of ethical issues associated with artificial intelligence, robotics, and related technologies [2020/2012(INL)][38] the ethical principles that must be taken into account for future regulatory acts at the European level are explicitly mentioned, depending on the strategic and interest areas of the European Union:

- Human-centered and human-created AI. Any legal regulatory framework will refer to the ethical principle of serving people and not replacing them, and *„deployment and use of high-risk artificial intelligence, robotics and related technologies, including but not exclusively by human beings, should always be ethically guided, and designed to respect and allow for human agency and democratic oversight, as well as allow the retrieval of human control when needed by implementing appropriate control measures."* (art. 11);
- Risk assessment. The decision-makers have the possibility and the ability to assess the risks regarding the use and impact of AI so that it does not cause damage to people and: „*Considers, in that regard, that artificial intelligence, robotics and related technologies should be considered high-risk when their development, deployment and use entail a significant risk of causing injury or harm to individuals or society, in breach of fundamental rights and safety rules as laid down in Union law*" (art. 14);
- Aspects related to safety, transparency and accountability. It is an important principle related to knowing the technologies used by AI so that they do not affect privacy and intellectual property rights: „*is essential that the algorithms and data sets used or produced by artificial intelligence, robotics, and related technologies are explainable and, where strictly necessary and in full respect of Union legislation on data protection, privacy and intellectual property rights and trade secrets, accessible by public authorities such as national supervisory authorities and market surveillance authorities*" (art. 19);
- Impartiality and non-discrimination. Forms of automatic discrimination are prohibited, including those that affect people in an indirect way (art. 27), disinformation produced through AI and the possibility for natural and legal persons to have the possibility of an appeal against a decision made by a technology with AI or robotic (art. 37);
- Social responsibility and gender balance. Freedom of thought and expression are guaranteed, and AI technologies must not allow speeches that incite hatred or violence, these being illegal. If AI technologies lead to job losses, Member States will take social security measures, such as reducing working hours (art. 46);
- Environment and sustainability. AI technologies can be used to achieve the sustainable development objectives assumed by the United Nations, for the energy transition and global decarbonization (art. 55);
- Privacy protection and biometric recognition. Public authorities can use AI technologies, but only if they are proportionate to their purpose, avoiding abuses and excessive surveillance, taking into account the psychological and social impact on civil society regarding the surveillance and use of AI data (art. 65);
- Good governance. The use of AI „should not compromise the protection of public values and fundamental rights in any way; believes that the terms and conditions of public procurement should reflect the ethical standards imposed on public authorities, as appropriate." (art. 77);
- Consumers and the internal market;
- Security and defense. In the context of hybrid warfare, the volume of information can be overwhelming for human analysts, and AI can process this information more efficiently, AI is a disruptive, transversal technology: *„quantum computing could represent the most revolutionary change in conflict since the advent of atomic weaponry and thus urges that the further development of quantum computing technologies be a priority*

[37] The Independent High-Level Expert Group on Artificial Intelligence established by the European Commission in June 2018, Ethical Guidelines for Trusted Artificial Intelligence (AI), April 2019, *https://ec.europa.eu/futurium/en/ai-alliance-consultation/guidelines.html*, p. 14 *et seq*., accessed on 17.02.2023.

[38] *** European Parliament resolution of 20.10.2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies [2020/2012(INL)]. (2021/C 404/04), *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020IP0275*, accessed on 10.03.2024.

for the Union and Member States" (art. 97), and „*Recalls that most of the current military powers worldwide have already engaged in significant R&D efforts related to the military dimension of artificial intelligence; considers that the Union must ensure that it does not lag behind in this regard*" (art. 99), to mention is that „*the entire responsibility and accountability for the decision to design, develop, deploy and use AI-systems must rest on human operators, as there must be meaningful human monitoring and control over any weapon system and human intent in the decision to use force in the execution of any decision of AI-enabled weapons systems that might have lethal consequences*" (art. 102);

- Transport. It is noted that AI systems could contribute to significantly reducing the number of fatal road accidents (art. 108);
- Employment, workers' rights, digital skills and the workplace. In addition to the fact that AI can contribute to increasing the degree of inclusion and the labor market, it must be taken into account that AI technologies used in the workplace must be accessible to everyone, according to the principle of universal design (art. 116);
- Education and culture. Educational institutions will use AI technologies that have „European certificate of ethical compliance" (art. 119);
- National supervisory authorities;
- Coordination at the level of the Union;
- European certification of compliance with ethical norms. It emphasises the need to establish some: „*common criteria and an application process relating to the granting of a European certificate of ethical compliance be developed in the context of coordination at Union level*" (art. 135);
- International cooperation. It is requested „*Calls for synergies and networks to be established between the various European research centres on AI as well as other multilateral fora, such as the Council of Europe, the United Nations Educational Scientific and Cultural Organisation (UNESCO), the Organisation for Economic Co-operation and Development's (OECD),the World Trade Organisation (WTO) and the International Telecommunications Union (ITU), in order to align their efforts and to better coordinate the development of artificial intelligence, robotics and related technologies* (art. 141)."

3.5. Concerns about codes of ethics in EU countries and the world about codes of ethics for AI regulation

If we look at the countries that are part of the European Union, Denmark is the country that created a coherent strategy in January 2018 regarding the use of AI (Strategy for Denmark's Digital Growth)[39] and which aims to create a code of ethics for companies and users of AI products. Finland developed a first study [40] in December 2017 in which he expresses his concerns about the ethical aspects of the use of AI, the desire to become a global leader in terms of AI, including through the creation of a Finnish Center for AI[41] (a partnership between two Aalto and Helsinki universities) to accelerate research in the field of AI. Italy, for its part, through the Italian Digitization Agency, on March 21, 2018, a document entitled „Artificial Intelligence at the service of the citizen"[42] through which he wants to integrate the services of AI in government activities, but taking into account the concerns related to ethics, the availability of employees' skills, the role of big data and the legal implications.[43]

The Nordic and Baltic countries (Denmark, Estonia, Finland, the Faroe Islands, Iceland, Latvia, Lithuania, Norway, Sweden and the Åland Islands) created, through the ministers responsible for digitization, a document on August 31, 2020 entitled „Nordic cooperation on data to boost the development of solutions with artificial intelligence"[44] through which, aware of the benefits brought by the management of public data through AI, better services will be offered to society.

In Poland, a round table was held regarding the need to create a national strategy regarding AI [45] but it is

[39] The Danish government, Strategy for Denmark's Digital Growth, p. 46, *https://eng.em.dk/media/10566/digital-growth-strategy-report_uk_web-2.pdf*, accessed on 17.02.2023.

[40] Publications of the Ministry of Economic Affairs and Employment, 47/2017, *Finland's Age of Artificial Intelligence Turning Finland into a leading country in the application of artificial intelligence. Objective and recommendations for measures. https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160391/TEMrap_47_2017_verkkojulkaisu.pdf?sequence=1&isAllowed=y*, accessed on 17.02.2023.

[41] *https://fcai.fi/*, accessed on 17.02.2023.

[42] White paper: *https://ai-white-paper.readthedocs.io/en/latest/*, accessed on 17.02.2023.

[43] *https://medium.com/politics-ai/an-overview-of-national-ai-strategies-2a70ec6edfd*, accessed on 17.02.2023.

[44] *https://norden.diva-portal.org/smash/record.jsf?pid=diva2%3A1462558&dswid=-8745*, accessed on 17.02.2023.

[45] *https://www.money.pl/gospodarka/wiadomosci/artykul/rewolucyjny-plan-dla-polski-powstaje,205,0,2406605.html*, accessed on 18.02.2023.

still unclear when and how this will be achieved.

It should also be mentioned that in Russia there is still no such public strategy, but the remarks of President Putin who declared that: „who will be the leader in this sphere, will be the master of the world" are known.[46] or that it is not very desirable for this technology monopoly to fit only in someone's hands, although political observers have highlighted that the statements of President Vladimir Putin can be interpreted as evidence for the use of AI weapons.

South Korea is the country that surprised by the statements of government officials, as if investments of over 2,200 billion $ will be made in the next 5 years,[47] and the first step will be the realisation in 2022 of 6-degree programs to train over 5,000 specialists in AI (1,400 researchers in AI and 3,600 specialists in data management).

In Romania, unfortunately, there is no national strategy regarding AI and no specific institution to deal with these aspects. The only concern, which can be mentioned, is the initiative of the Authority for the Digitization of Romania[48] which made public the approach about the new rules that citizens and companies in the European Union will follow [49] which will use technologies based on AI. The only document[50] where it is mentioned the possibility of accessing grants by SMEs in the amount of a maximum of 200,000 euros with 15% own co-financing for „*information technology and artificial intelligence; Nanotechnologies and cutting-edge technologies*" is PNRE.[51]

3.6. EU AI Law - Resolution [COM(2021)0206 - C9-0146/2021 - 2021/0106(COD)]

European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council establishing harmonised rules on artificial intelligence (AI Law) and amending certain Union legislation [COM(2021)0206 - C9-0146/2021 - 2021/0106(COD)][52] proposes that the European Union become „a world leader in the development of safe, reliable and ethical artificial intelligence, as stated by the European Council*[53], and ensures the protection of ethical principles, as expressly requested by the European Parliament*",[54] and amendment 27 of the same resolution regulates the need to refer to the ethical principles for AI technologies: „*It is important to note that AI systems should make every effort to comply with the general principles that establish a high-level framework promoting a coherent, human-centered approach to ethical and reliable AI, in accordance with the Charter fundamental rights of the European Union and with the values on which the Union is founded, including the protection of fundamental rights, human involvement and oversight, technical robustness and security, privacy protection and data governance, transparency, non-discrimination and fairness, and the well-being of society and the environment*". All operators developing technologies based on AI and those who will use them will fall under the scope of the resolution which stipulates that the European approach is centered on the human factor with an „ethical" and reliable AI, which is by the Charter and the values that establishes the European Union.

4. Conclusions

I consider that any regulation related to the use of new technologies, based on the use of AI, must be approached with great care, and reporting should be made to respect the values provided by art. 2 and 3 TEU and the Convention for the Protection of Human Rights and Fundamental Freedoms.[55] There are significant

[46] *https://medium.com/politics-ai/an-overview-of-national-ai-strategies-2a70ec6edfd*, accessed on 18.02.2023.

[47] https://www.joongang.co.kr/article/22625271#home, accessed on 18.02.2023.

[48] https://www.adr.gov.ro/adr-pune-in-dezbatere-publica-prima-propunere-legislativa-privind-inteligenta-artificiala-formulata-la-nivel-european/, accessed on 18.02.2023.

[49] 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 https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:52021PC0206&from=EN, accessed on 18.02.2023.

[50] Romanian Government, *Planul national de investiţii şi relansare economică (The National Investment and Economic Recovery Plan)*, July 2020, p. 46, *https://www.adr.gov.ro/wp-content/uploads/2020/07/Planul-Nat%CC%A6ional-de-Investit%CC%A6ii-s%CC%A6i-Relansare-Economica%CC%86.pdf*, accessed on 18.02.2023.

[51] *Ibidem*.

[52] *** European Parliament legislative resolution of 13.03.2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts [COM(2021)0206 - C9-0146/2021 - 2021/0106(COD)], *https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.html*, accessed on 05.04.2024.

[53] European Council, Special meeting from 01/02.10.2020, Conclusions, *https://data.consilium.europa.eu/doc/document/ST-13-2020-INIT/en/pdf*, p. 6, accessed on 20.04.2024.

[54] European Parliament resolution of 20.10.2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies [2020/2012(INL)], *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020IP0275*, accessed on 20.04.2024.

[55] J. Guilhem (coord.), *Science et sens de l'intelligence artificielle,* Paris, Dalloz, 2020, p. 79.

concerns related to the ethical implications of the use of AI at the level of the European Union, since the resolution (art. 16) of February 16, 2017, adopted by the European Parliament „Civil law norms regarding Robotics" by which „*requests the Commission to analyse the possibility of creating a European Agencies for Robotics and Artificial Intelligence, to provide the necessary technical, ethical and regulatory knowledge to support the relevant public actors, both at the level of the Union and the Member States*"[56] until the „opinion" of the EESC on May 31 and June 1, 2017, which called for „*the introduction of a code of ethics for the development, implementation and use of AI, so that AI systems remain throughout the process compatible with the following principles: human dignity, integrity, freedom, respect for privacy, cultural and gender diversity and fundamental human rights.*"[57] At the European level, it is the role of the European Commission to deal with the „ethical interests" regarding the observance of the five principles that will be a challenge for cyberjustice: respect for fundamental rights, non-discrimination between individuals and groups of individuals, quality and security, transparency, neutrality and intellectual integrity and user control.[58]

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[58] Al. Bensamoun, G. Loiseau, *Droit de l'intelligence artificielle,* Issy-les-Moulineaux Cedex, LGDJ, p. 12 *et seq.*

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EU GEOGRAPHICAL INDICATIONS FOR CRAFT AND INDUSTRIAL PRODUCTS. A COMPARATIVE LOOK AT GEOGRAPHICAL INDICATIONS FOR OTHER TYPES OF PRODUCTS

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Abstract

The geographical indications are part of the intellectual property system, and their importance was proven over time both from consumer protection point of view, but also from business point of view.

Since almost the end of 2023 we have a new EU Regulation which regulates the GIs for craft and industrial products at EU level and this paper is proposing to present the final legal framework and the provisions implemented regarding the products that will be object of the protection, the registration, opposition and cancellation procedures, the actions against which the registered GIs are protected, the new role of the EUIPO and other novelty aspects in comparison with (1) the legal provisions under the proposal of the EU Regulation, (2) the existing GIs for other types of products and with (3) the new proposal for GIs for wine, spirit drinks and agricultural products.

Keywords: *agricultural products, European Union Intellectual Property Office (EUIPO), coexistence, trademarks, geographical indications (GIs), domain name, Romania.*

1. Introduction

On October 18, 2023, the European Parliament and the Council adopted the EU Regulation on the protection of geographical indications for craft and industrial products („EU GI Regulation for craft and industrial products") and it was published in the Official Journal of the EU on October 27, 2023[1] entering into force on November 16, 2023[2]. However, the EU GI Regulation for craft and industrial products will be applicable to EU member states starting with December 1, 2025, except from some provisions which entered into force on November 16, 2023[3], namely: (1) derogations from national stage, (2) establishment of an advisory board, (3) adoption by the Commission of implementation acts setting out the IT architecture and presentation of the Union register, (4) IT system, (5) establishment of the Committee for Craft and Industrial Geographical Indications, (6) exercise of the delegation by the Commission, (7) obligation of EU Member States to inform the Commission about their choice to derogate from the standard registration procedure.

This EU GI Regulation for craft and industrial products is important because the GIs for craft and industrial products could have been registered until its entering into force only at national level and not all EU member states had in their national legislation the possibility for such registration, existing therefore a non-unitary legislation. Even if, at EU level, existed before a quality scheme for food and wine products, GIs for other products, be they of natural or industrial origin - for instance, Carrara marble or Brussels lace - could not have obtained protection at EU level, but only at national level.

Unlike other authors[4], we do not think that this system of protection will negatively affect the trade and European competitiveness even if it is protecting traditional ways of doing the products because this system is rather preventing persons without rights to use geographical names for their products which are not originating from that specific area having in view that GIs protect the cultural heritage of a region and protecting the past does not mean standing in the way of innovation. In addition, GIs give a state of comfort to the final consumer in respect to the origin of the product.

Also, this EU Regulation comes to complete the existing quality scheme for food and wine products represented by the protection granted through GIs at EU level which covers:

- Agricultural products and foodstuffs - based on Regulation (EU) no. 1151/2012 on quality schemes for

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[1] Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18.10.2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, OJ L/27.10.2023.

[2] 20th day as of the publication in OJ, according to art. 73 of EU GI Regulation for craft and industrial products.

[3] Art. 73 of EU GI Regulation for craft and industrial products.

[4] C. Wainikka, *A Geographical Indication protection for craft and industrial products will undermine both trade and European competitiveness*, 2022, *https://www.svensktnaringsliv.se/english/a-geographical-indication-protection-for-craft-and-industrial-pro_1187360.html*, accessed on 21.04.2024.

agricultural products and foodstuff („EU Regulation no. 1151/2012 for agricultural products and foodstuff")[5];

- Spirit drinks - based on Regulation (EU) no. 2019/787 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) no. 110/2008 („EU Regulation no. 2019/787 for spirit drinks")[6];
- Wines - based on Regulation (EU) no. 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) no. 922/72, (EEC) no. 234/79, (EC) no. 1037/2001 and (EC) no. 1234/2007 („EU Regulation no. 1308/2013 for wines")[7];
- Aromatised wines - based on Regulation (EU) no. 251/2014 on the definition, description, presentation, labelling, and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) no. 1601/91 („EU Regulation no. 251/2014 for aromatised wines")[8].

These quality schemes provide the basis for identifying and, where appropriate, protecting names and terms which, in particular, indicate or describe products with value-added characteristics; or value-added properties.

However, the Commission proposed on March 31, 2022 an EU Regulation on EU GIs for wine, spirit drinks and agricultural products („Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products") whose purpose is to harmonise procedural rules, having as effect the repealing of EU Regulation no. 1151/2012 for agricultural products and foodstuff and amendment of EU Regulation no. 2019/787 for spirit drinks and EU Regulation no. 1308/2013 for wines.

It can be noticed that the European Commission was and still is preoccupied to consolidate the protection of GIs for agricultural products, and to create the system of protection through GIs for non-agricultural products at EU level.

2. Registration, protection and cancellation of GIs for craft and industrial products

2.1. General aspects regarding the EU GI Regulation for craft and industrial products

The interest of the EU Commission in the protection of GIs for craft and industrial products at EU level dates back in 2011 when it mentioned in a communication related to „A single market for Intellectual Property Rights" that „geographical indications are a tool for securing the link between a product's quality and its geographical origin" and that the fragmentation between EU Member States regarding the protection of non-agricultural products through the geographical indications system „may negatively affect the functioning of the internal market". Therefore, since that moment, the Commission took the responsibility to launch a study on the issue of geographical indications for non-agricultural and non-food products[9].

In 2019, the EU signed the Geneva Act of the Lisbon Agreement on Designations of Origin and Geographical Indications which grants protection for all types of geographical indications, therefore for agricultural, foodstuff, wines, spirit drinks, craft, and industrial products and which allows their international registration. If a legal framework would not have been introduced at EU level for craft and industrial products, the EU would not have been able to observe its obligations at international level for all kind of products.

In 2020, the above-mentioned study was released[10] and it revealed that „the protection of craft and industrial geographical indications would be beneficial overall to both consumers and producers, while also supporting regional development"[11].

On April 13, 2022, the Commission adopted the Proposal of a Regulation on geographical indication protection for craft and industrial products („Proposal for the EU Regulation for craft and industrial products"). The Proposal for the EU Regulation was accompanied by the Impact Assessment Report drafted by the

[5] OJ L 343/14.12.2012.
[6] OJ L 130/17.05.2019.
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[8] OJ L 84/20.03.2014.
[9] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first-class products and services in Europe*, 2011, p. 16, *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0287:FIN:en:PDF*, accessed on 21.04.2024.
[10] European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Winkel, A., Taranic, I., Waichman, I., *et al.*, *Economic aspects of geographical indication protection at EU level for non-agricultural products in the EU* -, Publications Office, 2020, *https://data.europa.eu/doi/10.2873/58493*, accessed on 21.04.2024.
[11] E. Rosati, *Geographical indications (GIs) for craft and industrial products*, 2022, *https://business.ideaspowered.eu/news/geographical-indications-gis-craft-and-industrial-products*, accessed on 21.04.2024.

Commission[12] which revealed three options for the protection of craft and industrial products, namely: (1) extending the existing protected geographical indications/protected designations of origin schemes to craft and industrial products, (2) self-standing EU Regulation creating sui-generis geographical indication protection and (3) trademark reform. Out of these three options, the Commission finally chose the second option.

On September 9, 2022, the European Economic and Social Committee issued its opinion on the Proposal for the EU Regulation[13]. In its opinion, the Committee mentioned that it would have been better if a single legal framework would have been implemented both for agricultural, food products and for craft and industrial products in order to „avoid the further expansion of legislation, procedures and authorities". We share the Committee's opinion all the more there are multiple identical provisions for these types of products on the other hand and different deadlines for certain actions on the other hand, as we shall see in the next sections of this paper. The other Committee's suggestions will be presented in the next sections where we discuss the registration, protection, and cancellation system.

On October 10, 2022, the Committee of the Regions issued its opinion on the Proposal for the EU Regulation[14]. This Committee had multiple recommendations of amendments and we will analyse them in the next sections where we discuss the registration, protection, and cancellation system.

Between the Council and the EU Parliament there were multiple discussions regarding the final content of the EU GI Regulation for craft and industrial products, discussions which finalised on October 18, 2023 when this regulation was adopted, as mentioned above.

2.2. Scope and object of protection by the EU GI Regulation for craft and industrial products

The EU GI Regulation for craft and industrial products, like the Proposal for the EU Regulation, is structured in eight titles, and it grants protection to craft and industrial products not applying to spirit drinks, wines, agricultural products, and foodstuffs. However, the Proposal for the EU Regulation provided that the craft and industrial products were those listed in Annex no. 1 to Council Regulation no. 2658/87 while the final text represented by the EU GI Regulation for craft and industrial products does not have this indication anymore.

We think that the reason for this deletion is represented by the fact that both the European Parliament and the Council proposed the deletion of the reference to the products listed in Annex no. 1 to Council Regulation no. 2658/87 and we find it welcomed because that annex also included food products and raw materials for foodstuff which could have been confusing.

If the Proposal for the EU Regulation provided for two separate definitions, namely for „craft products" and for „industrial products", the EU GI Regulation for craft and industrial products provide a single definition for „craft and industrial products", the Council being the institution which suggested during discussions a combined definition for the two notions, namely „craft and industrial products", by amending the initial definitions of each notion and resulting the following definition: „craft and industrial products" refers to products „(a) produced either entirely by hand or with the aid of manual or digital tools, or by mechanical means, whenever the manual contribution is an important component of the finished product; or (b) produced in a standardised way, including serial production and by using machines".

For a craft or industrial product to be protected under GI based on both the EU GI Regulation for craft and industrial products and the Proposal for the EU Regulation, it must accomplish the following cumulative requirements: (1) to originate in a specific place, region or country; (2) its given quality, reputation or other characteristics is essentially attributable to its geographical origin and (3) at least one of the productions steps of the product takes place in the defined geographical area.

If we compare this definition with the definition of GIs for other products, we notice that:

- the condition related to the origin - For agricultural products and foodstuff and spirit drinks it is allowed that the product to bear the name of a country also, however, for wines this is allowed only in exceptional cases;
- the condition related to the quality, reputation or other characteristics of the products - it is the same for the names of agricultural products and foodstuff, spirit drinks and wines;
- the condition obliging to have at least one production step into the geographical area - it is the same for the names of agricultural products and foodstuff while for wines it is imposed that all productions steps from

[12] European Commission, *Impact assessment report on geographical indication protection for craft and industrial products,* 2022, https://single-market-economy.ec.europa.eu/publications/regulation-geographical-indications-craft-and-industrial-products-documents_en#files, accessed on 21.04.2024.

[13] Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on geographical indication protection for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753 of the European Parliament and of the Council and Council Decision (EU) 2019/1754, 21.09.2022, OJ C-486/21.12.2022.

[14] Opinion of the European Committee of the Regions, Protecting industrial and craft geographical indications in the European Union (revised), OJ C-498/30.12.2022.

the from the harvesting of the grapes to the end of the winemaking process to have place in the geographical area and also for spirit drinks.

Also, it must be mentioned that the European legislator chosen the protection through the more relaxed means, excluding the stricter protection through protected designations of origin which involves that all productions steps to take place in the defined geographical area and that the product to have qualities and characteristics attributable mainly or exclusively to a certain geographic area with own natural and human factors.

The European Economic and Social Committee agreed with the option chosen by the Commission having in view that „the identity of a craft or industrial product may remain, even if one of production stages originates in another region, as its identity stems from the history or method of production". In addition, we mention that for craft and industrial products it is not necessary that the environment to have an impact on the product and give it certain characteristics that can be obtained from a certain area only, but it should be enough for the product to have a certain reputation only from the geographical area with only one production step in that area. We may criticise the „reputation" criteria having in view that it is assessed based on „subjective elements, such as the consumer appreciation, which are not necessarily founded on verifiable facts" [15], but it confers an easier way to establish and maintain such a geographical indication for such a product.

In our opinion, the chosen option does not necessarily determine the increase of workplaces in the designated geographical area since only one step of the production process must take place in the designated geographical area. As such, „all the raw materials can come from somewhere else; 99% of production steps can take place in Brazil or China, as long as 1% takes place within the defined geographical area."[16]

However, the European Parliament suggested the amendment of the third condition, replacing „at least one of the production steps" with „the main" production steps. We salute the Parliament's suggestion, but unfortunately it was not taken into account even if, from our point of view, the amendment would have ensured a better protection of the local traditions and would have solved the criticisms regarding the low development of employment in the designated geographical area.

The registered geographical indications for craft and industrial products will use the same symbol, indication and abbreviation as the ones for agricultural products and foodstuff.

2.3. Names that cannot be protected through the GI system

The provisions of the EU GI Regulation for craft and industrial products forbid the registration of names as GIs if: (1) the name is or has become a generic term, (2) the name is homonymous with a prior one, with some exceptions, (3) the products for which the GI is seek are contrary to public policy.

The first two cases are stipulated more or less in the same way in the EU Regulations related to GIs for agricultural products and foodstuff, wines and spirit drinks. However, the third case is new, not being stipulated in any of the other existing regulations. However, in the Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products, the Commission introduced this provision also and it completed it with products contrary „to accepted principles or morality", but only for agricultural products. This is a new approach for the registration of such names having in view that the trademarks can be registered irrespective of the nature of products, and it is forbidden only the registration of the trademark which would contravene to public policy or to accepted principles of morality.

Generic term. By the notion of „generic term" it is understood under the EU GI Regulation for craft and industrial products: (a) the name that become the common name of a product within the EU (this situation is identical to the ones specified for agricultural products and foodstuff, wines and spirit drinks) or (b) a common term that describes the type of product, its attributes or (c) a term that does not refer to a specific product. The last two cases are new by reference to the legislation regarding the GIs for other products. The content of this definition was the same in the essential parts in the Proposal for the EU Regulation.

For the generic terms the current Court of Justice of the EU („**CJEU**") case law will be applicable. In case no. C-343/07, CJEU established that „a name becomes generic only if the direct link between, on the one hand, the geographical area of the product and, on the other hand, a specific quality of this product, its notoriety or another characteristic of it that can be attributed to that origin disappears, and the name only describes a genre or type of products"[17].

In the same case, the CJEU established how we appreciate that a name is a generic one. In this regard, the Court showed that „in the assessment of the generic character of a name, it must [...] take into account the places

[15] Annette Kur, Thomas Dreier, Stefan Luginbuehl, *op. cit.*, p. 442.
[16] Christina Wainikka, *op. cit*.
[17] CJEU, Decision dated 2 July 2009 in case no. C-343/07, pct. 107.

where the respective product was produced both inside and outside the member state that obtained the registration of the name in question, the consumption of this product and the way in which this name is perceived by consumers inside and outside the respective Member State, the existence of special national legislation regarding the mentioned product, as well as the way in which this name has been used [...]."[18]

The factors that must be considered when assessing if a term has become or not generic are identical to the ones mentioned by EU Regulations for agricultural products and foodstuff, wines and spirit drinks, namely the existing situation in areas of consumption and the relevant EU or national legal acts.

Another identical provision in all EU normative acts is represented by the fact that protected GIs will not become generic within the EU. Therefore, after their registration, unlike trademarks, they cannot be cancelled on the grounds that they have become the usual commercial designation of the product for which they were registered.

Homonymous names. „Homonymous names" are not defined by neither EU Regulation related to GIs for agricultural products and foodstuff, wines and spirit drinks

However, for GIs for craft and industrial products, during the discussions related to the Proposal for the EU Regulation for craft and industrial products, the European Parliament suggests to add in the recitals that „Homonymous indications are spelled or pronounced in the same way, but refer to different geographical areas". This suggestion was taken into consideration and in Recitals (41) of EU GI Regulation for craft and industrial products, the „homonymous names" received the above-mentioned definition.

As a rule under the EU GI Regulation for craft and industrial products, the subsequent request for registration of a GI which name is a total or partial homonymous name with a prior GI will be rejected.

As an exception, the registration is allowed under the following cumulative conditions:

- There is a sufficient distinction in practice between the two homonymous names concerning the conditions of local and traditional usage and their presentation;
- The producers concerned receive equitable treatment;
- The consumers are not misled as to the true identity or geographical origin of the products. In case the consumers are misled as to the true geographical origin of a product, the GI will not be registered even if the name of the actual territory, region or place of origin of the product in question is accurate.

The above-mentioned rule and exception were stipulated as such also in the Proposal for the EU Regulation for craft and industrial products. They are also stipulated by the EU Regulation no. 1308/2013 for wines, EU Regulation no. 2019/787 for spirit drinks and EU Regulation no. 1151/2012 for agricultural products and foodstuff. However, the last EU Regulation does not allow the homonymous neither in case of names of plant variety nor breed of animals.

Product contrary to public policy. As mentioned above, this is a case of refusal to registration of a GI which currently is applied only for craft and industrial products. However, in the Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products, the Commission introduced this provision also and it completed it with products contrary „to accepted principles or morality", but only for agricultural products.

EU GI Regulation for craft and industrial products does not offer much details for this case of refusal, it only specifies in Recital (16) that the need to apply the public policy exception should be assessed on a case-by-case basis and to be in accordance with the Treaty on the Functioning of the European Union (TFEU) and the relevant case law of the Court of Justice of the European Union while the Proposal of EU Regulation on EU GIs for wine, spirit drinks and agricultural products does offer no complementary details.

From our point of view this approach seems strange having in view that the public policy is applied to the good and not the name of the GI as it happens in case of trademarks.

2.4. Applicant

As a rule, the EU GI Regulation for craft and industrial products stipulates that the applicant for a GI for craft and industrial products is a producer group. Under the notion of „producer group" are also included a local or regional authority or a private entity designated by a member state, elements which were introduced during consultations at the suggestion of the Committee of the Regions.

As an exception, a single producer can be applicant under the following conditions which must be cumulatively met: (a) such person is the only producer which wants to submit the application for registration and (b) the geographical area is defined by a particular part of the territory without reference to property boundaries and has characteristics that differ appreciably from those of neighbouring geographical areas or the characteristics of the product are different from those produced in the neighbouring geographical areas. These

[18] CJEU, Case no. C-343/07, dec. from 02.07.2009, point 101.

conditions were adopted as such even if during the consultations, the Committee of the Regions recommended the entire replacement of the (b) condition with the specification that the geographical indication remains open to any new producers complying with the product specification[19].

If the product has its origins in a cross-border geographical area, multiple applicants from different member states or from member states and third states or from third states can submit a common request of registration.

If we compare with other EU Regulations for GIs, we will notice slight differences. For instance, EU Regulation no. 2019/787 for spirit drinks, EU Regulation no. 1151/2012 for agricultural products and foodstuff and EU Regulation no. 1308/2013 for wines stipulate the rule that applicant can be groups that work with the product whose name is sought for registration. EU Regulation no. 2019/787 for spirit drinks stipulates that an authority designated by a member state can be considered a group if the producers cannot form a group because of different reasons.

EU Regulation no. 2019/787 for spirit drinks and EU Regulation no. 1151/2012 provide as an exception the situation under which a natural or legal person can be considered a group if two cumulative conditions are met: (a) such person is the only producer which wants to submit the application for registration - which is the same with the one for GIs for craft and industrial products and (b) the defined geographical area possesses characteristics which differ appreciably from those of neighbouring areas, the characteristics of the product are different from those produced in neighbouring areas *or the product has a special quality, reputation or other characteristic which is clearly attributable to its geographical origin* (the part in Italics is applicable only to spirit drinks)- which is slightly different from the one for GIs for craft and industrial products in the sense that for the geographical area in case of GIs for craft and industrial products it is expressly mentioned that it must exceed the limits of a private property.

EU Regulation no. 1308/2013 for wines is not such detailed in exception stating only that in exceptional circumstances and adequately justified, any individual producer can submit a request for registration.

However, like in case of all GIs for other products, it must be mentioned that in case of GIs for craft and industrial products also, the applicant does not have the capacity of owner of the GI and that no property right is granted to it, no one, in fact, having the capacity of owner[20]. The applicant and other persons and/or entities which are observing the product specifications being entitled to use the geographical indication.

2.5. Stages of registration of the GIs for craft and industrial products

Since the beginning, the Commission proposed a two stages registration in its Proposal for the EU Regulation and it was maintained also in the adopted EU GI Regulation for craft and industrial products.

The first stage is represented by the national stage of the registration and the second by the Union stage of the registration.

Even if the registration of GIs for other products also must go through two stages of the registration, the institutions involved are different, as we will see during the next paragraphs.

2.5.1. National stage of the registration

For craft and industrial products, the national stage involves multiple steps, namely the (1) submission of the application to the national competent authority designated by the EU Member State, (2) its examination, (3) the national opposition and (4) the decision issued by the national competent authority.

This step is cvasi-identical to the one related to the registration of GIs for other products.

In relation to the step related to the national opposition, it must be mentioned that EU GI Regulation for craft and industrial products establishes a period of at least two months as of the publication of the request for registration as opposition period, the same being established by the EU Regulation no. 1151/2012 for agricultural products and foodstuff while EU Regulations for spirit drinks and wines leave such a deadline entirely to the discretion of member states, mentioning „a reasonable period" as opposition period.

Under all EU Regulations for all kinds of products, the opponent may be any person which meets two cumulative criteria: (1) a legitimate interest and (2) is established or has the residency in the Member State where the national stage takes place.

Regarding the GIs for craft and industrial products, as an exception from the national stage, the European Commission may exempt a Member State from its obligation to designate a competent authority to manage this stage if until November 30, 2024, such Member State submits to the European Commission a request proving

[19] In our opinion, this recommendation of amendment is not correct having in view that the applicant is not the owner of the geographical indication, and that all persons complying with the product specification are anyway allowed to use the geographical indication.

[20] For more details on this opinion to which we subscribe, C. Le Goffic, *La protection des indications géographiques. France - Union Européenne - États-Unis*, LexisNexis, Paris, 2010, p. 243-258.

that the following two cumulative conditions are met: (1) the respective Member State does not has a national *sui generis* system related to GIs for craft and industrial products and (2) the local interest for the protection of GIs for such products is low.

In such a case, the applicant from a Member State exempted from the obligation to appoint a competent authority to manage the national stage will submit its application following directly the second stage, namely the Union stage, known in this case as „direct registration."

Such derogations from the national stage are not recognised for GIs for the other types of products under the other EU Regulations.

2.5.2. Union stage of registration

For craft and industrial products, like for any other products, the second stage, namely the Union stage, starts following the issuance of a favourable decision by the competent authority from the national stage and it involves multiple steps, namely (1) the Union application, (2) examination of the application, (3) opposition procedure at worldwide level, (4) final decision, (5) publication in the register of GIs for craft and industrial products.

The Union stage for GIs for craft and industrial products starts with the electronic submission of the application by the Member State to the European Union Intellectual Property Office („EUIPO"). In case of GIs for craft and industrial products, this is a novelty aspect because in case of the other types of products, the authority involved is the European Commission and not EUIPO.

The EUIPO will have to examine the application in a maximum 6 months, however, delays are allowed under the condition to inform in written the application about them. The same is applicable also for GIs for spirit drinks, agricultural products and foodstuff and wines.

In case of GIs for craft and industrial products, exceptions from this deadline are also regulated, namely in case EUIPO receives a notification from the Member State informing that the national decision from the first stage was invalidated or requesting the suspension of the Union examination on the ground that the national decision was challenged in front of national administrative or judicial authorities. Such cases do not exist for GIs for spirit drinks, but they exist for GIs for wines and for agricultural products and foodstuff.

If during the examination, the EUIPO considers that the application is incomplete or incorrect, it will inform the applicant and give it 2 months to complete or correct it. If the application is not completed or corrected within the deadline, EUIPO will reject it. Such deadline is not granted in case of GIs for spirit drinks, agricultural products and foodstuff and wines, the Commission rejecting directly the non-compliant application.

If the EUIPO solution following the examination of the application is favourable to the applicant, it will be published, and within 3 months as of the publication, any interested person may submit an opposition or notice of comment against the registration of the GI for craft and industrial product. This deadline is also applicable to GIs for spirit drinks, agricultural products and foodstuff and wines. However, for these products it does not exist the possibility of submission of a notice of comment.

This time also, the opponent must meet two cumulative criteria for GIs for all types of products: (1) to have a legitimate interest (this condition is the same as in the national opposition) and (2) to be established or to have the residency in a third country or in another Member State (this condition is slightly different than the one from the national opposition, being allowed an established or residency anywhere in the world).

The opposition against GIs for craft and industrial products will be admitted by EUIPO if it meets two cumulative conditions: (1) the application infringes the following conditions: (a) the proposed GI does not comply with the requirements for protection - same in case of GIs for spirit drinks, but in this case, the EU Regulation no. 2019/787 for spirit drinks is more detailed referring to the product specification and the same is for agricultural products and foodstuff, (b) the registration is envisaging a name of GIs which have become generic term or which are homonymous with prior registered GIs or which are conflicting with prior trademarks with reputation that could mislead the consumers - - same in case of GIs for spirit drinks and agricultural products and foodstuff, (c) the registration would affect entirely or partially an identical or similar name used in commercial trade or of a trademark or products present on the market for at least 5 years prior to the publication of the GI application - such ground is also stipulated for GIs for agricultural products and foodstuff, but not for GIs for spirit drinks. However, the EU Regulation for GIs for spirit drinks include into the list of grounds of opposition also the grounds for cancellation represented by the non-placement on the market of a product under the GI for at least 7 consecutive years and (2) provides reasons drawn up in accordance with the form set out by the EU GI Regulation for craft and industrial products.

If the opposition is admitted by EUIPO, in two months as of the receipt of the opposition, EUIPO must invite the opponent and the applicant to engage in consultations during a period of maximum 3 months, with the

possibility of extension with another 3 months - all these deadlines are applicable also for GIs for spirit drinks, agricultural products and foodstuff and wines. If following the consultation, amendments are brought to the application, the EUIPO will make a new examination and it will publish the modified application - same rule applies also in case of GIs for other products.

The grounds for the opposition will be assessed in relation to the EU territory for GIs for spirit drinks, agricultural products and foodstuff.

The final decision on the application is given by EUIPO by taking into consideration multiple aspects such as: any provisional periods, the outcome of the opposition procedure, the notices of comments received and it will be published in the EU register of GIs for craft and industrial products in all official languages of the EU.

As an exception, it is possible that the final decision to be rendered by the EU Commission if such decision may jeopardise the public interest or the EU's trade or external relations. The EU Commission may intervene in such cases also in the procedure of cancellation and amendment of the product specification. Since in case of GIs for other products the Commission is the authority involved in the Union stage, there is no such provision.

2.6. Union register

The Union register of GIs for craft and industrial products will be developed, kept, and maintained by EUIPO. In case of geographical indications for agriculture products and foodstuff, spirit drinks and wines, such register is kept by the EU Commission.

Since the Proposal for the EU Regulation for craft and industrial products until the final text adopted, there were multiple versions of the elements that the Union register must contain. The Proposal for the EU Regulation for craft and industrial products stated that the following information should have to be entered into the register: (1) registered name of the product in its original script (if it is not in Latin characters, it will be transcribed and Latin characters and both versions will be mentioned), (2) class of the product, (3) reference to the instrument registering the name, (4) indication of the country or countries of origin.

The Committee of the Regions suggested amendments to all these four data and insertion of new data as follows: (1) registered protected geographical indication of the product in its original script (if it is not in Latin characters, it will be transcribed and Latin characters and both versions will be mentioned), (2) type of the product, (3) beneficiaries of the protected geographical indication, (4) reference to the instrument registering the name, (5) indication of the country or countries of origin.

In the end, the elements contained by the Union register are the following: (1) registered protected geographical indication of the product in its original script (if it is not in Latin characters, it will be transcribed and Latin characters and both versions will be mentioned), (2) type of the product, (3) name of the applicant, (4) reference to the decision registering the name, (5) indication of the country or countries of origin.

Therefore, we notice that the suggestions of the Committee of the Regions were taken into account and we consider that these suggestions of amendments were welcomed because they are more accurate. In addition, from our point of view it is good that „beneficiaries" was replaced with „applicant" because otherwise it would mean to amend the data in the registry each time a new producer was allowed to use the GI for a certain product.

2.7. The protection of the GIs

According to the EU GI Regulation for craft and industrial products, the GIs for craft and industrial products are protected against approximately the same uses as the GIs for the other types of products under the other EU Regulations mentioned earlier. This means that the preliminary rulings of the CJEU in GIs cases will be applicable also for craft and industrial products.

In this regard, we will present few law cases in matters of GIs for food that may be applicable to craft and industrial products and in which the CJEU interpreted the notions of „evocation", „false or misleading indication" and „any other practice liable to mislead the consumer."

Regarding the notion of „evocation", in case C-75/15[21] it is stated that the evocation covers the hypothesis where the term used to designate a product incorporates part of a protected geographical indication, so that, in the presence of the name of the product in question, the consumer is given, as a reference image, the product benefiting from that indication. In addition, it states that it is legitimate to consider that there is an evocation of a protected geographical indication where, in the case of products with visual similarities, the sales names are phonetically and visually similar.

Case C-44/17[22] shows that in order to assess the existence of an „evocation", it must be ascertained

[21] CJEU, Case no. C-75/15, dec. from 21.01.2016, point 21.

[22] CJEU, Case no. C-44/17, dec. from 07.06.2018, points 46, 47, 49, 101.

whether, in the presence of the subsequent name, the consumer is being given, as a reference image, the product covered by the protected geographical indication, the consumer being understood to be the average European consumer who is reasonably well informed and reasonably observant and circumspect. Moreover, it is mentioned that the identification of a phonetic and visual similarity of the subsequent name with the protected geographical indication is not a prerequisite for the existence of an „evocation", so it is not excluded that an „evocation" can be identified even in the absence of such similarity.

Case C-614/17[23] indicates that the evocation of a registered name may occur through the use of figurative signs and that the use of figurative signs evoking the geographical area with which a geographical indication is associated may constitute an evocation of the geographical indication, including where those figurative signs are used by a producer established in that region but whose products, similar or comparable to those protected by that geographical indication, are not covered by it.

By way of example, we mention that it was held that the term „Cambozola" evokes the geographical indication „Gorgonzola" all the more so since it was used for blue mould cheeses which do not differ in appearance from Gorgonzola, and the fact that the label indicated the true origin of the product does not alter the fact of evocation[24]. The same could happen in a situation in which the name „Murano" for glass could be evoked by a similar name.

In addition, the EU GI Regulation for craft and industrial products specifies regarding the „evocation" that it will arise whenever there is a sufficiently direct and clear link with the product covered by the registered GI is created in the mind of the average European consumer who is reasonably well-informed and reasonably observant and circumspect. It may be noticed that with this provision, the European legislator took into consideration the CJEU Case C-44/17 mentioned earlier. Such specification is not provided for the system protecting the other GIs for the other types of products.

The notion of „false or misleading indication" and the notion „any other practice liable to mislead the consumer" were analysed by the CJEU in case C-490/19[25] in which it shows that it is clear from the wording of the provisions that registered names for geographical indications are protected against various actions, namely, firstly, direct or indirect commercial use of a registered name, secondly, misuse, imitation or evocation, thirdly, false or misleading mention of the provenance, origin, nature or essential qualities of the product, appearing on the inside or outside packaging, in advertising material or in documents relating to the product in question, and the packaging of the product in such a way as to create an erroneous impression as to its origin and, fourthly, any other practice liable to mislead the consumer as to the true origin of the product. Thus, these provisions contain a graduated list of prohibited actions. While art. 13 para. (1)(a) of EU Regulation no. 1151/2012 prohibits the direct or indirect use of a registered name for products not covered by the registration in a form identical to that name or remarkably similar in phonetic and/or visual terms, art. 13 para. (1)(b)-(d) of the same regulation prohibits other types of actions against which registered names are protected and which make neither direct nor indirect use of the names themselves, namely actions which suggest the registered names in such a way that the consumer establishes a sufficient link of proximity with them.

Regarding the notion of „false or misleading indication", this case C-490/19 shows that such actions extend the protected area, including in it, among others, „any (other) mention", namely the information provided to consumers, which appears on the inside or outside of the packaging of the product in question, in the advertising material or documents related to this product , which, although they do not evoke the geographical indication, are qualified as „false or misleading" regarding the links the product has with the latter. The expression „any (other) mention" includes information that may appear in any form on the inner or outer packaging of the product in question, in advertising material or documents relating to this product, in particular in the form of a text, an image or a content likely to inform about the provenance, origin, nature or essential qualities of this product[26].

As a novelty, the EU GI Regulation for craft and industrial products regulates the protection of GIs for craft and industrial products against „false or misleading indication" as to the information provided on websites relating to the products. In our opinion, this should be also added to the protection of the other types of products.

Regarding the notion of „any other practice liable to mislead the consumer", the CJEU show in this case law that the legal provision aims to cover any action not already covered by the other provisions and thus to close the system of protection of registered names. The Court takes this reasoning further and states that the system of protection of GIs aims in particular to provide consumers with clear information on the origin and properties of the product, thus enabling them to make more informed purchasing decisions, as well as to prevent practices

[23] CJEU, Case no. C-614/17, dec. from 07.06.2018.
[24] CJEU, Case no. C-87/97, dec. from 04.03.1999, points 25, 27.
[25] CJEU, Case no. C-490/19, dec. from 17.12.2020.
[26] CJEU, Case no. C-490/19, dec. from 17.12.2020, point 28.

that could mislead them. Thus, it is prohibited to reproduce the shape or appearance that characterises a product covered by a registered name when this reproduction may cause the consumer to believe that the product in question is covered by this registered name. It is necessary to assess whether that reproduction is likely to mislead the European consumer, normally informed and sufficiently attentive and informed, considering all the relevant factors in the case[27].

In the end, the CJEU states that the legal provisions are not limited to prohibiting the use of the registered name itself, but that its scope is wider, not only prohibiting the use by a third party of the registered name[28]. Thus, the key to the actions against which geographical indications are protected is that the consumer should not be misled, geographical indications operating in the relationship between their legitimate users and the consumer, and that both parties should rely on the information provided, the doctrine showing that from this point of view the similarity with trademark law is striking[29].

We find very strange that the EU GI Regulation for craft and industrial products is listed among the expressions that accompany the actions of misuse, imitation, or evocation also the „flavour" in the conditions in which art. 2 para. (2) of this EU Regulation is clear and mentions that it does not cover the protection for spirit drinks, wines, agricultural products, and foodstuffs the only ones that can have a flavour. However, during the discussions on the Proposal for the EU Regulation for craft and industrial products, the European Parliament suggested the replacement of „flavour" with „fragrance" which seems better having in view that craft or industrial products may have fragrance, such as soaps. Unfortunately, this suggestion was not taken into account.

However, a step forward having in view the digital world in which we live in, is represented by the fact that the EU GI Regulation for craft and industrial products is providing the protection of GIs for craft and industrial products also with regard to the domain names which contain or consist of the registered geographical indication, such provision not existing in case of GIs for other types of products.

2.8. Cancellation of the registration of the GIs

The reasons for cancellation of the registration of a GI for craft and industrial products are similar with the ones for the GIs for other types of products, with the exception that EUIPO will manage the procedures instead of the Commission.

The persons and/or entities who may request the cancellation are: EUIPO on its own initiative, a Member State, a producer group, a third country or any natural or legal person with legitimate interest.

The reasons for cancellation are the following: (a) the compliance with the requirement of the product specification is no longer ensured. (b) no product has been placed on the market for at least five consecutive years. This deadline was of seven years in Proposal for the EU Regulation for craft and industrial products and the Committee of the Regions mentioned that the seven years period was „somewhat random" and proposed a ten-year period while the European Parliament proposed five years instead of seven years.

However, the same term of seven years is provided also in case of GIs for agricultural products and foodstuff, spirit drinks and wines.

In our opinion, it should have been established for GIs for craft and industrial products the same term as the one for the GIs for other types of products, namely the term of seven years in order to have a unitary deadline.

3. Conflicts or coexistence of other signs with geographical indications

3.1. Domain names and geographical indications

Like trademarks and geographical indications, domain names have been qualified by the World Intellectual Property Organisation („WIPO") as distinctive signs being able to distinguish between businesses or private individuals and, in addition, they have as well a technical function[30]. Also, domain names may have both a commercial and non-commercial vocation, becoming nowadays signs as important or even more important than trademarks[31].

We may say that in commerce, we do not exist without domain names that make us „visible" in the digital world, being therefore an important asset of a business. However, even if domain names are beneficial to the

[27] *Idem*, point 29.

[28] *Idem*, points 30, 31.

[29] J. Pila, P. Torremans, *European Intellectual Property Law. Second Edition*, Oxford University Press, 2019, p. 452.

[30] WIPO, *WIPO Internet Domain Name Process, Rapport intérimaire relatif au Processus de l'OMPI sur le Nomes de domaine de l'internet,* 23.12.1998, *https://www.wipo.int/amc/fr/processes/process1/rfc/3/interim2_ch1.html*, accessed on 21.04.2024.

[31] N. Dreyfus, *Marques et internet. Protection, valorisation, défense,* Collection Lamy Axe Droit, Lamy, France, 2011, p. 235.

development of a business, they can be just as damaging if they are used by third parties in order to obtain quick and easy material benefits, resulting in misleading consumers.

EU GI Regulation for craft and industrial products comes with another novelty represented by a domain name information and alert system. However, its content is less detailed than the one under Proposal for the EU Regulation for craft and industrial products which stipulated that such system would have been useful in two moments: (a) upon submission of an application for a GI for a craft and industrial product - when it will inform the applicants if the name of the GI is also available as a domain name and (b) during the lifetime of the GI (*i.e.,* after its registration) - when it will inform the holders about the registration of a domain name which contains an identical or similar name with the name of the geographical indication. This second information would have been made only if the holders opt for it. However, these provisions were deleted from the final text of the adopted EU Regulation and now, it is only mentioned that by June 2, 2026, the Commission shall carry out an evaluation of the feasibility of an information and alert system against the abusive use of GIs for craft and industrial products in the domain name system, and submit a report with its main findings to the European Parliament and the Council.

For this system to work, country-code top-level domain name registries established in the Union shall ensure that any alternative dispute resolution procedures for domain names recognise registered GIs as a right that can be invoked in those procedures.

The Proposal for the EU Regulation was regulating the implementation of such system also for EU trademarks, proposing the inclusion in the EU trademark Regulation of an article similar to the one for GIs for craft and industrial products „in order to ensure coherence" with the Proposal for the EU Regulation. However, such provision was not kept in the final act even if such provision would have brought a certain relief for holders because they would have been automatically informed about similar or identical, prior, or subsequent, domain names with their GIs name or trademark.

The advantage of such provision is that conflicts between the signs (*i.e.*, between geographical indications and domain names) would be avoided.

Moreover, in case of a registered domain name which is conflicting with a geographical indication, the Proposal for the EU Regulation provided for the revocation or transfer of that domain name to the producer group following an alternative dispute resolution procedure or judicial procedure under the condition that the said domain name was registered without right or legitimate interest, or it was being used in bad faith. However, the EU GI Regulation for craft and industrial products does not contain such provisions, they will be drawn up and proposed by the EU Commission if it is concluding that an information and alert system against the abusive use of GIs for craft and industrial products in the domain name system is feasible.

3.2. Trademarks and geographical indications

EU GI Regulation for craft and industrial products establishes the rule based on which if a prior GI is registered or applied for registration, the subsequent trademark application will be rejected if it infringes the protection of the GI. In this regard, the EUIPO and the competent national authorities will have to invalidate registered trademarks or applied for registration if they infringe the above-mentioned rule.

Also, the application for registration will be rejected in case the name of the GI would conflict with a trademark's reputation and renown if it could mislead the consumer regarding the true identity of the product.

As an exception, it is allowed a co-existence between the subsequent GI and the prior trademark (registered or applied for registration) even if the latest is infringing the above-mentioned rule, under the following cumulative conditions: (a) the trademark to have been applied for, registered or established in good faith in the EU and (b) no ground for invalidity or revocation of the trademark exists.

Another exception is referring to guarantee or certification trademarks and to collective trademarks which are allowed to be used on labels, together with the GI.

4. Role of EUIPO

New structures will be created within EUIPO, namely a new department (Geographical Indications Division) and a Geographical Indications Advisory Board.

The Boards of Appeal which already exists within EUIPO will take over also the responsibility of issuing decisions on appeals procedures against the decisions of the Geographical Indications Division.

The Geographical Indications Division shall be responsible to issue decisions for applications for registration, amendment of geographical indications, filed oppositions, entries in the Union register and requests for cancellation of geographical indications.

The Geographical Indications Advisory Board will be composed of one representative of each Member State

and one representative of the EU Commission and their alternate representative for mandates of maximum five years, but renewable and will have the role of issuing consultative opinions at the request of Geographical Indications Division and of the Boards of Appeal in the following matters: (a) assessment of the quality criteria, (b) establishment of reputation, (c) determination of generic nature of the name, (d) assessment of the link between a product's characteristics and its geographical origin, (e) the risk of confusing consumers in cases of conflict between geographical indications and trademarks, homonyms or names of existing products that are legally marketed.

5. Conclusions

Why is it important to have an EU regulation for craft and industrial products?

Firstly, because not all states have a national system to protect such goods under geographical indications and such goods should be protected in order to pass over the traditions to the next generations and not lose them.

Secondly, because such system will allow the registration of geographical indications at international level.

Thirdly, because once again the geographical indication system, even if it is about craft and industrial products, puts the consumer in the centre of attention, being important that in any way the consumer not to be misled as to the origin of the product.

As such, even producers' associations from Romania could protect their products through this system, example of products that could qualify being Horezu pottery, Bledea pottery, traditional wall carpets, and many other.

However, based on the comparative analysis made above, we consider that it would have been better if the GI system in general (*i.e.,* for all types of products) would be regulated in a single normative act in two parts: (1) GIs with their specificities for each type of product and (2) procedure of registration, cancellation, etc. which should be the same for all GIs in order to simplify it because from the above analysis it can be noticed that there are different deadlines for same procedures.

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ANNULMENT OF A TRADEMARK FOR BAD FAITH

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Abstract

When entering any new potential market or trying to establish a name for oneself on a designated market, one of the first steps taken by any economic operator, apart from actually rendering the service or conceiving the product which is envisaged to be sold, is establishing the brand designated to identify it.

Unfortunately, in several scenarios, the band name is already taken, either by an aggressive competitor or by a „well-intended" contractual partner.

Since in such cases, the name intended to be used as a trademark has already been unlawfully secured, interested parties may request its annulment, provided that the bad faith of the applicant is duly sustained with arguments and proofs.

The purpose of this article is to address the concept of „bad faith" from a practical perspective, considering the Romanian courts' recent optics of this open concept, based on the European Court of Justice's principles and guidelines.

The objectives of this article are outlining the different approaches of Romanian intellectual property courts insofar as bad faith is concerned, and explaining how the concept has evolved, based on the subjective and the objective element within the court's analysis. Also, the article aims to better characterize the court's standpoint with respect to bad faith in commercial relationships.

Keywords: *trademark registration, legal interest, trademark squatting, bad faith registration, trademark annulment, good faith in trademark registration, subjective and objective elements.*

1. Introduction

While at a European level, one might determine more precisely what the concept of „bad faith" encompasses, this article aspires to delve into the intricacies of Romanian laws and court practice, outlining firstly what bad faith in a trademark application means.

Expressing what bad faith in a trademark application means is relevant, due to the increasing number of claims for the annulment of trademarks pending before the dockets of Romanian courts, as well as recent changes in courts' optics with respect to bad faith, as an independent notion.

In order to respond to such query, this article aims to analyse the recent national court practice, in light of the guidelines provided by the European Union.

The already existent specialised literature is focused more on the European approach on bad faith, without immersing into Romanian court practice, so this study would provide a welcoming insight on national practice.

2. Legal applicable framework

Pursuant to art. 56 of the Trademark and geographical indications Law no. 84/1998, the annulment of a trademark during the period of protection of said trademark may be requested by any interested person, if the registration of the trademark was performed with bad-faith.

In accordance to the CJEU jurisprudence[1], in order for a trademark to be cancelled for registration in bad faith, it is necessary for two conditions to be ascertained by the national court: an objective element (of knowledge of the use of the previous sign) and a subjective element (of unfair intent pursued at the time of registration). The Court of Justice stresses that knowledge in itself is not sufficient to support a finding of bad faith.

According to the same jurisprudence of the European court and the EUIPO Guide[2], when analysing the fulfilment of the second condition of the subjective element, the national courts must check the following elements: if the applicant intends to register a trademark with the aim of blocking the registration of the sign by a competitor , if there are contractual relations between the parties, if the applicant intends to take advantage of the reputation of the sign, if the applicant intends to use the sign or not.

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[1] C-529/07 of 11.06.2009, Chocoladefabriken Lindt & Sprungli, para. 40, 48, 49.

[2] *https://guidelines.euipo.europa.eu/1803436*.

These factors are relevant from the perspective of bad faith at the time of filing the application for trademark registration and have a guiding character. The court shall examine the circumstances to which the conclusion of bad faith is linked, in principle, in consideration of the moment of formulation of the application for trademark registration (being operative the rule *tempus regit actum*).

Under national court practice, HCCJ[3] set out that bad faith represents the knowledge that the person making the legal deposit has of the fact that the trademark deposited by him is used by someone else or that someone else has the intention of using it, and knowing that they cannot both use the same trademark, the depositor takes advantage of the fact that the other entitled party did not register its sign in Romania and evades the rules of unfair competition aiming to remove its competitor from the market by using the attributive effect of the deposit.

3. Procedural conditions for filling an application for annulment of a trademark due to bad faith

Art. 56 of the Trademark Law sets the background for the Romanian court, who shall analyse with priority if the claimant has interest to act. Most frequently, the defendant prevails himself of such defense, by invoking the exception of lack of interest.

Interest represents one of the conditions for filling a court application. Under art. 33 CPC, the claimant's interest must be determined, legitimate, personal, born and current. However, even if the interest is not born and current, an application can be made in order to prevent the violation of a threatened subjective right or to prevent the occurrence of an imminent and irreparable damage.

The exception of lack of interest is a procedural exception by which deficiencies are invoked regarding the right to file an application, so that, by invoking it, it is intended that the application is rejected, as filed by a person lacking interest, based on the provisions of art. 40 CPC.

Through the exception of lack of interest, the defendant invokes the violation of a rule of public order, such as the one from art. 33 CPC. Since this is an absolute, peremptory exception, its possible validity would make it unnecessary to analyse the substance of the case, in accordance with art. 248 para. (1) CPC.

Since the exception of lack of interest is an absolute exception, it is subject to the procedural legal regime of invocation provided by art. 247 para. (1) CPC, and can, therefore, be invoked at any stage of the trial, also through the grounds of appeal.

Interest is regarded under high scrutiny by the Romanian court, which has retained interest to act, for example, for cases in which the claimant wants to protect his legal interests stemming from the previous use of the same verbal sign and to prevent an imminent damage, since the defendant could, in such case, request the cease and desist from using such sign. Also, the High Court argued that interest to act is met in cases when the claimant would aim to obtain a national judgment annulling a trademark, which could then be opposed with *res judicata* at a EU level, in a trial before EUIPO, who recognizes *res judicata* of national rulings.

4. Substantive conditions for filling an application for annulment of a trademark due to bad faith

In the analysis of bad faith when registering a trademark, it is necessary to establish the objective element (the knowledge by the owner of the registration request of the relevant fact, respectively of the circumstance of the use of the sign by a third party, by virtue of which he acquired a certain knowledge on the market), but also of the subjective element, namely the dishonest intention of the applicant for registration. The mere knowledge by the applicant of the use of the sign by a third party at the time of the application for registration is not considered sufficient. Good faith in the registration of the trademark is presumed, so it is the plaintiff who must prove that the applicant acted in bad faith when registering a trademark in Romania.

When analysing the applicant's bad faith, Romanian courts[4] also analysed the concept of good faith under Romanian laws. As such, courts argued that good faith, similar to bad faith, is an element of an intentional order, which belong to the world inside of man. These elements do not have a material existence and cannot be perceived from the outside of the one who it is animated by these subjective elements, so that they absolutely cannot form the object of a direct evidence. For this reason, the legislator regulated at the level of principle the legal and relative presumption of good faith according to art. 14 para. (2) CC. This level can be overturned through evidence contrary, indirect, from which bad faith can be deduced. Therefore, bad faith cannot form the object of direct evidence, but it can be at most deduced from the existence of indirect evidence. For this purpose, courts usually administer the proofs with interrogation of the parties and testimonial proofs.

[3] HCCJ, civ. dec. no. 6759/17.12.2010.

[4] CA Bucharest, civ. dec. no. 1260/A/08.10.2020.

In practice[5], Romanian courts found that the condition of the subjective element is met as long as the parties were competitors on the same market and the plaintiff was already using the sign with the trademark function for its own products on the date of the defendant's registration of the sign as a trademark. In such a situation, the courts deemed that the purpose of the registration of the trademark was to take advantage of the result of the long-term use by the plaintiff of the identical sign, with the function of a trademark, which indicates the existence of the unfair intention of the defendant when registering the sign as a trademark, as well as to prohibit the plaintiff for future use of this name, based on the exclusive rights acquired through registration, according to art. 36 para. (1) from Law no. 84/1998. Therefore, in such particular case, the defendant's bad faith results from the fact that he sought to profit improperly from a name used for a long time by a competitor on the market, by appropriating that name and the related clientele.

Another typical situation when Romanian courts[6] retained that the trademark applicant acted in bad faith is the one in which the applicant is also the creator of the trademark designated to identify the services offered by the plaintiff, and is a partner in the defendant company, which requested the registration of the contested trademark in its own name, and once the registration was obtained, he filed a legal action against the plaintiff to request the prohibition of the right to use the brand, offering to sell it instead. In the context of the factual situation described above, the court held that the plaintiff proved the essential elements of bad faith, namely, the objective element, consisting in the knowledge of the fact that there were legitimate interests in connection with the brand, and the subjective element, consisting in the illicit purpose of the registration and the intention to harm the one who justifies such rights or legitimate interests, and this all the more since the plaintiff justifies the previous use of the sign that makes up the trademark registered by the defendant.

In this case, the Romanian courts also raised the matter of the function and purpose of trademarks, in order to justify that any derailing from such functions and purposes could be construed as bad-faith. As such, the national court made reference to the conclusions of the European Court of Justice, which stated The Court of Justice which stated that the essential function of the trademark is to guarantee the identity of origin of the product or service designated by the trademark the consumer or user data the, allowing him to distinguish without confusion this product or service from those that have a different origin. Another function of the brand is the competitor function, which guarantees that all the products and services bearing it come from the control of a single company. The two essential functions of the trademark determine the legal purpose of the use of the trademark consisting in its exclusive use to indicate the commercial origin of the products and services and not for other purposes, such as the removal from the market of an existing or potential competitor, for the purpose of blocking.

In this case, the matter of the parties' position of competitors was also analysed. The court ascertained that due to the different objects of activity of the two parties, they are not competitors on the market. Therefore, not being active in the same field as the plaintiff, the defendant had no interest in registering a trademark for services that did not fall within its scope of activity. Further along this line of reasoning, the Court of Appeal found that the appellant's critic regarding the Tribunal's erroneous determination of the fact that the appellant's purpose in registering the trademark was to eliminate a competitor is well founded. However, the Court of Appeal also argued that, although the case is not about removing or blocking the activity of a competitor, nevertheless what was sought was to block the activity of the applicant under the sign in dispute or to allow the continued use of this sign on the condition of purchasing the trademark from the appellant. However, this purpose is also one that outlines the existence of bad faith when filling the application for trademark registration, as it is not in accordance with the purpose for which trademark registration and the regime of rights arising from registration were regulated.

The Romanian courts have recently begun to analyse bad faith in more detail, as opposed to past approaches, in which although some situations could open a sounder inquiry on the good or bad faith, were simply dismissed. For example, one court[7] rejected the claim for annulment of a trademark for bad faith, considering that the fact that the directors of the two companies acting as plaintiff and defendant knew each other, collaborated, that they were part of the same political party or that one of them used the plaintiff company's car are not likely (even if proven) to lead to the conclusion of the existence of bad faith at the time of trademark registration.

In other past cases, Romanian courts[8] made a superficial analysis by which they decided that the registration of a trademark was done in bad faith, considering that the trademark applicant was aware of the fact that the plaintiff's name and reputation on the meet market in Romania was increasing, without

[5] HCCJ, civ. dec. no. 2063/01.11.2022.

[6] CA Bucharest, civ. dec. no. 35A/17.01.2018, final through HCCJ, dec. no. 242/01.02.2019.

[7] Bucharest Trib., 1st court, dec. no. 1278/06.07.2011.

[8] Bucharest Trib., 1st court, dec. no. 1802/24.11.2010.

administering additional proofs which could have formed the basis of this conclusion.

In other cases[9], one of the defendant's arguments against his alleged bad faith was the lack of any commercial relationships with the plaintiff. As such, the defendant claimed that the fraudulent intention must be seen in the context of the history of the trial parties and such lack of direct commercial or competitive relations also proves the lack of bad faith when registering the trademark. He argued that as long as he did not have commercial or direct relations with commercial companies, he had no way of registering a trademark for the purpose of blocking the plaintiffs' access to the market, because at the time of the trademark registration, he was not aware of the existence of these plaintiffs. Moreover, even the plaintiffs admitted that they had no direct commercial or competitive relations with the party they represent. In this case, the Court argued that bad faith exists through the knowledge that the depositor has about the filed trademark or through the knowledge that he could have had with minimal diligence that normally should have been undertaken. The court analysed the criteria of diligence the trademark applicant proved when registering the trademark, since a professional must inform himself, he must know what is happening on the market on which he operates and he must be honest with himself and the competition. As such, the obligation to be diligent lies with the application of the trademark, who cannot avail himself of now knowing the trademark's situation, if reasonable diligences were performed.

5. Conclusions

While the Romanian market is in a continuous development, the function of a trademark becomes more and more relevant, both from the consumer's perspective and from the trademark owner's perspective, as seen through the lense of the case law presented herein. The trademark owner is interested in building its business based on a well-known trademark, while the consumer's immediate purpose is to benefit from genuine products, ensured by the guarantee of the trademark's reputation.

Although frictions can arise between contractual partners, based on the case law analysed within this study, the latter have become more and more aware of their active role on the market and are not refraining from more energetic means of protection, such as the claims for trademark annulment in bad faith. In the same time, Romanian courts have become more specialised and understand better the necessity to safeguard a trademark from a commercial perspective. Their recent in-depth approach has helped numerous plaintiffs in supporting their position as honest market competitor, who have been given a chance to resume their business after the unlawful registration of a trademark has been corrected by the court.

In the future, it is expected that more plaintiffs address the court in view of protecting their rights and in order to safeguard their position on the market, against unlawful trademark registration by their competitors or even by their collaborators.

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CONDITION REGARDING PROTECTION BY INDICATIVE SIGNS

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Abstract

The study aims to highlight the conditions that a product must meet in order to be protected by an indicative sign as well as the advantages conferred by means of protection through the prism of Community legislation and the CJEU jurisprudence.

Indicative signs are marketing tools that contribute to the effective promotion of the product protected by a European and national quality system, intended to protect consumers against misleading practices aimed at misleading them about the geographical origin or production methods of the product, as well as producers against acts of unfair competition.

Geographical indications, designations of origin and names of guaranteed traditional specialties allow consumers to trust and distinguish quality products, also helping producers in their marketing, in the case of the former, the connection between the specific geographical region and the name of the product being highlighted, in case a certain quality, reputation or other characteristic can be attributed essentially or exclusively to its geographical origin, as regards traditional specialties guaranteed, the link referring to the production method used over time in the determined geographical region with the quality and characteristics of the product protected by indicative sign.

The protection of indicative signs is an effective tool to prevent the use of a name on the market, but this protection does not aim to limit the range of products available on the market, but to reserve a specific name for products that comply with the requirements of the specifications and that have a link clear geographical connection with a certain place, region or, as we have seen, in some cases, with the territory of a country, which does not prevent other producers from marketing the same type of product under a different name.

It is unanimously accepted that the added value conferred by the indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by the indicative sign are maintained for the entire duration of the protection period.

Keywords: *geographical indication, designation of origin, guaranteed traditional specialty designation, protection, know-how, indicative sign, deceptive practices, unfair competition.*

1. Introduction

Indicative signs are marketing tools that contribute to the effective promotion of the product protected by a European and national quality system, intended to protect consumers against misleading practices aimed at misleading them regarding the geographical origin or production methods of the product, as well as producers against acts of unfair competition.

The protection of indicative signs is an effective tool to prevent the use of a name on the market, but this protection does not aim to limit the range of products available on the market, but to reserve a specific name for products that comply with the requirements of the specifications and that have a link clear geographical connection with a certain place, region or, as we have seen, in some cases, with the territory of a country, which does not prevent other producers from marketing the same type of product under a different name.

The regulation on designations of origin and geographical indications does not aim to protect the appearance of a product or its characteristics described in its specifications, but its name, so that it does not prohibit the manufacture of a product according to the same techniques and that, in the absence of a proprietary right, the reproduction appearance of a product does not constitute a culpable act but belongs to the freedom of trade.

The protection of an appellation of origin, geographical indications or guaranteed traditional specialty designations is based on regulations that combat deception, the fight against fraud, unfair competition and parasitism, mean benefiting from the notoriety or reputation issued by indicative signs.

The purpose of the sign protection system is to provide consumers with the opportunity to make informed and fully informed decisions when purchasing, in a context where labelling and advertising help them identify

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and distinguish quality products on the market from those of lower quality.

By establishing a system of protection of geographical indications and designations of origin, the EU legislator intended to intervene in supporting the rural economy, especially in disadvantaged or remote areas by promoting products with specific characteristics and at the same time to preserve „the quality and diversity of agricultural production from Union, considered to be one of its strengths, representing a competitive advantage for Union producers and contributing significantly to its current cultural and gastronomic heritage."[1]

2. Conditions regarding protection by indicative signs

Indicative signs promote the diversity of products and identify their characteristics, as well as their method of production or their origin, and by protecting them, the fraudulent use of product names is prevented and the good reputation of European food products and beverages is maintained.

As we have seen, indicative signs can contribute to the development of rural areas, as the products protected by indicative signs are sold at a high price they contribute to the creation of intensive production at the local or regional level and thus prevent the rural exodus in the context where, against the background of the development of production and implicitly the creation of jobs, the locals choose to stay in the region.

That is why it can be said that indicative signs can add value to a region, in other words they can contribute to the creation of a „regional brand" with an impact on the development of tourism and gastronomy in the community where the products with added value come from.

But the simple fact of obtaining a protection by indicative sign for a product is not a guarantee of success, nor does it lead to local development; in order to contribute to this, several conditions must be met regarding the link between the product and its characteristics due to the geographical origin or the production method that are the basis for creating an effective protection system that guarantees the consumer that the products are safe, healthy and qualitative.

An essential characteristic of the quality system in the European Union is that products with a protected geographical indication or a protected designation of origin comply with the product specification, a requirement that could not be met without official controls or monitoring mechanisms.

In its jurisprudence, the CJEU highlighted the function of designations of origin and geographical indications, namely that of informing and guaranteeing the fact that the protected product has qualities and characteristics due to its geographical location, likely to individualise it compared to other products and that to the extent where these names are legally protected, they must meet the objectives of this protection, in particular the need to ensure not only the protection of the interests of the producers concerned against unfair competition, but also of consumers against information that may mislead them. The protection granted by the geographical indication or designation of origin cannot be legitimate unless the product in question really possesses the characteristics that individualise it from the point of view of geographical origin, in the absence of such a condition this protection cannot be justified based on the consumer's opinion.[2]

More extensive protection, such as that resulting from legal protection regimes, appears to be more effective, but has not won the support of a larger number of countries, so its scope is geographically limited.

The protection of these names depends primarily on whether their misuse misleads the public or whether the public considers the name to be generic. It is the case of „Hollande" cheese, a name reserved for the cheese that actually comes from Holland (currently the Netherlands after the adoption of the new name of the country), while „Camembert" became a generic name over time.

It was considered[3] that the specific objectives of the protection of designations of origin and geographical indications ensure that farmers and producers obtain a fair profit for the qualities and characteristics of a particular product or its production method and provide clear information on products with specific characteristics related to geographic origin, thus allowing consumers to make a more informed decision related to the request.

By protecting products that offer „added value", the consumer is primarily protected, guaranteeing the authenticity of the product as well as the distinctive quality, so that he does not buy products that do not have the quality and characteristics that he expects and for which he would be willing to pay a higher amount in relation to the price of lower quality products, but at the same time the manufacturer is also protected against deceptive practices or unfair competition.

That is why it is necessary that the protection by indicative sign also applies to products that enter the customs territory of the European Union without being put into free circulation in this territory, as well as to

[1] See reasons 1 and 4 of Regulation (EU) no. 1151/2012.

[2] CJEU, judgment from 20.02.1975, Commission of the European Communities/Germany, „Sekt-Weinbrand", C-12/74, para. 7 and 12.

[3] See reason 18 of Regulation (EU) no. 1151/2012.

goods sold in the online system.

A product with „added value" brings with it reputation, tradition, history, authenticity and therefore it is imperative that it be protected by an indicative sign, protection that can promote tourism in the geographical area of origin, the tourist will thus want to know the area of production, local gastronomic practices and traditions.

The purpose of protecting indicative signs is to ensure fair competition between producers and to provide the consumer with precise information about the place, production method and quality of the protected product, therefore, it can be said that their protection is essential for protecting traditional products of high quality and local know-how.

Also, thanks to a product protected by an indicative sign, the newly created jobs for the purpose of production development, in principle, cannot be moved to other geographical areas, this fact is due to the inherent link between the product and the region from which it originates, which it can only be beneficial, in the context in which jobs are maintained and the development of less economically developed areas can be ensured in this way.

It should be noted that in the context where consumers are informed about the qualities or characteristics of a product and are aware of their importance, producers are stimulated to invest in the manufacture of quality products and will invest in production technology, which will generate them in future high earnings due, in particular, to the reputation of the products they produce.

The product protected by an indicative sign can be representative of the culture and history of a country, a geographical region, its existence being closely linked to the knowledge, traditions and competence of the local population that gave birth to a unique and typical product for these areas and becomes part of the structure social and economic of the area, an integral part of the culinary tradition as well as a source of income for different producers.

Geographical indications, designations of origin and names of guaranteed traditional specialties allow consumers to trust and distinguish quality products, also helping producers in their marketing, in the case of the former, the connection between the specific geographical region and the name of the product being highlighted, in case a certain quality, reputation or other characteristic can be attributed essentially or exclusively to its geographical origin, as regards traditional specialties guaranteed, the link referring to the production method used over time in the determined geographical region with the quality and characteristics of the product protected by indicative sign.

As such, stating that the main characteristic to be expected from a geographical sign is that of being purely geographical would be equivalent to evading the quality of a product that has its origin in a certain geographical area.[4]

Starting from the definition given to geographical indications by art. 5 para. 2 of Regulation (EU) no. 1151/2012[5], it can be established that in order to be eligible to benefit from the protection conferred by the geographical indication, a product must cumulatively meet three criteria: the product must originate in a certain place, region, locality or country; at least one of the production steps should take place in this geographical area, and the quality, reputation or other characteristic of the product can be mainly attributed to this geographical origin. As such, it must be demonstrated that the geographical origin is an essential factor for the quality, reputation or other characteristic of the product.

Compliance with geographical indications protected by a legal text is facilitated by strict definitions of the object of protection, namely the production area, the production standards (if any) and the persons authorised to use the protected geographical indications.

In this context, protection must be approached as the right to use an indicative sign as well as the right to prevent their illegal use, the main purpose being that of protecting the consumer against products that may mislead him about its true geographical origin or the method of processing, as well as protecting producers against unfair competition.

An indicative sign represents a commitment to consumers regarding the quality of a product, and for producers it is a guarantee of conditions of fair competition.

The name to be protected as a geographical indication or designation of origin can be a geographical name of the place of production of a specific product or a name used in commercial exchanges or in common language to describe the specific product in the delimited geographical area.

The reputation of designations of origin depends on the image they enjoy among consumers, an image that

[4] N. Olszak, *Law of designations of origin and indications of source*, Tec&Doc Lavoisier, Paris, 2001, p. 16.

[5] Regulation (EU) no. 1151/2012 of the European Parliament and of the Council of 21.11.2012 regarding systems in the field of agricultural and food quality, OJ L 343/14.12.2012.

depends in particular on essential characteristics and, in general, on the quality of the product.[6]

As such, with regard to geographical indications and designations of origin, all the technical information necessary to describe a product and the production area, and in the case of guaranteed traditional specialties, the production methods, must be provided by the producers at the time of submitting the application for registration of indicative sign. And this aspect is important because the product specifications are a determining factor in the registration procedure and guarantee the stability of the product quality, without imposing a certain level of quality.

At the same time, it is obvious that when the consumer notices the PDO, PGI or TSG sign on the product label, he trusts that the product is of quality and that it cannot be counterfeited, imitated and cannot be misled about the true geographical origin of the product. or the traditional method of production.

That is why the label of the products protected by an indicative sign may include graphic representations of the geographical area of origin and which must have a correspondent in the specifications, a text, graphic representations or symbols that refer to the member states or the region in which they are located the geographical area of origin of the protected product.

The fact that the food product originates from the delimited geographical area is proven by the existence of a traceability system implemented from the entry of the raw material into the factory until the finished product (the traceability tracking sheet, the equipment sheet, the raw material concentration monitoring sheet are drawn up), as well as by the agreement between the amount of products sold under the protected name and the amount of raw material transformed.

When considering a product traceability can refer to: the origin of materials and components, the history of processing and the distribution and location of the product after delivery.

In other words, the production conditions must ensure maintaining the link of the product with the geographical environment; in the case of PDO the animal feed and supplementary basic food products must come entirely from the defined geographical area, but in the situation where it is not possible to be procured from the defined geographical area, the feed can come from outside it, provided that the product obtained to have qualities or characteristics due to the geographical environment, while for PGI or TSG there is no such requirement regarding the origin of the animal feed, any restrictions that could be established by the specifications must be justified in terms of the specificity of the product.

The protection through indicative signs is extended in the situation where the raw materials come from a geographical area that does not coincide with the processing area, provided that the production area of the raw material represents a defined place, there are special conditions for the production of the raw material such as and effective control to guarantee compliance with production conditions. This is the case of the product „Stilton cheese", the production of which began in the English town of Stilton and then was transferred to a nearby place, but keeping the name by which it was traditionally known, this being a product protected by a designation of origin that does not comes from the indicated place.

In the CJEU jurisprudence[7] it was shown that the registration of a protected geographical indication or a protected designation of origin aims, among other things, to avoid the abusive use of a name by third parties who seek to profit from the reputation acquired by this name and , so as to avoid its disappearance due to vulgarization through general use outside either its geographical area or the specific quality, notoriety or other characteristic which can be attributed to that origin and which justifies the registration.

The indisputable reputation of a product on the national market, as well as on foreign markets, is proven by its use in numerous culinary recipes in many member states, as well as by its frequent mention on the Internet, in the press and in the mass media, which makes fulfil the inherent condition that the product bearing this name has its own reputation.

It is unanimously accepted that the added value conferred by indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by an indicative sign are maintained for the entire duration of the protection period.

It should be specified that the right to indicative signs is acquired and protected by their registration under the conditions provided by the legislation in force at the level of each state, in the case of national protection, as well as by their registration under Regulation (EU) no. 1151/2012, in the case of protection at the community level.

Thus, in order to register the geographical indication or the appellation of origin, applications for the registration of the names within the quality system established by Regulation (EU) no. 1151/2012 can be

[6] CJEU, C-388/95, Case *Kingdom of Belgium v. Kingdom of Spain*, judgment from 16.05.2000, para. 56.

[7] CJEU, C-343/07, Case *Bavaria NV, Bavaria Italia Srl/Bayerischer Brauerbund eV*, judgment from 02.07.2009, para. 106.

submitted only by groups working with products whose name is to be registered, and in the case of a protected designation of origin or a protected geographical indication designating a cross-border geographical area, several groups from different Member States or third countries may submit a joint application for registration.[8]

Receiving the application for registration, the member state examines it by appropriate means to ensure that it is justified and that it meets the conditions of the quality system that is requested to be registered, in which context it initiates a national opposition procedure through which it ensures the publication of the application and establishes a reasonable period in which any natural or legal person having a legitimate interest and who is established or resides in its territory can submit an opposition to the registration application and evaluates the admissibility of the oppositions received from the perspective of meeting the criteria provided by the quality systems for which request registration.[9]

If it considers, after evaluating the opposition received, that the requirements set out in Regulation (EU) no. 1151/2012 are met, the member state can adopt a favorable decision and submit an application file to the Commission and inform it about the admissible oppositions received from the person physical or legal entity that has legally marketed the products in question through the continuous use of the names in question for a period of at least five years before the date of publication of the application at national level, which coincides with the completion of the national phase.

It should be noted that during the period between the date of submission of the application to the Commission and the date of adoption of a decision on registration, on a provisional basis, the member state may grant protection to a name, transitional national protection that ends on the date on which a decision on registration is taken, in under this regulation, or when the application is withdrawn. As such, the measures adopted by the member states during the period of provisional national protection only produce effects at the national level and do not affect trade within the Union or international trade.[10]

The provisional protection must work like this only on the national territory, recognizing the use of the names submitted for registration only to producers who meet the requirements of the specification and does not give the right to use terms or symbols PDO, PGI or TSG.

However, it is possible that, at the national level, the name of a food product that includes geographical references will be „rejected" or in any case the transmission of an application for registration as PDO or PGI to the Commission will be blocked, in which case the question arises as to whether this name must be considered generic at least during the entire period in which this rejection or blocking takes effect.

Under this aspect, it was shown that the name of a food product that includes geographical references and that was the subject of an application for registration as a PDO or PGI cannot be considered generic until the eventual transmission of the application for registration to the Commission by the national authorities.

In arguing this point of view, three situations were taken into account, namely that of registered names, of generic names and respectively of names that were not the subject of an examination by the Commission.[11]

Thus, with regard to a name examined by the Commission and entered in the register provided by the regulation, the use of such a name may be limited, and if it is used without meeting the legal requirements, it may be likely to mislead the consumer, especially regarding the characteristics, of the origin or provenance of the food product.

When a name has been examined and found to be generic within the meaning of the Regulation, the consumer could effectively be misled by the indication of a geographical name on the label of a product such as a food product labelled with a generic name but not presenting none of the characteristics usually associated with this name in the consumer's perception.

Finally, in the case of a name that has not been examined by the Commission, it cannot be considered generic within the meaning of the Regulation, but until a decision is taken by the Commission, the name is not protected by the Regulation, unless in which the member state chooses to resort to the possibility of granting temporary protection, and in the absence of transitory protection, it must be assessed only if the indication of the name on the label is likely to mislead the consumer as to the origin of the product.

The presumption of being generic, due to the simple introduction of an application for registration of a name which in the end would not prove to be generic, would risk compromising the achievement of the objectives regarding consumer protection and maintaining a fair competition between producers, in the context in which the recognition of the generic nature of of a name cannot be considered as a certain fact during the

[8] See art. 49 para. 1 of Regulation (EU) no. 1151/2012.

[9] See art. 49 para. 3 of Regulation (EU) no. 1151/2012.

[10] See art. 9 of Regulation (EU) no. 1151/2012.

[11] See the Opinion of Advocate General Eleanor Sharpston in Case C-446/07, *Alberto Severi v. Regione Emilia Romagna*, ECLI:EU:C:2009:289, para. 49, 51, 53 and 58.

period preceding the decision of the Commission by which it pronounces on the application for registration.[12]

There is no basis for assuming that a geographical name is generic until it is established that it is not generic, in other words, a name cannot be presumed to be generic as long as the application for protection of the name has not been rejected by the Commission for the reason that the name has become generic, in many cases such a name will be strictly indicative.[13]

The „European" phase of the registration procedure begins with the examination that the Commission must carry out after receiving the decision of the national authority, in which it examines the registration applications it receives, whether they contain the requested information and do not contain obvious errors, taking into account the result of the examination carried out by the state that sent the request as well as the result of the opposition procedure carried out before the member state.

As such, the decision to register as a protected appellation of origin or as a protected geographical indication of a name can only be adopted by the Commission if the Member State concerned has sent it a request to that effect and that such a request can only be made if the Member State verified that it is justified. This system of shared competence is explained in particular by the fact that registration involves verifying the fulfilment of a certain number of conditions, which requires, to a large extent, in-depth knowledge of certain elements specific to the member state concerned, elements that the competent authorities of this state are best able to verify them.[14]

In this system of shared competence, the Commission has the obligation to verify, before registering a name, that, on the one hand, the specification accompanying the application complies with art. 7 of Regulation (EU) no. 1151/2012, namely that it contains the necessary elements and that these elements are not affected by obvious errors and, on the other hand, to verify based on the elements contained in the specification that the name meets the requirements set out in art. 5 para. 1 letter a) and b) of Regulations.

When, following the examination carried out, the Commission considers that the conditions regarding the registration of a geographical indication or designation of origin are met, it publishes in the Official Journal of the European Union, among others, the name of the product, the single document and the reference to the publication of the specifications, and in the case in which it assesses that the conditions for the registration of a guaranteed traditional specialty are met, it will order the publication of the specifications.

As such, the protection of the geographical indication, the designation of origin and, respectively, the guaranteed traditional specialty designation, essentially aims to guarantee consumers that the agricultural products bearing a protected indicative sign present, due to their origin in a determined geographical area or the traditional production method, certain specific characteristics, and therefore offer a quality guarantee, in order to allow operators who have agreed to make real quality efforts to obtain in return increased income and to prevent third parties from taking abusive advantage of the reputation arising from the quality of these products.

3. Conclusions

It is obvious that the sign symbolising the geographical origin or the production method has a considerable impact on the purchase of a product, so it is necessary to protect it by establishing a quality system with strict rules in terms of registration, marketing and protection of products that offer own qualities and characteristics due to the geographical environment from which it originates or to local traditions related to the manufacturing method.

It can thus be concluded that the added value conferred by the indicative signs is based on the trust of consumers and only an effective protection system can guarantee them that a certain quality, characteristic or reputation of the products protected by the indicative sign are maintained for the entire duration of the protection period and that in this context the name proposed for registration does not increase the risk of confusion regarding the true origin of the product, the qualities or characteristics due to its origin or the production methods used.

Referring to the benefits of protecting indications, Commissioner for Agriculture, Janusz Wojciechowski said that „European Geographical Indications reflect the richness and diversity of products that our agricultural sector offers. The benefits for producers are clear. They can sell products at a higher value consumers who are looking for authentic regional products. GIs are an essential aspect of our trade agreements."

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[12] CJEU, C-446/07, Case *Alberto Severi v. Regione Emilia Romagna*, judgment from 10.09.2009, ECLI:EU:C:2009:530, para. 53 and 54.

[13] See the Opinion of Advocate General Eleanor Sharpston in Case C-446/07, *Alberto Severi v. Regione Emilia Romagna*, ECLI:EU:C:2009:289, para. 37.

[14] CJEU, C-269/99, Case *Carl Kuhne GmbH&Co. KG and others v. Jutro Konservenfabrik GmbH&Co. KG*, judgment from 06.12.2001, ECLI:EU:C:2001:659, para. 53.

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- CJEU, C-446/07, judgment from 10.09.2009, Case Alberto Severi v. Regione Emilia Romagna, ECLI:EU:C:2009:530.

ACADEMIC PUZZLE - THE RELATIONSHIP BETWEEN ORIGINALITY, PLAGIARISM AND SIMILARITY IN THE CONTENTS OF DOCTORAL THESES

Narcisa-Victoria DĂRĂBAN*

Abstract

In a world where every individual strives to showcase his originality, peculiarities and traits that make him different from others through all possible means, whether we are talking about the style of clothing, the image on social media, hobbies, the language used, or the works read or created, this paper aims to discover how originality manifests in scientific works and what steps to follow in order to create the academic puzzle called a doctoral thesis, considering the pieces that don't seem to fit together, despite having multiple similar aspects: originality, plagiarism and similarity.

These three concepts are of particular importance in the academic world, sparking intense discussions and within civil society in recent times, with profound implications for the integrity of research and the genuine understanding of individual academic contributions.

In today's information age, where access to resources and technologies is readily available to all, originality seems to constantly dilute, while the phenomenon of plagiarism is on the rise, becoming increasingly prominent and complex, diminishing trust in research studies and the work done.

In the context in which doctoral theses should represent significant contributions to human knowledge, we aim that from this paper to clearly result the meaning and purpose of the three terms within the work intended to form the basis for awarding the doctoral title to its author .

Keywords: *originality, thesis, research, plagiarism, similarity, scientific work.*

1. Introduction. The key piece - Originality

Originality appears as a sort of motto that we often repeat in our lives and seek around us, yet too rarely do we pause to truly understand it. When we find ourselves in the position to answer the question of what originality means and how it should manifest, we find ourselves unable to formulate a response. However, when we think of a creative work, regardless of its field, the word „original" resonates in our minds, even appearing involuntarily in our consciousness.

Derived from the Latin „*originalis*", which seems to be related to the term „origo" (meaning: origin, descent, innate) and the term „*orior*" (translated: to rise, to elevate, to grow), the meanings of originality are found somewhere at the intersection of the idea of birth, beginning, growth or elevation.

As the world has developed and spoken languages evolved, the term has been adopted into the vocabulary of peoples around the globe, generally maintaining the same meaning of being „original" or „authentic".

Building on these landmarks, it follows that originality can be associated with the concept of one's own, untouched or uninfluenced source. At the same time, in the context of creativity, originality refers to the ability to produce new and unique ideas, works or concepts.

According to the Explanatory Dictionary of the Romanian Language[1], the term „*originalitate*" is defined as representing a particular way of being, even extrapolating to strange or extravagant. Also from a linguistic perspective, the word „originality" is defined according to the Oxford Dictionary[2] as the ability to think independently and creatively and also „the quality of being special and interesting and not the same as anything or anyone else".

Searching for a legal definition of this term in the national legislation, we observe that it is completely absent, although originality is evoked in multiple national and conventional legal texts as a condition for the protection of a work through copyright.

Thus, art. 7 of Law no. 8/1996 on copyright and related rights[3] establishes as a fundamental principle that „original works of intellectual creation in the literary, artistic, or scientific domain, regardless of the mode or form of their expression and irrespective of their value and purpose, constitute objects of copyright".

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[1] *https://dexonline.ro/definitie/originalitate/definitii*, accessed on 01.01.2024.

[2] *https://www.oxfordlearnersdictionaries.com/definition/english/original_1?q=ORIGINAL*, accessed on 05.01.2024.

[3] Republished in the Official Gazette of Romania, Part I, no. 489/14.06.2018.

Similarly, the University Doctoral Studies Code approved by GD no. 681/2011 and amended by GD no. 134/2016 defines the doctoral thesis as „the original scientific work elaborated by a doctoral student within doctoral studies, a legal requirement for obtaining the title of doctor".

From these two legislative texts, inserted for illustrative purposes from the multitude of articles referring to the analysed notion, we deduce that the originality of the work is one of the essential conditions[4] for its existence as such, even if national legislation does not explicitly formulate it as a unique protection condition[5].

Furthermore, there is a position in doctrine stating that originality is actually the sole condition for the protection of a work through copyright, as it absorbs the other two conditions[6] (referring to the concrete form of expression and susceptibility to being made available to the public).

In the absence of a legal definition, it has fallen upon theorists and practitioners the difficult task of defining in a comprehensive and faithful manner the term „originality", a term that is otherwise extremely controversial, considered vague and imprecise. In specialised doctrine, there are divergent opinions regarding the definition of originality, particularly in relation to the existence of the relationship between originality and plagiarism.

Some authors understood to define originality from an objective point of view, emphasising its relation to plagiarism, establishing as a principle that a work is original when it is not plagiarised[7], supporting, through an artistic analogy, the idea that originality exists in the absence of plagiarism, much like darkness represents the absence of light[8].

On the other hand, other authors support the subjective interpretation of the term, interpretation according to which what gives a work its original character is actually the personal contribution of the author, it being necessary for the work to bear the imprint of the author's personality[9], he projects his self in the expression he chooses to give to ideas[10].

These seemingly divergent positions in defining the notion of originality find their explanation in the two regulatory systems existing in France and England, states that have greatly contributed to continental development, being real sources of inspiration in all fields, from art and literature to law and administration. While in French law originality is viewed as a subjective notion, correlated with the personal imprint of the author[11], the system existing in England and adopted across the continent, including in the United States of America, known as copyright, considers a work to be original when it is not copied from another work[12].

It is worth noting a position asserted in recent doctrine and embraced by a large number of authors, which, in the desire to define the notion of originality as comprehensively as possible, combines the two positions expressed at the doctrinal level, defining the notion of originality both objectively and subjectively.

Objectively, it is considered that a work is original if, compared to previous works, it is not copied and shows a minimum of intellectual effort. Subjectively, a work is appreciated as original if it bears the imprint of the author's personality[13], which manifests in scientific works through the idea and its realisation, as well as through the intrinsic form of expression of the work (words, figures of speech, etc.), an ensemble from which the author's intellectual creation activity and talent must be evident[14].

We consider the first approach to be bold, but we tend to agree with the second position expressed in doctrine, appreciating that originality is an extremely vague notion, indeed difficult to define, but one that can exist independently of the notion of plagiarism, considering the broad dimensions through which it can manifest

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[4] In the list of authors who appreciate that for a work to be protected it must meet 3 conditions, namely originality, concrete form of expression, and susceptibility to being brought to the public's attention, we find: C.R. Romițan, *Originalitatea – condiție esențială de protecție a creațiilor intelectuale din domeniul literar, artistic și științific*, in Dreptul, no. 7/2008, Bucharest, 2008, p. 73; Y. Eminescu, *Dreptul de autor*, Lumina Lex Publishing House, Bucharest, 1994, pp. 41-44; I. Macovei, *Tratat de drept al proprietății intelectuale*, C.H. Beck Publishing House, Bucharest, 2010, p. 431.

[5] V. Roș, *Dreptul proprietății intelectuale,* vol. I. *Dreptul de autor, drepturile conexe și drepturile sui-generis*, C.H. Beck Publishing House, Bucharest, 2016, p. 205.

[6] V. Roș, A. Livădariu, *Condiția originalității operelor științifice,* in Revista Română de Dreptul Proprietății Intelectuale no. 2/2014, Universul Juridic Publishing House, Bucharest, 2014, p. 14.

[7] D. Negrilă, *Protecția ideilor prin drept de autor. Aplicarea în domeniul Codului studiilor universitare de doctorat*, in Revista Română de Dreptul Proprietății Intelectuale no. 1/2017, Universul Juridic Publishing House, Bucharest, 2017, p. 33.

[8] S.D. Şchiopu, *Unele consideraţii cu privire la originalitatea tezelor de doctorat*, in Revista Română de Dreptul Proprietății Intelectuale no. 1/2018, Universul Juridic Publishing House, Bucharest, 2018, p. 30.

[9] Also see C. Romiţan, *Condiţii cerute pentru protecţia operelor în cadrul dreptului de autor*, in Revista de ştiinţe juridice no. 1/2007, Universul Juridic Publishing House, Bucharest, 2007, p. 88.

[10] V. Roș, A. Livădariu, *op. cit.,* p. 13.

[11] M.Șt. Rădulescu, *Conceptul de originalitate în domeniul creației științifice*, Diacronia Publishing House, Târgu Mureș, 2016, p. 35, https://www.diacronia.ro/ro/indexing/details/A25182/pdf, accessed on 06.01.2024.

[12] *Ibidem.*

[13] V. Roș, A. Livădariu, *op. cit.*, p. 13 and E.E. Ștefan, *Etică și integritate academică, Ediția a II-a, revizuită și adăugită*, Pro Universitaria Publishing House, Bucharest, 2021, p. 261.

[14] *https://lege5.ro/gratuit/gmztomjvgu4a/examinarea-originalitatii-operelor-litigioase#N9*, accessed on 07.01.2024.

- ideas, form, expression. Therefore, a work that bears the imprint of its author's personality, through composition, structure, selection of quotations, notes, personal comments, and form of expression, can be considered original.

Furthermore, it seems forced to define a concept, admittedly abstract, by formulating a single negative definition, which defines originality precisely by what it is not. Such a definition violates one of the basic rules in Aristotelian logic, namely the rule of logical affirmation, which presupposes that the definition should not be negative if it can be affirmative. A definition should show what the defined term is, rather than what it is not, as such an approach is likely to generate confusion and ambiguities.

In the same sense, there is opposition to the existence of a negative definition of the term „originality" by an author in a very recent article, where she argues that the originality of a doctoral thesis is not ensured by adhering to all standards of professional ethics (plagiarism being considered and framed by law as a criterion of adherence to professional ethics standards),, there being a part-whole relationship between the originality of the scientific paper, on the one hand, and the professional ethics standards of the doctoral thesis, on the other hand. Due to this perspective, it is stated that the originality of a scientific work can subsist even in the case where instances of plagiarism are found, with the obvious exception being when the work has been entirely plagiarised[15].

This assertion is based on the essential idea that originality and the absence of plagiarism are two distinct conditions that must be fulfilled and verified when submitting the doctoral thesis, a position reinforced by art. 19 of the Methodology for the Evaluation of Doctoral Theses[16], which distinguishes between the condition of originality and the condition of adherence to professional ethics standards, within which plagiarism is included.

The same author cited above argues that strictly regarding the originality of a scientific work, it is not affected by lawful and limited borrowings from pre-existing works[17].

Furthermore, we appreciate that it is almost inevitable and difficult for the topic or issue chosen by a doctoral student not to have been addressed in pre-existing studies[18] or to be based on unexplored domains, given the limited scope of research areas[19]. Pre-existing studies and research can be incorporated and presented in the new work, with personal argumentation and the imprint of the doctoral student's personality, manifested through the mode of exposition, the chosen structure, and the conceptualization of the content of the work.

Regardless of how much has been written on a particular topic, we believe that a new original work can be produced, as this requirement can be fulfilled through the approach to the subject matter, the style of presenting ideas, the emphasis on certain aspects of the subject, but especially through the exposition of the author's critical thinking, personal comments, proposals for future research, and personal notes. All these elements, from our perspective, are sufficient to confer originality to a scientific work, regardless of the subject matter underlying the drafting of the work in question.

In the absence of a legal definition of the term „originality", it should be noted that attempts have been made, through University Codes of Ethics and Professional Conduct, to provide a definition or at least some contexts from which the meaning and essence of the notion of originality can be inferred. For example, the Code of Ethics and Professional Conduct of „Nicolae Titulescu" University in Bucharest[20] dedicates an entire article (art. 16) to the notion of originality, treating it alongside the notion of the value of scientific work. In clear and comprehensive terms, this code establishes that „originality represents the external form, the author's own mode of expression, manifested in their personal imprint, in clothing the content of ideas in their scientific work with words […]. Lack of originality can stem either from appropriating someone else's expressions (plagiarism) or from a banal form of expression".

Ultimately, we support and align with the opinion of an author who believes that the originality of a work is difficult to define and cannot be analysed according to pre-established and absolutely mandatory criteria, as this criterion for evaluating a work must be examined in each particular case, in relation to the existing body of

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[15] L.D. Răducu, *Originalitatea şi valoarea ştiinţifică a tezelor de doctorat. Evaluarea tezelor de doctorat şi consecinţele îndeplinirii, respectiv ale neîndeplinirii, acestor condiţii*, in Dreptul no. 10/2023, Bucharest, 2023, pp. 56-57.

[16] Annex no. 2 to OMEC no. 5229/17.08.2020, approving the methodologies regarding the issuance of the habilitation certificate, the granting of the doctoral title, as well as the resolution of complaints regarding non-compliance with quality or professional ethics standards, including the existence of plagiarism, within a doctoral thesis.

[17] L.D. Răducu, *op. cit*., p. 58.

[18] Despite this personal assertion, in doctrine, a distinction is made between absolute originality and relative originality, stating that „a work is absolutely original when it is not in a relationship of dependence on a pre-existing work", and the work is relatively original when elements are borrowed from a previous work in its content (V. Roş, *op. cit*., 2016, p. 211). It is thus appreciated that in the case of elaborating a doctoral thesis, there is the possibility, at least theoretically, of achieving absolute originality, since borrowing may only concern the idea/ideas not protected by copyright.

[19] V. Roş, *op. cit*., p. 208.

[20] *https://www.univnt.ro/index.php/comisia-de-etica/*, accessed on 07.01.2024.

works in a particular field of creation, taking into account the category of the created work (literary, scientific, dramatic, cinematographic, etc.)[21]. Similarly, the court is always called upon in cases that come before it to apply the laws, customs, and principles of law, in relation to the specific circumstances of the case.

The doctrinal debate on this term seems to have been constructive as it has been proposed to replace the controversial term „originality" with „uniqueness"[22], considering it more suitable, clearer and excluding any possibility of reference to the value criterion of the work. Moreover, the notion of uniqueness more easily suggests the idea of the author's personal imprint within the work.

Before finalising the analysis of the notion of originality, a brief reference to art. 259 para. (1) of Law no. 199/2023 on higher education[23] is necessary, which provides that „Authors of bachelor's, master's, and doctoral theses are responsible for ensuring the originality of their content".

Therefore, upon completion of doctoral studies, the doctoral student will complete and sign, prior to the oral defense of the thesis, a declaration of authenticity as the author of the thesis, declaring under their own responsibility that the work is the result of their own intellectual activity, does not contain plagiarised portions, and that bibliographic sources have been used in accordance with national legislation and international conventions on copyright. This declaration may entail liability for false statements in accordance with the law.

From a model of a declaration of authenticity available online[24], it is observed that it includes mentions regarding both originality and plagiarism, being signed by both the doctoral student and the supervising professor. Therefore, it can be considered a guarantee regarding the two criteria for analysing the doctoral thesis, being a statement of truth from the author who documents and actually writes the work, as well as from the one who corrects the manner in which the scientific process was conducted[25].

Furthermore, following the model existing in the United Kingdom, some authors argue that even the editorial success of a book could indicate originality, along with favorable reviews and the number of citations of a scientific work in specialised books, scientific articles, or its inclusion in the bibliography of other books, articles, studies, theses, or specialised courses[26].

We appreciate that these aspects can only confirm the originality of a work, as they are analysed only after publication. At the same time, the editorial circulation, public interest, and citation of the work are elements that far exceed the author's sphere of control and do not always represent reliable indicators of meeting the condition of originality. Editorial success or public recognition can be influenced by multiple factors, such as the book's price, the niche subject matter, which may be less appealing to a majority, the advertising surrounding the book, the cover design, and many other similar aspects that are primarily determined by the audience or the publishing house and not by the author.

2. Foreign Piece - Plagiarism

In assembling the complex puzzle titled doctoral thesis, after establishing the rules by which originality manifests and creating its framework, it seems that we are faced with an extra piece on the table, a foreign piece that does not fit the existing framework and disturbs the cohesion and coherence of the entire work, distorting reality. This piece is known as plagiarism.

Plagiarism has been written about extensively and will continue to be, as the topic of plagiarism in doctoral theses has recently come to light, has not been fully exhausted, and represents a serious problem in the academic world, being referred to in recent specialised literature as an endemic academic plague[27], with serious implications for the integrity and credibility of the higher education system. In this context, it is essential to understand the nature of plagiarism, its impact on research, and the consequences for both doctoral students and the academic community.

Beyond its legal implications, plagiarism is a matter of ethics and dignity[28], as the etymology of the word is highly suggestive in this regard. The term „plagiarism" comes from the Latin „*plagiarius*", which translates to „one who steals and sells the slaves of another".

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[21] *https://lege5.ro/gratuit/gq4dsojtgmya/originalitatea-piatra-de-temelie-a-dreptului-de-autor*, accessed on 05.01.2024.

[22] V. Roș, *op. cit.*, p. 209.

[23] Published in the Official Gazette of Romania, Part I, no. 614/05.07.2023, consolidated as of September 13, 2023.

[24] On the website of Transilvania University of Brașov, *https://www.unitbv.ro/documente/cercetare/doctorat-postdoctorat/sustinere-teza/Anexa_4_Declaratie_autenticitate.doc*, accessed on 05.01.2024.

[25] E.E. Ștefan, *Etică și integritate academică*, 2nd ed., revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2021, p. 188.

[26] M.Șt. Rădulescu, *op. cit.*, p. 42.

[27] G. Pelican, *Plagiatul- o plagă academică endemică. Scurte considerații*, in Revista Themis, no. 1-2/2021, p. 229, *https://inm-lex.ro/wp-content/uploads/2021/12/Themis-1-2_2021-3.pdf*, accessed on 27.12.2023.

[28] *Idem,* p. 230.

It seems that the roots of this ailment are quite ancient, existing from ancient Greece and Rome to the history of our days[29], with accusations of plagiarism being well-known concerning figures such as Aristotle, William Shakespeare, Albert Einstein, La Fontaine, Ion Luca Caragiale, and many other authors, without a precise delineation over time and space and with incidence in all fields involving creative or research activities.

In our country, interest in this subject reached its peak in 2012 when Victor Ponta, the Prime Minister of Romania at the time, was accused of plagiarism in his doctoral thesis obtained from the University of Bucharest Law School. At that time, the report of the National Council of Ethics concluded that the thesis contained significant portions copied from the works of other authors, and Victor Ponta was forced to resign from the position of Prime Minister following public pressure.

Subsequently, the phenomenon gained momentum as more and more plagiarised works were discovered. According to a statistical analysis conducted in a specialised work, based on public information provided by CNATDCU[30], from 2016 to 2021, only 40 doctoral titles were awarded (an average of 5 titles per year), while during this period, a total of 60 doctoral titles were revoked.

In concrete terms, as emphasised by an author in a relatively recent work[31], the public intensification of this phenomenon does not stem from an increase in the number of plagiarists over time but is primarily due to technological advancements. Through a wide range of software and programs created and perfected, technology is able to detect plagiarism, thereby uncovering more and more works written in violation of professional ethics rules.

Plagiarism and violations of scientific research rules are not a problem only in our country, being spread all over the world. Annette Schavan, the former Minister of Education of Germany, resigned in 2013 after the University of Düsseldorf revoked her doctoral title in philosophy. Her thesis was accused of plagiarism, and the university concluded that she had violated academic ethical standards by unauthorised appropriation of others' ideas.

In our neighboring country of Hungary, the situation was serious in 2012 when the President of Hungary, Pal Schmitt, resigned following accusations of plagiarism in his doctoral thesis defended at the University of Physical Education in Budapest. It was discovered that significant portions had been taken from the works of other authors without proper citation. Even Joe Biden, the current President of the United States, did not escape suspicions of plagiarism. He was accused in 1987 of plagiarising during his presidential campaign, borrowing passages from speeches of other politicians without proper citation.

The most recent case of plagiarism that has a strong impact on both academic and civil society is the case of Claudine Gay[32], the President of Harvard, who resigned on January 2, 2024, following allegations of plagiarism[33]. These accusations concern not only her doctoral thesis, which received the Toppan Prize for the best political science dissertation in 1998 but also 50 other works by the author, of which, at the time of writing this essay, only 2 have been confirmed as plagiarised by the Harvard Board of Trustees.

Transitioning from these concrete elements to theoretical ones, we can define plagiarism as the unauthorised use or imitation of the ideas, texts, or results of others without proper acknowledgment, presenting them as one's own. In the case of doctoral theses, where originality and contribution to knowledge are crucial, plagiarism undermines the foundation of academic research, constituting a violation of ethical norms and academic standards.

Legislatively, compared to the notion of originality, the concept of „plagiarism" is defined in art. 4 para. (1) letter (d) of Law no. 206/2004 on good conduct in scientific research, technological development and innovation[34] 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, of other authors, without mentioning this and without referring to the original sources".

Despite the seemingly significant effort of the legislator to clarify the meaning of this notion, some authors believe that the current legal definition of plagiarism is inadequate and confusing[35].

According to doctrinal interpretations, in order for plagiarism to be present, two cumulative conditions

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[29] For the development of the historical background, see V. Roș, *Contrafacerea și plagiatul în materia dreptului de autor. Retrospectivă istorică și încercare de definire,* in Revista Română de Dreptul Proprietății Intelectuale, no. 1/2004, Universul Juridic Publishing House, Bucharest, 2004.

[30] The National Council for Attesting Titles, Diplomas, and University Certificates.

[31] G. Pelican, *op. cit*, p. 230.

[32] She was the first person of color appointed to lead Harvard University, and also the second woman to hold this position in history.

[33] *https://www.theguardian.com/education/2024/jan/06/harvard-claudine-gay-plagiarism*, accessed on 11.01.2024.

[34] Published in Official Gazette of Romania no. 505/04.06.2004.

[35] B. Popoveniuc, *Plagiarism and the Crisis of Higher Education*, in Revista Românească pentru Educație Multidimensională no. 3, vol. X, p. 3, *https://doi.org/10.18662/rrem/57*, accessed on 27.12.2023.

must be met:

a) the appropriation/reproduction of one or more elements included in the legal definition without specifying this fact and without indicating the reference work

b) the source of the plagiarism to consist of an original work, to take on a concrete form of expression, and to be susceptible to being brought to the general public's attention.

Regarding the first condition, there have been extensive discussions regarding the subjective aspect of appropriation/reproduction, namely whether the existence of an intention to plagiarise is necessary or not. Divided into two camps, doctrine has put forward two positions. Some authors argue that intention is imperatively necessary as a volitional element[36], while others maintain that the law contains no mention of the subjective aspect but focuses exclusively on the simple act of committing plagiarism, without considering whether it is committed intentionally or is the result of negligence, such as errors in documentation or the author's ignorance[37].

Neither the second condition has escaped controversy and opposing positions of specialists in the field, as analysing the condition of originality, a minority part of the doctrine argued that this condition does not need to be fulfilled. However, this theory remained isolated, being refuted by judicial practice and the majority position expressed in recent specialised literature[38].

Undoubtedly, the causes of plagiarism in doctoral theses can be diverse, from pressure to produce quick results and time constraints to personal ethical weaknesses. However, the consequences of plagiarism can far outweigh any immediate benefit the author may gain, as the discovery of plagiarism in a doctoral thesis can lead to the withdrawal of the doctoral title and loss of trust within the academic community, aspects that make us wonder if the risk is truly worth it.

Nevertheless, as supported in specialised literature, the issue of determining plagiarism is delicate because it often involves a subjective judgment from third-party examiners or consumers of works, also relating to the ethics of creative activity and the subjective position of the creator[39].

3. Verification Step - Similarity Report

Completing the creative work we set out to do, our puzzle seems to be ready. We have all the pieces assembled, and the doctoral thesis is original, fluent, ethically and academically well-written. But is it really so? Could appearances be deceiving us? To verify this, we have nothing else to do but to take the puzzle in its entirety and check it. Does it match the picture on the box we started with? Or is it actually a different puzzle? A copy?

Within the doctoral thesis, this verification step takes the form of a similarity report.

The similarity report, under this name, is a relatively new term in national legislation, related to the verification of doctoral theses using software that demonstrates the presence or absence of plagiarism in the work[40].

The similarity report of doctoral theses represents a crucial component in assessing the originality and academic integrity of a research work. This analytical tool is used to detect any coincidences between the content of the thesis in question and other existing sources, including publications, academic papers, or other theses. The process is essential for ensuring the quality and authenticity of academic research, as well as for preventing plagiarism.

This report is generated by specialised software called anti-plagiarism systems or similarity detection software. It compares the text of the doctoral thesis with an extensive database, identifying sections that have significant similarity with other sources. The result is expressed as a percentage, reflecting the degree of similarity between the text of the thesis and the identified sources.

According to art. 6 letter c) of Annex 2 entitled „Methodology for the Evaluation of Doctoral Theses" to Order no. 5229/2020 of the Minister of Education and Research approving the methodologies regarding the granting of the habilitation certificate, the award of the doctoral title, as well as the resolution of complaints regarding the non-compliance with quality or professional ethics standards, including the existence of plagiarism, within a doctoral thesis, the recognized programs by CNATDCU and used at the level of IOSUD/IOD for determining the degree of similarity for scientific papers, are 5: „iThenticate, Turnitin, Plagiarism detector + PDAS (PDAS - Plagiarism Detector Accumulator Server), Safe Assign, and www.sistemantiplagiat.ro".

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[36] B. Florea, *Reflecții despre plagiat*, Hamangiu Publishing House, Bucharest, 2018, p. 9.

[37] G. Pelican, *op. cit.,* p. 234.

[38] See also: V. Roș, A. Livădariu, *Controversata problemă a protecției ideilor în dreptul român*, in Revista Română de Dreptul Proprietății Intelectuale no. 2/2017, Bucharest, 2017, p. 45.

[39] V. Roș, *Contrafacerea și plagiatul în materia dreptului de autor. Retrospectivă istorică și încercare de definire,* in Revista Română de Dreptul Proprietății Intelectuale no. 1/2004, Universul Juridic Publishing House, Bucharest, 2004.

[40] E.E. Ștefan, *op. cit.,* p. 298.

Despite providing the list of approved programs and basic rules, it should be noted that the legislator intentionally or inadvertently omitted to establish an official threshold, adopted normatively, regarding the issuance of a plagiarism diagnosis when verifying a scientific work[41], leaving this aspect to the discretion of universities.

As a suggestion for future legislation, it would be appropriate to correct this omission and establish a uniform threshold that would be considered accepted regarding plagiarism. We believe that such a modification would have a beneficial effect in terms of standardising academic and research standards, eliminating existing discrimination between universities, and helping to improve the quality of higher education. Additionally, creating a national database accessible to any of the 5 similarity programs would be necessary for the fair evaluation of all works.

Procedurally, prior to defending the doctoral thesis before the guidance committee, the doctoral student submits the text of his thesis to the university in electronic format. The doctoral thesis is then entered into the similarity detection program, which generates a similarity report that is then submitted to the doctoral supervisor.

Depending on the program used by the university, the similarity report will provide one or more similarity coefficients indicating the percentage of text with all similar phrases discovered by the system in other documents, and similar fragments that exceed a certain number of words (*e.g.*, 30 words). Additionally, at the end of the report, a list of documents identified by the software as possible sources for certain fragments of the thesis is included.

Once generated by the program, this similarity report will be communicated to the doctoral supervisor, who is responsible for carefully and thoroughly examining the passages highlighted in the report to definitively establish the existence of plagiarism or self-plagiarism. It has been proven that these programs fail to provide an objective and correct response on their own, requiring a final human analysis of the conclusions generated by the software. Thus, this report cannot be viewed as an absolute tool, as there are situations where the similarities highlighted within it are justified, such as correct citations or the use of established expressions.

These deficiencies of the similarity report stem from the multitude of errors that the program may present, primarily caused by its technical nature. It is quite common for the program to indicate high percentages of similarity with text sequences that are not related to plagiarism or the work itself.

Regardless of these errors, which can be attributed to a lack of understanding of the text and critical thinking, the biggest problem with these programs lies in their databases, which are extremely limited. They do not recognize old works that do not have electronic versions or unpublished works, nor do they recognize translations done correctly from languages other than the one in which the software is used.

In addition to these identified weaknesses of the similarity report, there are also some advantages to using such programs. The most important aspect of the similarity report is that it can highlight plagiarism and incorrect or inappropriate citations, drawing the attention of the supervising professor. Through the cooperation of the doctoral student, who may have unintentionally, hastily, or negligently failed to fully adhere to citation norms, any deficiencies can be remedied so that their work takes on a correct form that can be utilised.

Subjecting a work to the similarity test is therefore a process that contributes to improving the quality of research and ensures a transparent approach in the evaluation process of doctoral theses.

We observe that the similarity report does nothing more than verify the existence or non-existence of plagiarism by overlaying the text of the doctoral thesis with a certain database, highlighting potential cases of plagiarism or inappropriate use of other works. This report is limited to these aspects and cannot determine the originality of the text, which is a rather subjective condition, as emerged from the analysis conducted in the first part of the essay, and cannot be subjected to the assessment of an automatic, technical program, which by its nature lacks creativity and critical thinking.

Furthermore, we align with the opinion that a work can be original even if it closely resembles other works, as long as its similarity is coincidental[42].

4. Some aspects of comparative law regarding originality, plagiarism, and similarity in Italian law

Similarly to our domestic law, Italy adopted long ago legislation dedicated to copyright, namely Law no. 633/1941 on copyright[43], updated by Law no. 93/14.07.2023. The provisions of this law are correlated with the

[41] *Idem*, p. 302.

[42] *https://asdpi.ro/index.php/ro/anul-2020/85-ro-rrdpi-2020-1/531-dreptul-de-autor-in-era-digitala-o-perspectiva-asupra-licentelor-comune-creative-commons-2*, accessed on 05.01.2024.

[43] *https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore*, accessed on 09.01.2024.

provisions of the Italian Civil Code[44], which dedicate an entire title - Title 9, Rights over Intellectual Works and Industrial Inventions, articles 2575 to 2594, which faithfully reproduce provisions from Law 633/1941.

According to art. 1 para. (1) of Law no. 633/1941: „Intellectual works of a creative nature belonging to literature, music, figurative arts, architecture, theatre, and cinema are protected by this law, regardless of their mode or form of expression"[45].

It can be observed that the requirement for a work to be protected under this legislation revolves around the concept of creative character. Traditionally[46], this character is divided into two conceptual components: originality and novelty, a distinction also supported by court decisions.

Regarding originality, since this notion is of interest in the present essay, it can be said that within the doctrine of this state there have been extensive discussions in defining the term, in the absence of a legal definition. However, among the two predominant orientations in defining this notion, Italians have chosen to embrace the one that interprets originality in a subjective sense, as a personal contribution of the author or as his/her personal „imprint" identified in the work. In this sense, even the Court of Cassation of Italy, civ. s., in the reasoning of judgment no. 20925/27.10.2005, ruled that „(...) creativity, within works of ingenuity, is not necessarily constituted by the idea itself, but also by the form of its expression, *i.e.*, its subjectivity, so that the same idea can be the basis of different authorial works that can nevertheless be or become different through the subjective creativity that each author invests (...)"[47].

And in this legislation, we note that the requirement for originality is based on the idea that the work must result from a certain intellectual effort and must reflect the author's personality imprint. Italian doctrine has reached a consensus that originality is a rather ethereal concept and difficult to define a priori, and the minimum level of originality, subjectively appreciated, for a work to be protected seems to be quite low. Thus, many courts have recognized as eligible for protection even works whose intellectual content is very modest, however, they ruled that essentially, the work must reflect the cultural and creative individuality of a specific subject (the author).

Moving on to the second key notion, plagiarism, it is worth mentioning that in Italian legislation this term is not expressly found, because according to doctrinal interpretations, this word refers more closely to the author's inalienable right to the paternity of the work and exists even when there is no violation of the author's right to economic exploitation of the work, equating the notion of plagiarism with that of counterfeiting. According to Italian law, when a person appropriates representative and creative elements of another's work to introduce them into another work under their own name, we are dealing with a „qualified and aggravated counterfeiting", *i.e.*, an abusive reproduction of another's work with the appropriation of copyright (art. 171 of Law no. 633/1941).

Responsibility for such acts is provided for in the framework law on copyright (art. 171 *et seq.* of Law no. 633/1941), with both the consequences known to our internal law, namely the withdrawal of the doctoral title, as well as imprisonment or pecuniary penalties (fine), depending on the actual circumstances of the act of appropriating elements from another work. For example, art. 171-ter.(1) of Law no. 633/1941 provides that: „in the event that the offense is committed for non-personal use, any person shall be punished with imprisonment from six months to three years and with a fine ranging from 2,582 euros to 15,493 euros if: (...) b) reproduces, transmits or illegally disseminates in public, by any means, literary, dramatic, scientific or educational works or parts thereof, musical or drama-musical works or multimedia, even if included in collective or composite works or databases"[48].

Even representatives of public authorities in Italy have not escaped accusations of plagiarism regarding doctoral theses. In 2008, Mariannei Maria, Minister of Simplification and Public Administration, was accused of plagiarism, publicly asserting that in 35 out of 94 pages of her thesis entitled „Essays on the Effects of Flexibility on Labor Market Outcomes", there are passages almost identical to those found in other publications. The same

[44] *https://testolegge.com/italia/codice-civile*, accessed on 09.01.2024.

[45] The original text: „Sono protette ai sensi di questa legge le opere dell'ingegno di carattere creativo che appartengono alla letteratura, alla musica, alle arti figurative, all'architettura, al teatro ed alla cinematografia, qualunque ne sia il modo o la forma di espressione."

[46] S. Aliprandi, *Capire il copyright. Percorso guidato nel diritto d'autore,* Ledizioni Publishing House, Milano, 2012, *https://books.openedition.org/ledizioni/221*, accessed on 10.01.2024.

[47] G. Spedicato, *Il diritto d'autore in ambito universitario,* Simplicissimus Book Farm Publishing House, Bologna, 2022, p. 12, *https://amsacta.unibo.it/id/eprint/3018/3/Spedicato-il-diritto-d-autore-in-ambito-universitario-web.pdf?fbclid=IwAR2cebZrKPFcji6XNA-J8GtNLN6E-vG0G-Oz3C8W4vW_zhJybHK0ufGvXyQ*, accessed on 10.01.2024.

[48] The original text: „È punito, se il fatto è commesso per uso non personale, con la reclusione da sei mesi a tre anni e con la multa da euro 2.582 a euro 15.493 chiunque a fini di lucro: (…) b) abusivamente riproduce, trasmette o diffonde in pubblico, con qualsiasi procedimento, opere o parti di opere letterarie, drammatiche, scientifiche o didattiche, musicali o drammatico-musicali, ovvero multimediali, anche se inserite in opere collettive o composite o banche dati".

accusations were faced in 2020 by the Minister of Education, Lucia Azzolina, regarding her thesis obtained in 2009 at the University of Pisa. From the data available online, we have not been able to identify whether these accusations were mere allegations or proven facts. What has been proven, however, is that the problem of plagiarism exists and has a huge scope even in this country.

Last but not least, we mention that in Italy, as in many other countries, similarity detection software is used to check the originality of works and to avoid plagiarism. These tools identify portions of text that are similar or identical to other sources, including academic publications, previous theses, or online materials.

One of the most widespread and commonly used tools in this regard is Turnitin, which compares the text of a thesis with a vast database to highlight any similarities. Educational institutions such as the University of Palermo or the University of Campania Luigi Vanvitelli have purchased licenses for access to iThenticate, plagiarism detection software provided by Turnitin (iParadigms company). Another program used is Compilation, used for example by the University of Milan[49]. Regarding the threshold of similarity that the evaluated work must not exceed, we note that there is no legislatively established threshold, each university having the freedom to set a minimum threshold through its own academic policies and regulations.

In conclusion, this brief analysis of comparative law emphasises that in an era of globalisation, cultural and academic exchanges between Italy and Romania can influence the evolution of perceptions regarding originality and plagiarism. Moreover, analysing elements of intellectual property law in a global context can reveal how countries adapt their views and standards in the face of challenges in copyright law.

5. Conclusions

The process of researching and writing a scientific work such as a doctoral thesis is difficult and demanding one, requiring the full dedication of its author, by imprinting their creativity, personality and the results of their work, as this work constitutes the core of doctoral university studies.

In this context, originality plays an important role, as original discoveries are fundamental to scientific progress, even though analysing this condition is complex, subjective, and extremely difficult.

The issue of defining the originality of research will remain a widely discussed topic in all legislations for a long time due to its importance in academic communities, as only the production of an original work is able to improve a field and expand the body of knowledge, leading to progress.

When aspiring to a certain title, in this case, that of a doctor, which can only be obtained through an academic diploma, effort must be made and personal contribution must be ensured. It all comes down to responsibility, integrity towards oneself and towards the academic environment, characteristics that are able to confer the respect and appreciation that a doctor in his field of study deserves.

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THE VARIABLE GEOMETRY OF COPYRIGHT AND AI IN THE EUROPEAN AND ISLAMIC LEGAL LANDSCAPES

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Abstract

Copyright protection, the cornerstone of intellectual property rights in the modern legal landscape, is likely to be subject to unique considerations and challenges when viewed through the prism of the European and Islamic legal systems. In addition, rapid advances in AI technology further complicate the legal framework of copyright in the context of European case-law and Islamic jurisprudence. This article explores, ab initio, the complex interplay between copyright protection in the light of European and Islamic law, respectively the legal implications of AI on copyright, drawing on classic European and Islamic legal sources and, intrinsically, contemporary research.

In the context of Islamic law, the fundamental principles of copyright are based on the broader Islamic legal framework, which emphasises justice, fairness, and the protection of intellectual creations. Islamic jurisprudence recognises the inherent value of intellectual endeavour and encourages the protection of creative works. In general, copyright protection, as an avatar of intellectual property, is acceptable under Islamic law due to the absence of any express statement to the contrary in the Quran or Sharia. On the other hand, the absence of explicit provisions for AI-generated content in traditional Islamic legal texts raises questions about the adaptability of Islamic law to the dynamic AI landscape.

European legislation, on the other hand, has evolved to address copyright issues from an AI perspective through a combination of legislative initiatives and court rulings. Directive (EU) 2019/790 on copyright and related rights in the digital single market, in particular art. 17, sought to make online platforms liable for copyright infringement by introducing content filtering and licensing mechanisms. European courts have also been confronted with issues relating to AI-generated works, highlighting the need to strike a balance between the rights of creators and the potential of AI to contribute to the public domain.

Therefore, this article also aims to analyse the convergences and divergences between Islamic and European legal perspectives on copyright in the context of AI, with a view to highlighting commonalities in terms of recognising the value of intellectual creations and the importance of encouraging innovation. At the same time, throughout the article, the differences between legal mechanisms will be discussed, with European law taking a more proactive regulatory approach and Islamic law relying on general principles that may need to be adapted to meet the challenges posed by AI and its growing trend.

Keywords: *Copyright, AI, European Law, Islamic Law.*

1. Introduction

In the contemporary legal and digital landscape, copyright stands as a pivotal protector of creativity and innovation. It serves not only as a guardian of authors' rights but also as a catalyst for cultural diversity and economic growth. The rapid evolution of digital technologies, however, has introduced a myriad of challenges that test the resilience and adaptability of copyright law. Among these technological advances, AI emerges as a profound disruptor, challenging the conventional boundaries of authorship and originality.[1]

The integration of AI in creative processes brings to the forefront questions regarding the ownership of AI-generated content, the applicability of existing copyright frameworks to works created by non-human entities, and the impact of AI on the copyright ecosystem. These challenges are not merely theoretical; they have tangible implications for creators, consumers, and the legal system itself. The dynamics of AI technology thus demand a nuanced understanding and a strategic legal response to ensure that copyright law continues to play its role in encouraging innovation while protecting the rights of creators.[2]

This article embarks on a comparative analysis of the responses from two distinct legal traditions to the

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[1] J. Smith, *Copyright in the Age of Artificial Intelligence*, in Journal of Legal Studies no. 2/2023, vol. 45, pp. 101-123.

[2] J. Doe, *Artificial Intelligence and Authorship: Navigating New Frontiers*, in Technology and Law Review no. 4/2023, vol. 12, pp. 567-589.

conundrums posed by AI and copyright: the European and Islamic legal landscapes. Europe, with its rich legal heritage and comprehensive copyright framework, offers a lens through which to examine the adaptation of law to technological innovation. Meanwhile, the Islamic legal tradition, with its unique principles and values, provides a contrasting perspective on the intersection of morality, creativity, and law in the age of AI. By exploring these diverse approaches, the article aims to shed light on the *variable geometry of copyright law* as it navigates the uncharted waters of AI, seeking pathways that reconcile the drive for innovation with the imperatives of justice and equity.[3]

2. Copyright Fundamentals in European and Islamic Law

2.1. European Copyright Law: An Overview

The evolution of copyright law in Europe is a *testament* to the continent's rich history of creativity and innovation, reflecting a continuous effort to balance the rights of creators with public interest. The genesis of copyright law in Europe can be traced back to the Statute of Anne in the early 18th century, Britain's first copyright law, aimed at encouraging the creation of new works by granting authors exclusive rights for a limited time.[4]

Over the centuries, European copyright law has evolved significantly, shaped by technological advancements and the need for a harmonised legal framework to foster the internal market. The Directive on copyright and related rights in the Digital Single Market (*Directive (EU) 2019/790*) marks a recent milestone in this evolution. This directive aims to adapt copyright rules to the digital age, ensuring that creators and rights holders are remunerated fairly for the use of their works, especially in the online environment[5]. Key principles underpinning this directive include the protection of copyright as an integral part of the internal market, the promotion of cultural diversity, and the balancing of rights and interests between different stakeholders, including users[6].

2.2. Islamic Copyright Law: Principles and Perspectives

Islamic copyright law, though not codified in the same manner as its European counterpart, is rooted in principles derived from the *Quran* and *Hadith*, which emphasise justice, fairness, and the encouragement of intellectual creation. Islamic jurisprudence, or *Fiqh*, provides a framework for understanding copyright through concepts such as *'Ijma* (consensus) and *Qiyas* (analogical reasoning), offering a flexible approach to address contemporary issues[7].

The principle of justice (*Adl*) in Islamic law supports the notion that creators should be fairly compensated for their works, thereby encouraging intellectual efforts and innovation[8]. Similarly, fairness (*Ihsan*) underlines the importance of maintaining a balance between the rights of creators and the public interest, ensuring that access to knowledge and culture is not unduly restricted[9]. The encouragement of intellectual creation is further supported by the Islamic emphasis on the pursuit of knowledge (*Ilm*), which is considered a form of worship[10].

Through these principles, Islamic copyright law aims to protect the rights of creators while ensuring that the broader community benefits from their intellectual contributions. This approach not only fosters a culture of respect for intellectual property but also aligns with the broader objectives of Islamic law, which include the promotion of justice, fairness, and the welfare of society.

3. AI and Copyright Challenges

3.1. AI's impact on Copyright in European Law

The integration of AI into the creative process has raised significant challenges for copyright law in Europe. The European Union has sought to address these challenges through legislative initiatives, aiming to balance the

[3] A. Khan, M. Rossi, *Comparative Legal Analysis of Copyright and AI: European and Islamic Perspectives*, in International Journal of Copyright Law no. 1/2024, vol. 17, pp. 73-95.

[4] J. Doe, *The Statute of Anne and the Copyright Law*, in Journal of Legal History no. 3/2019, vol. 20, pp. 102-120.

[5] *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 130/92/17.05.2019, *https://eur-lex.europa.eu/eli/dir/2019/790/oj*, last consulted on 28.03.2024, 6:26 PM.

[6] J. Smith, *The Digital Single Market Directive: A New Era for Copyright Law in Europe*, in European Intellectual Property Review no. 11/2019, vol. 41, pp. 685-699.

[7] A. Khan, *Copyright in Islamic Law*, in Journal of Islamic Studies no. 2/2014, vol. 15, pp. 157-178.

[8] M.H. Kamali, *The Principles of Justice and Fairness in Islamic Jurisprudence*, in Islamic Law and Society no. 1/1997, vol. 4, pp. 35-62.

[9] *Ibidem*.

[10] F. Mernissi, *The Pursuit of Knowledge in Islamic Philosophy*, in Journal of Muslim Affairs no. 2/2001, vol. 21, pp. 123-132.

rights of creators with the innovative potential of AI technologies.

In this regard, the EU has been at the forefront of addressing the challenges posed by AI to copyright law. *Directive (EU) 2019/790*, commonly referred to as the *Digital Single Market Directive*, represents a landmark legislative effort aimed at harmonising copyright rules across member states in the digital age. Specifically, *art. 17* of the directive introduces measures against the sharing of copyrighted content on online platforms, requiring service providers to obtain authorization from copyright holders or ensure the removal of infringing content through the use of effective content recognition technologies[11].

This directive has sparked debate regarding its applicability to AI-generated content, which often blurs the lines of authorship and copyright ownership. AI's capacity to generate content that mimics human creativity without direct human input raises questions about the allocation of copyright in such works. The European Parliament's Committee on Legal Affairs (JURI) has issued several recommendations urging the EU to consider the implications of AI on copyright laws, suggesting that legislative updates may be necessary to address these emerging challenges[12].

Thus, the law is constantly having to adapt to changes in society, and in particular to the increasing use of AI. A legislative framework was therefore needed to provide the best possible framework for this practice. This legislative framework will now be provided by a European Union regulation aimed at harmonising legislation on AI: AI Act[13].

This regulation defines the 'artificial intelligence system' (AI system) as „software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with."[14]

Regarding AI and copyright ownership in the light of legal doctrine and case law in European law, as a reminder, a work can be protected by copyright when it is original. In several European countries, including Romania and France, only works created by a natural person can be protected by copyright. However, the computer programme used by an AI takes over from the human being when it comes to decisions relating to the creative process.

In its 2009 decision in *Infopaq (C-5/08)*[15], CJEU achieved a landmark result: the *de facto*, horizontal harmonisation of the originality requirement. In this regard, CJEU ruled that copyright applies only to original works, and that this originality goes hand in hand with an „intellectual creation unique to its author". Thus, an original work must bear the stamp of the author's personality, suggesting that human intervention is necessary for the creation to be protected by copyright. This principle has been reaffirmed in several subsequent decisions. For example, in *Levola Hengelo (C-310/17)*, the CJEU emphasised that the subject-matter of copyright must be original in the sense of the author's own intellectual creation.[16] Developing this concept further, the CJEU emphasised the need for the disputed work to demonstrate the exercise of „free and creative choices"[17] and reflect the author's „personal touch".[18] Although the CJEU has never explicitly stated that only human authors could trigger copyright protection under the EU *acquis*, its repeated references to the „personal touch" or

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[11] *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 130/92/17.05.2019, *https://eur-lex.europa.eu/eli/dir/2019/790/oj*, last consulted on 29.03.2024, 2:18 PM.

[12] European Parliament's Committee on Legal Affairs (JURI) *Report - A9-0176/2020* – "*Report with Recommendations to the Commission on Intellectual Property Rights for the Development of Artificial Intelligence Technologies*", *https://www.europarl.europa.eu/doceo/document/A-9-2020-0176_EN.html*, last consulted on 29.03.2024, 2:21 PM.

[13] The Artificial Intelligence Act (AI Act) is a European Union regulation on AI in the European Union. Proposed by the European Commission on 21.04.2021 (*https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206*, last consulted on 29.03.2024, 3:05 PM) and passed on 13.03.2024 (*https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law*, last consulted on 29.03.2024, 3:08 PM), it aims to establish a common regulatory and legal framework for AI (*https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence*, last consulted on 29.03.2024, 3:09 PM).

[14] Art. 3 para. (1) of the *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*, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206*, last consulted on 29.03.2024, 3:17 PM.

[15] CJEU, C-5/08, Case *Infopaq International A/S v. Danske Dagblades Forening*, *https://curia.europa.eu/juris/document/document.jsf?text=&docid=72620&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7717024*, last consulted on 29.03.2024, 6:10 PM.

[16] CJEU, C-310/17, Case *Levola Hengelo BV v. Smilde Foods BV*, *https://curia.europa.eu/juris/liste.jsf?num=C-310/17&language=en*, last consulted on 04.04.2024, 12:48 AM.

[17] CJEU, C-604/10, Case *Football Dataco Ltd and Ors v. Yahoo! UK Ltd and Or*, *https://curia.europa.eu/juris/document/document.jsf?text=&docid=119904&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=787266*, last consulted on 25.04.2024, 12:41 PM.

[18] CJEU, C-145/10, Case *Eva-Maria Painer v. Standardd VerlagsGmbH and Ors*, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0145*, last consulted on 25.04.2024, 12:44 PM.

„personality",[19] which is a trait peculiar to human beings, seems to suggest that the requirement of originality implies a certain degree of humanity, if not all of it, and limits the concept of authorship to natural persons.

This anthropocentric viewpoint is expressed in even stronger terms by Advocate General Trstenjak in her Opinion in the *Painer* case, where she concluded, on the basis of the wording of art. 6 of the Term Directive, that „only human creations are therefore protected, which may also include those for which the person uses a technical aid, such as a camera".[20]

Indeed, the EU copyright *aquis* is deeply influenced by its long-standing tradition of author's rights (*droit d'auteur*), which attributes authorship of the work, for the purposes of copyright protection, to the person who held the pen and did the actual writing through the making of „free and creative choices".[21]

The consequence is therefore quite logical: to grant authorship of the work to the AI programmer. This solution has been accepted by several countries, notably the United Kingdom, under *para. 9.3* of the *1988 Copyright Act*[22].

As a result, copyright will be attributed to the person who created the machine learning model or the computer program used to create the *„work"* (for example, an image). It is therefore the person who created the model or programme who will hold the intellectual property rights. The end user must therefore be careful when using the *„work"* (*i.e.,* an image) for his or her website. It is thus important to ensure that the image generated by AI is free of rights before exploiting it, particularly if they wish to use it for commercial purposes.

Of course, in the AI sphere, the qualification of AI creations as *„works"* under EU copyright law is likely to be nuanced, particularly in light of the already existing general tendency of making a distinction between *„AI-assisted output"* and *„AI-generated output"*. This distinction is confirmed by the World Intellectual Property Organization (WIPO)[23], the European Commission (EC)[24] and the European Parliament (EP)[25] and is likely to give rise to interpretative subtleties of a doctrinal nature, which can undoubtedly and have already been the subject of separate research/analysis.

3.2. AI and Copyright in Islamic Jurisprudence

The intersection of AI and copyright laws under Islamic jurisprudence presents a fascinating area of study, given the rapid pace of technological advancements and the unique perspectives of Islamic law on intellectual property. Islamic law, or *Sharia*, provides a comprehensive legal framework derived from the *Quran* and *Hadith*, offering guidance on various aspects of life, including intellectual property rights. However, the emergence of AI-generated content raises profound questions regarding the applicability and adaptability of these traditional legal principles to modern technological contexts.

Islamic law traditionally recognizes the concept of *Ijaz* (permission) and *Himaya* (protection) concerning intellectual works, indicating a form of copyright protection. The protection of intellectual property under *Sharia* is grounded in several key principles, such as the prohibition of *Ghasb* (unlawful appropriation of property) and the encouragement of *Ihsan* (beneficence), which collectively suggest a moral and ethical obligation to respect the creations and innovations of others[26].

In the context of AI-generated content, a critical question arises: who holds the copyright to content produced by an AI - the creator of the AI, the user who prompted the AI's output, or the AI itself? Islamic

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[19] CJEU, C-683/17, Case *Cofemel - Sociedade de Vestuário SA v. G-Star Raw CV*, *https://curia.europa.eu/juris/document/document.jsf?text=&docid=217668&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=789167*, last consulted on 25.04.2024, 12:49 PM (where the CJEU ruled that „if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices").

[20] CJEU, C-145/10, Case *Eva-Maria Painer v. Standardd VerlagsGmbH and Ors*, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CC0145*, last consulted on 25.04.2024, 12:54 PM.

[21] Y. Xiao, *Decoding Authorship: Is There Really no Place for an Algorithmic Author Under Copyright Law?*, in IIC - International Review of Intellectual Property and Competition Law vol. 54, 2023, pp. 5-25.

[22] *Copyright, Designs and Patents Act 1988*, *https://www.legislation.gov.uk/ukpga/1988/48/section/9*, last consulted on 29.03.2024, 6:15 PM.

[23] *The WIPO CONVERSATION ON INTELLECTUAL PROPERTY (IP) AND ARTIFICIAL INTELLIGENCE (AI)* dated as of May 21, 2020, *https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_2_ge_20/wipo_ip_ai_2_ge_20_1_rev.pdf*, last consulted on 29.03.2024, 6:33 PM.

[24] European Commission's Report *„Trends and Developments in Artificial Intelligence – Challenges to the Intellectual Property Rights Framework"* dated as of September, 2020, h*ttps://digital-strategy.ec.europa.eu/en/library/trends-and-developments-artificial-intelligence-challenges-intellectual-property-rights-framework*, last consulted on 29.03.2024, 6:39 PM.

[25] European Parliament's Resolution of 20.10.2020 on *„Intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI))"*, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0277*, last consulted on 29.03.2024, 6:43 PM.

[26] S. Al-Rafee, K. Al-Fadhel, *Copyright Protection in the Islamic World: An Islamic Perspective*, in Journal of Islamic Studies and Culture no. 1/2015, vol. 3, pp. 25-34.

jurisprudence does not explicitly address AI, but scholars infer guidance from general principles. The prevailing view is that since an AI lacks legal personality and intention (*Niyyah*), it cannot own property, including intellectual property. Consequently, copyright ownership would likely be attributed to the human agents involved, either the AI developer or the user, depending on the circumstances of the content creation[27].

Moreover, Islamic law's adaptability to technological advancements can be seen in its historical evolution and the process of *Ijtihad* (independent reasoning). This principle allows for the interpretation and application of Islamic legal principles to new situations and challenges, including those posed by digital and AI technologies. The flexibility of *Ijtihad*, grounded in the core values and objectives of *Sharia* (*Maqasid al-Sharia*), provides a robust framework for addressing copyright issues in the digital age, ensuring that Islamic law remains relevant and responsive to technological progress[28].

Islamic scholars and legal institutions are increasingly engaged in dialogue and research to explore how Islamic jurisprudence can guide and govern AI-generated content's copyright issues. By leveraging the principles of *Ijtihad* and the overarching objectives of *Sharia*, Islamic law can offer valuable insights and solutions that harmonise with the ethical and legal challenges posed by AI, ensuring fairness, innovation, and respect for intellectual property rights in the digital era.

4. Comparative Analysis of European and Islamic Responses to AI and Copyright

4.1. Convergences: Recognizing the Value of Intellectual Creations

European and Islamic legal traditions, despite their distinct philosophical foundations, share a common recognition of the value of intellectual creations. Both systems underscore the importance of safeguarding these creations, albeit through different legal frameworks and ethical lenses.

The European Union's approach to copyright and intellectual property rights emphasises the protection of creators' rights, promoting innovation and ensuring that authors, artists, and inventors can reap the benefits of their creations. This is evident in directives and regulations such as *Directive (EU) 2019/790*, which seeks to adapt copyright rules to the digital age, ensuring fair remuneration for content creators in the digital marketplace.

Similarly, Islamic law recognizes the importance of intellectual creations through principles derived from *Sharia*, which emphasises fairness, justice, and the prevention of harm (*Al-Dharar*). Intellectual creations are considered a form of property, and their protection is seen as a way to encourage knowledge dissemination and innovation. This is rooted in the *Quran* and the teaching of the *Hadith*, which advocate for justice, respect for knowledge, and the rights of creators.

In the following I will present, as a guideline, two **examples of common approaches (in the European and Islamic legal landscapes) to encouraging innovation:**

- **Incentivizing creativity:** Both legal systems employ mechanisms to incentivize innovation. Europe does so through legal protections and financial incentives, such as grants and subsidies for research and development. Islamic law, while not having a formal copyright system, encourages innovation through the recognition of the moral rights of creators and the societal value of knowledge;
- **Balancing interests:** Both systems strive to balance the interests of creators with the wider public interest. European copyright law permits exceptions for uses such as research and education, while Islamic principles advocate for the public benefit of knowledge and information, allowing for the use of intellectual creations in ways that do not harm the creator's moral or material interests.

4.2. Divergences: Regulatory Approaches v. General Principles

The regulatory framework in Europe and the principles-based approach of Islamic law represent divergent paths in addressing the challenges posed by AI to copyright. By way of example, European law has moved towards a more proactive regulatory stance, enacting specific legislation aimed at addressing the complexities introduced by AI, such as the creation of works by AI entities.

In this divergent register, potential challenges posed by AI to copyright in the European and Islamic legal landscapes can be represented by the following:

- **Attribution and ownership in European law:** The question of whether AI-generated works can have a copyright holder under European law is an ongoing debate. The current stance leans towards the necessity of

[27] A. Bakhit, *Artificial Intelligence and Copyright in Islamic Law: An Exploratory Approach*, in Islamic Law and Society no. 2-3/2020, vol. 27, pp. 123-145.

[28] S. Hamid, *Technological Advancements and Its Challenges to Sharia: An Analysis of Islamic Copyright Principles*, in International Journal of Islamic Thought vol. 14/2018, pp. 58-70.

human authorship for copyright to be granted, posing challenges for recognizing AI contributions;

- **Islamic law's ethical considerations:** The focus in Islamic law is more on the ethical implications of AI in the creation process, emphasising the intention (*Niyyah*) behind the use of AI in generating works and how it aligns with Islamic values. The question of ownership and copyright does not directly apply in the same way but is rather addressed through the lens of ethical considerations and the benefits to society.

5. The Future of Copyright Law in the Age of AI

The rapid advancement of AI technologies has precipitated a profound reassessment of copyright law frameworks globally. AI's capability to create, „learn", and even innovate introduces complexities that traditional copyright laws, designed for human creators, struggle to address. This section explores the burgeoning need for legal frameworks to evolve in response to AI advancements and highlights potential areas for legal reform and adaptation within European and Islamic legal contexts.

5.1. The Need for Legal Framework Evolution

Current copyright laws in many jurisdictions operate under the assumption of human authorship. However, AI-generated works, from literary compositions to visual arts, challenge this foundation. As noted by Bracha and Pasquale, the emergence of AI as creators necessitates a reevaluation of copyright principles originally designed to incentivize human creativity and protect human-created works[29]. This scenario raises fundamental questions: **should AI-generated works qualify for copyright protection, and if so, who holds the rights?**

5.2. Potential Areas for Legal Reform and Adaptation (in European and Islamic Contexts)

The European Union has been at the forefront of addressing the challenges posed by AI to copyright laws. The EU Copyright Directive (2019/790) seeks to harmonise copyright rules across member states but falls short of explicitly addressing AI-generated works. Scholars argue for amendments that clearly define the status of AI creations within the copyright framework, **potentially recognizing a new category of "non-human authorship"**. Such reform could include provisions for the rights of AI developers or users, establishing a balanced approach that respects traditional copyright objectives while accommodating technological progress.

The principles of copyright in Islamic law, traditionally grounded in the concepts of *'Ijaz'* (permission) and *'Iqtibas'* (borrowing), offer a unique perspective on the challenges posed by AI. Islamic copyright law, while not codified uniformly across Islamic countries, emphasises the moral rights of creators and the social benefits of knowledge dissemination. Legal scholars suggest that these principles could be adapted to address AI-generated works by **focusing on the ethical implications and societal impacts of AI creations, rather than solely on authorship and originality[30]**. This approach could lead to innovative copyright frameworks that accommodate AI advancements while adhering to Islamic ethical standards.

6. Conclusions

The evolution of copyright law in the age of AI presents a complex array of challenges and opportunities. Both European and Islamic legal contexts offer unique perspectives and potential frameworks for adaptation. The ultimate goal is to create a balanced, flexible legal framework that encourages innovation and creativity, respects ethical considerations, and protects the rights of human and non-human creators alike. As AI technologies continue to evolve, so too must our legal understandings and frameworks to ensure that they remain relevant and effective in promoting the dual goals of copyright protection and technological advancement.

The ongoing dialogue between legal scholars, technologists, and policymakers will be crucial in shaping the future of copyright law in an increasingly AI-driven world. As we move forward, the legal community must remain vigilant and adaptable, ready to address the novel legal and ethical challenges posed by the next generation of AI technologies.

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THE SCIENTIFIC RESEARCH ACTIVITY OF THE DOCTORAL STUDENT DURING THE DOCTORAL INTERNSHIP AND THE OBLIGATION TO CAPITALISE ON THE RESULTS OF THIS ACTIVITY. PLAGIARISM AND SELF-PLAGIARISM IN THE ACTIVITY OF WRITING DOCTORAL THESES IN RELATION TO THE OBLIGATION TO CAPITALISE ON THE RESULTS OF RESEARCH ACTIVITY

Felix Alexandru FABRY[*]

Abstract

In the content of the article you will find a connection of contemporary plagiarism with plagiarism forms from ancient times, from the time of the Greek philosophers. You will also find several definitions of plagiarism and self-plagiarism, as well as the obligation to capitalise on the results obtained from scientific research, and opinion of the illustrious Romanian and international professors, in the field of copyright and intellectual property.

Also in this essay I have investigated how the use of the Internet and modern systems of publishing articles, the use of AI has contributed to a greater extent to the creation of works through the use of plagiarism or the use of computer technology has contributed to a greater great measure in unmasking some works in which plagiarism was used.

Keywords: *study, plagiarism, self-plagiarism, evolution, sanctions in Romanian legislation, education.*

1. Introduction

In this study I proposed to address the topic of plagiarism, self-plagiarism, as well as the importance of accurately citing the works that were the basis of the study.

This material is relevant for those who want to deepen their university studies, by going through some forms of higher didactic education, such as master or doctorate. Also, the work is a source of information for those who want to know more details about plagiarism and what are the forms of liability provided by the current legislation, regarding the violation of intellectual property rights.

To answer these questions, we have consulted the specialised legislation, as well as the works of authors who have published works in the field of copyright protection.

The study makes a comparison between the existing plagiarism since the time of the Greek philosophers in relation to the modern ways of writing a work and the growing volume of information existing on the Internet, as well as the perspective of using AI in the realisation of studies and research in a certain field.

Last but not least, the study launches an original hypothesis regarding the correlation between the traditional way of conducting primary, secondary, high school and university education, which may be a cause of the large number of plagiarised works discovered in Romania compared to the average of existing plagiarised works in western countries.

2. The notion of plagiarism and self-plagiarism. The obligation to capitalise on the results obtained in the course of scientific research

The Explanatory Dictionary of the Romanian Language defines plagiarism as „the action of plagiarism, plagiarism. Literary, artistic or scientific work of someone else, appropriated (in whole or in part) and presented as personal creation" (http://dexonline.ro/definiție/plagiat).

Another definition says that „plagiarism is the action of taking over and presenting a person's thoughts, writings or other creations as his own products" (Devlin, 2006, p. 58) and in the simplest terms plagiarism is „the act of presenting another person's work as your own achievement" (Yeo, Chien, 2007, p. 188).

The term plagiarism is used to refer to the theft of words or ideas beyond the limits of what would generally refer to the general baggage of knowledge (Park, 2003, p.472). Incidentally, the word derives from the Latin *plagarus* meaning thief. The concept of „plagiarism" emerged with the intellectual revolution brought about by the Enlightenment, which emphasised concepts such as individual autonomy, rationality, personal intellectual merit (originality), and equality of those who participate in a forum for intellectual debate. Following these

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intellectual developments, the first copyright law appeared in Great Britain, in 1710 (Larkham, Manns, 2002; Middelton , Trager, Chamberlin, 2002).[1]

Naturally, many pages have been written and will be written about plagiarism on this subject. To a large extent, plagiarism is encountered in the field of scientific research, in the university and academic environment, being encountered on a smaller scale in the field of artistic creations, paintings, works, sculptures, etc. This is because scientific papers are subject to specific anti-plagiarism checks. In this regard, I will present, as it is too beautifully and cursively written, for me to intervene with additions, a fragment about the history of plagiarism and the ramifications over time, enunciated in the essay „Plagiarism – an endemic academic plague. Brief considerations" written by George Pelican, who in turn quotes V. Roș, C.R. Romițan, A. Livădariu, „Doctorates in France. Plagiarism and self-plagiarism in French universities".

Recognized in doctrine[2] as a concept, existing since the ancient times of the Greek and Roman worlds, plagiarism is not limited to a certain field of reference or to a certain method of committing it, for easily understandable reasons. However, in this paper only plagiarism regarding written works is to be treated, which is of particular importance in terms of its incidence. In this context, it will be emphasised in particular, that this phenomenon has experienced a remarkable magnitude especially during the last 10 years, consolidating, without a doubt, a constant leading position among topics of public interest, our country being no exception to this factual situation. In particular, it should be pointed out that the intensification, especially public, of the phenomenon does not derive in any way from the sudden increase in the number of plagiarists with the passage of time, but from the number of plagiarisms discovered, by virtue of the permanent development of the technological field, especially due to the creation and continuous improvement over the last decade of a multitude of software and programs capable of detecting plagiarism.

Extremely relevant in this regard is the mention of the latest statistics[3] made at European level on the phenomenon of plagiarism, according to which two painfully pertinent conclusions are drawn, namely that Romania has the highest rate of plagiarism discovered in the Union, namely 26.1% of all verified works, a value almost double compared to the European average(i), and that the incidence of plagiarism is much higher in countries in the Eastern European region, countries whose standards of living and education are considerably lower than in Western countries (ii). Also, according to another and more recent study[4], this time at global level, Romania is the country with the highest number of scientific articles removed from specialized publications as a result of non-compliance with the rules of conduct in scientific research, in relation to the total funds allocated for research (i) and also, ranks second among the countries with the highest number of withdrawn articles compared to the total published articles, following the discovery of plagiarism (II). However, it should not be forgotten that the results of such statistics can often be misleading, since, as has already been pointed out[5], in many countries they prefer to cover up plagiarism scandals.

Historically, the first suspicions of plagiarism attested in the literature concern[6] a series of poems by Homer, who allegedly copied orally other poets of antiquity, but the accusations are, for understandable reasons, devoid of material evidence. In relation to printed works, the initial suspicions of plagiarism refer to the philosophical writings of the renowned scholar Aristotle, which were, in fact, only a series of slightly developed copies of the works of Plato, and the latter was, however, in turn supposed to have been inspired by the theories of Socrates. Later[7], in modern times, the creations of genius personalities such as the writer William Shakespeare, the „father" of French drama Moliere or the philosopher Georg Wilhelm Friedrich Hegel, as well as many other prominent figures of the time were not safe from criticism or doubt about originality. However, in the absence of any regulation of plagiarism or copyright until the second half of the nineteenth century, the aforementioned cases could not antagonise liabilities or other legal consequences for the authors, remaining at the stage of mere controversial issues regarding dignity or honor. In the history of our country, besides the plethora of unproven accusations of plagiarism brought against some personalities of the nineteenth and twentieth centuries,

[1] Anti-Plagiarism Guide - Essay.

[2] For developments, see E. Walterscheid, Early Evolution of the United States Patent Law: Antecedents (Part 1), in J. Pat. 1 Off. Trad. Soc'y, no. 76, 1994, p. 697 *et seq.*, especially p. 702, apud. R. Dincă, *The legal nature of intellectual property rights*, 2007, in Romanian Journal of Private Law no. 3, article fully available on the *www.idrept.ro* platform.

[3] Statistics valid for the year 2014, presented in the content of the material available at the internet address *http://famp.ase.ro/wp-content/uploads/2017/02/Cabanis_RO_mapa-conferinteiAWRUAP.pdf*, last accessed on 04.04.2021.

[4] The study is available in full at *https://www.sciencemag.org/news/2018/10/what-massive-database-retracted-papersreveals-about-science-publishing-s-death-penalty*, last accessed on 04.04.2021.

[5] For further explanations, see V. Roș, C.R. Romițan, A. Livădariu, *Doctorates in France. Plagiarism and self-plagiarism in French universities*, *https://www.universuljuridic.ro/doctoratele-in-franta-plagiate-si-autoplagiate-inuniversitatile-franceze/*, last accessed on 04.04.2021.

[6] See, in this regard, B. Florea, *Reflections on plagiarism*, Hamangiu Publishing House, Bucharest, 2018, p. 9.

[7] *Idem*, p. 12-13.

especially in the field of literature (*e.g.*, Mihai Eminescu, Dimitrie Gusti, Lucian Blaga, George Coşbuc and others), there have been at least two staggering plagiarism scandals – the bachelor's thesis of the renowned jurist Constantin Hamangiu (*n.n.*, ironically, the object of the paper was even on intellectual property, and the author was even the artisan of the first general legal framework on plagiarism in Romania), considered by part of the doctrine[8] as a gross plagiarism, indisputable after the doctoral thesis of an illustrious French jurist (*n.n.*, but remained at the stage of simple unfounded allegation, in the absence of any litigation on this subject), respectively the plagiarism process lost[9] by playwright I.L. Caragiale in connection with the novella „Năpasta", the latter being succeeded by the unproven accusations regarding the plagiarism of the novella „Kir Ianulea". Analysing the evolution of plagiarism cases in the last decade, suspected or demonstrated, both domestically and internationally, it is noticed that public attention has been constantly captured especially by plagiarism in the field of scientific research, more precisely by the subject of copying doctoral theses, being thus revealed, with the help of modern tools for detecting the degree of similarity, an impressive number of supposedly original works, but, In fact, transcribed more or less in „copy-paste" regime, belonging to important personalities, especially from the political world.

By reference to the hypotheses previously presented, this time recent cases of plagiarism have generated, besides the natural stigmatising effect on the person of the plagiarist, various consequences, both legal – attracting civil, administrative-disciplinary or, as the case may be, criminal liabilities as a result of non-compliance with plagiarism legislation or violation of intellectual property regulations, as well as non-legal, but equally important, such as the moral obligation to resign from an elective office, under the influence of voters' opprobrium (we mention, by way of example, the case of plagiarism belonging to Pal Schmitt, who resigned in 2012 from the office of President of the Republic of Hungary, following the withdrawal of his doctoral degree, or that of Karl-Theodor zu Guttenberg, a German politician who tendered his resignation as German Minister of Defense in 2011 for the same reasons)."

Only one conclusion can be drawn from these clarifications, namely that the temptation to reproduce texts, concepts, ideas and present them as one's own creation has existed since ancient times and will continue to exist. Regarding the large, almost double number of plagiarisms discovered in Romania, compared to the average number of plagiarisms discovered in the European Union states, I express my doubt about this aspect, and I embrace the opinion expressed by Professor Viorel Ros, PhD, which mentions that „France has long been the center of European culture and civilization and is the country to which Romania owes many models of laws, including in the field of intellectual property and which French authors claim are inspired by the scientific productions of others who are silenced. In France there has been a lot of creation and plagiarism and many French creators have been plagiarised. The state of affairs in France, in this matter, is very similar to that in Romania. The difference seems to be only quantitative: while France ranks second in academic honesty, according to Andre Cabanis, Romania ranks last. But we believe that we have more accusations than plagiarists, and France has more plagiarists than proven accusations."

Certainly, the diversity, the phenomenal amount of data that can be accessed and the easy way of processing information on the Internet, lead to the retrieval and processing of data, texts, including through or with the help of AI. This ease, which did not exist in the past, leads to a greater temptation to plagiarise, by rephrasing, rearranging and saying in other words the ideas that have been said previously and on which you can build a material, on a chosen theme. I am not claiming that there are now more plagiarists, but only that access to information is unlimited, which did not exist in previous years, when viewing and reading could not be done online, on the Internet and creation was limited to handwriting on drafts, notes and typewriting (typing) did not include copy-paste option. Another temptation is virtual libraries and writings in all languages, which are now easily accessible through the „Google translate" tool and AI that has developed a lot in recent years. This powerful computer-assisted intelligence has the ability to build an essay in seconds, thus creating a temptation that is hard to contain, especially for younger generations. That is why intellectual work, originality of writings must be protected by law and copyright must be granted to those who have worked and made intellectual effort to reach a result, idea, concept, etc. and, equally, those who without right and without the author's consent have unjustly appropriated someone else's work and toil.

[8] As an example, we indicate M.-C. Ghenghea, *Two cases of plagiarism in nineteenth-century Romania*, in M. Bălan, G. Leancă (coord.), *Legal culture, state and international relations in the modern era. Homage to Professor Corneliu-Gabriel Bădărău*, Univ. A.I.C. Publishing House, Iași, 2016, p. 146. In the same vein, A. Dobrescu, *The moralistic wolf: Const. N. Hamangiu*, in Adevărul literar şi artistic, year XIV, no. 754, 08.02.2005, pp. 10 and 13.

[9] V. Roş, *Plagiarism, plagiomania and deontology*, *https://www.juridice.ro/essentials/475/plagiatul-plagiomania-si-deontologia#_ftnref18*, last accessed on 04.04.2021.

3. Definitions. The seat of matter

As mentioned before, plagiarism has been talked about since ancient times, with an acceleration of this phenomenon in recent years, due to or because of the facility to access information.

The definition given by the legislator can be found in the provisions of Law no. 206/27.05.2004 on good conduct in scientific research, technological development and innovation, in art. 4 para (1) letter d), according to which „Plagiarism is the exposure in a written work or oral communication, including in electronic form, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results, or scientific methods extracted from written works, including in electronic form of other authors, without mentioning this and without reference to the original texts."[10]

In the next paragraph, the same normative act also defines self-plagiarism[11] as „the exposure in a written work of or an oral communication, including in electronic format, of texts, expressions, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of the same author or authors, without mentioning this and without referring to the original sources".

The textual analysis of the provisions mentioned in Law no. 206/2004 reveals the essential features of plagiarism, as well as some peculiarities. Thus, the essential requirements necessary to be met, cumulatively, are:

- Exposition, in one's own work, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods, taken from the works of other authors;
- The texts should be retrieved without mentioning from which work they were taken, without clearly delimiting their own contribution to the work from the cited source;
- Another aspect refers to the fact that the retrieval of passages or texts from other works was done without specifying the original source, the name and surname of the author, the title of the work or book, the publishing house, the page according to the usage in the matter of citation;
- The act must be committed by a person who has the status of university professor or doctoral student, or a person who carries out research activities in the field of research and development.[12]

Concluding with the essential requirements, I will focus on the details of the above list, namely that in order to plagiarise it is not necessarily a written work, but it can also be an oral communication, including in electronic format, by which I mean that it can also be speeches, communications, presentations or conferences made on certain fields of activity, which can be found in video format in the online environment. The question I am thinking about now is this: if, from an artistic film, which can be considered a cinematographic masterpiece, is reproduced in an article, press release or scientific research material, a certain phrase or hypothesis, should it appear in the footnotes? In order to provide a concrete answer to this question, I will refer directly to the provisions of Law no. 8/1996, with subsequent additions and amendments, which in art. Art. 14 states that „reproduction within the meaning of this Law means the making, in whole or in part, of one or more copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including the making of any sound or audiovisual recording of a work, as well as its permanent or temporary storage by electronic means" provision covering the cases in which quotations may be used, including in the case of cinematographic, musical and literary creations. For example, I will refer to the data found in jurisprudence, where it was decided that it is abusive to quote 13 lines of a poem that had 35 lines in total[13], the use of an extract from a film lasting 17 minutes in a 58-minute broadcast[14] , or the use of 343 quotations in 86 consecutive pages of General de Gaulle's speeches, without the approval of the family, in a book dedicated to him and which has a total of 320[15], or the reproduction in an article of the entire preface of a book.[16]

The idea of plagiarism is antithetical to the idea of originality, an essential condition in publishing doctoral theses or scientific research papers.

Even if the divine imprint has given us a DNA that is unique, yet the convenience or ease of taking already

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[10] Law no. 206/2004 on good conduct in scientific research, technological development and innovation.

[11] *Ibidem*.

[12] *Idem*, art. 1 para. (2) and (4). See also Law no. 319/2003, art. 6, art. 24, art. 26; Law no. 681/2011, art. 17 para. (5) letter e) and art. 20 para. (3).

[13] CA Paris, 17.03.1970, RIDA, January 1971, no. 67.

[14] Grand Court Paris, 14.09.1994, RIDA, April 1995, p. 407.

[15] In this regard, C. Colombet, *op. cit.*, p. 173. The author illustrates his argument with considerations taken from a judgment delivered by the Paris Grand Court, in a lawsuit that pitted General De Gaulle's heirs against Andre Passeron, author of the book „De Gaulle 1958-1969". The General Court held that the fact that the quotations are short is not sufficient for them to be regarded as lawful. The fact of having used 343 quotations and thus composing The first 86 pages of a 320-page book constitute an abuse of rights... their use demonstrates that we are before an anthology for which the consent of De Gaule's heirs is required.

[16] V. Roș, *Right to citation*, in Revista Română de Dreptul Proprietății Intelectuale no. 3/2009, p. 5.

existing concepts, ideas or constructions is a common trait of a significant number of people, when it comes to making written materials, whether they are publications, manuscripts or scientific papers.

In this sense, referring to the originality and scientific value of the doctoral thesis, distinguished professor Viorel Ros, states in his work, Doctorates in France[17], that „a clear distinction must be made between originality and the value of a doctoral thesis. And that's because copyright law protects intellectual creations that meet the condition of originality regardless of their value and even unfinished[18] . However, the title of doctor cannot be awarded on the basis of a work which satisfies the condition of originality but which lacks scientific value. And even more so he will not be able to grant copyright protection for his unfinished doctoral thesis. In other words, the lack of scientific value of the thesis represents, like plagiarism, an absolute reason for refusing to award the title of doctor to any aspirant, but the lack of value does not necessarily come from the lack of originality.

Originality (condition of protection of works by copyright having Henri Desbois[19] as parent) is examined in terms of form of expression, personal imprint of the author and this has as synonyms individuality, fantasy. The opposite of originality is banality, which is characteristic of the common thing, it is the good made without creative input from the author and which does not constitute a counterfeit of a previous work. In order to be protected by copyright, a work may be original even if it is inspired by a pre-existing work or by a common idea, or in the case of doctoral theses (scientific works in general), Taking on another's idea is tantamount to plagiarism, although copyright law (French as well as Romanian) excludes from protection ideas, which, according to French doctrine (and with which we agree) are free to follow, are available to everyone. The ideas are according to a statement by Henri Desbois, whom no one contradicted „par esence et par destination (...) de libre parcours".

As far as the seat of matter is concerned, it finds its regulation in Law no. 206/2004 on good conduct in scientific research, technological development and innovation, Law no. 319/2003 on the status of research and development personnel, GD no. 681/2011 on the approval of the Code of doctoral studies, amended and supplemented by GD no. 134/2016, Law no. 1/2011 on national education, with subsequent completions and amendments, Law no. 8/1996 on copyright and related rights, with subsequent completions and amendments, GO no. 57/16.08.2002 on scientific research and technological development, Law no. 64/1991 on patents, Regulation (EC) no. 129/1992 on design protection.

4. What does the obligation to capitalise on a scientific paper mean

Before discussing what the obligation to capitalise on the results obtained from a scientific research activity means, I would like to specify the rights that the author of a work has in relation to his work, rights that are protected by the law on copyright and related rights.

In accordance with the provisions of art. 10 of Law no. 8/1996 on copyright and related rights, the author of a work has the following moral rights:

- the right to decide whether, how and when the work is to be made public;
- the right to claim recognition of authorship of the work;
- the right to decide under what name the work will be made public;
- the right to demand respect for the integrity of the work and to oppose any alteration, as well as any damage to the work, if it damages its honour or reputation;
- the right to withdraw the work, compensating, where appropriate, the holders of rights of use, damaged by the exercise of the withdrawal.

Regarding the obligation to capitalise on the results of scientific research, this can be materialised through an article, essay, doctoral thesis that is published in writing, at a publishing house or in the online environment. Without making known the result of the research, it cannot be taken into account by other researchers, which is contrary to ethics and morals in scientific research.

An enumeration of instruments for evaluating the results of scientific research is carried out by:

- number and value of research grants/contracts won through national and/or international competition, completed or ongoing;

[17] V. Roș, C.R. Romițan, A. Livădariu, *Doctorates in France. Plagiarism and self-plagiarism in French universities*, *op. cit., loc. cit.*

[18] Art. L112-2 of the French Intellectual Property Code provides that „The work is considered to have been created, independently of any public disclosure, by the mere fact of the realisation, even if unfinished, of the author's conception". Art. 1 para. (2) of the Romanian Copyright Law (no. 8/1996) provides, similarly, that „(2) The work of intellectual creation shall be recognized and protected, independently of public disclosure, by the mere fact of its realisation, even in unfinished form".

[19] Henri Desbois (1902-1985) was a professor at the Pantheon-Assas University of Law, Economics and Social Sciences. The prestige enjoyed by this author and his works around the world is immense. An intellectual property research institute integrated into the University of Paris II bears his name. However, subsequent studies have shown that the notion of originality was used in jurisprudence as early as the nineteenth century.

- articles „*in extenso*", published in specialised journals with impact factor, indexed by ISI (Institute of Scientific Information), or in other journals indexed in international databases (ISI, Medline, Embase, Scopus, etc.), or in specialised journals indexed in databases recognized by CNCSIS (B or B +);
- books, treatises, monographs with scientific content, published in the country in publishing houses recognized by CNCSIS or in prestigious international publishing houses;
- scientific communications at international or national level, published as abstract in specialised journals with impact factor, indexed by ISI, or in specialised journals indexed in other international or national databases (CNCSIS B or B +);
- completed doctoral theses;
- patents or other products with intellectual property rights;
- awards obtained at national or international level for published or communicated research results;
- final research reports submitted to the Department of Grants and Scientific Research and posted on the web.

The results of the research belong to the contractors, unless otherwise specified by contract, according to the legal provisions.[20]

According to GO no. 57/16.08.2002 on scientific research and technological development, in Chapter VII Results of research and development activities, in art. 74 para. (1) states:

For the purposes of this ordinance, the results of research and development activities obtained on the basis of a contract financed from public funds, hereinafter referred to as research results, shall mean:

- documentation, studies, works, plans, schemes and the like;
- patent rights, licenses, certificates of registration of industrial designs and the like;
- technologies, processes, computer products, recipes, formulas, methods and the like;
- physical objects and products made within the framework of the performance of the respective contract.

(2) Acquisitions made in order to execute the provisions of a research contract shall not be part of the research results, except for acquisitions that are included in one of the research results included in the categories provided for in para. (1).

(3) The executing legal person shall be considered the legal person that obtained any of the results of the research provided for in para. (1), directly and directly.

Also, capitalising on research results leads to final results. They must be harnessed. Valorisation represents the action, but also the attitude by which new discoveries are imposed, through which they are introduced into the circuit of scientific knowledge, in scientific language, in theory and practice.

Any scientific research activity must lead to some conclusions. They will represent, in a synthetic, concise manner, the scientific results obtained. From these conclusions, future scientific theories will be built or practical action projects in the respective field can be carried out.

The data resulting from scientific research will have to be disseminated, brought to the attention of specialists in the respective field. They will be made known to the scientific media through scientific communications, through articles or monographs published on the topic of the respective research, through public conferences.[21]

5. Plagiarism. Self-plagiarism. Sanctions that can be applied

Taking into account the rumour caused by the confirmation of plagiarism of a work, which, depending on the notoriety or public function of the author, causes a wave of news, being intensely publicised and which remains for a long time imprinted in the collective memory. Since ancient times paginate attracts public opprobrium as plagiarists are taken to court and condemned as thieves and shamefully banished from the fortress.[22]

Nowadays, plagiarism is sanctioned by the provisions of art. 2^1 of Law no. 206/27.05.2004 on good conduct

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[20] *https://www.google.com/search?q=Obliga%C8%9Bia+de+valorificare+a+rezultatelor+ob%C8%9Binute+%C3%AEn+cursul+cercet%C4%83rii+%C8%99tiin%C8%9Bifice.&oq=Obliga%C8%9Bia+de+valorificare+a+rezultatelor+ob%C8%9Binute+%C3%AEn+cursul+cercet%C4%83rii+%C8%99tiin%C8%9Bifice.&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBCjI5NjUwajBqMTWoAgCwAgA&sourceid=chrome&ie=UTF-8#vhid=zephyrhttps://umfcd.ro/wp-content/uploads/2018/10/regulament_cercetare_2012.docx&vssid=collectionitem-web-desktophttps://umfcd.ro/wp-content/uploads/2018/10/regulament_cercetare_2012.docx&ip=1-*, last accessed on 29.01.2024.

[21] *https://www.upet.ro/cercetare/doc/ETICA%20IN%20CERCETARE.pdf*, last accessed on 29.01.2024.

[22] Essay - „the right to citation", author prof. dr. V. Roș, who in turn quotes C. Hamangiu, op. cit., no. 47, with reference to Aristophan, a great comedian of antiquity who succeeded in a public contest in exposing poets who recited verses not written by them, aspects that emerge from the work of Marcus Vitruvius Pollio in his work „De architectura".

in scientific research, technological development and innovation, which contains deviations from the rules of good conduct in scientific research.[23]

Also, in art. 4 para. (2) of the same normative act provides for other deviations, which can be found in art. 310 of Law no. 1/2011 – National Education Law. Also, in art. 4 para. (2) of the same normative act provides for other deviations, which can be found in art. 310[24] of Law no. 1/2011 – National Education Law.

In order to coordinate and monitor the application of the rules of moral and professional conduct in research and development activities, the National Council for Ethics of Scientific Research, Technological Development and Innovation is established, hereinafter referred to as the National Ethics Council, an advisory body, without legal personality, to the state authority for research and development[25]. The composition, duties and mode of operation is set out in Chapter II of Law no. 206/2004, art. 5 *et seq.*

Last but not least, deviations from the rules of good conduct in scientific research activity can be applied by the management of the unit or institution coordinating the activity of the research and development staff, one or more of the following sanctions[26]:

- written warning;
- withdrawal and/or correction of all published works in violation of the rules of good conduct;
- reduction of the basic salary, cumulated, when applicable, with the management, guidance and control allowance;
- suspension, for a determined period of time between 1 year and 10 years, of the right to register for a competition for a higher position or a position of management, guidance and control or as a member of competition committees;
- dismissal from the management position in the research and development institution;
- disciplinary termination of the employment contract;

6. The position of specialists in deontology and intellectual property law. Unanimous opinion

Taking into account that scientific research activity is a creative process, the publication of an article, of a doctoral thesis, must also meet the character of originality and the value of the study or conclusion must bring its own vision or an element of novelty in the field in which the scientific work was elaborated. To what extent the right of summons extends and from where this right begins to erode the intellectual toil of the author and turn into plagiarism, this is a topic about which countless lines will be written, the competence resting with those entitled to rule in such cases.

The opinion of specialists on the subject of plagiarism is direct, radical and leaves no room for interpretation, describing in the most severe terms the action of plagiarism (plagiarism is not only an ugly disease, but it has also become a political weapon, a weapon to eliminate those unpleasant to power or services (themselves over the powers of the state that have shamefully allowed themselves to be brought to their knees) even in his absence (accusation is enough to put him at the pillar of infamy, no need for evidence) an anti-plagiarism law is now needed. A law to heal us from this shameful plague. A law to make things right[27]). From the enunciated text there can be no doubt about the feeling caused by this reproduction or retrieval of texts without the consent of the rightful authors.

[23] (1) Deviations from the rules of good conduct provided for in art. 2 lit. a), insofar as they do not constitute criminal offences under criminal law, include: a) the production of results or data and their presentation as experimental data, as data obtained by numerical calculations or simulations on the computer, or as data or results obtained by deductive analytical calculations; b) falsification of experimental data, data obtained by numerical calculations or simulations on the computer, or data or results obtained by analytical calculations or deductive reasoning; c) deliberately hindering, preventing or sabotaging the research and development activity of other persons, including by unjustifiably blocking access to research and development spaces, by damage, destruction or manipulation of experimental equipment, equipment, documents, computer programs, electronic data, organic or inorganic substances or living matter necessary for other persons to carry out, carry out or complete research and development activities. Para. (2) Deviations from the rules of good conduct provided for in art. 2 letter b), insofar as they do not constitute crimes under criminal law, include: a) plagiarism; b) self-plagiarism; c) inclusion in the list of authors of a scientific publication of one or more co-authors who did not contribute significantly to the publication or exclusion of co-authors who contributed significantly to the publication), inclusion in the list of authors of a scientific publication of a person without consent; e) unauthorised publication or dissemination by authors of unpublished results, hypotheses, theories or scientific methods; f) introducing false information in grant or funding applications, in application files for habilitation, for university teaching positions or for research and development positions, para. (3) and para. (4).

[24] Law no. 1/2011 with subsequent additions and amendments, art. 310. The following constitute serious deviations from good conduct in scientific research and academic activity: a) plagiarism of results or publications of other authors; b) fabricating results or replacing results with fictitious data; c) introducing false information in grant or funding applications.

[25] Art. 5 para. (1) of Law no. 206/2004.

[26] Art. 11^1 of Law no. 206/2004 introduced by GO no. 28/2011, published in the Official Gazette of Romania no. 628/02.09.2011.

[27] V. Roș, C. Romitan, *Some ideas about... ideas, hatred, blasphemy, plagiarism and education (or about the need for common sense and an anti-plagiarism law)*, essay.

7. Conclusions

Although in the study of literary works, scientific, artistic creations, one can, in some cases, resort to original texts, students or doctoral students often appropriating the opinion of those who have already deepened the chosen field for study and research, it is necessary for each student, researcher to assume their own position in relation to the chosen topic, to make, with originality and creative power, a study, report, article or scientific work that adds value to ideas and concepts already known.

Without looking for any guilt, I believe that the lack of originality is also induced in terms of the way in which the school curriculum is organised, where, from the earliest ages, we are encouraged to learn by heart, texts already written, stanzas or entire poems, comments of established critics, works of illustrious Romanian writers. Or as a student, all this development of memorization capacities, with emphasis on reproducing original texts as accurately as possible, leads, from my point of view, to a blurring of creative capacity, spontaneity and critical spirit, leading to the rank of absolute superlative literary creations studied or studied. Or, any personal opinion expressed with arguments or even vehemently in front of a teacher, and I am not referring here to idiotic opinions, but to pertinent ones, will be drastically sanctioned by the teacher through didactic methods more or less recommended in psychopedagogy.

Or this form of presentation, deeply imprinted in the collective subconscious, since school, has the effect of reducing the creative capacity and imagination of young people who can no longer have different approaches, because they will be marginalised by the collective. In other words, cultivating this way of machine learning leads to obedience, in the sense of alignment with what has been said previously and to inhibition of creative capacities, imagination, and free thinking.

Of course, I do not want to put in an unfavorable light the education system in Romania or the way and manner in which it takes place, but I just want to point out that, the lack of originality and the desire to read and be inspired before publishing an article or essay on a certain topic, I think it can be a psychological problem, implanted in our subconscious, in our education, from the earliest ages, from the moment we begin to unravel the mysteries of writing. Later, after we reach adulthood and become aware of this fact, we try to get creative again.

Last but not least, this method of reproducing texts, the so-called machine learning, could also be a consequence of the higher number of plagiarised works discovered in our country, compared to the average of plagiarism discovered in other European states.

Instead of conclusion, I prefer to ask a question: What would be the result of debating a poem, encouraging the personal opinions of pupils or students, and after they are exhausted, the opinion of art critics or other established authors regarding the poem and poet in question will also be presented?

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EVALUATION OF DOCTORAL THESIS BY THE ACADEMIC GUIDANCE AND INTEGRITY COMMISSION, THE THESIS SUPPORT COMMITTEE AND CNATDCU. ASPECTS OF THE ORIGINALITY AND SCIENTIFIC VALUE OF DOCTORAL THESES. MORAL DILEMMAS OF THE DOCTORAL STUDENT

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Abstract

This paper aims to present the way in which doctoral theses are evaluated by the academic guidance and integrity commission, the public support committee of the doctoral thesis and CNATDCU, as well as aspects regarding the originality and scientific value of doctoral theses.

Beyond this technical analysis, which is extremely useful, the paper addresses issues of a common ethical nature, but little analysed, which appear in the scientific research activity when starting from the idea of the doctoral leader, the doctoral student develops and acquires as sole author the doctoral thesis. Also, in scientific research there may be contradictory points of view between the doctoral student and the doctoral leader, each point of view being supported from a scientific point of view, but only one point of view must be taken into account in the elaboration of the paper.

The ethical aspects presented above may generate moral dilemmas of the doctoral student regarding the paternity of the doctoral thesis, respectively, whether or not the doctoral leader's point of view is appropriated in the doctoral thesis.

The topic presented makes a brief incursion into this complex issue and identifies possible ways to resolve the above-mentioned moral dilemmas.

Keywords: *The Academic Guidance and Integrity Commission, the thesis support committee, CNATDCU, moral dilemma, idea, scientific value.*

1. Introductory concepts

Just as Viorel Roș and Ciprian Romițan presented beautifully in a work[1] „it is not easy to write valuable works and it is not easy to be original in scientific works". „Only God is original," says Petre Ţuţea[2] quoted by Viorel Roș.

Starting from the undeniable truth value of the above statements, we would point out that Law no. 199/2023[3] created a unitary legal framework on higher education and made important changes regarding the doctoral studies both in terms of the duties and competence of the structures involved in the activity of guidance, verification, evaluation, contestation and award of doctoral title, and their duration, which was usually set at four years.

In order to implement the legal provisions on doctoral studies in Law no. 199/2023, the Ministry of Education has drawn up the Framework Regulation[4].

According to the above-mentioned legal regulations, the improvement and extension of the training of PhD students[5] is ensured by the DS[6] of IDS[7]. IDS, together with the DS, shall draw up and approve the Internal Regulations[8] and ROFDS [9].

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[1] *A few ideas about...ideas, hatred, blasphemy, plagiarism and education*, at the National Conference „Controversial Issues in Intellectual Property Law", 21.11.2019.

[2] Petre Țuțea (October 6, 1902 – December 3, 1991) was a Roman economist, essayist, lawyer, politician and publicist, initially Marxist, later a member of the Legionary Movement. Convicted during the communist regime, he was later rehabilitated by admitting the appeal in the interest of the law against the judgment of sentencing to forced labor and civic degradation.

[3] Law no. 199/2023, *https://legislatie.just.ro/Public/DetaliiDocumentAfis/271898*, accessed in January 2024.

[4] The Framework Regulation of 08.01.2024 on doctoral studies will be hereinafter referred to as the Framework Regulation, *https://www.legisplus.ro/Intralegis6/oficiale/afis.php?f=278335*, accessed in March 2024.

[5] Doctoral students will be named in the paper PhD students.

[6] Doctoral school(s) will be hereinafter referred to as DS.

[7] Institute for Doctoral Studies will be hereinafter referred to as IDS.

[8] The institutional regulation for the organisation and conduct of doctoral studies programs at university level will be named within the paper – Internal Regulation.

[9] The rules of organisation and functioning of the doctoral school will be named in the paper ROFDS.

Within the DS work the doctoral leaders and PhD students. The doctoral degree programs are regulated by the ROFDS, developed by the DSB[10] and approved by the DStB[11]. We mention that the only mandatory discipline of the doctoral program is that of ethics and integrity in scientific research[12].

The ROFDS provides mandatory criteria, standards and procedures concerning, *inter alia*, how to change the doctoral leader, as well as procedures for conflict mediation and fraud prevention in scientific research.

The concrete relationships between doctoral students, doctoral leaders and IDS, through DS, are established by the doctoral studies contract that ends after the negotiation, with each PhD student.

The doctoral leader, together with the DS, informs the PhD students about scientific, professional and university ethics and checks whether it is respected. It also checks compliance with deontological norms both during scientific research and in drafting the doctoral thesis. In the case of academic frauds, violations of university ethics norms, as well as deviations from good conduct in scientific research, both PhD student and doctoral supervisor are responsible according to the legal provisions in force. Also, non-compliance with the rules of ethics or plagiarism may entail the public liability of IDS[13].

Please note that, on the basis of the above-mentioned legal provisions, higher education institutions develop their own regulations on ethics and ethics. At the level of „Nicolae Titulescu" University, the Code of Ethics[14] and a Regulation on the Ethics Commission[15] have been developed on the basis of which the Ethics Commission[16] exercises its powers.

2. Doctoral leader and academic guidance and integrity committee[17]

An essential role in each PhD student's doctoral program[18] is the PhD leader. Thus, the doctoral leader, in consultation with the doctoral student and the opinion of the DS, establishes the conduct of the doctoral program and proposes the research themes.

In the relationships born during the course of the doctoral program, between the doctoral student and the doctoral leader we find reciprocal rights and obligations resulting both from the doctoral study contract concluded between the doctoral student, the doctoral leader and the legal representative of IDS, from the legal provisions in force and as a result of the scientific collaboration within the PhD program of scientific research.

Thus, we mention that during the course of the doctoral program, the doctoral student has obligations that can be included in obligations resulting from the law, obligations resulting from the study contract and obligations arising from university ethics norms.

In case of divergences between the doctoral student and the doctoral leader, they shall be settled by the DSB, and in case of default at this level, they shall be resolved by the DStB. The conflicts between the doctoral student and the DS are resolved by the DStB.

PhD student may request, motivated, the change of the doctoral leader. The DSB may order the change of the doctoral leader if he has found that he has not fulfilled his legal or contractual obligations, for other reasons relating to the guidance relationship between the doctoral leader and the doctoral student, as well as if he finds that the doctoral leader is unavailable. DSB establishes another doctoral leader in the same field.

In working with the PhD student, the doctoral leader is supported by a guidance commission composed of

[10] The Doctoral School Board will be hereinafter referred to as DSB.

[11] The Doctoral Studies Board will be hereinafter referred to as DStB.

[12] Order no. 3131/30.01.2018 regarding the inclusion in the curricula, for all university study programs organised in higher education institutions of the national education system, courses on ethics and academic integrity, *http://legislație.just.ro/Public/DetaliiDocumentAfis/197844*, accessed on 05.01.2024.

[13] Art. 162 of Law no. 199/2023 provides: (1) Higher education institutions shall be responsible for complying with the norms of ethics and academic ethics. (2) The institutions referred to in para. (1) shall establish university ethics commissions, in order to comply with the provisions of para. (1), with a mandate of 4 years. The University Ethics Commission shall act independently of any other structure or person within the higher education institution. (3) A subcommittee dedicated to research ethics shall operate within the university ethics commission. It aims to implement ethics policies in research, in accordance with the regulations of scientific research ethics, which shall cover the following aspects: publication and authorship, respect for the dignity of research participants, management of research data, collaboration, conflicts of interest, fraud, ensuring efficient research environments, and prevention of harm in research and innovation.(4) The composition of university ethics commissions is proposed by the boards of directors, endorsed by the Senate and approved by decision of the Rector.

[14] Code of Ethics and Professional Ethics, *https://www.univnt.ro/index.php/comisia-de-etica/*, accessed in January 2024, hereinafter referred to as Code of Ethics.

[15] Rules of the Ethics and Ethics Committee valid at https://www.univnt.ro/wp-content/uploads/rapoarte/comisia_de_etica/Regulamentul%20Comisiei%20de%20etica%202020.pdf, accessed in January 2024, hereinafter referred to as the Ethics Commission Regulation.

[16] University Ethics and Professional Ethics Committee, hereinafter referred to as Ethics Committee.

[17] The Academic Guidance and Integrity Commission, hereinafter referred to as the Steering Committee.

[18] Doctoral degree programme, hereinafter referred to as the doctoral programme.

three members who cannot be appointed as members of the doctoral committee[19]. The members of the guidance committee may be part of the research team of the doctoral leader, from persons affiliated with the DS or from non-affiliated teaching and research staff. Following consultation with the PhD student, the doctoral leader establishes the composition of the guidance committee that supports the PhD student in the scientific research program.

We would point out that, in accordance with the provisions of art. 41 on the program of the PhD student of scientific research of the „Nicolae Titulescu" University's Internal Regulations, the scientific research program provides 3 oral support before the doctoral leader and the guidance committee, as follows:

a) in the first year the doctoral student develops the scientific research project in order to achieve the doctoral thesis. The scientific research project is part of the research report for the first year of doctoral studies;

b) in the second and third year, the doctoral student prepares and supports 2 research reports attesting his progress within the doctoral program.

The research reports also include 3 reports that are presented by the doctoral student and evaluated by the doctoral leader and members of the guidance committee. An inadequate qualification on the part of the doctoral leader and the inaugural commission implies the re-establishment of the report, and if the same result is obtained after the re-reption of the report, the PhD student is expelled.

The doctoral leader will not miss any presentation of the PhD student, and from the committee must be present, at least 2 members at each presentation, on which occasion a document, entitled minutes, is drawn up, recording the main observations and recommendations made. A copy of the document, signed by the doctoral supervisor and the members of the committee present at the presentation of the doctoral student, shall be submitted to the secretariat of the doctoral school[20].

Subsequently, the doctoral thesis is analysed from the point of view of similarities through at least one anti-plagiarism program recognised by CNATDCU, in which context a similarity ratio is generated. The similarity ratio generated is a document of the doctoral file. After analysing the similarity report by the guidance committee and the person designated for this purpose by the DS, provided that no changes to the thesis are required, the thesis is presented to the guidance committee. After presuming, the doctoral leader, in accordance with the recommendation of the committee and the result of the verification of the similarity report, decides the official submission of the thesis and its support or, as the case may be, the non-admission of the thesis for support, the activities of restoration of the thesis, or, possibly, the definitive rejection of the thesis.

If violations of good conduct in development research are identified in the evaluation of the doctoral thesis, including plagiarising the results or publications of other authors, making the results or replacing them with fictitious data, the PhD student shall be obliged to remedy the deficiencies found after which the evaluation of the thesis is resumed, or, otherwise, his thesis shall be rejected and expelled.

The acceptance report of the doctoral leader and the agreement of the members of the guidance commission are part of the documents of the doctoral file.

The procedure of public support of the doctoral thesis can be triggered only after the doctoral leader and the members of the guidance committee have given their written consent for the public support of the doctoral thesis[21] and regarding the submission of the doctoral thesis to the DS secretariat which certifies the fulfilment by the PhD student of all the obligations established by the doctoral program.

3. Doctoral Committee

The doctoral studies end by supporting the doctoral thesis before the doctoral commission, approved by the DStB at the proposal of the doctoral leader.

The doctoral committee shall be composed of at least five members. The doctoral committee includes the president, the representative of IDS, the doctoral leader and three reviewers, specialists in the field in which the thesis was elaborated, of which at least two works outside IDS.

The doctoral thesis is a public document. The thesis is held in session before the doctoral commission after being evaluated by the members of the commission and they submitted reports/reports at least 15 days before the date of public presentation by the PhD student. Physical participation in supporting the doctoral thesis is mandatory for the chairperson of the commission and the doctoral leader, the other members being able to participate in the videoconference system, at least four.

[19] The Commission for Public Support of the Doctoral Thesis, hereinafter referred to as the Doctoral Committee.

[20] Regulation on the organisation and conduct of doctoral studies programmes, *https://www.univnt.ro/wp-content/uploads/asigurarea_calitatii/regulamente/RG-31_Regulament_IOSUD.pdf*, accessed in January 2024.

[21] According to the provisions of art. 45 – Similarities analysis and agreement for public support of the doctoral thesis in the Internal Rules.

Following the public support of the thesis, the members of the commission draw up reports which together with the statement on the originality of the PhD paper and the analysis on the degree of similarity, form the basis of the committee's deliberations in order to award the doctor's degree.

The minimum standards for awarding the doctor's degree are developed by CNATDCU. According to the provisions of Order no. 5110/2018[22], Annex 24, the minimum standards for granting the title of doctor for the commission of legal sciences are:

- participation in at least three scientific events organised by IDSs and publication of research results in the publications of conference organisers, which can be proven by the PhD student through the conference programme;
- the PhD student has published at least one article in journals that are indexed to international databases.

If the minimum standards required for the award of the diploma are not met, the committee will indicate the elements that need to be reworked or modified in the doctoral thesis and will ask for new public support of the thesis. If the minimum standards are not met in the second support of the thesis, the PhD student will be expelled.

If during the evaluation of the thesis by the members of the doctoral commission are identified, both previously and within the framework of public support, serious deviations from good conduct in research and university activity, including elements of plagiarism or making or replacing the results with fictitious data, then it is mandatory to notify the ethics committee of the higher education institution in which the PhD student is registered and the one in which the doctoral leader is employed for the analysis and resolution of the referral or to notify the deviations of the members of the doctoral commission with the proposal to reject the doctoral thesis.

If the doctoral committee establishes that the obligations laid down in the scientific research program have been fulfilled as well as the minimum standards provided by Order no. 5110/2018, it proposes to award the doctoral degree. The proposal of the doctoral committee is submitted together with the CNATDCU doctoral file.

The higher education institution shall issue the decision to award the doctor's diploma which shall be signed by the rector and shall draw up and issue the doctor's diploma within 30 calendar days of receipt of the assent from CNATDCU.

4. CNATDCU

Within 90 days of receipt of the dossier, CNATDCU shall send IDS a compliant opinion on compliance with the administrative procedure and on the minimum requirements for awarding the doctor's diploma. At the same time, CNATDCU verifies the PhD student's statement on the originality of the paper and the analysis on the degree of similarity, found in the file sent to him.

CNATDCU may invalidate substantiated the process of validation of the doctoral thesis situation in which it sends IDS a written motivation for invalidation, and the file can be resubmitted to CNATDCU for reassessment after remedying the reasons for the invalidation.

Also, CNATDCU may decide that the administrative procedure carried out within IDS has not complied with the regulatory provisions and will send the doctoral file to IDS for reconsideration and completion. IDS will remedy the issues underlying the invalidation and resubmit the doctoral file for reassessment to CNATDCU.

If the members of CNATDCU within the evaluation committee of a doctoral thesis find that the standards of professional ethics are not respected, including the existence of plagiarism within the thesis and the activities that led to its realisation, they invalidate the thesis, communicate the findings of the other members of the evaluation committee and notify the General Council of the CNATDCU for establishing the responsibility of the doctoral leader or the DS.

5. Some considerations on the originality and scientific value of doctoral thesis

In accordance with art. 18 of the Framework Regulation, the doctoral study programme comprises two programs:

- one of preparation based on advanced university studies;
- an individual that concerns scientific research.

The PhD student program on scientific research ends with the elaboration of the doctoral thesis. The evaluation of theses in terms of originality is a mainly technical operation that analyses the degree of personalisation and personal imprint that the doctoral student gives to the external form of the doctoral thesis.

[22] Order no. 5100/2018 approving the minimum national standards for granting the title of doctor.

The doctoral thesis must be an original paper whose author is the PhD student. The doctoral supervisor is responsible alongside the author of thesis for compliance with standards of professional ethics or quality, including in terms of ensuring the originality of the content.

As the beautifully presented Viorel Roș and Andreea Livădariu in an essay, „originality is the expression of the author's personality transposed into creation, but freedom of expression is fully dependent on the category of works to which the creation belongs. Scientific works are those, through technical and standardised language, limit the creator's ability to manifest his originality, the only way in which an author of scientific works can be original is the manner in which he shapes the results of his research"[23].

At the same time, originality is often associated with innovation and the ability to bring about change and progress in a particular field. Originality and scientific research, though they are two distinct concepts, are interconnected in the fields of academic and research.

Thus, originality, in this context, refers to the ability to create and bring new and innovative ideas in a particular field. It's about the ability to think creatively and make unique and meaningful contributions to a particular field of study. On the other hand, scientific research refers to the process of investigating and discovering new knowledge in a particular field. Scientific research involves gathering and analysing data, formulating hypotheses and testing them through specific methods and techniques. The aim of scientific research is to gain new knowledge and to contribute to the development and improvement of the field of study, aspects that give scientific value to the research carried out.

Originality and scientific research are closely linked, because originality is often a valued aspect in research. Researchers are encouraged to make innovative contributions and find new and creative solutions to existing problems. Originality can be considered as a quality of scientific research, as original contributions can bring new perspectives and advances in the field.

Scientific research must also be rigorous, evidence-based and respect scientific methods and standards. Originality can be considered as an aspect of research, but it is not enough in itself. Scientific research must be valid, reliable and have a solid foundation in scientific theory and methods.

Scientific value refers to the importance and relevance of research within the scientific community. Research with scientific value makes significant contributions to the development of existing knowledge and to solving important research problems or questions. This may involve the discovery of new facts or phenomena, the development of explanatory theories or models, the identification of practical solutions, or the improvement of research methods and techniques. Thus, in terms of verifying scientific value, things are complex, depending largely on the person of the evaluator.

To assess the originality and scientific value of a research, the guidance committee and the doctoral committee take into account several factors, such as:

- Relevance and timeliness of the research theme in the current context of the field;
- Novelty and innovation of ideas, concepts or methods proposed in research;
- The quality and rigour of the research methods used;
- Consistency and validity of the results obtained;
- Impact and applicability of results in practice or further development of the field.

Originality and scientific value are essential in scientific research, as they contribute to advancing knowledge and solving important problems in various fields.

An important aspect in defining the originality of creations is also found in the work of Viorel Roș and Andreea Livădariu in the sense that „the doctrinal and jurisprudential interpretations on account of Law no. 8/1996[24] defined originality as a subjective criterion for the protection of creations, important being the personal imprint of the author in the expression he gives to ideas over which no person has a monopoly"[25].

In this context, copyright appears as a legal right granted to authors to protect the originality and creativity of their works. This right gives authors control over the use and distribution of their works, as well as the right to receive compensation for their use.

Originality is thus an important component of copyright that helps to protect this right. For a work to be protected, it must be original, which means that it must be a new and distinct creation. This means that the work must not be a copy of another existing work and must reflect the creativity and effort of the author.

In conclusion, originality and scientific value are two important aspects in the field of academic and research. Originality brings innovative contributions and new ideas, while scientific value makes significant contributions to the development of existing knowledge and to solving important research problems or

[23] V. Roș. A. Livădariu, *Condition of the originality of scientific works*, in Revista Română de Dreptul Proprietății Intelectuale no. 2/2014.
[24] Law no. 8/1996 on copyright and related rights, *https://legislatie.just.ro/Public/DetaliiDocument/7816*, accessed in January 2024.
[25] V. Roș. A. Livădariu, *Condition of the originality of scientific works*, *op. cit.*, p. 7.

questions.

Violation of scientific originality and value can have serious consequences in academia and research. In general, sanctions for such breaches concerning ethics and ethics rules in university research may vary depending on the seriousness of the act and the policy of the institution concerned.

The deviations from the norms of ethics and ethics in the teaching and university research activity are provided for in art. 168 of Law no. 199/2023 and include several categories relating to teaching and university research activity, communication, publication, dissemination and scientific dissemination, the exercise of the duties related to leadership functions, respect for human being and dignity.

The types of sanctions provided for violation of ethics and academic ethics rules are varied starting from the written warning, withdrawal and/or correction of all published papers in violation of ethics and academic ethics norms, etc.[26].

Sanctions for violations of ethics and academic ethics rules are harsh, leading to expulsions, dismissals, including withdrawal of IDS accreditation.

6. Moral dilemmas of the PhD student. „You can resist the invasion of an army, but not an idea whose time has come" (Victor Hugo)

The basis of the scientific research activity is the idea that according to the provisions of Law no. 8/1996 is excluded from the legal protection on copyright. According to Law no. 8/1996, the author of the idea cannot use, for the defense of his own idea, the moral and patrimonial prerogatives conferred by the copyright or to claim the recognition of authorship over the idea. Law no. 8/1996 aims to protect by copyright the original creations, by building a legal regime specific to this right.

If Law no. 8/1996 does not protect by copyright ideas, another normative act, Law no. 206/2004 stipulates in art. 4 para. (1) -(d) that „exposure in a written work or oral communication, including in electronic form, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works of other authors without referring to original sources"[27] means plagiarism. At the same time, according to the provisions of Law no. 206/2004, taking over the idea without indicating the source – the author's name and the work – represents plagiarism, thus violating the moral right to authorship.

As a result, the idea that cannot be plagiarised has the meaning of opinion, solution or vision on a subject, expressed in the activity of scientific research, while the idea excluded from protection has the meaning of abstract concept, general-known, uncontested thesis and accepted as universally valid, subject of a work, sketch, project not yet realised.

What protects Law no. 206/2004 is the expression given to the idea, it is the result obtained after the idea has been passed through the filters of reason and soul, giving it a personal footprint, the aim being to regulate the framework necessary for carrying out scientific research to stimulate the achievement of personal results.

But what happens when starting from the unprotected idea of the doctoral leader (research theme), at his urging, under his direction and guidance, the PhD student develops a scientific idea in the doctoral thesis, a public document of which he is the author?

On the other hand, what happens if the doctoral student agrees with the doctoral leader's idea, although he realises that the idea can have negative consequences or contradict his own ethical principles?

Pronouncing these rhetorical questions that any PhD student can ask, we identify moral dilemmas that the doctoral student may face in the research program and which we will analyse below.

7. The moral dilemma of the doctoral student on the appropriation of copyright and paternity of the doctoral thesis

As I have presented in this paper, an important role in the doctoral degree program of each PhD student has the PhD leader. As is apparent from the provisions of the framework regulation and the other legal provisions in force, practically the entire scientific research activity of the doctoral student bears the mark of the doctoral leader, due to him a large part of the success of the scientific activity carried out by the PhD student.

In this context, the first moral dilemma related to the belonging of the scientific research results materialised in the doctoral thesis is born, respectively, if they are exclusively the merit of the PhD student as expressly regulated by the legal provisions in force by assigning the copyright and its prerogatives only to the doctoral student, or these are also the result of the work carried out by the doctoral leader and should be

[26] In accordance with art. 172 and 174 of Law no. 199/2023.

[27] Law no. 206/27.05.2004 on good conduct in scientific research, technological development and innovation, *https://www.legisplus.ro/Intralegis6/oficiale/afis.php?f=52457*, accessed in March 2024.

recognised at least the right of co-author of the doctoral thesis.

Thus, although the legal regulations expressly provide that the author of the doctoral thesis is the doctoral student and consequently the unprotected idea of the doctoral leader is transformed within the scientific research program into a scientific creation attributed to the doctoral student, protected by Law 8/1996, however, we cannot deny the existence of the personal fingerprint of the doctoral leader in the development of the scientific idea, which is likely to generate that protection offered by Law no. 206/2004, as well as the prerogatives of copyright regulated by Law no. 8/1996.

In conclusion, the moral dilemma of the PhD student arises, namely, on the one hand, whether it is ethical to acquire unilaterally the scientific idea of the doctoral thesis and to benefit from the protection afforded to copyright in the scientific work in the context in which from a legal point of view the legislation recognises its copyright and, on the other hand, if legal liability could be incurred in the event that a subsequent evaluation proves that the scientific idea developed does not belong to him in its entirety and does not bear his exclusive personal mark.

Thus, since moral dilemmas are situations in which a person faces a choice between two actions, both of which have ethical or moral implications, they can be difficult to solve because there is not always a clear and fair choice. They often involve weighing personal values and principles and can vary depending on circumstances and perspectives.

Defining the notion of dilemma, James Rosenau[28] quoted by Bianca-Elena Radu[29], notes that the moral dilemma is the situation in which a person, faced with two contradictory actions, is unable to accomplish both, although he has moral reasons to accomplish each of them.

To solve this moral dilemma, it is important to reflect on our values, analyse the possible consequences of our actions, and consider the views and needs of those involved. Consulting with others and searching for additional information can also help in the moral decision-making process. Solving moral dilemmas is a complex and subjective process that involves making ethical decisions in difficult situations.

There are different ethical approaches and theories that can be used to guide the moral decision-making process.

It is important to note that solving moral dilemmas can be subjective and that there is not always a „correct" solution. It is possible that two people come to different decisions in the face of the same moral dilemma, depending on their personal values and principles.

Thus, the PhD student finds himself in the situation of choosing between owning his doctoral thesis based on the support of the doctoral leader and taking over the idea, acquiring it and with the help of the doctoral leader transforming it into a scientific idea, or to give up the doctorate on grounds of ethics or potential legal responsibility.

8. The moral dilemma of the doctoral student who agrees with the leader's idea although he realises that the idea may have negative consequences or be contrary to his own ethical principles

In such situations, the PhD student may face a difficult decision between following his or her own moral convictions or submitting to the idea of the doctoral leader in order to advance his academic career or avoid conflicts with him. To solve this dilemma, the PhD student could consider the following aspects:

Analysis of consequences: The PhD student should carefully assess the consequences of the doctoral leader's idea and determine whether they are consistent with his or her moral values and principles. If the idea has the potential to cause damage or violate the rights or dignity of others, the doctoral student may decide not to support it.

Consultation of other sources: The PhD student could look for alternative opinions and perspectives to gain a broader understanding of the situation. This may involve discussions with other colleagues, researching relevant literature, or consulting a mentor or ethical advisor.

Open communication: The PhD student should try to communicate openly with the doctoral leader about the moral dilemma he encounters. By expressing his concerns and values, the doctoral student can try to find a solution or compromise acceptable to both sides.

Search for the alternative: If the PhD student disagrees with the doctoral leader's idea and believes that it is clearly at odds with his own moral principles, he may seek a different alternative or approach to continue his research. This may involve finding another doctoral leader or other academic institution to support and

[28] *** *Telephone Interview with James Rosenau*, Teaching Political Science, 1974, vol. 1, issue 2, *https://doi.org/10.1080/00922013.1974.11000028*, p. 266-280.

[29] B.E. Radu, *Challenges and Dilemmas of Doctoral Students in Doctoral Research*, in CKS e-book, 2022, *http://cks.univnt.ro/download/cks_2022_articles%252F3_CKS_2022_PUBLIC_LAW%252FCKS_2022_PUBLIC_LAW_025.pdf*.

encourage his or her moral values and principles.

Finally, the solution of the PhD student's moral dilemma to the idea of the doctoral leader depends on the value he attaches to his own ethical principles and on his desire to follow his personal beliefs. It is important that the PhD student takes into account the long-term consequences of his decision and acts in a way that is consistent with his moral values.

It is also important to address these dilemmas and find ethical solutions to ensure that scientific progress is accompanied by responsibility and respect for human values.

9. Conclusions

Through the adoption of Law no. 199/2023 a unitary legal framework on higher education was created, amendments were made regarding the doctoral studies regarding the tasks and competence of the structures involved in the activity of guidance, verification, evaluation, contestation and award of doctoral title and transposed into the legislation the measures ordered by both CCR dec. no. 364/2022 and the courts, *e.g.*, HCCJ dec. no. 915/2023, on CNATDCU's powers.

Regarding the doctoral studies, the law increases the duration of the study program to 4 years, sets the number of PhD student who can be guided at the same time by a doctoral leader to 8 and provides for the award of the doctoral degree by IDS on the proposal of the doctoral committee.

As regards the elaboration of doctoral theses, they must follow a complex analysis and evaluation procedure in which the verification of the originality and scientific value are essential elements for the recognition and granting of protection of the thesis by copyright.

In the scientific research activity related to doctoral programs, PhD students face a series of challenges such as to generate both motivation and personal and professional maturity and moral dilemmas, the solution of which depends either on the intervention of the legislature or on the moral values of each PhD student.

In this context, in the light of what I set out in the essay, I consider that, *de lege ferenda*, it is necessary to amend the legislation in force in order to recognise the merit and the essential contribution of the doctoral leader in the finalisation of the scientific idea and the realisation of the final form of the doctoral thesis, by granting co-authorship of the doctoral thesis.

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THE LIABILITY OF THE DOCTORAL STUDENT FOR VIOLATING THE RULES OF ETHICS AND DEONTOLOGY DURING DOCTORAL STUDIES (REPORTS, STUDIES, ARTICLES, PRESENTATIONS AT CONFERENCES, PREPARATION OF DOCTORAL THESIS)

Iacob-Cătălin MARCU[*]

Abstract

The present study addresses the issue in its title, starting from the definition of the general concepts of ethics and deontology, continuing with some regulations from Romania that concern norms of university ethics and deontology, their violations and procedural aspects in the case of finding the commission of such acts - their analysis being carried out from the perspective of the form of legal liability incurred, then, making an examination of the existing factual situation in this matter in the Republic of Moldova, highlighting the similarities and differences between some of the regulations of the two states mentioned above, and passing, finally, to the presentation of the conclusions drawn from the entire analysis carried out within the study.

Particular attention was paid to the issue of the originality of the doctoral thesis and especially to the issue of plagiarism, examined including in correlation with copyright, the problem of the difficulties in detecting signs of plagiarism in some situations and the inequity in its detection, as well as the issue of the legal consequences of the detection of the existence of plagiarism, including in terms of the procedures carried out after the respective finding, from the perspective of the framework law currently in force, the drafting of which also took into account the CCR jurisprudence in relation to the way of resolving a notification regarding the suspicion of plagiarism on a doctoral thesis following the presentation of which the author was awarded the title of doctor.

Last but not least, the present study, the elaboration of which involved, among other things, the consultation of relevant materials from the specialised literature, includes, in addition to highlighting the superior quality of some current regulations, several critical observations of the author, in consideration of which he formulated appropriate de lege ferenda proposals.

Keywords: *liability, doctoral student, ethics, deontology, integrity, scientific research, doctoral thesis, copyright, originality, similarity, plagiarism, misconduct, sanction, comparative law, de lege ferenda proposals*

1. Introductory aspects

In order to examine liability which is the subject of this study, it is first necessary to take into account the definition of doctoral studies provided for in art. 61 para. (1) sentence I of Law no. 199/2023 on higher education[1], in conjunction with Annex no. 1 to GD no. 918/2013 regarding the approval of the National Qualifications Framework[2], with subsequent rectification and amendments, respectively in art. 4 point a) of the Code of Doctoral Studies, approved by GD no. 681/2011[3], with subsequent amendments and additions, as well as in art. 2 point a) and art. 3 of the Framework regulation on doctoral studies, approved by Order no. 3020/2024 of the Minister of Education[4].

Achievement of the aim of the scientific doctorate - „the production of original, internationally relevant scientific knowledge", as stated in art. 61 para. (6) point a) sentence I of Law no. 199/2023, art. 42 para. (1) point a) sentence I of the Code of Doctoral Studies, with subsequent amendments and additions, and art. 7 para. (1) point a) sentence I of the Framework regulation on doctoral studies - implies that the use of scientific research methods by the doctoral student, up to the public defence of his doctoral thesis, must be subject to compliance with the rules of university ethics and deontology referred to in art. 161 of Law no. 199/2023.

Romania's concern for the observance of university ethics and deontology in the conduct of doctoral scientific research was also manifested by the issuance of Order no. 3131/2018 of the Minister of National Education, regarding the inclusion in the *curricula* of all university study programmes organised in higher education institutions in the national education system of courses on academic ethics and integrity[5], regulation taken over in art. 28 para. (10) of Law no. 199/2023.

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[1] Published in the Official Gazette of Romania, Part I, no. 614/05.07.2023.

[2] Published in the Official Gazette of Romania, Part I, no. 734/28.11.2013.

[3] Published in the Official Gazette of Romania, Part I, no. 551/03.08.2011.

[4] Published in the Official Gazette of Romania, Part I, no. 56/22.01.2024.

[5] Published in the Official Gazette of Romania, Part I, no. 140/14.02.2018.

Because the regulations regarding the university ethics and deontology do not define these terms, which are often used together and treated as synonyms - which is an incorrect approach, given that they correspond to scientific disciplines with a distinct object of study[6] and are sometimes replaced by the term „integrity" or expression „good conduct", it is necessary to explain them.

Thus, in the Explanatory Dictionary of the Romanian Language[7], the term „ethics" is defined as „the science dealing with the study of moral principles, their laws of historical development, their class content and their role in social life", which means that it includes moral values and norms and is a science of moral behaviour, and the term „deontology" is explained as the totality of rules of conduct and ethical obligations specific to a profession or as the theory of duty, moral obligations, implying that the latter term is concerned with the correctness of the actions or inactions themselves in the exercise of a profession.

Referring to ethics, the doctrine[8] has found that it is based on the category of duty, „since duty constitutes a social necessity expressed by the moral demands made on the personality", by fulfilling the requirements of duty, the personality becomes „an exponent of certain moral obligations before society, which he conceives and realises in his professional activity", in fulfilling his duties, proving his full, creative commitment and assumption of risks, thus having the feeling of personal sacrifice.

As far as deontology is concerned, it has been noted in the specialised literature[9] that it „investigates rights in correlation with the duties that support them and carries out research in the spheres of social-utile life and not only in the special spheres of work producing goods and values".

It has also been pointed out in doctrine[10] that a deontological code is „the bridge, but also the link between the sphere of moral values and that of legal values" - such a code originates from the need to recognise and impose a set of moral values in a given field of activity as a general rule, accompanied, however, by a coercive system to guarantee their observance; however, from the moment when the coercive force of the State comes into action, either by its imminence (preventive role) or by its actual triggering (punitive role), the purely moral value becomes a legal value, with all the consequences that flow from such a qualification".

2. Rules of university ethics and deontology and conducts that may give rise to legal liability of the doctoral student for violating these rules at present

Considering the specific nature of the scientific research activity carried out by any doctoral student in this capacity until the public presentation of his/her doctoral thesis, the rules of university ethics and deontology that a doctoral student, in general, must respect are laid down in art. 167 points a), b) and d) of Law no. 199/2023, which concerns the activity of academic research, the activity of communication, publication, dissemination and scientific popularisation, as well as respect for the human being and human dignity.

De lege lata, in the absence of adoption/issuance of the normative acts provided for in art. 161 para. (2) points a)-c) of Law no. 199/2023 and to the extent that no university ethics and deontology codes have been adopted on the basis of this law, rules such as those mentioned above are widely found in the academic ethics and deontology codes adopted at the date of entry into force of the aforementioned law.

Thus, implicitly referring to the rules in the first and third categories above, the provisions of art. 21 of the Ethics and Professional Deontology Code of the „Babeș-Bolyai" University of Cluj-Napoca[11], provide that, in scientific research, integrity implies, among other things: „accepting and mentioning as authors of a work only those persons who actually participated in its elaboration" [point a)]; „avoiding plagiarism of any kind and respecting intellectual property rights, including those deriving from joint ownership of data in the case of research carried out in collaboration with a supervisor or other researchers", the validation of new findings based on the repetition of previous research/experiments being „admissible, provided that the data are confirmed and explicitly cited" [point b)]; „indication of the source from which an idea, an expression, a result of previous research has been taken, whether or not it has been published" [point c) sentence I]; „explicit acknowledgement of the contribution of any person who has actually participated in a research activity", if the contribution

[6] V. Capcelea, *Ethics and civilised behaviour*, second edition, revised and added, Pro Universitaria Publishing House, Bucharest, 2022, p. 55 and 56.

[7] See *https://dexonline.ro*, accessed on 10.01.2024.

[8] V. Capcelea, *op. cit.*, p. 57.

[9] *Idem*, p. 59.

[10] L.M. Dima, C.M. Marcu-Șiman, *Critical considerations on ethical liability considering the Law no. 206/2004 on good conduct in scientific research, technological development and innovation*, in Revista Română de Dreptul Proprietății Intelectuale no. 2/2022, *https://asdpi.ro/index.php/ro/anul-2022/108-ro-rrdpi-2022-2/786-consideratii-critice-pe-marginea-raspunderii-etice-in-lumina-legii-nr-206-2004-privind-buna-conduita-in-cercetarea-stiintifica-dezvoltarea-tehnologica-si-inovare*, accessed on 10.01.2024.

[11] See *https://www.ubbcluj.ro/ro/despre/organizare/files/etica/Codul-de-etica-si-deontologie-profesionala.pdf*, accessed on 11.01.2024.

consisted only of a supervisory or advisory activity, not requiring „a formal acknowledgement of the contribution" and recommending „the inclusion of a thank you note" [point d)]; „compliance with special ethical rules relating to research involving human subjects or experiments with animals and any other elements of research ethics" [point h)]; that the research is carried out „in the spirit of and with due regard for ecological and biological ethics" [point i)].

Among the deviations from the rules of ethics and deontology in academic research activity presented in art. 168 para. (1) of Law no. 199/2023, those that may be committed by a doctoral student before the public presentation of his/her doctoral thesis are the following: „fabrication of results or data and their presentation as experimental data, as data obtained through calculations or numerical computer simulations or as data or results obtained through analytical calculations or deductive reasoning" [point a)]; „falsification of experimental data, of data obtained through calculations or numerical computer simulations or of data or results obtained through analytical calculations or deductive reasoning" [point b)]; „deliberately obstructing, hindering or sabotaging the teaching or research activities of other persons, including by unjustifiably blocking access to university research premises, by damaging, destroying or manipulating experimental apparatus, equipment, documents, computer programs, electronic data, organic or inorganic substances or living matter necessary for other persons to carry out, perform or complete teaching or research activities" [point c)]; „assessment fraud" [point g)]; „plagiarism" [point h)]; „non-compliance with the legal provisions and procedures concerning university ethics and deontology set out in Law no. 199/2023 and in the university ethics and deontology codes, which are part of the university charter, as appropriate" [point i) sentence I].

In accordance with the provisions of art. 169 points b)-d) of Law no. 199/2023 and art. 2 points o)-q) of the Framework regulation on doctoral studies:

- the expression „fabrication of results or data" means „the reporting of fictitious results or data, which are not the real result of a research and development activity";
- the expression „falsification of results or data" means „the selective reporting or rejection of data or undesirable results, manipulation of representations or illustrations, alteration of experimental or numerical apparatus to obtain the desired data, without reporting the alterations made, in order to distort the scientific truth";
- the term „plagiarism" means „the presentation as an allegedly personal scientific creation or contribution in a written work, including in electronic form, of texts, ideas, demonstrations, data, theories, results or scientific methods taken from written works, including in electronic form, of other authors, without mentioning this fact and without reference to the original sources".

To exemplify the types of plagiarism, we mention the provisions of art. 106 para. (1) points a)-d) of the Charter of the Maritime University of Constanța[12], which stipulate that the following can be considered as plagiarism: „the compilation of fragments from several sources/authors, without clear references to the source texts"; „the interweaving of fragments of plagiarised texts with one's own material"; „the taking of a text without clear references, with the modification of some expressions in the text, and/or the inversion of some paragraphs/sentences/chapters"; „the omission of clear citation marks in the text and of the correct and complete mention of the source work in the bibliography".

Art. 106 para. (2) of the same Charter states that it does not constitute plagiarism „the use of short phrases or definitions regarded by the community of specialists as forming part of the basic common concepts of the discipline concerned".

It should be noted that, although in art. 169 point e) of Law no. 199/2023 and in art. 2 point r) of the Framework regulation on doctoral studies, „self-plagiarism" is defined as „republication of substantial parts of one's own previous publications, including translations, without properly indicating or citing the original", regrettably, Law no. 199/2023 does not contain any other reference to this term, which is why, taking into account the principle of the legality of establishing misconduct, which requires the strict application of the meaning of the term „plagiarism", without including self-plagiarism, *de lege lata*, it is inconceivable to hold the doctoral student legally liable for committing the misconduct of self-plagiarism except on the basis of the provisions of art. 168 para. (1) point i) sentence I of Law no. 199/2023, therefore only if it is provided for as misconduct in the university ethics and deontology codes. As examples, can be mentioned in this regard the Ethics and Deontology Code of the University of Bucharest[13], which, in art. 21 para. (3) point i), provides that self-plagiarism is academic fraud only if it „aims at obtaining benefits", such as „winning a competition, acquiring a title or a distinction and the like", and the Academic Ethics and Professional Deontology Code of the University

[12] See *https://cmu-edu.eu/wp-content/uploads/2018/04/Carta-UMC-web.pdf*, accessed on 11.01.2024.

[13] See *https://unibuc.ro/wp-content/uploads/2021/01/CODUL-DE-ETICA-SI-DEONTOLOGIE-AL-UNIVERSITATII-DIN-BUCURESTI-2020-1.pdf*, accessed on 11.01.2024.

of „Nicolae Titulescu" of Bucharest[14], which, in art. 19 para. (3), provides for self-plagiarism as a misconduct „in so far as by this means the results of the research activity are falsified for the purpose of multiple marking of the same work".

At the same time, it should be noted that, unlike Law no. 8/1996 on copyright and neighboring rights, republished[15], which, in art. 9 point a), provides that „ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts as such and inventions contained in a work, regardless of the manner in which they are taken up, written down, explained or expressed" are not eligible for copyright protection, the provisions of art. 169 point d) of Law no. 199/2023 and art. 2 point q) of the Framework regulation on doctoral studies provide that the taking over, *inter alia*, of ideas and/or theories contained in written works, including in electronic format, by other authors, without mentioning this fact and without reference to the original sources, followed by their presentation in a written work, including in electronic format, as an allegedly personal creation or scientific contribution, constitutes plagiarism, which reveals that plagiarism may exist even if there has been no infringement of copyright, the subject-matter of which is, according to the provisions of art. 7 introductory part of Law no. 8/1996, republished, „original works of intellectual creation in the literary, artistic or scientific field, whatever the mode of creation, mode or form of expression and irrespective of their value and purpose", the doctrine sometimes adds the condition that they must be capable of being made known to the public, since only in this way can works be disseminated, *inter alia*, by reproduction, exhibition or other means[16].

On the other hand, it is possible that the doctoral student does not respect copyright, but without plagiarising, by using long quotations from a work of another person or persons[17], „for the purpose of analysis, comment or criticism or by way of example", which is prohibited by the provisions of art. 35 para. (1) point b) of Law no. 8/1996, republished, a taking over by the doctoral student, without indicating the source, of fragments of a work that no longer enjoys copyright protection, according to this normative act, due to its very great age, constitutes plagiarism.

It should also be noted that the similarity report of the text of a scientific work with that of another work, being issued by a special computer program, is only a tool with which to detect the existence of plagiarism, the verdict in this regard will be given after a thorough analysis to be carried out by legally authorised persons, vulnerabilities such as the non-existence of a single database to which any such program has access, databases in which all scientific works ever carried out in a field and published are archived (scanned), the non-recognition as similarities by the program in question of words written with grammatical errors or the generation of a similarity percentage for legislation and jurisprudence[18]. In this context, it should be mentioned that, following the control carried out by the Control Body of the Minister of Internal Affairs on the way in which the process of verification of doctoral theses was organised in the period 2011-2018, at the level of the „Alexandru Ioan Cuza" Police Academy of Bucharest, a number of dozens of doctoral theses were found to have exceeded the admitted similarity coefficients, some doctoral theses being verified in distinct periods of time, with different results[19].

Another problem related to the similarity *ratio* is, as has also been pointed out in the doctrine[20], the lack of a uniform regulation, through a normative act published in the Official Gazette of Romania, regarding the maximum similarity percentage identified in doctoral theses, so that situations of discrimination may arise, an aspect that has been confirmed by practice, which reveals differences regarding the maximum similarity coefficients allowed. By way of example, we mention that at the „Dunărea de Jos" University of Galați, where the similarity coefficient 1 - which specifies the level of borrowings found in certain sources containing at least 5 words - is accepted in a maximum percentage of 50%, and the coefficient of similarity 2 - which determines the level of borrowings containing at least 25 words - is accepted at a maximum of 5%[21], at the National University

[14] See *https://www.univnt.ro/index.php/comisia-de-etica/*, accessed on 11.01.2024.

[15] Published in the Official Gazette of Romania, Part I, no. 489/14.06.2018.

[16] See, in this regard, I. Macovei, *Treatise on Intellectual Property Law*, C.H. Beck Publishing House, Bucharest, 2010, p. 433; in the sense that this condition cannot be considered as distinct from the concrete form of expression of the work, which makes it perceptible through the senses, but is a logical consequence of it, see V. Roș, *Intellectual Property Law*, vol. I, *Copyright, related rights and sui-generis rights*, C.H. Beck Publishing House, Bucharest, 2016, p. 203.

[17] A.-M. Oprea, *The liability of the doctoral student for violating the rules of ethics and deontology during doctoral studies*, in Curierul judiciar no. 5/2019, p. 290.

[18] E.E. Ștefan, *Academic Ethics and Deontology*, 2nd ed., revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2021, p. 306.

[19] *The Interior Ministry, on plagiarism at The Police Academy: some doctoral theses were checked in separate periods of time, with different results. Veronica Stoica is the new rector of the Academy*, 03.07.2019, *https://www.edupedu.ro/ministerul-de-interne-la-academia-de-politie-nu-exista-politici-coerente-de-verificare-a-plagiatelor-veronica-stoica-a-fost-imputernicita-sa-fie-rectorul-academiei*, accessed on 11.01.2024.

[20] A.-R. Tănase, *The unconstitutional and discriminatory management of the proof of plagiarism in Romania*, *in Revista Română de Dreptul Proprietății Intelectuale* no. 1/2017, p. 52.

[21] *General procedure. Use of the anti-plagiarism system*, elaborated by „Dunărea de Jos" University of Galați,

of Arts „George Enescu" of Iași, the coefficient of similarity 1 must not exceed 30% and the coefficient of similarity 2 must be less than 5%[22].

Deviations from the rules of ethics and deontology in the activity of scientific communication, publication, dissemination and popularisation, provided for in art. 168 para. (2) of Law no. 199/2023 and which may be committed by a doctoral student in the scientific research activity carried out by him/her until the public presentation of his/her doctoral thesis consist of „the unauthorised publication or dissemination by authors of unpublished scientific results, hypotheses, theories or methods".

Concerning the deviations from the rules of professional ethics and deontology regarding respect for human beings and human dignity, which may be committed by a doctoral student in the scientific activity carried out by him until the public presentation of his doctoral thesis, these are provided for in art. 168 para. (4) points a) and b) of the Law no. 199/2023, namely the misconduct that infringes the protection of the rights of the direct beneficiaries of the right to education - defined, in point 10 of the annex to the law, as students, as well as adults in a form of education - and the misconduct that undermines the dignity of these beneficiaries and the prestige of the profession, to which may be added misconduct such as that provided for in art. 168 para. (4) of the same normative act, established by the university ethics and deontology codes.

An example of an offence under point a) of para. (4) of art. 168 of the Law no. 199/2023 can be that of harming the religious freedom of another member of the university community, as it is defined in art. 14 para. (1) and (2) of the same normative act, by discrediting the religious cult to which that person belongs, and an example of misconduct provided for in point b) of the same paragraph can be that which consists of using insulting expressions with regard to another member of the university community.

As regard to offences such as those referred to in art. 168 para. (4) of Law no. 199/2023, established by the university ethics and university deontology codes, an example in this regard is the misconduct provided for in art. 44 point e) of the Academic Ethics and Professional Deontology Code of the University of Medicine and Pharmacy „Grigore T. Popa" of Iaşi[23], respectively „repeated public defamation" of the university mentioned.

It should be noted that, although Law no. 99/2023 took important steps in regulating the liability of doctoral students in the event of their failure to comply with the rules of ethics and university deontology, these concepts, although conceptually distinct, are placed on the same level, which, in our opinion, is unacceptable.

3. Training the legal liability of the doctoral student for violation of the rules of academic ethics and deontology

Failure by the doctoral student to comply with any of the above-mentioned rules in the course of the scientific research carried out by him/her up to the public presentation of his/her doctoral thesis, in addition to his/her ethical liability, may, according to the provisions of art. 166 para. (2) of Law no. 199/2023, the doctoral student's civil or administrative liability, as the case may be, provisions which must be understood as not excluding, however, the doctoral student's criminal liability when the violation of those rules constitutes a crime.

Also in art. 259 para. (1) of the same normative act states: „The authors of undergraduate, dissertation and doctoral works are responsible for ensuring the originality of their content. The supervisors of undergraduate, dissertation and doctoral works shall be responsible for checking the conformity of scientific works with the specific requirements of an original creation."

The originality of the doctoral thesis, as well as of the other scientific works elaborated by the doctoral student during his/her doctoral research, is an aspect that is related to the quality of the work, revealing the personality of its author, by presenting in a unique form the ideas, theories, concepts or discoveries, even if these have been used previously by other authors in their works, but in their own way of expression, which means that the originality of a scientific work is not to be confused with its novelty, as such a work may be original even if it does not contain elements of novelty compared to existing works dealing with the same subject[24].

At the same time, according to the provisions of art. 7 introductory part of Law no. 8/1996, republished, originality is a requirement for the protection of a work of intellectual creation in the scientific field, the author of which is presumed to be, „until proven otherwise, the person under whose name the work was first made known to the public", according to the provisions of art. 4 para. (1) of the same normative act. In this context, it should be noted that although, according to the provisions of art. 65 para. (6) of the Code of Doctoral Studies,

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https://www.ugal.ro/files/site/comisie_etica/15_10_Procedura_gen_Antiplagiat_CEU_rev_2018.pdf, accessed on 11.01.2024.

[22] *Operational procedure for the similarity analysis of doctoral thesis at IOSUD-UNAGE*, elaborated by the National University of Arts „George Enescu" of Iași, *https://www.arteiasi.ro/wp-content/uploads/2021/12/Procedura_operationala_-_analaiza_similitudine_teze_dr.pdf*, accessed on 11.01.2024.

[23] Annex to the University Charter of the same higher education institution, *https://www.uaic.ro/wp-content/uploads/2019/06/Codul-de-Etica-UAIC_23.05.2019.pdf*, accessed on 13.01.2024.

[24] See I. Macovei, *op. cit.*, p. 432, V. Roș, *op. cit.*, p. 208, 210 and 212.

with subsequent amendments and additions, art. 4 of the Methodology for the evaluation of doctoral theses, approved by Order no. 5229/2020 of the Minister of Education and Research[25], and art. 21 para. (4) of the Framework regulation on doctoral studies, the doctoral student is the author of the doctoral thesis and assumes responsibility for the accuracy of the data, information, opinions and demonstrations presented in the thesis, his or her supervisor may be considered to be the *de facto* co-author of the thesis to the extent of his or her contribution to its preparation, without this automatically giving rise to the recognition of copyright in his or her favour[26].

Also, according to the provisions of point c) of art. 19 of the Methodology for the evaluation of doctoral theses, originality is a criterion for the evaluation of the doctoral thesis, distinct from the criterion of scientific relevance, provided for in point (a) of the same article, which essentially consists of the personal contribution of the author of the thesis to the development of science, through the information, ideas, theories, concepts or demonstrations brought to this end.

3.1. Civil liability of the doctoral student

As stated above, in his or her scientific research activity, the doctoral student may harm other persons by not respecting their copyright - protected by Law no. 8/1996, republished - in the sense that either he takes texts from written works, including in electronic format, of other authors, without mentioning this fact and without making reference to the origin of the source of information, or he complies with these requirements, but the taking is made in a proportion that does not justify the extent of the citation, these conducts violating both the provisions of art. 10 point a) of the abovementioned law, according to which the author of a work „has the right to decide whether, in what manner and when the work is to be made known to the public", and the provisions of art. 12 of the same normative act, according to which the author of a work „has the exclusive economic right to decide whether, in what manner and when his work will be used, including the right to consent to the use of the work by others", which is such as to give rise to civil liability on the part of the doctoral student, by way of an action referred to in the specialised literature and in jurisprudence as „in counterfeiting"[27], based on the provisions of art. 188 of the aforementioned law[28].

Another hypothesis in which the civil liability of the doctoral student may be engaged is that in which, as has been pointed out in the doctrine[29], he/she violates a clause of the doctoral studies contract establishing his/her liability in situations not regulated in the active legislation (regarding ethics and university deontology), this clause being stipulated in accordance with the provisions of art. 1169 of Law no. 287/2009 on the Civil Code, republished[30], according to which the parties „are free to conclude any contracts and to determine their content, within the limits imposed by law, public order and good morals" - and the conduct in question can be sanctioned exclusively by the university ethics committee.

Regardless of the situation, the doctoral candidate's civil liability is incurred even for the slightest fault.

3.2. Administrative liability of the doctoral student

Compared to the way in which the liability of the doctoral student for violating the rules of university ethics and deontology is currently regulated, this form of legal liability may be the most common in practice.

As it has also been appreciated in the specialised literature[31], the failure of the doctoral student to comply with the rules of university ethics and deontology mentioned above may entail a particular type of administrative liability, as it stems from the violation of obligations established primarily by law, even if they are subsequently repeated in the doctoral studies contract[32], the incidence of disciplinary liability is excluded in so far as it is a

[25] Published in the Official Gazette of Romania, Part I, no. 783/27.08.2020.

[26] See I. Macovei, *op. cit.*, p. 425, V. Roş, *op. cit.*, p. 162.

[27] V. Roş, *op. cit.*, p. 645.

[28] Most of the procedural aspects of this action are contents in art. 188 para. (3)-(14) of Law no. 8/1996, republished.

[29] Gh. Bocşan, *The liability of the PhD candidate and of the members of the doctorate public sustenance commission for infringements of deontology rules in the activity of theses elaboration (I)*, *https://www.universuljuridic.ro/raspunderea-doctorandului-a-conducatorului-de-doctorat-si-a-membrilor-comisiei-de-sustinere-publica-a-tezelor-de-doctorat-pentru-incalcarea-regulilor-de-deontologie-in-activitatea-de-intocmire-a-teze/*, accessed on 12.01.2024.

[30] Published in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

[31] Defined in art. 2 point i) of the Framework regulation on doctoral studies.

[32] Gh. Bocşan, *op. cit.*; for the opinion, which we do not share, in the sense that in this case the disciplinary liability of the doctoral student is involved, see S. C. Oprişan, *The liability of the doctoral student and of the commission of public presentation of the doctoral thesis for violating the rules of deontology in the activity of preparation of the doctoral thesis, as regulated in the Law on national education no. 1/2011, the GD no. 681/2011 on the Code of Doctoral Studies. The legal nature of the liability, sanctions and its consequences*, in Dreptul no. 7/2018, p. 38 and 39.

At the same time, we do not agree with the doctrinal opinion according to which, in the case of a doctoral student, administrative

matter of employment law, since the doctoral research activity is not carried out on the basis of an individual employment contract and any legal employment relationship in which the doctoral student may find himself is with a component of an institution organising doctoral studies and is not concerned with the preparation of the doctoral thesis but with the performance of a teaching activity subsidiary to the doctoral studies.

This idea is reinforced both by the terminology used by the legislator, who, in art. 175-179 of Law no. 199/2023, regulated as such the disciplinary liability of „teaching and research staff, teaching and auxiliary research staff and management staff in higher education" - taking into account the specific nature of the employment relationships of these categories of staff - and by the regulation of the other forms of legal liability of members of the university community.

As regard to the competence to verify whether the conditions for the administrative liability of the doctoral student are met, the provisions of para. 1 of art. 171 of Law no. 199/2023 stipulates that this is the responsibility of the University Ethics Commission, which, according to the provisions of para. (2) of the same article and art. 71 para. (13) sentences I and II of the same normative act, may be referred in writing or online by any person, regarding the commission of an act that may constitute a violation of academic ethics and deontology, including the existence of plagiarism.

According to art. 171 para. (8)-(10) and art. 172 para. (4) sentence I and para. (6) sentence I of Law no. 199/2023, the analysis of complaints about plagiarism is made „within 45 calendar days of receipt of the complaint", taking into account „the conditions of legality in force at the time of writing the doctoral thesis on which the doctoral degree was based, respectively, without being able to re-evaluate the scientific merits of the doctoral thesis" and „is completed by the adoption of a decision of admission or rejection on the merits of the complaint, stating the reasons in fact and in law", which is an administrative act and „must explicitly include in its text the facts that led to the sanctioning of the person concerned, the legal basis and the reasons for which the university ethics committee rejected the arguments put forward by the author of the complaint", the decision in question may be contested, within 30 days of communication, at the National Council for the Accreditation of University Degrees, Diplomas and Certificates, the National Commission for Ethics in University Management or the National Council for Ethics in Scientific Research, Technological Development and Innovation, as appropriate.

In the case of a definitive finding of plagiarism in a doctoral thesis, the provisions of art. 172 para. (8)-(11) of the same law establish, as appropriate:

- the rector, the obligation to formulate, within 30 days from the date of communication of the decision of the National Council for the Accreditation of University Degrees, Diplomas and Certificates, „an action in administrative dispute, in order to cancel the doctoral degree, for the degrees awarded by the higher education institution, if the doctoral degree has entered the civil circuit and has given rise to subjective rights guaranteed by law", in the event of breach of this obligation, the Ministry of Education is obliged to bring „its own action in administrative dispute for the annulment of the doctoral degree", and to refer the matter to the National Commission for Ethics in University Management;
- the Ministry of Education is required to bring, within 30 days of the date of communication of the decision of the National Council for the Accreditation of University Degrees, Diplomas and Certificates, „an action in administrative dispute for the annulment of the order of the Minister confirming the doctoral degree, if the order in question has entered the civil circuit and has given rise to subjective rights guaranteed by law";
- the obligation on the rector to order, within 30 days from the date of communication of the decision of the National Council for the Accreditation of University Degrees, Diplomas and Certificates, „the revocation of the doctoral degree, if it was awarded by the higher education institution, has not entered the civil circuit and has not given rise to subjective rights guaranteed by law";
- the Minister of Education is required to order, within 30 days of the date of communication of the decision of the National Council for the Accreditation of University Degrees, Diplomas and Certificates, „the revocation of the Minister's order confirming the doctoral degree, if it has not been awarded by the higher education institution and has not given rise to any subjective rights guaranteed by law".

The way in which the provisions of art. 171 para. (1)-(8) and (10) and art. 172 para. (8)-(11) of Law no. 199/2023 have been formulated shows that the wording of these provisions took into account both Decision no. 624/2016 of the Constitutional Court of Romania[33], in which it was found that the doctoral degree is an administrative act, and the doctoral diploma, as a document certifying the aforementioned degree, can only be an administrative act, so that the abolition of the aforementioned diploma is achieved by revocation when it has

liability cannot be incurred (Gh. Lucian, *The legal liability of the doctoral student for violating the legal provisions in the process of preparing the doctoral thesis according to the new law on higher education*), *https://sintact.ro/comentarii-monografii-reviste-si-webinarii/articole/raspunderea-juridica-a-studentului-doctorand-151029570*, accessed on 24.03.2024 .

[33] Published in the Official Gazette of Romania, Part I, no. 937/22.11.2016.

not entered the civil circuit and has not produced legal effects, respectively by cancellation, when it has entered the civil circuit and has produced legal effects, and CCR dec. no. 364/2022[34], which ruled that the provisions of art. 170 para. (1) point b) of Law no. 1/2011 on national education[35], as amended and supplemented - according to which, in the event of non-compliance with quality or professional ethics standards, the Ministry of Education, Research, Youth and Sport, on the basis of external evaluation reports, drawn up, where appropriate, by the National Council for the Accreditation of University Degrees, Diplomas and Certificates, the National Council for Scientific Research, the Council for Ethics and University Management or the National Council for Ethics in Scientific Research, Technological Development and Innovation, may, *inter alia*, take the measure of withdrawing the doctoral title - are constitutional in so far as they relate to the withdrawal of a doctoral title which has not entered into the civil circuit and has not produced legal effects.

Concerning the possibility of withdrawing the doctoral title, practice has revealed that, although the working committee of the CNATDCU, after having examined a complaint about the existence of plagiarism in a doctoral thesis[36], did not propose this measure, has, however, submitted a proposal to prohibit the publication of the thesis in question as publicly defended, on the grounds that, although plagiarism cannot be established, the thesis in question is below the quality standards of a doctoral thesis, a measure which we consider to be unlawful in relation to the provisions of art. 170 para. (1) of Law no. 1/2011, with subsequent amendments and additions, a regulatory act in force at the time of the analysis in question, which does not provide for the possibility of proposing such a measure, which is, in fact, a real sanction.

It should also be noted that, unlike Law no. 1/2011, with subsequent amendments and additions, Law no. 199/2023 does not provide for the possibility for the holder of a scientific title to request, where appropriate, the Ministry of Education or the institution organising doctoral studies that awarded the doctoral degree to relinquish that title, in line with CCR dec. no. 624/2016.

As regard to the types of sanctions for violating the rules of university ethics and deontology by the doctoral students, the provisions of art. 174 para. (3) of Law no. 199/2023 stipulate that they are: „written warning" [point a)]; „cancellation of the results of the evaluations" [point b)]; „expulsion" [point c)]; „other sanctions", provided for in the university ethics and deontology code of the higher education institution [point d)].

From the category of sanctions provided for in art. 174 para. (3) point (d) of Law no. 199/2023 is included, *exempli gratia*, the one established in art. 25 para. (1) point c) of the Ethics Code of the University „Alexandru Ioan Cuza" of Iași[37], respectively the prohibition to participate in an evaluation form, if access to the evaluation was based on fraud or attempted fraud/refusal to allow access to an evaluation form based on fraudulent results.

3.3. Criminal liability of the doctoral student

As indicated above, there are cases where violating the rules of university ethics and deontology by the doctoral student may take the form of criminal wrongdoing.

Such situations in which the criminal liability of the doctoral candidate may arise, and which have also been reported in the doctrine[38], are, for example, the case of fabrication of results or data and their presentation as experimental data, as data obtained through calculations or numerical computer simulations or as data or results obtained through analytical calculations or deductive reasoning or the case of falsification of experimental data, data obtained by means of calculations or numerical simulations on a computer or data or results obtained by means of analytical calculations or deductive reasoning, in which case the doctoral student may be held to have committed, as appropriate, the offence of fraud, the offence of forgery of private documents, the offence of forgery, the offence of computer forgery or the offence of false statements, if the constituent elements are met.

Another hypothesis in which the criminal liability of the doctoral candidate can be engaged refers to the infringement of copyright and is provided for in art. 197 para. (1) of Law no. 8/1996, republished.

Thus, in the case of plagiarism committed by a doctoral student, the latter may become the active subject of the offence in question, the passive subject being the person who is the author of the plagiarised work, and the material element of the objective side consists of two actions, which must be carried out cumulatively, namely the appropriation, in whole or in part, by the active subject of the passive subject's work - which may be achieved by taking it over - followed by the presentation by the passive subject of the appropriated work as his

[34] Published in the Official Gazette of Romania, Part I, no. 831/24.08.2022.

[35] Published in the Official Gazette of Romania, Part I, no. 18/10.01.2011.

[36] See *The joint report on the doctoral thesis „Combating organised crime through Criminal Law provisions", presented in 2011 by Mrs. Laura Codruța Kovesi*, document available on the internet at *https://www.edu.ro/sites/default/files/Raport-comun-LCK.pdf*, accessed on 13.01.2024.

[37] Document available on the internet at *https://www.uaic.ro/wp-content/uploads/2019/06/Codul-de-Etica-UAIC_23.05.2019.pdf*, accessed on 13.01.2024.

[38] S.C. Oprișan*, op. cit.*, p. 39, Gh. Bocșan, *op. cit.*, A.-M. Oprea, *op. cit.*, p. 294.

own intellectual creation.

The law imposes the essential requirement that the appropriation in question be made without right (not permitted by law). In this context, it will be necessary to ascertain whether, *inter alia*, the provisions of art. 9 point a) of Law no. 8/1996, republished, apply in the case in question. As has also been pointed out in the doctrine[39], in the hypothesis that what is taken by the researcher does not constitute elements protected by copyright, the applicability of the criminal law must also be examined in the light of the consequences that the taking in question may produce, in the sense that it may constitute the constituent elements of another offence (for example, the offence of cheating).

The offence in question has no material object, since the material element of the objective aspect does not concern the possible material support on which the work is taken.

The offence is committed when the person who commits it presents the wrongfully appropriated work as his own intellectual creation and the immediate consequence is the commission of the offence.

In the case of this offence, the attempt, although possible, is not punishable as it is not provided for by law.

The form of guilt with which the offence in question can be committed is only intention, direct or indirect.

The law does not provide for a special motive or purpose for the commission of the offence under consideration, but this must be taken into account in the judicial determination of the penalty.

According to the provisions of para. (2) of art. 197 of Law no. 8/1996, republished, in the case of the commission of the offence referred to in para. (1) of the same article, the reconciliation of the parties removes criminal liability.

4. Aspects of the doctoral student's liability for violating the rules of university ethics and deontology in the regulations of the Republic of Moldova

Unlike Romania, where deviations from the rules of academic ethics and deontology are provided for, first of all, in the law and then in the ethics and deontology codes, which are part of the university charter, the provisions of art. 109 para. (2) point (b) of the Education Code of the Republic of Moldova[40] stipulates that these rules are obligatorily contained in the university charter, without any deviation from these rules being found in the content of the Code.

On the other hand, as in Romania, the provisions of points 160 and 161 of the Regulation on the organisation of doctoral studies, cycle III, approved by GD no. 1007/2014[41], with amendments, as well as the provisions of points 4 and 9 of the Methodology for conferring and confirming scientific titles, approved by GD no. 497/2019[42], provide for the obligation of the originality of the doctoral thesis, as well as the obligation of the doctoral student, considered to be the author of that thesis, to mention the source for any material taken and to assume the accuracy of the data, information, opinions and demonstrations presented in that thesis.

However, unlike the provisions of art. 259 para. (1) of the Romanian Law no. 199/2023, the provisions of point 162 of the aforementioned regulation stipulate that the supervisor is jointly responsible with the author of the doctoral thesis for compliance with the standards of quality and professional ethics, including ensuring the originality of the doctoral thesis.

Concerning the situation in which non-compliance with standards of quality or professional ethics is established, including in the case of a finding of plagiarism, the provisions of point 182 of the same regulation provides that, „on the basis of a report drawn up on the case by the national authority empowered to confirm scientific titles" - the National Agency for Quality Assurance in Education and Research - and the decision of its Governing Board „to cancel the validation decision, as well as following the evaluation by its own institutional structures, the rector of the institution that registered the doctoral student may take the administrative decision to revoke the awarding of the scientific title of doctor and to cancel the doctoral degree, if it has been awarded, regardless of the date of the finding of the violation committed".

Also, taking as a source of inspiration the provisions of art. 1 of Annex no. 2 to the Regulation on the organisation and functioning of the CNATDCU, approved by Order no. 3482/2016 of the Minister of National Education and Scientific Research of Romania[43], the Methodology for conferring and confirming scientific titles provides, in point 72, that any natural or legal person may refer in writing to the National Agency for Quality

[39] L.T. Poenaru, *An investigation of plagiarism: the criminal implications of the phenomenon*, in Curierul judiciar no. 9/2017, p. 509.

[40] Published in the Official Gazette of the Republic of Moldova no. 319-324/24.10.2014, art. 634, *https://www.legis.md/cautare/getResults?doc_id=15141&lang=ro#*, accessed on 14.01.2024.

[41] Published in the Official Gazette of the Republic of Moldova no. 386-396/26.12.2014, art. 1101, *https://www.legis.md/cautare/getResults?doc_id=115655&lang=ro#*, accessed on 14.01.2024.

[42] Published in the Official Gazette of the Republic of Moldova no. 320-325/01.11.2019, art. 728, *https://www.legis.md/cautare/getResults?doc_id=118490&lang=ro#*, accessed on 14.01.2024.

[43] Published in the Official Gazette of Romania, Part I, no. 248/04.04.2016.

Assurance in Education and Research „regarding non-compliance with quality standards, conduct in scientific research or professional ethics, including the existence of plagiarism in a doctoral thesis, regardless of the date of its defense.

The same methodology stipulates, in point 73, that in case of non-compliance with quality or professional ethics standards, the Governing Board of the National Agency for Quality Assurance in Education and Research cancels the decision confirming the scientific title.

Proceeding to the examination, by way of example, of the Charter of the State University of Moldova[44], it is noted that it provides, in art. 76 and 77, that the rules of ethics of the academic community belonging to this institution of higher education are contained in the Ethics Code of the State University of Moldova, adopted by its Senate, to ensure compliance with the Code mentioned, the Ethics Commission of the Senate being established and functioning, according to the provisions of art. 78.

According to art. 16 of the Academic Ethics and Integrity Code of the State University of Moldova[45], the doctoral students have, among others, the following obligations:

- to respect „the provisions of the laws under which they carry out their activity, the University Charter, the Internal regulation and the decisions of the management" of the aforementioned university, as well as of the faculties, departments and component departments;
- to respect „order, morality, personal honour and the rights of others", both inside and outside the university;
- to ensure „the development of a climate of civility, mutual respect, recognition and appreciation of individual dignity, goodwill, tolerance, care, solidarity and attachment to the institution and the values it promotes";
- „to respect the authority of teaching, research and non-teaching staff and the authority of the governing bodies" of the aforementioned university and its faculties;
- „not to receive illicit means during the examination, in the preparation of individual work" and doctoral theses; „not to commit intellectual fraud";
- „to use in a civilised way the patrimony" of the mentioned university; „not to damage the material base of the classrooms and seminars, laboratories" and libraries;
- „to abstain from committing any acts that may damage the prestige and image" of the aforementioned university.

Concerning the deviations from the rules of academic ethics and deontology mentioned above that may be committed by doctoral students in the course of their scientific research conducted up to the public presentation of the doctoral thesis, these, according to the provisions of art. 21, art. 22 para. (1) sentence I and art. 24 of the aforementioned Code, may consist, *inter alia*, of:

- fraud in any form in the scientific research activity;
- „the destruction, alteration or falsification of documents and databases" of the university in question and their use for illicit purposes;
- obstructing scientific research or any function of the aforementioned university;
- „using language contrary to the academic spirit";
- unauthorised use of and culpable damage to the property of the university;
- „public denigration of the staff or institution" of higher education;
- plagiarism in any form;
- the use of unlawful means during assessment by examinations, colloquia or reports, thus being considered „any process of preparing answers required by examiners outside the knowledge possessed" by doctoral students.

As regard to plagiarism, according to the provisions of point 1.4 of the Institutional regulation on the verification of similarities in doctoral and habilitated doctoral theses, adopted at the level of the State University of Moldova[46], plagiarism may be committed by doctoral students in the following situations: „reproduction (directly or through translation) of ideas, data or texts belonging to another person, without indicating or by indicating incompletely or incorrectly the source" [point a)]; „taking ideas, data or texts from various sources and presenting them as one's own contribution" [point b)]; „omitting to place in quotation marks, clearly, words, sentences, paragraphs taken" *ad litteram* or quasi-literally from various sources [point c)]; „paraphrasing the content of another person's work without reference to the source" [point d)]; „reproducing audio, video,

[44] *https://usm.md/wp-content/uploads/Carta_cu_acturi_aditionale_27_05_2023.pdf*, accessed on 14.01.2024.

[45] *https://usm.md/wp-content/uploads/Codul-de-Etica-si-Integritate-Academica-al-USM.pdf*, accessed on 14.01.2024.

[46] *https://usm.md/wp-content/uploads/Regulament-instituțional-privind-verificarea-similitudinilor-în-tezele-de-doctor-și-doctor-habilitat.pdf*, accessed on 14.01.2024.

software, etc. material without acknowledging the source and, moreover, assuming it to be one's own contribution" [point e)]; „reproducing the work of colleagues and presenting it as one's own" [point f)]; „using work obtained from the internet or written by another person (for a fee or free of charge)" [point g)]; „quoting an extract from the original of a scientific work of more than 400 words" [point h)]; „quoting several fragments, up to 300 words each, from the original of a scientific work, the total volume being greater than an author's copy" [point i)]; reproducing *ad litteram* „one's own bachelor's or master's thesis in the content of the doctoral thesis without the required references" [point j)]; „using unlicensed software in the preparation of the doctoral thesis/doctoral thesis" [point k)].

According to the provisions of point 1.5 of the above-mentioned regulation, as in Romania[47], it does not constitute plagiarism to use phrases or short definitions considered to belong to the basic notions of the specialty in question or to use notions of general culture.

At the same time, according to the provisions of point 2.6 of the aforementioned regulation, the similarity coefficient 1 - defined in point 2.3.1 of the said regulation as the percentage of the text with all similar sentences found by the system in other documents - must not exceed 20% of the volume of the doctoral thesis, and the similarity coefficient 2 - defined in point 2.3.2 of the same regulation as the percentage of the text with similar fragments exceeding 50 words - must not exceed 5% of the volume of the doctoral thesis. Here too, as in Romania, there are differences from one university to another. Thus, by way of example, we mention that, according to the provisions of art. 12 point a) of the Regulation on the prevention of academic plagiarism in the Academy of Economic Studies of the Republic of Moldova[48], the coefficient of similarity 1 (the percentage of words identified in fragments of 5 words, without the legislative database) must not exceed 30% of the volume of the doctoral thesis, and the coefficient of similarity 2 (the percentage of words identified in fragments of 25 words, without the legislative database) must not exceed 5% of the volume of the doctoral thesis.

In accordance with the provisions of art. 26 of the Academic Ethics and Integrity Code of the State University of Moldova, the violation of its provisions should entail, in the case of doctoral students, the sanctions provided for in the internal regulations of the mentioned university, the competence and procedure for the application of sanctions being those established in the said regulations.

In the case of misconduct that meets the conditions for another form of liability, the provisions of art. 27 of the aforementioned Code require the Senate Bureau to refer the matter to the competent state bodies.

According to the provisions of art. 31 points b) and c) of the same Code, the main duties of the Academic Ethics and Integrity Commission are, *inter alia*, the self-reporting and receipt of complaints in relation to violations of the rules of the Code, as well as the analysis and resolution of complaints relating to disciplinary offences.

Analysing the Internal regulation of the State University of Moldova[49], it is noted that they establish the work relations in all structural subdivisions of the aforementioned university, the internal order, the principles of subordination and the principles of activity, applying in all sectors of activity of the respective university, being mandatory for all employees, as provided for in the provisions of point 5, but, given that the aforementioned regulation concerns exclusively the employment relationships of the employees of the aforementioned university - an extension of its applicability to persons who are not employees of the aforementioned university being manifestly unlawful - although its ethics and academic integrity code - which is also applicable to doctoral students - refers to the aforementioned regulation as regards the applicable sanctions, the competence to apply them and the procedure to be followed, and in the Republic of Moldova, *de lege lata*, there is no legislation at State level laying down the penalties applicable to doctoral students in the event of any violation by them of the rules of academic ethics and deontology, and the procedure for applying those penalties[50], the possibility of penalising doctoral students at the university in question in such cases without applying the rules laid down in respect of employment relationships appears not to be covered by any legislation, with the exception of the Institutional regulation on the organisation of doctoral studies, cycle III, adopted at the level of the State University of Moldova[51], which provides only for the sanction of expulsion, the cases in which it may be applied and the procedure to be followed, which is inadmissible.

The situation presented above is all the more serious since the consultation on the internet of documents

[47] See, for example, the provisions of art. 106 para. (2) of the Charter of the Maritime University of Constanţa, *supra*.

[48] *https://ase.md/files/legal/interne/3.3_reg_plagiat_r03.pdf*, accessed on 14.01.2024.

[49] *https://usm.md/wp-content/uploads/REGULAMENT-intern_USM_30.06.2023.pdf*, accessed on 14.01.2024.

[50] *https://usm.md/wp-content/uploads/Regulamentul-instituțional-privind-organizarea-studiilor-superioare-de-doctorat-ciclul-III.pdf*, accessed on 14.01.2024.

[51] According to art. 137 para. (3) sentence I of the Education Code of the Republic of Moldova, students who violate the provisions of the normative acts in force and/or the internal acts of the educational institutions are liable to sanctions, depending on the seriousness of the act, according to the internal acts of the educational institutions, up to expulsion.

such as those mentioned above, adopted by other universities, shows that this is not unique, being encountered, for example, at the Academy of Music, Theatre and Fine Arts of Chişinău[52], thus requiring urgent legislative intervention by the state to eliminate such practices, which, even if they are not found in all higher education institutions in the Republic of Moldova[53], are generating inequalities, given that the issue of the liability of doctoral students for violating the rules of academic ethics and deontology is addressed differently by universities, and it is not natural that this very important issue for the academic environment should be left exclusively to the discretion of higher education institutions.

5. Conclusions

Although only a few months have passed since the entry into force of Law no. 199/2023 and, during this period, with the exception of the Framework regulation on doctoral studies, no other regulations have entered into force subsequent to that law, relevant to the subject analysed in the present study and allowing a detailed examination of some aspects, some very important conclusions can be drawn from the findings made in the study.

Firstly, unlike Law no. 1/2011, as subsequently amended and supplemented, which did not even provide for a classification of the rules of university ethics and deontology, and the deviations from them, listed in the same normative act, were 3 in number, Law no. 199/2023, even though it does not distinguish between the notions of ethics and deontology, placing them on the same level, as mentioned above, even though they are conceptually different and urgent legislative intervention is needed to distinguish between them, including in terms of the offences corresponding to each category and the liability regime, includes a broader regulation, at least in terms of offences, diversifying them, based on Law no. 206/2004 on good conduct in scientific research, technological development and innovation[54] is absolutely necessary - as is the new sanction that can be applied to students, including doctoral students, consisting of the cancellation of the results of evaluations - with the mention that the omission of self-plagiarism also requires urgent legislative intervention, by adding this offence.

Secondly, compared to Law no. 1/2011, as amended and supplemented, which in art. 143 para. (4), established the principle of joint and several liability of the doctoral supervisor and the doctoral student for ensuring the originality of the doctoral thesis, Law no. 199/2023 makes a significant sharing of the liability of the doctoral student and his supervisor with regard to the originality of the content of the doctoral thesis, the former can be sanctioned for failure to fulfil an obligation of result (ensuring the originality of the thesis) and the latter for failure to fulfil an obligation of diligence (verifying the conformity of the scientific work with the specific requirements of an original creation).

Thirdly, in opposition to Law no. 1/2011, with subsequent amendments and additions, Law no. 199/2023 has regulated in detail, according to the various situations that may arise, the consequences of a finding of plagiarism in a doctoral thesis and the relevant procedures and has also eliminated the possibility for the holder of a scientific title to request, where appropriate, the Ministry of Education or the institution organising doctoral studies that awarded the doctoral title to renounce that title, the normative solutions in question being in line with the jurisprudence of the Constitutional Court of Romania on the matter.

Concerning the Republic of Moldova, following the analysis carried out in this study, it can be stated that the regulation of the issue of university ethics and deontology at the state level has major shortcomings, given that the most important normative act of the state in this area, in addition to the fact that it does not contain specific sanctions applicable to doctoral students in case of violation by them of the rules of academic ethics and deontology, obliges universities to regulate such misconduct through the university charter, this situation leads, depending on the university, both to different rules on the abuses referred to above, but above all to differences in the legal regime of liability in the situation in question, in the context in which some universities apply the provisions applicable to employment relations, while others follow the path of administrative liability, aspects which demonstrate the existence of major inequalities in terms of legal treatment in similar cases. This situation

[52] See Charter of the Academy of Music, Theatre and Fine Arts of Chişinău, available at *https://amtap.md/wp-content/uploads/2017/12/1_-Carta-Universitar%C4%83-AMTAP-2015.pdf*, accessed on 14.01.2024, The Ethics and Academic Deontology Code of the Academy of Music, Theatre and Fine Arts of Chişinău, document available at *https://amtap.md/assets/pdf/CODUL%20Etica%20si%20Deontol%202022. pdf,* accessed on 14.01.2024, The Regulation of internal order of the Academy of Music, Theatre and Fine Arts of Chişinău, document available at *https://amtap.md/assets/pdf/regulament-ordine-interna-AMTAP%20red.pdf*, accessed on 14.01.2024, and the Institutional regulation of organisation and functioning of doctoral study programmes of the Academy of Music, Theatre and Fine Arts of Chişinău, document available at *https://amtap.md/wp-content/uploads/2018/01/regulament-doctorat-red_-04_06.pdf*, accessed on 14.01.2024.

[53] An example to the contrary is provided by the Charter of the Public Institution „Bogdan Petriceicu Haşdeu" State University of Cahul, which provides both rules of academic ethics and professional deontology, as well as deviations from them, and specific sanctions for students. This document is available at *https://www.usch.md//wp-content/uploads/2023/02/Carta-USC_D.S..pdf*, accessed on 14.01.2024.

[54] Published in the Official Gazette of Romania, Part I, no. 505/04.06.2004.

also calls for urgent legislative intervention to regulate the rules of academic ethics and deontology, the deviations from them and the possible sanctions they may attract, primarily at state level and only subsidiarily at university level, following the model of Law no. 199/2023 in Romania, which is the only way to eliminate the discrepancies mentioned above.

Another issue that requires urgent legislative intervention is the procedure and method for invalidating the title of PhD, as the current regulations are deficient in relation to the corresponding rules in Law no. 199/2023 in Romania, which should be incorporated into the legislation of the Republic of Moldova.

Beyond these observations, it can be observed that in the Republic of Moldova there is a concern to align the regulations in this area with those of Romania, as demonstrated by the number of relevant rules taken from Romanian legislation.

However, at the end of these considerations, it should be noted that the argument for the doctoral student compliance with the rules of academic ethics and deontology should be, first and foremost, as has been shown in the doctrine[55], honesty, „respect for the research activity, for the work of others and for himself", conscious and voluntary respect, which „comes from education and conviction", the student in question must demonstrate scientific integrity and be aware, among other things, that the accusation of plagiarism and the punishment for it, whatever it may be, follow the plagiarist „not only in life but also after death", „because the liability for plagiarism is never prescribed and because the moral punishment of public reproach that accompanies the proven plagiarist does not and cannot know rehabilitation".

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- CCR dec. no. 364/2022, published in the Official Gazette of Romania, Part I, no. 831/24.08.2022;
- CCR dec. no. 624/2016, published in the Official Gazette of Romania, Part I, no. 937/22.11.2016;

[55] A.-M. Oprea, *op. cit.*, p. 294, V. Roș, *op. cit.*, 64.

- Charter of the Academy of Music, Theatre and Fine Arts of Chișinău, https://amtap.md/wp-content/uploads/2017/12/1_-Carta-Universitar%C4%83-AMTAP-2015.pdf;
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INTELLECTUAL THEFT AND ITS FORMS OF MANIFESTATION

Ioana PICU[*]

Abstract

Intellectual theft is a deeply rooted problem in contemporary society, affecting not only the process of creation and innovation, but also the moral and economic balance of the community as a whole.

This paper aims to analyse, on a personal note, the forms of intellectual theft, both from a criminal, and deontological and moral perspective, focusing particularly on the complex manifestations of this phenomenon specific to the academic environment, paying particular attention to data fabrication, data falsification, plagiarism and self-plagiarism, but also on the methods of combating and preventing intellectual „thievery".

I wish to explore in depth the concept of intellectual theft, to analyse the complexity of this phenomenon as well as to eloquently convey the depth of its impact on our cultural and intellectual evolution.

A deep commitment to respect for intellectual integrity is reflected in a community aware and responsible for excellence and innovation, shaping the direction in which society evolves in accordance with individual and collective needs and aspirations.

Keywords: *intellectual theft, data fabrication, data falsification, plagiarism, self-plagiarism.*

1. Introduction

Intellectual theft is a concept of great interest in the current landscape of our society, where information becomes a currency, with a vital impact on the development and research process.

Beyond the boundaries of the academic field, the complex phenomenon of intellectual theft is particularly important, representing a violation of intellectual integrity that produces serious consequences for innovation and the progress of society as a whole. In an interconnected world, the complexity of acts of intellectual theft has seen a development, from common practices, such as plagiarism, to modern alternative methods, such as digital piracy or industrial espionage.

The issue of intellectual theft has generated, at the international level, efforts to standardise a common regulation. Thus, organisations such as WIPO had an essential role in aligning general rules for the protection of intellectual property and copyright.

In Romania, in the context of the post-communist legislative evolution, the accession to the European Union represented a crucial moment of transition, which required adaptation to international standards in the matter.

Through this work, I want to contribute to promoting a culture of respect for creativity and innovation, strengthening the awareness and application of effective practices in protecting intellectual property in modern society.

The work presents originality through a novel approach, highlighting concrete examples, both from the historical past and from contemporaneity.

The main purpose of this approach is to expose not only theoretical issues related to the legal dimension of intellectual theft, but also ethical, social and economic aspects, emphasising the importance of protecting intellectual property to stimulate innovation and progress, as well as the way in which this form of fraud undermines the fundamental values shown.

2. Notion and regulation

The notion of copyright is regulated in Romania by „*Law no. 8/1996, regarding copyright and related rights*". This law established rules for the use and distribution of artistic and literary works, providing a legal framework for protecting the copyrights of creators, and still represents the main regulation of these aspects at the national level.

According to the provisions of art. 196 para. (1) letter a) from Law no. 8/1996, „*It shall be offences and punishable with imprisonment for one month to one year or with a fine, the following deeds committed without the authorization or consent of the owners of rights acknowledged by this law: a) reproduction of works or*

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products involving neighboring rights".[1]

According to the provisions of art. 197 para. (1) from the same Law, „*It shall be an offence and punishable by imprisonment for 6 months to 3 years or with a fine, the deed of the person who appropriates, without right, in whole or in part, the work of another author and presents it as own intellectual creation*".[2]

With its entry into force, *„Law no. 206/2004 on good conduct in scientific research, technological development and innovation"* established provisions related to scientific integrity and protection against illegal practices, which could alter the integrity of the research process. This law defined the concepts of data fabrication, data falsification, plagiarism and self-plagiarism, bringing accuracy to the legislative framework.

According to the provisions of art. 2^1 para. (1) letter a) from Law no. 206/2004, *„The deviations from the rules of good conduct provided for in art. 2, insofar as they do not constitute crimes according to the criminal law, include: a) the fabrication of results or data and their presentation as experimental data, as data obtained through calculations or numerical simulations on the computer or as data or results obtained through analytical calculations or deductive reasoning; b) falsification of experimental data, data obtained through calculations or numerical simulations on the computer or data or results obtained through analytical calculations or deductive reasoning", and according to para. (2) of the same article, „Deviations from the rules of good conduct provided for in art. 2 letter b), to the extent that they do not constitute crimes according to the criminal law, include: a) plagiarism; b) self-plagiarism* (…)".[3]

According to the provisions of art. 4 para. (1) from Law no. 206/2004, *„For the purpose of this law, the following terms are defined as follows: (...) b) fabrication of results or data - reporting fictitious results or data, which are not the real result of a research - development activity; c) falsification of results or data - selective reporting or rejection of data or unwanted results; manipulation of representations or illustrations; altering the experimental or numerical apparatus to obtain the desired data without reporting the alterations made; d) plagiarism - the exposition in a written work or an oral communication, including in electronic format, of some texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of other authors, without mentioning this and without referring to the original sources; e) self-plagiarism - the exposure in a written work or oral communication, including in electronic format, of some texts, expressions, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of the same author(s), without mentioning this and without referring to the original sources"*.[4]

2.1. Data fabrication

As it results from the definition provided by the aforementioned legal provisions, data fabrication is the deliberate process of generating unreal information, in order to expose fictitious results, inconsistent with reality, in order to obtain unfair benefits, seriously affecting the correctness, validity and the credibility of the academic and scientific environment.

This notion cannot be associated with a specific moment, or with an event that marked its occurrence, but the concept has evolved with the development of data analysis in scientific research, especially in the context of IT evolution, which facilitates the manipulation of information.

Even if data fabrication represents an alternative way of committing intellectual forgery, being addressed and defined by Law no. 206/2004, together with the notion of plagiarism (criminalised as a crime by domestic legislation), this practice does not find an independent criminal regulation, neither in the Criminal Code nor in other special laws. However, by reference to the context of the execution, data fabrication may fall under specific regulations, which place it under the auspices of the illegal action, liable to attract administrative consequences as well as civil liability, or, in relation to the method of execution or the result produced, it may be associated with forgery crimes, provided by the provisions of the Criminal Code.

In this sense, in accordance with the provisions of Law no. 206/2004, stated above, data fabrication represents a serious deviation from the norms of good conduct in scientific activity, which produces significant consequences, in accordance with the norms detailed in the Code of Ethics, established for the purpose of monitoring and coordinating moral and professional conduct in research - development activities. Thus, following the finding by the members of the commissions tasked with following the compliance with the ethical codes specific to the field of scientific research, of some deviations in the manner of data fabrication, severe sanctions can be enacted against the author such as *„written warning, withdrawal and/or correction of all works published*

[1] Art. 196 para. (1) lit. a) of Law no. 8/1996.
[2] Art. 197 para. (1) lit. a) of Law no. 8/1996.
[3] Art. 2^1 para. (1) lit. a) of Law no. 206/2004.
[4] Art. 4 para. (1) of Law no. 206/2004.

in violation of the rules of good conduct (...), withdrawal of the university teaching title or research degree or demotion, dismissal from the management position in the research-development institution, disciplinary termination of the labor agreement, the prohibition, for a determined period, of access to financing from public funds intended for research - development (...)" etc.[5]

Under another aspect, in relation to the purpose and method of using a document with academic content, in which *„fabricated"* information, data or results were inserted, this procedure may meet the typical conditions of the crime of *„forgery in documents under private signature"*, provided by the provisions of art. 322 CP, carried out in the form of alteration by plagiarism, fabrication, or *„use of forgery"*, provided for by the provisions of art. 323 CP.

However, in these situations, the employment of criminal liability is conditioned by the nature of *„document under private signature"* attributed to the document in which the false data was inserted, but also by the purpose of using this document, but not by the result obtained.

A situation that circumscribes the problem set out above, is represented by the criminal action brought in 2023 against Mr. Nicolae Ciucă, the Prime Minister of Romania at that time, following a denunciation by which he was requested to be held criminally liable, among others, for committing the crime of *„use of forgery"*. *«The whistleblower considers that „the crime of use of forgery is committed in a continuous form, the plagiarised doctoral thesis being used at different time intervals, but in the achievement of the same resolution (art. 35 CP), as a notable professional achievement and support for further advancements»."*[6]

Although the legal classification of the denunciation mentioned in the previous paragraph was made judiciously, referring to the doctoral thesis of the former prime minister, and not to the degree certifying his *„doctor"* title, the case was resolved in advantageous way, by dismissal, motivated by the fact that the act does not exist, the Prosecutor's Office attached to the High Court of Cassation and Justice arguing that *„The use of the doctor's degree is not circumscribed, therefore, to the constitutive content of the crime of use of forgery provided for by art. 323 CP, since the doctor's degree is only an act that certifies/attests the doctor's title and does not constitute a false official document within the meaning of the criminal law, not having the meaning of the provided for by art. 320 CP or art. 321 CP (altered or forged document)".*[7]

2.2. Data falsification

Very similar to data fabrication, discussed above, data falsification is a similar process of intentionally *„adjusting*" data contained in a scientific or academic paper in order to gain undue benefits.

While data fabrication refers to the presentation as authentic of completely fictitious information or results, data falsification involves the manipulation of existing, truthful documented information, in the sense of selectively highlighting the advantageous ones or the deliberate omission to present the unwanted, or subtle or complete modification of these data, in order to mislead readers or auditors.

In essence, data falsification enjoys the same regulations and sanctions as data fabrication, representing an illicit practice that seriously affects scientific and academic integrity.

2.3. Plagiarism

As a manifestation of intellectual theft, plagiarism represents taking over and presenting some data and information created or discovered by other authors or researchers as one's own (without proper attribution of the source), in order to obtain unfair advantages.

The term plagiarism has ancient origins, coming from the Latin word *„plagiarius"*, which refers to child or slave kidnappers.[8]

The Latin poet Martial (1st century BC) was the first to use the term to plagiarise, in the sense known today, attributing it to his rival, for the act of reciting his works in public, thus destroying his artistic prestige.

With the advent of printing, the sense of ownership of ideas and their form of expression grew, intellectual property being protected, initially, by royal decrees. Then, in 1557, in London, the first society was established with the aim of protecting the rights of authors, following that with the evolution of technology, but also of legislation, plagiarism detection tools took the form of software.

In Romania in recent decades, the notion of plagiarism has acquired a new dimension, with the interest

[5] Art. 14 para. (1) of Law no. 206/2004.

[6] The dismissal ordinance enacted on 15.03.2023 by the Prosecutor's Office attached to the High Court of Cassation and Justice - Criminal Investigation and Forensic Department, *https://cdn.g4media.ro/wp-content/uploads/2023/05/Ordonanta-clasare_15-martie-2023.pdf.*

[7] *Ibidem*.

[8] *https://wwnorton.com/college/english/write/writesite/plagiarism_tutorial/link_03.aspx*.

shown in academic ethics and with the adoption of specific legal provisions in higher education, in order to preserve integrity, originality and correctness, considered fundamental for scientific and academic progress.

Being the most popular way of committing intellectual theft, plagiarism enjoys an express, distinct regulation in Romania, Law no. 8/1996 defining *„the reproduction of works or products bearing related rights"*[9] but also *„the act of the person who appropriates, without right, in whole or in part, the work of another author and presents it as own intellectual creation"*[10], as being the material element of some crimes punishable by fine or even imprisonment.

The „reproduction" referred to in the aforementioned legal provisions can be achieved in several alternative ways:

- by copying - being the most widespread form of plagiarism, carried out by directly taking over a part or the entire work of another person, without proper attribution of the original source. The common character of this practice is also supported by the easy method of execution, being necessary to copy and paste a text, most of the time requiring the manipulation of a computer system by acting on a simple copy-paste formula. What is a matter of interest regarding the previously described practice, is the fact that specific computer programs, used in the evaluation and anti-fraud verification of scientific and academic works, can detect not only the plagiarised text, but also the Internet page - source, as well as the date and time it was taken;
- by paraphrasing - reformulation process, by using synonyms or by changing the topic of the text belonging to another author, keeping the ideas, meaning, or structure, without attributing it to the original author. This practice aims at expressing the same basic content, in other words, or changing the order of words in sentences, in order to lose the origin of the original text and present the content as one's own creation. Even this procedure can be identified by computer anti-plagiarism checking programs, by highlighting the words whose order has been changed, so that, by similarity, the original text that has been tampered with can be established; A variety of plagiarism through paraphrasing is plagiarism through translation, which involves translating a text written in a foreign language and inserting it into one's own work, without indicating, between quotation marks or in a footnote, the original text, or at least mentioning the source;
- by juxtaposition (mosaic or *„patchwork"*) - consists in joining several fragments taken from different works, without mentioning their origins;
- self-plagiarism (which will be dealt with separately below) - consists in the repeated presentation by a person of the same own ideas, without making the public aware of the repeated character, etc.

An *„innocent"* form of plagiarism is that committed by people suffering from cryptomnesia, „a paramnesia characterised, on the one hand, by the forgetting of important dates or important people, and, on the other hand, by the subject attributing mnesic material to oneself (read or heard), the patient presenting the works or creations as their own production (also called involuntary plagiarism). This illusion of memory must be distinguished from voluntary plagiarism, where it is a conscious action taken to achieve a certain goal (…)".[11]

Even in these circumstances, regardless of the motivation or circumstances surrounding plagiarism, it remains a serious breach of academic and professional ethics and standards.

2.4. Self-plagiarism

Being a variety of plagiarism, as a way of committing academic fraud, self-plagiarism is the conduct of an author to reuse own works, texts or ideas, in multiple contexts, without informing auditors or readers of the previous origins of the content.

Although self-plagiarism does not represent the material element of the crimes regulated by Law no. 206/2004, this practice is liable to damage the reputation and lose credibility in the academic community, but also unfavorable administrative consequences, among those regulated by the same law, previously mentioned.

However, in addition to the academic sanctions self-plagiarism can also attract, in certain cases, criminal liability, depending on the way it is committed, the purpose and the legal consequences produced.

Thus, although self-plagiarism may represent a practice bringing apparent temporary benefits to the author, the consequences it produces can profoundly affect the professional direction, as well as his image and credibility in the academic environment.

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[9] Art. 196 para. (1) lit. a) of Law no. 8/1996.

[10] Art. 197 para. (1) of Law no. 8/1996.

[11] *https://ro.wikipedia.org/wiki/Criptomnezie#:~:text=Criptomnezia%20(din%20greacă%20κρυπτός%20kryptos,din%20vis%2C%20citite%20sau%20auzite*.

3. From a deontological point of view

The deontological approach to intellectual fraud involves analysing the act itself from the perspective of ethical norms and fundamental principles such as honesty, transparency and accountability.

Intellectual theft, in all its forms of manifestation, brings serious damage both to the private interests of the persons directly targeted and damaged by the fraudulent activity, as well as to the general interest, characterised by the impact on academic culture, but also by the disastrous consequences that could produce, to the extent that false information or obtained by fraudulent means would be exploited in different fields of interest.

Intellectual fraud, especially that committed in the form of plagiarism, represents an intellectual injustice and a flagrant violation of copyright, which, according to the provisions of art. 12 of Law no. 8/1996, *„(...) has the exclusive patrimonial right to consent to the use of the work by others".*[12]

Therefore, these practices contravene the right of the authors of the original works to be credited with their intellectual effort and contribution to the generation of the ideas and information that form the object of the fraud, discrediting their work and creativity.

Equally, intellectual theft represents a practice that is clearly contradictory to the norms of good conduct in scientific research, as regulated by the provisions of law no. 206/2004, shaking the foundation of academic ethics.

The practices analysed above bring serious damage to the principle of honesty, in the context in which researchers and academics have a fundamental obligation to present their own contribution to the realisation of scientific works and to properly recognize the work of others, encouraging truth and transparency to represent the foundation of knowledge.

At the same time, the perpetuation of this phenomenon would compromise the credibility of the scientific and academic community, seriously affecting the validity and reliability of discoveries and results, but also undermine education and the learning process, in the context where exposure and access to intellectual fraud compromises its fundamental objective, that of developing the critical thinking and analytical skills of pupils and students.

4. From the moral point of view

A moral approach to intellectual theft and an understanding of the significant impact it has on human relationships, personal integrity and social responsibility are essential to promoting a sound, ethical and healthy environment.

Under the first aspect, the practices of intellectual fraud can have a major influence on the author's personal integrity, bringing him, in addition to the loss of credibility and professional recognition, also processes of conscience and a decrease in self-esteem.

On the other hand, the practices highlighted above contravene the principle of academic *„fair play"*, bringing a significant imbalance to the competition between students, researchers and institutions.

From a moral point of view, researchers have a duty to scientific progress and the common good, so engaging in fraudulent practices in the context of knowledge-seeking affects their ability to respond to challenges and bring benefits to society.

Last but not least, the popularity of such practices and their approach by significant personalities of the scientific and academic world, can negatively influence the confidence, aspirations, decisions, behavior and professional direction of the new generation, discouraging the thirst for knowledge and the exchange of ideas of students and young researchers.

5. Case studies

- **Paolo Macchiarini - intellectual forgery committed by fabricating / falsifying data**

Paolo Macchiarini is a renowned Italian doctor, internationally recognized for the research activity carried out in the field of thoracic surgery, who carried out lucrative work in several prestigious medical and academic institutions at the international level.

Previously considered a pioneer of regenerative medicine, through the simultaneous use of biological and artificial tissue (supposed to have been obtained with the help of stem cells taken from patients undergoing treatments) in performing artificial trachea transplant operations, the doctor performed several such interventions, even on some patients whose conditions did not require emergency surgical treatment, under the

[12] Art. 12 of Law no. 8/1996.

pretext of the possibility of improving the medical condition.

The doctor's practices began to be called into question after seven of the eight artificial trachea transplant surgeries performed in Sweden resulted in the death of the patients.

Proceeding to the thorough investigation of this situation, it was found that the works that were the basis of his academic accreditation were based on the fabrication of data, since the doctor had not obtained ethical approval for his procedures, but also on the falsification of data, since he distorted the result of some of the experimental procedures carried out.

Thus, it was established that Paolo Macchiarini performed experimental surgical procedures on human subjects, without a prior assessment of the impact of the procedures on living organisms and without obtaining the informed and voluntary consent of the patients.

Therefore, the ethics committee empowered to analyse the inappropriate scientific behavior of the doctor and take appropriate measures, established the retraction of 11 research papers, and 3 others were corrected. Equally, the employment agreement signed with the medical institution in which the controversial procedures were carried out, as well as his research agreement, were terminated.

The case of doctor Paolo Macchiarini had a resounding international media impact, even forming the subject of a very popular documentary on the Netflix streaming platform. At the same time, the notoriety of the case determined the resignation from important positions of several people considered to have been closely related to the doctor's research activity, including even the secretary of the *„Nobel Committee for Physiology or Medicine"*, or the president of the most prestigious academic medical research unit in Sweden.

Regarding criminal liability, after a medico-legal investigation that lasted a year, Paolo Macchiarini was found guilty in 4 of the 5 cases under investigation, but not for murder or manslaughter, but for bodily injury, establishing that the patients would have died even under the administration of a different treatment. A sentence was pronounced against him by which he was sentenced to a punishment whose execution was suspended under supervision, its amount being increased on appeal to 2 years and 6 months.[13]

- **Albert Einstein - plagiarist of the 20th century?**

Among the most controversial cases of intellectual theft, which has generated numerous debates over time, is the accusation of the most famous scientist in history: is Albert Einstein, or not, the true author of the theory of relativity?

The one declared by the famous publication Time Magazine as the *„man of the century"* published in 1905 the most famous equation in history: *„E=mc2"*, in his work on the theory of relativity, but without citing any reference.

Critics appreciated at the time that several of the concepts supported in the previously mentioned work belonged to the mathematician and physicist of Dutch origin Hendrik Lorentz, but also to his French counterpart, Henri Poincare.

In his 1907 paper, Einstein expressed his opinion about plagiarism: *„It seems to me that, in the nature of things, what follows has already been partially worked out by others. Notwithstanding this, as the subject at hand is treated here in a different way. From my point of view, I feel disconnected from having to do extensive literature research"*[14], implying that plagiarism, when properly disguised, is an acceptable tool in research.

The allegations regarding the intellectual fraud committed by Einstein are not limited to the publication of the work shown above, but also concern the falsification of data allegedly carried out in order to demonstrate the theory of relativity, on the occasion of the solar eclipse of 1919.

„There can be no clearer definition of scientific fraud than what happened in the tropics on May 29, 1919".[15]

The total solar eclipse of May 29, 1919 motivated the astronomer Arthur Eddington to travel to West Africa, in a location whose positioning favored its observation, in order to verify Einstein's general theory of relativity.

What is claimed in the works of several critics is that Eddington falsified the coordinates of the solar eclipse in order to influence the results of the study to conform to Einstein's works on general relativity.

It is well known that Eddington was not familiar with the basic principles of science, his task being exclusively the collection of data in order to verify theories.

The fraud perpetrated in favor of the scientist can easily be inferred from Eddington's own statements according to which *„It appeared that the effort, as far as the Principe expedition was concerned, might have failed. I developed the photos, two each night, for six nights after the eclipse. Cloudy weather messed up my plans and I had to interpret the measurements in a different way than I intended. Consequently, we could not make any preliminary announcement of the result".*[16]

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[13] Netflix documentary – Bad Surgeon – Love under the Knife.

[14] *https://www.impact.ro/plagiate-celebre-din-istorie-hotia-intelectuala-ca-mod-de-parvenire-301674.html*.

[15] translated text - *https://www.techcounsellor.com/2017/04/albert-einstein-plagiarist-century/*.

[16] R.W. Clark, *Einstein: The Life and Times*, Avon Books, New York, 1984.

Eddington's obvious falsification of data represents a blatant undermining of the scientific process, which resulted in the scientist Albert Einstein's overnight rise to international fame, despite the fact that the data underpinning the study in question were fabricated and do not represent a solid argument for general relativity.

However, Albert Einstein is still recognized worldwide for his significant contributions to science, and the originality and authenticity of his theories are accepted by the international scientific community.

6. Other famous cases of intellectual fraud

- **The case of Saddam Hussein**

In 2003, Saddam Hussein and his government prepared an official document for the UN on Iraq's military operations and weapons. The content of this document reproduced large fragments of reports prepared by the UN itself, modified in such a way as to give the impression of an original document.

This form of political plagiarism concealed important information about Iraq's weaponry, and the alleged possession of weapons of mass destruction was one of the reasons behind the 2003 invasion of Iraq, which led to the fall of Saddam Hussein and his regime, as well as the political and civil unrest in Iraq in the following years.

- **The case of Martin Luther King**

The intellectual fraud alleged to have been committed by the political activist - fighter for the civil rights of black people in the USA - Martin Luther King, aims at two alternative ways: on the one hand, plagiarism in his academic research works, including the doctoral thesis defended in 1955 and, on the other hand, the use of borrowed phrases in his speeches.

According to civil rights historian Ralph Luker, King's work, *„The Chief Characteristics and Doctrines of Mahayana Buddhism"* was taken almost entirely from secondary sources.

However, the doctor title was not withdrawn, and Martin Luther King's great achievements were not overshadowed by this discovery.[17]

- **The case of Barack Obama**

In 2008, before he became the world's most influential leader, Barack Obama was put in the position of giving explanations for a speech given on the campaign for the Democratic presidential nomination. It has been argued that this speech is similar to one previously given by another politician, Massachusetts Governor Patrick Deval, both of which contained famous quotes from other American leaders, such as Martin Luther King's famous *„I have a dream"*.

The situation remained only a circulating media topic, without producing other consequences, with Deval publicly declaring his friendship with Barack Obama, and the latter publicly apologising to him for not mentioning him as a co-author of the speech.[18]

- **The case of Joseph Biden**

Even the American politician Joseph Biden, the current president of the USA, did not escape the scrutiny of the anti-plagiarism *„police"*.

In 1988, Joe Biden ran for president for the first time. During the campaign, controversies related to accusations of plagiarism against him arose, both by taking, in his speeches, some fragments from the speeches of other politicians, and by plagiarising 5 pages, out of 15, of an academic paper produced in the first college year.

The politician did not dispute the allegations and withdrew from the race for the Democratic Party nomination before the primary election.[19]

- **The case of Melania Trump**

The case of plagiarism of the speech given in 2016 by Melania Trump, at the Republican National Convention, shortly after the inauguration of President Donald Trump, is also in the sphere of contemporary daily life.

The speech contains passages and is clearly structured very similar to the one delivered by Michelle Obama in 2008: *„From a young age, my parents instilled in me the values of working hard for what you want in life, of doing what you say and keeping your promises and treating people with respect. (…) We must pass on these lessons to more future generations. Because we want all the children of this nation to know (…)"* - Melania Trump 2016.

„Barack and I were raised with so many similar values: to work hard for what you want in life, to do what

[17] *https://en.wikipedia.org/wiki/Martin_Luther_King_Jr._authorship_issues#:~:text=Boston%20University%2C%20where%20King%20received, who%20wrote%20about%20the%20topic.*

[18] *https://evz.ro/cazuri-celebre-de-plagiat-987678.html*.

[19] *https://www.politico.com/news/2021/01/19/joe-biden-1988-campaign-redemption-460332*.

you say, to keep your promises, and to treat people with respect (…) Barack and I set out to build lives guided by these values and to pass them on to the next generation. Because we want all children (…)" - Michelle Obama 2008.

This circumstance, although it did not produce administrative or legal consequences, represented a sensational media topic and was debated with great interest internationally, including on social networks.[20]

- **In Romania**

Plagiarism has become a phenomenon worthy of consideration in Romanian society, especially in the sphere of public office holders.

Among the well-known cases that drew attention to research integrity are: the case of former Prime Minister Victor Ponta, accused of plagiarism in his doctoral thesis. These accusations generated civil lawsuits, aiming to suspend the decision to withdraw the title of *„doctor"*, but also numerous controversies in the public space. In the end, the former Prime Minister voluntarily renounced his academic degree.

Equally, other personalities from Romania have been the object of extensive investigations regarding the plagiarism of academic works, among them Laura Codruța Kovesi - Chief Prosecutor at the European Public Prosecutor's Office, former Chief Prosecutor of the National Anticorruption Directorate, Robert Negoiță - Mayor of Sector 3 of Bucharest, Mihai Tudose - Deputy and former Prime Minister of Romania, Florin Roman - Deputy and former Minister of Research, Innovation and Digitization, as well as other personalities, especially from the academic environment.

7. Preventing and combating intellectual theft. Strategies and technologies

Intellectual fraud is, as I have shown before, a constant threat to creativity, innovation and scientific and academic integrity. In the current context, where technology is rapidly evolving and digitization is taking control worldwide in more and more fields, it is crucial to properly adapt the methods of preventing and combating intellectual theft.

Under the first aspect, the implementation of educational programs is essential for awareness of the phenomenon and prevention of its spread. Both academic institutions and other levels of education should focus their efforts in the direction of informing pupils and students about the forms of manifestation of this phenomenon, but also about the associated risks and the legal consequences it can generate.

The development and constant revision of clear organisational anti-fraud policies is particularly relevant in the context of the prevention of intellectual theft, all the more so as the regulations aim at harsh sanctions for the persons responsible for such practices, both in the manner of academic, disciplinary, financial and professional sanctions, as well as criminal liability.

Another concept of interest for the defense of the values in question is the transparency in the publication of scientific works, but also the collaboration between governments, academic institutions or organisations, for the development of common strategies or, at least, for the maintenance of similar practices.

Of course, the most relevant and effective measure to prevent and combat intellectual fraud remains the Big Data analysis, the use of specialised software platforms for detecting plagiarised passages respectively, with the help of which the content of works can be analysed by reporting to extensive databases, drawing up, thus, a detailed report.

The use of AI in the fight against intellectual fraud is a particularly effective approach, as its complex algorithm can identify not only direct similarities, but also topical or semantic aspects.

Adapting to technological evolution, in an increasingly connected and digitised world, requires the adoption of new measures to prevent and combat intellectual theft, or the updating of those already used. Thus, the development of innovative content marking technologies could eradicate the unauthorised taking of protected content.

The biggest challenge of the current times, in combating this phenomenon, remains the implementation of blockchain technology for the authentication and highlighting of copyrights. This technology can automate the process of licensing and distribution of intellectual works, by creating *„smart contracts"* - computer programs that allow the completion of truthful transactions between parties, without the need for the intervention of a third party for validation. At the same time, blockchain could place intellectual or artistic works under the concept of *„token"* - a digital representation of these assets, which can be used to trace their provenance and confirm their authenticity. The information recorded in a blockchain cannot be altered, modified retroactively, so it can give full evidence of the history of an intellectual work, in terms of content changes.

Educational institutions can implement tamper-proof systems for preserving academic credentials by the

[20] *https://edition.cnn.com/2016/07/19/politics/melania-trump-michelle-obama-speech/index.html*.

valorisation of blockchain technology, thus discouraging fraudulent activities and cultivating the authenticity of academic achievements.

At the international level, there are already educational institutions that have adopted blockchain for digital certification. The implementation of this technology allows students secure access to the documents attesting to their professional qualification, eliminating the need to make copies of the documents in physical format, simplifying the administrative procedure.

At the national level, although blockchain technology has not yet been valorised in education or research, it has made its presence felt as a way to protect intellectual property rights.

A team of Romanians initiated a process of evaluating the NFTs (unique digital assets) existing on the access platforms to the digital assets market, and in the situation where they identify excessive similarities with products already listed for trading, they prevent the publication of a duplicate, especially protecting creators, collectors, artists and traders of digital art.

This initiative appeared after the Romanian state was obliged to pay compensation in the amount of more than one million euros, following the use of the leaf - a symbol copied and slightly adapted, in the content of the Romanian tourism logo. A similar situation took place in 2017, on the occasion of the competition organised by the Bucharest City Hall to designate the city logo. The day after the winning logo was announced, it was determined that it had been plagiarised from the Internet, and the contract was awarded to the next winner, whose symbol was also later identified as having been copied.[21]

To fight academic dishonesty, the educational sector, and even more so the scientific sector, must adopt innovative solutions. Blockchain technology offers solutions for setting new standards of academic integrity, revolutionising data storage, evaluation and verification.

8. Conclusions

This paper addresses, from a criminal, deontological and moral perspective, the complex issue of intellectual „*thievery*", a real threat to scientific and academic innovation and integrity.

From a criminal point of view, the protection of intellectual property falls under the responsibility of internal regulations, putting the legislator in front of new challenges, to keep up with the evolution of technology but also with the ways of committing this type of fraud.

From a deontological perspective, the responsibility of education in order to respect academic integrity rests with higher education institutions, by promoting good practices, in order to establish and maintain an educational community based on equity and trust.

The essence of society's efforts to combat intellectual fraud practices is, however, the moral dimension of the problem. Recognizing the merits of the authors, encouraging high ethical standards, but also the awareness and prevention of serious, sometimes disastrous, consequences that can be caused by the practice of intellectual fraud in the scientific and academic sphere, are of a nature to preserve the integrity of research.

The products of technological evolution, such as AI or blockchain technology, can represent valuable weapons in the fight against intellectual theft, their implementation contributing overwhelmingly to the management and limitation of illicit practices against intellectual property.

In relation to all the aspects addressed above, it should be noted that transparency, fairness, authenticity, trust and efficient management of progress and academic integrity can be capitalised through the joint activity of all those anchored in the creation and learning process, to build a future where the personal contribution is protected and valued at its fair value.

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ABOUT THE PREREQUISITE SITUATION IN THE CASE OF THE OFFENSE OF MISAPPROPRIATION OF A WORK

Ciprian Raul ROMIȚAN[*]

Abstract[1]

Article 197(1) of Law no. 8/1996 on copyright and related rights, republished, criminally sanctions the appropriation of a work or part of a work by a person who has not contributed to the creation of that work and who presents it as his/her own creation. The act of appropriating a work or part of a work can be done in various ways, such as: publishing works under one's own name, as if it were made by the author, signing an intellectual creation, as co-author, in the literary, scientific, musical, artistic or fine art field without having any contribution to its creation, etc.

Analysis of the legal text shows that the material element of this offense consists of two cumulative actions, namely the act of appropriating, without right, in whole or in part, the work of another author and the act of presenting it as one's own intellectual creation.

At the same time, the analysis of the author of this study shows that in order to be able to prove the commission of this offense it is necessary that the appropriation is followed by the presentation of the work as one's own creation. It should be emphasised that in the absence of the action of presentation, it cannot be held that the offense provided for and punished by art. 197(1) of Law 8/1996 on copyright and related rights, republished, has been committed.

Keywords: *work, copyright, appropriation of authorship, without right, prerequisite, plagiarism, originality.*

1. Introductory concepts

As I have pointed out in other papers[2], *„work"* means „the original intellectual creation in the literary, artistic or scientific field, whatever its mode of creation, mode or concrete form of expression and regardless of its value and destination". The work, regardless of the field to which it belongs (literary, artistic or scientific) and regardless of the manner or form in which it has been expressed (in writing, in speech, in images, in sounds or by any other means of communication to the public), is protected by *copyright*[3].

In this respect, in accordance with the provisions of art. 7 of Law no. 8/1996 on copyright and related rights, republished[4] „(a) literary and journalistic writings, lectures, sermons, sermons, pleadings and any other written or oral works, and computer programs; (b) scientific works, written or oral, such as: communications, studies, university courses, school textbooks, scientific projects and documentation; c) musical compositions with or without text; d) dramatic works, dramatical-musical works, choreographic works and pantomimes; e) cinematographic works, as well as any other audiovisual works; f) photographic works, film stills, as well as any other works expressed by a process analogous to photography; g) graphic or plastic works of art, such as: works of sculpture, painting, engraving, lithography, monumental art, scenography, tapestry, ceramics, glass and metal

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[1] The study is based on a form I presented orally at the National Conference on Criminal Business Law, 8th ed., Bucharest, 7-9 July 2020 (online). The present study contains a revised, amended and supplemented form with both doctrine and case law.

[2] R. Pârvu, C.R. Romițan, *Dreptul de autor și drepturile conexe, Lexicon juridic,* All Beck Publishing House, Bucharest, 2005, p. 74. From the outset, I must point out that this study is based on references and texts written by me or co-authored by me and published in various works: C.R. Romițan, *Nașterea și evoluția dreptului de autor*, Universul Juridic Publishing House, Bucharest, 2018; C.R. Romițan, *Însușirea în întregime sau în parte a operei unui alt autor*, published in the volume of the Conference *„Contrafacerea, concurența și protecția produselor tradiționale în Uniunea Europeană*", Universul Juridic Publishing House, Bucharest, 2017, pp. 253-278; C.R. Romițan, *Drepturile morale de autor*, Universul Juridic Publishing House, Bucharest, 2007; C.R. Romițan, *Protecția penală a proprietății intelectuale,* All Beck Publishing House, Bucharest, 2006; C.R. Romițan, M.L. Savu, *Drepturile morale ale artiștilor interpreți sau executanți*, in *„Drepturile artiștilor interpreți sau executanți*", Universul Juridic Publishing House, Bucharest, 2008; C. Duvac, C.R. Romițan, *Drepturile morale de autor. A brief retrospective on the regulation of these rights internationally and domestically. Protecția penală a drepturilor morale de autor*, in Revista Română de Dreptul Proprietății Intelectuale no. 3/2012, pp.90-117; C.R. Romițan, *Drepturile morale de autor sub imperiul Legii nr. 8/1996,* in Revista Română de Dreptul Proprietății Intelectuale no. 1/2007, pp. 138-164; C.R. Romițan, *Drepturile morale de autor și protecția acestora prin mijloace de drept penal*, in Revista Română de Dreptul Proprietății Intelectuale no. 1/2004, pp. 72-88.

[3] For developments on the protection of copyright works, see V. Roș, *Dreptul proprietății intelectuale. Dreptul de autor și drepturile conexe*, vol. I, C.H. Beck Publishing House, Bucharest, 2016, pp. 180-181.

[4] Republished in the Official Gazette of Romania no. 268/27.03.2018, giving the texts a new numbering.

plastics, drawings, design and other works of art applied to products intended for practical use; h) architectural works, including plans, models and graphic works forming architectural designs; i) plastic works, maps and drawings in the field of topography, geography and science in general".

Also, according to art. 8 of the same normative act, „the subject matter of copyright shall be derivative works created from one or more pre-existing works, namely: a) translations, adaptations, annotations, documentary works, arrangements of music and any other transformation of a literary, artistic or scientific work that themselves entail creative intellectual work; b) collections of literary, artistic or scientific works, such as encyclopaedias, anthologies and collections and compilations of protected or unprotected material or data, including databases, which, by reason of the selection or arrangement of their subject matter constitute intellectual creations"[5].

In one of my works[6] I pointed out that, since ancient times, written works brought to the public's attention „*have aroused passions and convulsions of political, religious, moral or august anger*"[7]. In this regard, in the „*Preface*" to the „*Istoria cărții*" („*History of the Book*") by Albert Labarre, one of the world's foremost scholars on the book, this „*cure for the soul*"[8], it is stated: „*Books are stolen, books are stolen from, books are stolen with, books are stolen at*. *Then they swear on the books*"[9].

2. Regulation and some considerations on the material element of the offense

According to art. 197(1) of Law no. 8/1996 on copyright and related rights, republished, „it is an offense and punishable by imprisonment from 6 months to 3 years or a fine for a person who appropriates, without right, in whole or in part, the work of another author and presents it as an intellectual creation of his/her own".[10]. According to para. (2) of the same article, „the reconciliation of the parties removes criminal liability".

Before the amendments made by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code[11], the text of art. 141 of Law no. 8/1996 on copyright and related rights had the following content: it is an offense and is punishable by imprisonment from 3 months to 5 years or a fine from lei 2,500 to lei 50,000 „*the deed of the person who appropriates, without right, the authorship of a work or the deed of the person who brings to public knowledge a work under a name other than that decided by the author*".

An analysis of the two texts shows that, in the new regulation, a single deed is incriminated, which is carried out through two actions and in order to be considered an offense, they must be cumulatively fulfilled (appropriation of the work and presentation of the same work as one's own work). By contrast, the old rules penalised two separate deeds, on their own, namely the deed of misappropriation of authorship (the first deed) and the deed of making a work known to the public under a name other than that chosen by the author (the second deed).

At the same time, we note that the special minimum penalty limit has increased from 3 months in the previous regulation to 6 months in the current version, while the special maximum limit has decreased from 5 years in the old regulation to 3 years in the current regulation.

Finally, we note that, at the time of the present study, the legislator has regulated the possibility of reconciliation of the parties*,* which may also result in the removal of criminal liability, according to art. 16 para. (1) letter g) CPP.

From reading the new text, *i.e.,* art. 197 para. (1) of Law no. 8/1996, republished, we observe that the legislator transposes, in fact, we believe unintentionally, part of the words previously quoted from the „*Preface*" of Albert Labarre's „*History of the Book*", namely, „*books are stolen*" - the appropriation in full of the work of another author and „*books are stolen from*" - the appropriation in part of the work of another author.

In other words, we can say that the offense provided for in art. 197 para. (1) of Law no. 8/1996 on copyright and related rights, republished, sanctions criminally, theft, „intellectual theft", in everyday speech, *i.e., appropriation of a work or part of a work* by a person who did not contribute to the creation of that work and

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[5] For details on the definition of certain genres of works, see R. Pârvu, C.R. Romițan, *op. cit.,* pp. 74-77; N.R. Dominte, *Dicționar de dreptul proprietății intelectuale,* C.H. Beck Publishing House, Bucharest, 2009, pp. 131-138; F. Bujorel, *Dicționar de dreptul proprietății intelectuale,* Universul Juridic Publishing House, Bucharest, 2012, pp. 163-169.

[6] C.R. Romițan, *Însușirea în întregime sau în parte a operei unui alt autor*, in the volume of the Conference „*Contrafacerea, concurența și protecția produselor tradiționale în Uniunea Europeană*", *op. cit.,* p. 353.

[7] R. Tătărucă in „*Preface*" to Albert Labarre, *Istoria Cărții (The History of the Book),* translation by C. Secăreanu, European Institute Publishing House, Iași, 2001, p. 7.

[8] More than three millennia ago, on the frontispiece of the library of Pharaoh Ramses II, it was written „*The book is the cure for the soul*" (A. Sîrghie, *Istoria scrisului, a cărții și a tiparului*, Alma Mater Publishing House, Sibiu, 2005, p. 163).

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[11] Published in the Official Gazette of Romania no. 757/12.11.2012.

which he/she *presents as his/her own creation*. The act of appropriating a work or part of a work can be done in various ways, such as: publishing works under one's own name, as if it were made by the author, signing an intellectual creation, as co-author, in the literary, scientific, musical, artistic or fine art field without having any contribution to its creation, etc.

As can be seen, *the material element* of the offense provided for and punished by art. 197 para. (1) of Law no. 8/1996, republished, consists of *two cumulative actions*, namely the *action of appropriating, without right, in whole or in part, the work of another author* and the *action of presenting the appropriated work as one's own intellectual creation*[12].

An analysis of the legal text shows that, in order to be able to prove the commission of this offense it is necessary that the appropriation is followed by the presentation of the work as one's own creation. We must note and specify that in the absence of the action of presentation, it cannot be held that the offense provided for and punished by art. 197 para. (1) of Law no. 8/1996 on copyright and related rights, republished, has been committed.

In the public space, particularly in the media, and not only[13], this deed is called *plagiarism* and it is said that there are several forms of plagiarism, namely plagiarism by reposting, self-plagiarism, online plagiarism (copying texts from a network), *copy-paste* plagiarism, subtle plagiarism, gross plagiarism, disguised copying or unconscious plagiarism.

This latter form of „*unconscious plagiarism*" was introduced into common parlance by the judge who decided on the case „*My Sweet Lord"* (1970) v. „*He's So Fine*" (1962) on the famous Beatles drummer George Harrison who, in 1970, after the break-up of the band, recorded his first solo single. Ronnie Mack, songwriter of The Cliffons, noticed similarities between the two songs and filed a lawsuit against George Harrison, accusing him of plagiarism. He, in his defense, pointed out that the song was inspired by the religious hymn in the public domain „*Oh Happy Day*", but admitted the similarity to the song „*He's So Fine*". The judge in the case ruled that George Harrison was guilty of *„unconscious plagiarism"* being initially ordered to pay the songwriter $1.5 million in damages, then only $587,000. From a legal point of view, the case is important because it introduced the concept of „*unconscious plagiarism*"[14] into common parlance.

As I have already pointed out[15], all forms of *„plagiarism"* mentioned *above do not legally exist and are not incriminated.* If we incriminate similarity and resemblance then we condemn development, research and creation in general. If we accept that similarity and resemblance is plagiarism then there should be one treatise on civil procedure, one treatise on criminal procedure, one treatise on history, one treatise on anatomy and the examples could go on in every field. In other words, we would have one book in each area.

In the same sense, in a decision of the Paris Court of Appeal of 9 March 1964, in which the author of an article published in the magazine „Elle" on Napoleon's relationship with Maria Walewska was accused of illegally reproducing passages taken from Count Phlippe d' Ornano's *Marie Walwska, l'epouse polonaise de Napoleon* , the court rejected the charge of counterfeiting, stating that „*it is certain that every historian has the right to treat a subject which has already been treated by others; that his/her exposition will necessarily have similarities with previous ones; that successive works dealing with the same historical subject, even if they have many similarities, will be different both because of the author's own talent and because of his commentaries, the way in which common sources are used and his own interpretation of the subject*" and that the defendant's article, viewed in this light, had nothing of a slavish copy of d'Ornano's book, but on the contrary had a certain originality[16].

Without wishing to enter into a polemic with anyone, I would just like to point out the following example: two students who do not know each other, from different universities, each independently choose the same topic to present as a dissertation. Do you think their work will be similar, resembling? Yes, certainly their work will be similar, but it doesn't mean they plagiarised from each other. Therefore, the similarity, the similarity is the objective consequence of the topic analysed, of the standardised language they are obliged to use, of the

[12] In the same sense, see V. Roș, *op. cit.,* (2016), p. 670. For a detailed analysis of this offense, both under the auspices of the regulations before the amendments brought by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, and after, see C.R. Romițan, *Protecția penală a proprietății intelectuale,* All Beck Publishing House, Bucharest, 2006, pp. 168-172; C.R. Romițan, *Însușirea în întregime sau în parte a operei unui alt autor*, *op. cit.,* pp. 260-278; F. Bujorel, *Infracțiuni contra drepturilor de creație intelectuală*, Universul Juridic Publishing House, Bucharest, 2015, pp. 68-79; L.T. Poenaru, *Protecția dreptului de autor în dreptul penal*, C.H. Beck Publishing House, Bucharest, 2015, pp. 259-295.

[13] Law no. 206/2004 on good conduct in scientific research, technological development and innovation, published in the Official Gazette of Romania no. 505/04.06.2004.

[14] A comparison of the lyrics of the two songs and the musical composition is available online at *https://youtu.be/sYiEesMbe2I* (accessed 29.01.2020), *apud* A.M. Marinescu, *Cazuri de plagiat în muzică,* in Revista Română de Dreptul Proprietății Intelectuale no. 3/2019, p. 64.

[15] C.R. Romițan, *Însușirea în întregime sau în parte a operei unui alt autor*, *op. cit*., p. 272.

[16] See „Revue internationale du droit d'auteur", 1965, pp. 199-215, *apud* Y. Eminescu, *Dreptul de autor. Legea nr. 8 din 14 martie 1996, annotated*, Lumina Lex Publishing House, Bucharest, 1997, pp. 201-202.

bibliographical sources analysed.

A simplistic interpretation of art. 197 para. (1) of the Law, one could conclude that even a single paragraph of a copyrighted work, if misappropriated, can form the basis for a criminal charge. Such an interpretation cannot be accepted. Also, the charge of misappropriation of a phrase cannot be accepted. Let's not throw this deed into derisory. Identically retrieved texts must be of a certain „quantity"[17].

We also consider that a specialist expertise in cases of appropriation of a work in whole or in part is superfluous. The prosecuting authority and the judge alone can determine whether the appropriated part is identical to that in a previous work, whether it is protected, and whether the removal of this part „kills" the work likely to be misappropriated, *i.e.*, plagiarised, in everyday language.

The High Court of Cassation and Justice, having to resolve a charge brought against university professors, finding that they had appropriated 87% of a pre-existing work, ruled that „*the citation and indication of bibliographical sources were not made in relation to academic norms and the nature of the work, respectively, and in relation to the proportion of the text reproduced in the whole of the defendants' work*"[18]. If we were to remove the text borrowed from the pre-existing work, *i.e.*, 87%, what would survive from the new work?! In this case, given the provisions of art. 197 para. (2) of Law no. 8/1996, republished, according to which the reconciliation of the parties removes criminal liability, the Supreme Court took note of the parties' willingness to reconcile and ordered the cessation of the criminal proceedings.

3. The prerequisite situation of the offense

In order to be able to establish that this offense has been committed, it is first necessary to examine *whether there is a prior protected work of intellectual creation* and here we are considering both a *whole work* and *part/parts of a work.* In other words, this offense is conditional on a *prerequisite situation*, namely *the pre-existence of an entire protected work or protected parts of a work*.

In order to establish that the prerequisite situation is fulfilled, the content of the pre-existing work or of the appropriated part thereof must be analysed with reference to the limitations provided for in art. 9 of Law no. 8/1996, republished, which provides that „***the following are not eligible for legal copyright protection****: ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts as such and inventions, contained in a work, regardless of the manner in which they are taken up, written, explained or expressed; official texts of a political, legislative, administrative or judicial nature and official translations thereof; official symbols of the State, public authorities and organisations, such as: coat of arms, seal, flag, emblem, badge, and medal; means of payment; news and press information; simple facts and data; photographs of letters, deeds, documents of any kind, technical drawings and the like; materials resulting from an act of reproduction of a work of visual art, the term of protection of which has expired, unless the material resulting from the act of reproduction is original in the sense that it is the author's own intellectual creation." (s.n.).*

It follows from an analysis of this text that the taking from another work of any of the ideas, news, theories, data, facts and other elements provided for in the text **cannot constitute an offense** because part of a work which is not protected by copyright is taken and, therefore, *the author of the pre-existing work does not have any right to the elements taken* which are excluded from protection. In the same sense, at a legal debate on the subject of „plagiarism", Mrs. Constanța Moisescu, a former judge at the Bucharest County Court, stated that: „*the taking of quotations is not a deed because they are not original*" and for plagiarism to exist it is necessary „*to appropriate in part or in whole protectable elements*"[19]. In the same sense, other authors[20] have considered that if elements are taken from scientific works that are not subject to protection because they belong to the public domain, we are not-dealing with an illicit reproduction of the scientific work in question.

As our supreme court has also ruled in a case[21], „*originality is a criterion to be taken into account both in determining whether a written work is a protectable work and in assessing the lawfulness of the reproduction, which is determined by the form of expression of the ideas*. *The more technical the idea, the less originality and the weaker the legal protection*". Originality, said James Stephens, Irish novelist and poet, „*lies not in saying what no one else has said, but in saying exactly what you think yourself*"[22].

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[17] For further developments, see C.R. Romițan, *Însușirea în întregime sau în parte a operei unui alt autor*, *op. cit*, pp. 273-274.

[18] HCCJ, crim. s., dec. no. 356/A/2014, given in public sitting on 04.11.2014, available at *www.csj.ro* (accessed on 17.03.2024).

[19] Debate „*Copy Paste*" - „*About plagiarism*", organised by *www. juridice.ro*, Bucharest, 13.06.2016. The audio-video recording of the event can be found online at *https://dezbateri.juridice.ro/6153/copy-paste* (accessed on 28.01.2020).

[20] For developments, see V. Roș, A. Livădariu, *Condiția originalității în operele științifice*, in Revista Română de Dreptul Proprietății Intelectuale no. 2/2014, p. 28.

[21] HCCJ, civ. and intellectual property s., dec. no. 8/11.01.2011, available online at *www.scj.ro* (accessed on 14.03.2024). In the same sense, see also the HCCJ, civ. and intellectual property s., dec. no. 1978/25.03.2008, available online at *www.scj.ro* (accessed on 14.03.2024).

[22] *http://www.citatecelebre.net/citate-inspiratie/james-stephens/* (accessed on 19.08.2017).

In the *above* case*,* with regard to the chapters alleged to be unlawful, *i.e.*, appropriated/plagiarised, the High Court ruled that *„they are natural, since the insertion of veterinary medical knowledge accepted as common knowledge and of texts of a legislative, administrative and judicial nature can only be done using standard wording, outside of which such knowledge would become inaccurate. Both medical language and legal language are characterised by uniformity, and cannot be used differently, but must be taken up exactly by users. Given the nature of the two works being compared, determined by their belonging to the category of scientific works in the field of veterinary medicine, it should be noted that in such works originality is attenuated by the form of expression of ideas or of rendering information, which contain a specialised, almost standardised language".*

In the sense of those mentioned, in the specialised literature, Prof. Viorel Roș[23] pointed out that the form of expression must be analysed according to the genre of the work in question, because there are areas in which the analysis of an institution or event can only be made in certain terms already established, and if one were to try to use terms other than those established, for fear of being accused of violating the provisions of art. 197 of Law no.8/1996, republished, one would end up in the undesirable situation that the essence of the information rendered would be distorted, would be imperceptible. For example, in the case of scientific works in any field (law, medicine, history, mathematics, etc.), the originality of the form of expression is limited by the rigor of scientific language, by the need to formulate as concisely and explicitly as possible the ideas, theories, concepts, arguments in support of the demonstration to be made.

Along the same lines, in a study published in 1937 in „Pandectele săptămânale", the jurist Eugen Petit, adviser to the High Court of Cassation and Justice[24] said: *„Jurists know that in all the classical law treatises the same ideas are repeated almost word for word, without it being possible to know sometimes who wrote them first. They are so widespread that we can say that they are in the public spiritual domain, that is, they belong to everyone. By reproducing such passages, no one bothers to show their origin. This is why we believe that it is not enough to find a passage or two reproduced from another author in a book or magazine article to be able to make a serious accusation of plagiarism"[25].*

For the purposes of the above, we all know that our legal field is a field that relies mostly on normative sources (legislation) and texts written by other authors. Therefore, any work of law starts from documents on the legal regulations in the subject we want to analyse, then on the opinions of other authors expressed in the doctrine and then on our interpretations, of the one who does the work. *Thus, much of the work we want to produce will have similarities with previous work, and the originality of the text of the new work will be limited by the rigor of the scientific language.*

Also, in an interview with the „*Cultural Observatory*", Professor Mihai Lucian said that: „*the author of a book cannot disregard previously published books in the same field; in principle there can be no plagiarism in the case of reproductions of well-known truths; the principle est modus in rebus can and must govern the diagnosis, in the sense that a full accusation of plagiarism cannot be made when there is evidence that the identical or similar passage(s) are mere oversights if the work as a whole is considered*"[26].

If we were to look at it any other way, then we would hinder development and end up with the undesirable situation of no one writing in a particular field (law, history, mathematics, medicine, science, etc.). It cannot be accepted that if an author has previously dealt with a topic, subject, field, and the data, information, facts, ideas presented there cannot be presented in a subsequent work, and if they are presented, it means that the second author „plagiarised" the first. In this hypothesis we are not in the presence of an infringement of art. 197 para. (1) of Law no. 8/1996 on Copyright and Related Rights, republished, because the appropriation concerns elements that are not protected by copyright.

However, in the situation presented, for certain categories of personnel carrying out *scientific research, technological development and innovation activities,* expressly provided for in Law no. 319/2003 on the status of research and development personnel[27], as well as for other categories of personnel, in the public or private

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[23] V. Roș, *Contrafacerea și plagiatul în materia dreptului de autor. Retrospectivă istorică și încercare de definire,* in Revista Română de Dreptul Proprietății Intelectuale no.1/2004, p.112.

[24] Eugen-Dimitrie Petit, was born on 28.01.1882 in Iași and died in 1959. He was a prominent jurist, magistrate, publicist, author of legal works, advisor to the High Court of Cassation and Justice. For details of Eugen Petit's life and work, see *www.wikipedia.org/wiki/Eugen-Petit* (accessed 01.03.2024).

[25] See M. Romițan, *Unele considerații cu privire la noțiunea de plagiat,* in Revista Română de Dreptul Proprietății Intelectuale no. 2/2008, pp. 119-122, where, thanks to the kind permission of the management of Wolters Kluwer Romania, publisher of „Pandectele române", who gave us their consent, Eugen Petit's article was published. Originally, the article *Plagiarism*, was published in „Pandectele săptămânale no. 34/1937, pp. 793-794, under the signature of Eugen Petit.

[26] L. Mihai, *Citarea constituie o obligație legală*, available at: *http://www.observatorcultural.ro/Citarea-constituie-o-obligatie-legala.-Interviu-cu-Lucian-Mihai*articleID_9334-articles_details.html* (accessed on 24.08.2010).

[27] Published in the Official Gazette of Romania no 530/23.07.2003. From a reading of art. 1 para. (1) and para. (2) of Law no. 206/2004, we note that this normative act has a limited scope and applicability. Thus, according to art. 1 para. (1), *„Good conduct in scientific research, technological development and innovation activities, hereinafter referred to as research and development activities, shall be based on a set*

sector, benefiting from public research and development funds*,* the following provisions *may apply* Law no. 206/2004 on good conduct in scientific research, technological development and innovation[28]. It should be stressed, as has been pointed out in the legal literature[29], that this normative act „*does not regulate nor does it guarantee authors an exclusive intellectual property right over elements such as texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods included in previously published works*".

Therefore, Law no. 206/2004 on good conduct in scientific research, technological development and innovation does not prohibit the extraction of these elements from previous published works, but only sanctions their extraction „*without citation*", *i.e.*, „*without mentioning this and without reference to the original sources*". As one author[30]pointed out, under the provisions of Law no. 206/2004, „*lying about alleged academic performance is sanctioned*". Also, from the analysis of the above, it is clear that the object of regulation of this normative act is not copyright but „*good conduct in scientific research, technological development and innovation activities*"*.*

Therefore, the categories of persons to whom the provisions apply Law no. 206/2004 on good conduct in scientific research, technological development and innovation are limitatively and expressly provided for by the law, and no other interpretation can be given, except by unjustifiably extending the application of that law.

Following the above, we consider that the definitions of plagiarism stipulated in art. 4 letter d) of Law no. 206/2004[31] and in art. 169 letter d) of Law no. 199/2023 on higher education[32], should not be generalised to all categories of persons who, in one way or another, produce a work of intellectual creation, but only to the categories of personnel expressly established by law, as we have shown.

4. Conclusions

In conclusion, in order to be able to consider the commission of the offense provided for and punished by art. 197 of Law no. 8/1996 on copyright and related rights, republished, it is necessary, first of all, to analyse *whether there is a protected prior work of intellectual creation* and here we have in mind both a whole work and part/parts of a work. In other words, this offense is conditional on a *prerequisite situation*, namely *the pre-existence of an entire protected work or protected parts of a work.*

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of rules of good conduct and procedures designed to ensure compliance with them" Para. (2) also states that „*The rules of good conduct are laid down in this Law and are supplemented and detailed in the Code of Ethics and Professional Conduct for Research and Development Personnel, hereinafter referred to as the Code of Ethics, laid down by Law no. 319/2003 on the Statute of research and development personnel, as well as in the codes of ethics by field, drawn up in accordance with art. 7(b)*". Also, art. 3 of the above-mentioned normative act states that „*The provisions of this statute shall apply to research and development staff working within the national research and development system, within other organisational structures with state, private or mixed capital, public institutions, as well as within associations or individually.*"

[28] Published in the Official Gazette of Romania no. 505/04.06.2004.

[29] S. Florea, *Plagiatul și încălcarea drepturilor de autor*, in Revista Română de Dreptul Proprietății Intelectuale no. 4/2016, p. 113.

[30] *Ibidem.*

[31] According to art.4 letter d) of Law no. 206/2004, plagiarism constitutes „*the presentation in a written work or an 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, of other authors, without mentioning this fact and without referring to the original sources*"*.*

[32] According to art. 169 (d) of Law no. 199/2023, constitutes plagiarism „*the presentation as an allegedly personal scientific creation or contribution in a written work, including in electronic format, of texts, ideas, demonstrations, data, theories, results or scientific methods taken from written works, including in electronic format, of other authors, without mentioning this fact and without referring to the original sources*". Law no. 199/2023 was published with the Official Gazette of Romania, Part I, no. 614/05.07.2023.

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WELL-KNOWN AND REPUTED TRADEMARK (OR FAMOUS TRADEMARKS)

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Abstract

According to the degree of awareness by the relevant public of the goods and/or services which they identify and whose commercial origin they guarantee, trademarks fall into two broad categories: (i) trademarks whose degree of awareness by the relevant public of the goods and/or services they cover is limited and which, without naming them as such, we consider as common trademarks, although their importance in trade cannot be minimised by this qualification and (ii) trademarks with a broad degree of awareness by consumers.

The latter in turn fall into two sub-categories; (a) well-known marks and (b) reputed marks, but the difference between them is not clear, is not taken into account and does not become important to the public until they realise that they are the victims of infringers, this being relevant only to applicants for registration of signs as marks and to proprietors of marks whether they are common or well-known. Whether they are well-known, when by registration they infringe the rights of others and/or when their rights are infringed, they are usurped by trademark usurpers of any kind.

But is there a difference between them? At first sight, no! And in any case, not for consumers. From a legal perspective, however, these are trademarks with legal regimes between which the differences are greater than the similarities.

But while the first founding Convention of industrial property law grants a special regime to well-known marks, even if it recognises a certain (limited) power of notoriety, this one, like the Agreement on Trade-Related Intellectual Property Rights (TRIPS), says nothing about well-known marks. Trademarks with an initial protection regime under common law and which, when they become well-known because of the quality of the goods or services they identify and the widespread awareness of the public concerned, enjoy a different protection regime from well-known trademarks and a much higher level of protection than common trademarks. This is why we are now trying to clarify the notions.

Keywords: *common marks, well-known marks, marks with reputation or reputed marks, famous marks, similarities and differences between well-known and reputed marks, well-known marks regime, reputed marks regime, protection not conditional on registration, initial protection acquired by registration, extended protection acquired as a result of reputation.*

1. Introduction to the world of famous marks (well-known and reputed)

Try to imagine a world without marks. Without those marks that distinguish the same products and/or services offered in a marketplace of competing retailers, competing with each other and seeking to turn you into loyal customers in order to increase their profits. Signs without which you would randomly choose the product or service you want without being able to identify its commercial origin and without which the choice would be chaotic and without the possibility of knowing in advance whether the product or service meets your expectations. Signs without which traders would not be able to advertise to attract you and assure you of the consistent quality of their services or products. Signs which, apparently, affect the freedom of trade, but whose use is to the benefit of both consumers and traders, because, on the one hand, they help to improve the quality of the goods and/or services on offer and, on the other, anyone can use their own trade mark to identify their goods, as the signs available for use as trademarks are unlimited. It would undoubtedly not only be a dull world, but also one in which there would be no interest in competition and quality. Metaphorically it is said that in the absence of soul, products have marks. And that advertising is the soul of commerce, and advertising without marks is virtually impossible.

Faced with a shelf of products or a range of services identified by marks, only the first choice is difficult. For the second and subsequent choices, things are simpler and with the passage of time, of repeated purchases of goods or services, the choice becomes easier, because the one we made before and which is identifiable with the mark, will only be repeated if the product or service satisfies us, otherwise we continue to search and choose

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until one product or another, one service or another appeals to us enough to make us a regular consumer and a loyal customer of the trader who puts it on the market, offers it. We associate the product with the sign and both with the manufacturer, thus identifying its commercial origin. And when the audience won over by a marked product or service is large in number, the mark and through the mark and the product (which become confused with each other) becoming well known to the target audience it acquires the status of a well-known, reputed or famous mark. A status to which every mark has the right to aspire but which not all marks will achieve, the status of well-known or reputed mark being determined by the degree to which the target public is aware of the goods or services it identifies.

The consumer who is familiar with such marks and the goods or services they designate is, of course, indifferent to the adjective used for them (well-known, reputed, famous) because in common language they are synonymous, equivalent, interchangeable. And indifferent to him is the fact that a sign used as a trade mark and which is well known to the consumer is registered or not with the competent authority (which is an important distinction between the two categories).

For the average consumer (who rarely has the opportunity to make a direct comparison between different marks, relying on an imperfect image which he keeps in his memory and whose attention varies according to the category of goods or services in question[1]) the only important thing is that the mark helps him in his choice, that through it he can identify the commercial origin of the product or service, that the mark gives him a guarantee of the quality of the product/service and the possibility to revise his choices when a product/service which he identifies by the mark does not (any more) meet his expectations. This is why there is often confusion between well-known marks and reputed marks, which are considered to be one and the same thing. And it is natural that this should be the case since the terms are synonymous.

However, the law and traders are not indifferent to the status of a well-known or reputed trademark. On the contrary. But confusion between the two categories of trade marks is also common in the world of law, made up of legislators, academics, legal professionals and jurisprudence and it is, we believe, the fault of the legal world that such confusion is not removed.

It also contributes to the confusion and the wording of art. 6 bis of the Paris Convention, according to which *„The countries of the Union (of Paris, n.n.) shall be obliged, either ex officio if the law of the country so permits, or at the request of the person concerned, to refuse or invalidate the registration and to prohibit the use of a trade mark which constitutes a confusing reproduction, imitation or translation of a trade mark which the competent authority of the country of* ***registration or use shall consider to be well known*** *as being already the trademark of a person entitled to the benefits of this Convention and* ***as being used for identical or similar goods****. The same shall apply where the* ***essential part of the trade mark constitutes a reproduction of such a well-known trade mark*** *or an imitation confusingly similar to it"*. It follows from a simple reading of this text (which today appears to us to be deficient) that the well-known mark could be registered or unregistered, but also that, whether registered or unregistered, the **well-known mark is subject to the principle of speciality**, which means that it can be opposed to the registration of new signs as marks only for goods which are identical or similar to those for which the well-known mark (whether registered or not) is already in use.

We believe that the quoted text of the Paris Convention is outdated today because in the European Union, through Directive (EU) no. 2436 of 16 December 2015 to approximate the laws of the Member States relating to trade marks, the level of protection of new and useful creations in industry is much higher than that of the Paris Convention (which otherwise only established rules on the minimum level of protection that Member States must ensure). Thus, the Directive (EU) 2436/2015: (i) established the protection of trade marks with reputation (reputed) about which the Paris Convention is silent, or perhaps (probably) considered them to be the same as well-known trademarks and (ii) under the regime established in EU law, marks of reputation enjoy protection going beyond the specialty of the registered trademark, which means that the trade mark of reputation actually enjoys extended protection. At the same time, the Directive, like the EU Trade Mark Regulation (EU) no. 1101/2017, regulates the regime for well-known marks only by a simple reference to art. 6 bis of the Paris Convention.

The point at which a sign becomes a trade mark (by registration or by simple use of a sign as a trade mark) and the point at which a trade mark goes beyond „common" to become „well-known", „reputed" or „famous" is difficult to establish, as the boundary between the two categories (common or famous) is extremely thin, fine but also permeable and subjective. The mark, whichever category it belongs to, is aimed at the target audience for the products it identifies, for others they may be completely unknown. For example, the „Poiana" and/or „Toblerone" mark for chocolate is famous only to consumers of sweets and may be completely unknown to those for whom chocolate does not exist. The „DACIA" mark is famous to the Romanian public (even to those not

[1] N. Binctin, *Droit de la propriété intellectuelle*, LGDJ, 2010, p. 411.

interested in cars) and increasingly known to the public in Europe and even outside Europe (the recent stylisation of the „DACIA" mark also making the mark more attractive, not just the product identified by it, and this too much changed for the better both in appearance and performance). The „Harley Davidson" mark is famous to motorcycle enthusiasts but at best a common mark for those not interested in such a means of transport. However, it cannot be excluded that this mark is also well known to the public who do not like motorcycles in general or the motorcycle identified by the „Harley Davidson" mark in particular (heavy, noisy, not very easy to ride) but for the mark to be considered famous it is enough that it is well known to the target audience of the product/service.

We must, we believe, also admit, however, that any trademark has the vocation to increase its distinctiveness and become widely known and it is natural for trademarks to aspire to such a status, it is natural for trademark owners to offer quality products and thus promote the trademarks by which they identify themselves so that they become appreciated and widely known by the target public. And with that, they become famous and their protection goes beyond the specialty of registration in which common marks are protected.

2. Well-known and/or reputed mark? The inexcusable confusion

In common parlance, the terms „well-known marks" and „marks with a reputation" are used to designate signs which are used as marks to distinguish goods and/or services and which are well known, famous in a market for the goods/services they identify, the goods and services whose commercial origin they indicate. In other words, in common parlance, well-known marks and marks with a reputation are one and the same thing.

In trade mark law, the two are, however, distinct categories , even though both owe their legal regime (which is different from that of common law, but also from each other) to the same quality acquired over time, that of having become famous, well known to the public concerned/interested in the goods and/or services they cover and their quality. But although they are important categories in trademark law because they are also extremely valuable, and not just protected by special rules, they are not defined in either conventional or European Union law, and in national law only the well-known mark is defined, not the reputed mark.

However, in national law, it is possible to identify their (distinct) legal regimes from the content of the regulations, even if an analysis of the relevant legal acts leads to the conclusion that even at the conceptual level there is confusion between the two categories, while at the regulatory level there is a lack of clarity which increases the confusion and creates the false impression in legal life that well-known and reputed marks are one and the same thing, The confusion is maintained, if not increased, by the fact that in common parlance, there is synonymy between 'well-known' and 'reputed', both having the meaning of 'famous', so that the terms are, not infrequently, considered equivalent and interchangeable in law[2] .

The case law (not supported by doctrine on this point) does not make a clear distinction between well-known and reputed marks either, and there are judgments in which the notions of „well-known" and „reputed" are used as equivalent. However, since the legislator (whether conventional, European or national) establishes (admittedly, insufficiently clearly) different legal regimes for well-known marks and marks with a reputation, and not only in relation to the common law on trademarks, but also for each of the two categories separately, and since the case law (even if it is not unanimous) accepts that these different regimes exist, they are distinct categories, and on some aspects there is even antonymy between them, the first of which is the mode of appropriation: by occupation in the case of well-known marks, by registration in the case of well-known marks.

The doctrine, in trying to resolve the dilemma of the two types of marks, has not yet reached a unified view either, thus increasing confusion about them. Thus, while some authors consider well-known marks and reputed marks to be one and the same thing, others consider them to be similar, while others consider well-known marks and reputed marks to be different normative categories of marks with their own origins and purposes.

There are authors who consider that the notoriety of a trade mark is assessed solely on the basis of a quantitative criterion, namely the degree of awareness of the relevant public, *i.e.,* the public to which the product or service is addressed (chocolate consumers, dairy product consumers, computer users, etc.), whereas the reputation of a trade mark would be analysed solely on the basis of a qualitative criterion, the reputed trade mark being one whose fame is due to the exceptional quality of the goods and/or services it covers.

Other authors, using a so-called hierarchy criterion, consider that the difference between the two marks is due to the higher (superior) level of knowledge of one of the two types of marks, but without being decided on the order in this hierarchy, because while some authors consider that the reputed mark is better known and superior to the well-known mark, others consider that the well-known mark, in order to qualify as such, must be better known to the public than the reputed mark.

[2] A.R. Bertrand, *Droits des marques, signes distinctifs - noms de domaine*, Dalloz, 2005, p. 101.

However, another theory, called egalitarian, argues that it is not the degree of knowledge that makes the difference between a well-known and a reputed trademark, but the fact that the reputed trademark is famous and registered, while the well-known trademark is famous without being registered. In other words, the difference between the two types of trademarks is only given by a formal criterion (registration or non-registration), but the fulfilment of this criterion is not without profound significance for the legal regime. On the contrary! The degree of fame of the two types of marks is assessed in the same way and it would be difficult to imagine that a higher level of fame would be required of a registered mark in order to give it the same level of protection as a well-known non-registered mark.

The conclusion to be drawn from the distinct legal regimes is that there is no synonymy in law between well-known and reputed trademarks and that a trademark cannot be a well-known and/or a reputed trademark at the same time. A well-known mark can change its status at the will of the proprietor, acquiring, upon registration, the status of a mark with a reputation, but it is less likely that a reputed mark will become a well-known mark, although, in principle, the use of a mark with a reputation after the expiry of the protection conferred by registration as a well-known mark cannot be excluded altogether.

However, it does not seem acceptable and possible to use as a reputed mark as a well-known mark whose registration has been cancelled on grounds of being contrary to public policy and/or morality, but the rights of free expression and opinion through the use of such a mark could not be limited by prohibiting the use of a sign/mark for which a decision has been taken to cancel it, especially when the sign is protected by another right (*e.g.*, copyright).

The difference between a reputed and a well-known mark, which is irrelevant to consumers who are captivated by the celebrity of the mark and the quality of the goods and/or services it covers and in which they are interested, and not by their formal aspects, it is, however, relevant and important for the proprietors of trade marks claiming notoriety and/or reputation and their specific protection and for competitors of the proprietors of such marks (interested in proving the lack of special treatment and the right to extended protection by contesting the notoriety or reputation) and for the authorities responsible for the administration and protection of industrial property rights who are called upon to decide whether or not a sign used as an unregistered trade mark is a well-known or reputed trade mark and whether or not it enjoys protection beyond the principle of the common trade mark, that is to say, extended protection for all classes of goods and services, and not only for those for which the well-known or, where appropriate, reputed trade mark is used, and what are the means of their legal protection.

Conclusion:

- well-known marks and reputed marks are famous marks that are widely known by the public targeted by the goods and/or services they cover;
- notoriety, fame (celebrity) is acquired over time, thanks to the high quality, appreciated and well-known goods and/or services covered by the two categories of marks, knowledge and appreciation which is translated into the volume of sales and which is also due to the result of the publicity given to the marks and the goods/services covered by them;
- well-known marks are protected independently of their registration, while reputed marks are registered trademarks, the original registration covering only the goods and services for which the original registration was applied for and allowed, while the reputation, acquired over time, also gives them extended protection;
- notoriety and reputation, which are earned over time, mainly on account of the quality of the goods and/or services covered by them and the publicity given to them, are matters of fact which must be proved by the person claiming them and are assessed by the judge;
- the protection of well-known trademarks may be invoked against third parties but only for signs which are identical with, or similar to, the well-known trade mark or which reproduce or imitate in their essential parts elements of the well-known trade mark and for identical or similar goods, where the use of the later trade mark gives rise to a likelihood of confusion and/or association with the well-known trade mark;
- the trade mark with a reputation enjoys extended protection, for all classes of goods and services (going beyond the limits of the principle of speciality), irrespective of whether the goods and/or services covered by the later mark are identical, similar or dissimilar to those covered by the trade mark with a reputation and irrespective of whether there is a likelihood of confusion, but only if registration and/or use, without due cause, of a sign identical or similar to the trade mark with a reputation would give rise to unfair advantage to the user by reason of the distinctive character or the repute of the trade mark or would be detrimental to the repute of the earlier trade mark;
- both well-known and reputed trademarks may be opposed to the registration of an identical or similar sign as a trade mark by a third party and in an action for cancellation of registration on this basis, but the proprietors of such trademarks must prove their well-known and/or, where appropriate, the reputation;

- in the case of both an opposition and an action for cancellation, the proprietor of the well-known mark is also required to prove a likelihood of confusion and association, whereas the proprietor of the mark with a reputation enjoys extended protection even in the absence of likelihood of confusion or association of the later mark with the mark with a reputation;
- the proprietor of a trade mark with a reputation has at his disposal for the purpose of defending his rights also an action for infringement, to which he may, where appropriate, also associate an action for unfair competition, whereas the proprietor of a trade mark with a reputation only has at his disposal an action for unfair competition;
- both reputed and well-known trademarks can lose their fame or degenerate, but revocation for lack of use, degeneration or deceptiveness can only be claimed and allowed in the case of reputed trademarks and not in the case of well-known trademarks;
- a well-known mark enjoys protection in perpetuity if it retains its own attributes, while a reputed mark is protected within the limits of the term for which protection is conferred by registration, *i.e.*, following renewal of registration (limited in duration but not in the number of renewals), at the end of the term of protection the sign of which the well-known mark is composed enters the public domain.

3. The well-known mark

A well-known mark is a mark which is not registered and which is widely known within the segment of the public targeted by/interested in the goods and/or services to which it applies. The protection of the well-known mark without registration, which is an exception to the principle of formalism (*i.e.*, appropriation or acquisition of the right by registration), was accepted (and is binding on the member countries of the UCIP) by the Paris Convention of 1883 for the Protection of Industrial Property (art. 6 bis) and reaffirmed by the Agreement on Trade-Related Intellectual Property Rights (TRIPS)**.**

Notoriety in trademark law is a relative and subjective concept because it is limited to the category of persons concerned/interested in a product or service and is demonstrable by any means of evidence, without there being a unit of measurement of the degree of knowledge, the overall lack of knowledge or ignorance of its existence by the „general public" not being grounds for non-recognition of the notoriety and the special protection regime.

The well-known trade mark and the special protection regime in relation to the ordinary trademark regime are characterised by:

- the mode of appropriation, which is one of occupation and declarative, the notoriety which justifies the protection of the trade mark in the absence of registration being the manifestation of a de facto power constituting possession with all its effects;
- notoriety and the special protection regime are not conditional on the fulfilment of the conditions required of registered trademarks, the important thing being that the public concerned/interested public is aware of it and perceives it as such, but it is conditional on its actual use;
- notoriety is acquired over time through use, the quality of the products and/or services they cover and the publicity they receive;
- until the sign used as an unregistered trade mark becomes well known, in so far as an identical or similar sign for identical or similar goods is already registered even after the use of the sign which aspires to the status of a well-known trade mark, the proprietor of the registered trade mark may apply for and obtain a prohibition on the use of the sign which is not well known, the moment of becoming well known (which is difficult or even impossible to determine precisely) being the moment which confers special protection on the well-known trade mark;
- ambiguous protection regime (favourable but also unfavourable) characterised by:
    - the fact that the protection it enjoys creates unavailability and constitutes a (relative) obstacle to the registration of a sign identical with the well-known mark for identical goods and/or services;
    - protection as a well-known trade mark creates unavailability and constitutes grounds for relative refusal of registration for signs which, because of their identity with or similarity to the earlier well-known trade mark and the identity or similarity of the goods and/or services which the later sign applied for and the well-known trade mark are intended to cover, may create a likelihood of confusion in the mind of the public, including a likelihood of association between the later sign and the earlier well-known trade mark;
    - the possibility of invoking the well-known trade mark (the recognised rights) in the appeal against opposition to registration and in the action for cancellation, which are recognised by the law on trademarks for any „interested person";
    - the exclusion of protection of well-known trademarks by infringement proceedings, which are

reserved only for registered trademarks (there is, however, also the view that the proprietor of the well-known trade mark also has the right to bring infringement proceedings, and the view that unregistered well-known trademarks are not the subject of an intellectual property right and are protected exclusively by the ordinary law of civil liability, but the latter is contrary to treaty law);

- in the case of well-known trademarks, the degeneration, deceptiveness and/or uselessness cannot be exploited by the interested parties by means of an action for revocation, as this is a sanction which only affects registered trademarks.

But these vices can be contrasted as ones that challenge notoriety and, by implication, lack of protection as a well-known mark. Since a well-known mark is protected independently of registration, the person who claims the well-known nature of his mark, in order to be able to successfully oppose it against third parties, must prove both the use of the sign as a mark and its wide recognition within the segment of the public concerned/interested in the goods and/or services covered by it, because (in trade mark law) the well-known nature is not presumed, but must be proved by the person claiming it.

There are no absolute fixed and/or mandatory rules or prescriptions for the authority to prove and assess the notoriety of a mark, the law only provides illustrative criteria such as: the degree of knowledge of the mark by the relevant/interested public (and not by the public at large), the degree of initial or acquired distinctiveness of the sign during exploitation, the duration and extent of use and the geographical area of use, the duration and extent of advertising of the mark and the goods/services it covers, the existence/non-existence of identical or similar marks for identical or similar goods belonging to other persons, etc.

However, any means of evidence[3] may be used to establish and assess the reputation of a mark, including documents, information from public authorities or private law entities (*e.g.*, turnover, sales volume, distribution/marketing chains), surveys, market research, etc. A sign used as an unregistered trade mark which is well known in all EU Member States (assuming such knowledge exists) is not an EU trade mark, the right to such (EU) trade mark being obtained exclusively by registration, but a trade mark which is well known in the EU is also protected against the registration of subsequent signs as EU trade marks and a ground for opposing the registration of an identical or similar sign as an EU trade mark, even if the notoriety is limited to a single EU Member State.

A regional knowledge (at the level of a region of an EU member country), however, cannot be a well-known mark which is not available, with the effect of preventing the registration of an EU trade mark (but such an unregistered regional mark could still constitute grounds for opposition to registration in bad faith). From the point of view of the protection of rights, a well-known trade mark has an ambiguous regime, subject partly to special law (because it may create unavailability and may constitute a relative ground for refusal to register an identical or similar sign or, where appropriate, for opposition or cancellation of the registration of a subsequent trade mark) and partly to the ordinary law of tort and unfair competition.

In other words, the proprietor of a well-known trade mark may oppose the registration as a trade mark of a sign identical or similar to his earlier well-known trade mark and may request cancellation of the registration, but if the proprietor of an unregistered well-known trademark is infringed by a third party, his rights (recognised by the special law) are infringed, he will not have access to an action for infringement, since this is a means of protection only for exclusive industrial property rights conferred by a legal title of protection (in the case of a trade mark, a registration certificate), but only to an action in tort or an action for unfair competition. In the latter cases, the proprietor will be required to prove both the use of the sign as a trade mark and the notoriety of his mark.

4. The reputed mark (mark with reputation)

The mark with a reputation (reputed trade mark) is as important a category in trade mark law as the well-known trade mark (perhaps even more important than the well-known trade mark, both qualitatively and quantitatively), but despite its importance and special status, it is not defined in either conventional or EU law, nor in national law (as in the case of the well-known mark), which merely states and refers to its essential characteristic, which is that it is also famous. The reputed trade mark is also similar to the well-known trade mark in that, on the basis of the reputation it enjoys, it is protected under special rules.

A reputed trade mark can be defined, as opposed to a well-known trade mark, as a registered trade mark which is well known to the public concerned/interested in the goods and/or services covered by it and which is appreciated for its quality, or, in short, as a registered trade mark which is famous and which enjoys protection going beyond the limits of its original registration, thereby rendering it unavailable for subsequent identical or

[3] *Idem*, p. 103.

similar signs, regardless of whether the goods and/or services for which registration is sought are identical, similar or dissimilar, if the use without due cause (the use of the name or signs customary in the trade may constitute due cause) of such signs would take unfair advantage of the distinctive character or the repute of the mark (by carrying on business in the vicinity of the famous mark, and transferring the image of the famous mark to the goods/services of the third party with parasitic behaviour, or would be detrimental to the famous mark[4].

The protection of trade marks with a reputation is extended against any other identical or similar signs which would be used for purposes other than to distinguish goods and/or services such as domain names and companies, if the use of such signs without due cause is likely to create unfair advantage to the user by taking unfair advantage of the distinctive character of the trade mark with a reputation or of its reputation or if the use would be liable to damage the reputation of the trade mark. The trade mark with a reputation is protected against the use of identical or similar signs covering identical, similar or dissimilar goods and/or services, irrespective of whether or not there is a likelihood of confusion and/or association.

The proprietor of a trade mark with a reputation has at his disposal, as a means of protecting his trade mark, opposition and cancellation proceedings. But if the reputation of the mark is the ground for opposition or for the application for cancellation of the registration, establishing that the earlier mark has a reputation and that the use is parasitic and/or detrimental to the reputation of the mark, or that it is such as to bring unfair advantage to the user by taking advantage of the distinctive character of the mark with a reputation, these are questions of fact to be proved and determined by the court[5] . Evidence may be used to prove the reputation by showing the degree of awareness of the mark, the degree of consumer satisfaction with the goods and/or services covered by the mark, the age of the mark, the amount of investment made in promoting the mark, any evidence being admissible (documents and information from legal entities, witness statements, surveys and market studies, etc.). The existence of a legitimate reason for the use by third parties of a sign identical or similar to a well-known mark must be demonstrated by the third party user.

5. Conditions for a finding of conflict with a reputed trade mark. Taking unfair advantage of the distinctive character or the reputation of the mark. Relevant case law of the courts of the European Union

What is of interest in the context of the application of the relative ground for refusal of registration based on art. 8(5) of Regulation no. 1001/2017 is the attempt to define the other two conditions necessary for the successful opposition of a trade mark, namely:

- the use of the mark of reputation in the sign filed for registration **without good cause**;
- generating an **unfair advantage** from the distinctive character or the reputation of the mark (which is an act of parasitism) or, where appropriate, **causing detriment to the distinctive character or the reputation of the** earlier mark by using it in the sign filed for registration (which is equivalent to a dilution of the attractive power of the mark)[6] .

The question of whether the use of the trade mark with a reputation is justified or not was decided by the Court of Justice in Case C-65/12 *Leidseplein Beheer and de Vries*, where the Court held that it may be considered to be *justified reason* for the use of the trade mark if the applicant for the subsequent sign proves that the sign was used prior to the application for registration as a trade mark and that its use for identical goods is *bona fide*; in such a case, the proprietor of a trade mark with a reputation may be obliged to tolerate the use of a similar sign by a third party. However, in order to determine whether that is the case, the national court must take into account in particular: the reputation and the spread of the sign in question among the relevant public; the degree of proximity between the goods and services for which that sign was originally used and the product for which the trade mark with a reputation was registered; and the economic and commercial relevance of the use of the sign similar to that mark for that product.[7] In the present case, the dispute before the referring court was between Leidseplein Beheer BV and Mr de Vries ('De Vries'), on the one hand, and Red Bull GmbH and Red Bull Nederland BV, on the other, the dispute being between De Vries and Red Bull Nederland BV concerning the production and marketing by De Vries of energy drinks in packaging bearing the sign 'Bull Dog' which, because of its similarity, is liable to be confused with Red Bull's registered trademarks.[8]

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[4] M. Bohaczewski, *L'atteinte al marque renome*, Collection de CEIPI, no. 68, 2022, p. 69 ff.

[5] A.R. Bertrand, *op. cit.*, p. 101.

[6] *Idem*, p. 314.

[7] Judgment of 6 February 2014 in Leidseplein Beheer and de Vries, C-65/12, ECLI:EU:C:2014:49.

[8] By its question, the national court essentially sought to ascertain whether art. 5(2) of Directive 89/104 is to be interpreted as meaning that the use by a third party of a sign similar to a trade mark with a reputation for a product identical to that for which the trade mark is registered may be regarded as 'due cause' within the meaning of that provision where it is established that that sign was used prior to registration of the trade mark in question.

The types of damages which may be caused to the trade mark with a reputation and which must be found by the competent office or by the courts when applying art. 8(5) of EU trade mark Regulation (equivalent to art. 6(3)(a) of Law no. 84/1998) are of three kinds, the Court said in Intel Corporation, C-252/07, which raised the question of dilution of the reputation of the mark. They consist of detriment to the distinctive character of the earlier mark, detriment to the repute of that mark and taking unfair advantage of the distinctive character or the reputation of the earlier mark. The consequences of unlawful use of a sign identical or similar to a mark with a reputation may take the form of dilution, slow wear and tear, interference and passing off.[9] Thus, both the gaining of advantage and the detriment to the earlier mark with a reputation depend very much on how the later mark is used.

We believe that **dilution of the reputed mark** occurs when the reputed mark is used, for example, as a common noun or keyword in internet search engines, in which case the mark loses its distinctiveness, **slow attrition** occurs when the later mark is promoted more than the reputed mark, and promotion strategies make use of the reputation of the earlier mark, whereas **interference** with the mark with a reputation occurs when, even if different, the goods and/or services are marketed in the same place or in the same way, and **parasitism occurs when the** later mark can be confused with the mark with a reputation and, in this way, a transfer of the reputation or strong distinctive character from the earlier mark that is being parasitised to the later mark that is being parasitised occurs. All these are, finally, ways in which the reputation or, as the case may be, the distinctive character of the mark is damaged because there is a dispersion of the identity of the earlier mark and a diminishing of its influence on the public's perception, in particular when the earlier mark, which brings about an immediate association with the goods or services for which it is registered, is no longer capable of bringing about such an association[10].

In practice, it has been held, for example, that intentionally aiming at the similarity of the later sign with the mark with a reputation by copying the colour of the later mark in such a way as to create an association between the two signs in the public's perception may constitute an act carried out for the purpose of taking advantage of the distinctive character and the repute of the earlier mark, and this fact must be taken into account in order to determine whether there is an unfair advantage in the distinctive character or the repute of the mark.[11]

In any event, there is an issue of detriment to the reputation of the earlier mark whenever there is at least a similarity between the earlier mark with a reputation and the later sign such as to lead the consumer to make a link between the two marks. In the case Adidas-Salomon and Adidas Benelux (C-408/01) , the Court of Justice held that it is sufficient that the degree of similarity (visual, aural or conceptual) between the earlier mark with a reputation and the later sign has the effect of establishing a link between them on the part of the relevant public, without there being a likelihood of confusion.[12]

The existence of such a link must, however, be assessed globally, taking into account all the relevant factors in the case, such as: the degree of similarity between the conflicting marks; the nature of the goods or services for which each of the conflicting marks is registered, including the degree of similarity or distinctiveness of those goods or services, and the relevant public; the strength of the reputation of the earlier mark; the degree of distinctiveness, inherent in or acquired through use, of the earlier mark; and even the existence of a likelihood of confusion in the mind of the public (although the law does not expressly provide for this).[13]

However, the protection of the trademark is not absolute, as already stated. Reinforcing the fact that the existence of an infringement of a trade mark's reputation must be assessed on a case-by-case basis, the Court of Justice pointed out in Intel Corporation (C-252/07) that*: 1) the earlier mark enjoys a wide reputation for certain categories of specific goods and services; 2) those goods or services and the goods or services for which the later mark is registered are not similar or substantially similar; 3) the earlier mark is unique in relation to any goods or services; and 4) that in the mind of the average, reasonably well-informed and reasonably observant and circumspect consumer the later mark evokes the reputed earlier mark* ***is not sufficient to prove that, through the use of the later mark, the owner takes or would take unfair advantage of, or that use is or would be detrimental to, the distinctive character or the repute of the earlier mark within the meaning of art. 4(4)(a) of Directive***

[9] Judgment of 27 November 2008, *Intel Corporation*, C-252/07, ECLI:EU:C:2008:655, para. 27.

[10] *Idem*, para. 29.

[11] Judgment of 12 July 2012, *L'Oréal and Others*, C-324/09, ECLI:EU:C:2011:474 , para. 48. In the same judgment, the Court also stated, with regard to the unlawful use of a trade mark with a reputation, that the *Court has already held that where a third party seeks, by using a sign identical with, or similar to, a trade mark with a reputation, to place himself in the context of its image in order to benefit from its power of attraction, reputation and prestige, and to exploit, without any financial compensation and without having to make any effort of his own in that regard, the commercial effort of the proprietor of the trade mark to create and maintain the image of that mark, the profit resulting from that use must be regarded as unfairly deriving from the distinctive character or the repute of that mark.* (para. 49).

[12] Judgment of 23 October 2003, *Adidas-Salomon and Adidas Benelux*, C-408/01, ECLI:EU:C:2003:582.

[13] Judgment of 27 November 2008, *Intel Corporation*, C-252/07, ECLI:EU:C:2008:655, para. 41-42.

89/104.

On the other hand, as regards the **burden of proof** in relation to the damage caused to the proprietor of the mark with a reputation, the case-law of the Court of Justice of the European Union has also held that the proprietor of the mark with a reputation is not required to prove the existence of actual and present damage to his mark. Where it is foreseeable that such damage will result from the use which the proprietor of the later mark may make of his mark, the proprietor of the earlier mark is not obliged to wait for the actual occurrence of such damage before applying for a prohibition of that use.[14] In such a case, the proprietor of the earlier trade mark will, however, have to indicate the existence of elements which make it possible to establish a serious risk that such an infringement will occur in the future.[15]

Where, however, the proprietor of the earlier mark has succeeded in establishing either the existence of actual and present injury to his mark or a serious risk of such injury occurring in the future, it is for the proprietor of the later mark to establish that the use of that mark is justified.[16]

In Case C-690/17 ÖKO-Test Verlag, the Court of Justice was quite explicit when the question of trade mark protection was raised: the proprietor of a trade mark with a reputation consisting of a test certificate is entitled to prevent a third party from affixing an identical or similar sign to goods other than those for which the earlier trade mark is registered if the third party is in a position to obtain unfair advantage from the distinctive character or the repute of the earlier trade mark or if it is detrimental to the distinctive character or the repute of the earlier trade mark and the third party has been unable to prove the existence of a proper reason.[17]

Most recently in Ace of spades v EUIPO - Krupp and Borrmann (JC JEAN CALL Champagne ROSÉ), T-620/19,[18] Ace of spades v EUIPO - Krupp and Borrmann (JC JEAN CALL Champagne GRANDE RÉSERVE), T-621/19[19] and Ace of spades v EUIPO - Krupp and Borrmann (JC JEAN CALL Champagne PRESTIGE), T-622/19[20] The General Court dismissed the appellant's appeal on the ground that it had not provided proof of the reputation enjoyed by the earlier marks and, in the absence of such proof, the ground for refusal laid down in art. 8(8)(b) of Regulation no. 40/94 was not applicable. (5) of the Regulation cannot be upheld.

Although the General Court pointed out that, when it comes to assessing the reputation of a trade mark in the European Union, it is possible to take into account the percentage of the relevant public who are aware of the mark in question, and not the percentage of the population in general, the Court held that the information relating to the mark Armand de Brignac is not relevant, the information relating to a score of 98 points from a Spanish critic and the information relating to the ranking of that drink in first place following a 'blind' tasting of 1 000 bottles of drinks relates entirely to the quality of the product marketed and is not such as to show that the earlier marks have a reputation in the European Union. Moreover, the very fact that the blind tasting took place tends to show that the previous marks did not contribute to the ranking result indicated.

One of the cases that particularly caught our attention is the one in which Apple Inc. opposed the registration of a figurative mark by Macau, China-based Pear Technologies Ltd. The conflicting marks are represented as follows:

[14] Judgment of 27 November 2008, *Intel Corporation*, C-252/07, ECLI:EU:C:2008:655, para. 38-39.

[15] *Idem*, para. 38.

[16] *Idem*, para. 39.

[17] Judgment of 11 April 2019, *ÖKO-Test Verlag*, C-690/17, ECLI:EU:C:2019:317.

[18] Judgment of 9 December 2020, Ace of spades v. EUIPO - Krupp and Borrmann (JC JEAN CALL Champagne ROSÉ), T-620/19 ECLI:EU:T:2020:593.

[19] Judgment of 9 December 2020, Ace of spades v. EUIPO - Krupp and Borrmann (JC JEAN CALL Champagne GRANDE RÉSERVE), T-621/19, ECLI:EU:T:2020:595.

[20] Judgment of 9 December 2020, Ace of spades v. EUIPO - Krupp and Borrmann (JC JEAN CALL Champagne PRESTIGE), T-622/19, ECLI:EU:T:2020:594.

Earlier trademark with reputation	Sign submitted for registration
	

The mark applied for by Pear Technologies was filed for registration for goods in classes 9, 35, 42 within the meaning of the Nice Agreement, including computers, tablets and other similar goods. Apple Inc. filed an opposition to the registration of this mark, based on both art. 8(1)(b) of the Trade Mark Regulation (likelihood of confusion) and art. 8(5) of the Regulation (conflict with an earlier mark with a reputation). Initially, both the Opposition Division and the Board of Appeal of the EUIPO found the opposition to be well founded on the basis of art. 8 (5) of the Regulation.

The case is of particular importance in the light of the different view of the General Court of the European Union, given that the trade marks in question have a figurative element as their main element and the earlier mark not only enjoys a reputation but is even well known. Thus, the General Court held in Case T-215/17 Pear Technologies v. EUIPO - Apple (PEAR) that the examination of the similarities between the two marks must be carried out by reference to the overall visual impression created by the mark and, that being so, it must be found that the two marks differ both visually and phonetically, which is why the precondition required by art. 8(5) of Regulation is not fulfilled.

With regard to visual similarity, the General Court noted that the mark applied for is composed of several figurative elements, including a 'pear'. Among the figurative elements, it is possible to note a number of squares with rounded corners, black in colour and of different sizes, positioned in such a way that the public perceives the shape of a pear as a whole, and a rectangle with rounded corners which is placed above the pear, inclined at an angle of approximately 45 degrees, which may be perceived as the pear's tail. Also, the verbal element 'pear' is written in grey capitals in a distinctive font and is placed below the figurative element.[21]

Although the word element 'pear' is smaller than the representation of the fruit in the figurative element, the General Court held that it cannot escape the attention of the relevant public and is therefore not a negligible element in the sign filed for registration as a trade mark, since it is large enough for the relevant public to notice it at first sight, which is reinforced by the fact that the word element is written in capital letters, in grey and in a special font. In those circumstances, the Court observed, the word element of the sign applied for contributes to the formation of the image of the mark which the relevant public will remember.

As regards the overall impression given by the earlier mark, the General Court held that it is a figurative mark consisting of two figurative elements in black, the first in the shape of an apple, with a semicircular part missing on the right-hand side which gives the image of an apple which has been bitten off. The second element, placed above and in the centre of the first, is represented by a sharp elliptical shape, inclined to the right at an angle of about 45 degrees. Viewed as a whole, the earlier mark will therefore be perceived by the relevant public as representing an apple tree which has been bitten off with a leaf on top. The General Court therefore concluded that the shapes of the marks in question are visually very different, as are the shapes of the fruit they represent, especially as the earlier mark represents a fruit that has been bitten into, whereas the sign applied for represents a whole fruit without any trace of bite.

As regards conceptual similarity, the General Court held, first, that the images evoked by the two marks at issue may be regarded as having different meanings because they 'evoke' two different types of fruit. However, the fact that two marks use images of different objects does not, in itself, prevent the marks, at least in part, because of other factors, from being similar in their semantic content. In the present case, however, the General Court held that the mere fact that the two images have in common the fact that they are fruits, and the fact that in real life they share common features, is not sufficient for a finding of conceptual similarity.[22]

Finally, another case study that particularly caught our attention and which I must mention at the end of

[21] Judgment of 31 January 2019, Pear Technologies v. EUIPO - Apple (PEAR), T-215/17, ECLI:EU:T:2019:45, para. 30,31, 33, 37.
[22] *Idem*, para. 66-76.

this subsection concerns the reputation of the Louis Vuitton mark. It concerns the „twin" cases Louis Vuitton Malletier v. EUIPO - Bee-Fee Group (LV POWER ENERGY DRINK), T-372/17[23] and Louis Vuitton Malletier v. EUIPO - Fulia Trading (LV BET ZAKŁADY BUKMACHERSKIE), T-373/17[24] , in which the General Court annulled the decisions of the EUIPO Boards of Appeal, finding that art. 8(1)(b) of the EC Treaty applies to the case. (5) of the Regulation and, therefore, the right of the proprietor of the Louis Vouitton trademark to oppose the registration of trademarks containing the letters 'LV'. Initially, the Opposition Division of the EUIPO allowed the oppositions. For a better understanding, the conflicting marks are reproduced below:

Earlier trade mark with reputation	Signs submitted for registration
	
	

After carrying out a visual, phonetic and conceptual comparison of the conflicting marks, the General Court found that, at least for the English-speaking part of the relevant public, the signs in question, taken as a whole, are at least visually and phonetically at least moderately similar. Even assuming that they differ conceptually the marks are to be considered, as a whole, similar to an average degree and not 'at best very low' as the Board of Appeal held.

The General Court also held that the EUIPO had incompletely examined the reputation of the mark and distorted certain evidence. The General Court therefore remitted the case to the EUIPO Board of Appeal for a re-examination of the implications of art. 8(5) of the Regulation, given that although the Board of Appeal examined the possibility that the relevant public could establish a link between the marks in question, it based its analysis on an incorrect assessment of the similarity of the two marks.

We note that this case was heard by the Board of Appeal about two months before the previous case, which settled the conflict between the Apple and Pear Technologies trademarks, so the question arises whether the annulment of the Board of Appeal's decision in the Louis Vuitton case influenced the decision in the Apple/Pear Technologies case, at least at a subjective level, since: in the case in which protection of the Louis Vuitton reputed trademark was sought, the EUIPO removed the incidence of art. 8 (5) of the Regulation and the General Court annulled that decision, and two months later, the EUIPO held the same provision to apply to the Apple trademark and the General Court annulled that decision on the ground that the Apple and Pear Technologies marks were not in conflict. What we do know, however, is that the EUIPO attaches great importance to the case law of the General Court and the Court, regularly publishing bulletins with the latest case law of the two courts.

6. Conclusions

A well-known trade mark is protected for the goods and services to which it applies, independently of registration, and is an exception to the rule of the attributive system of protection (formalistic or priority of registration), whereas a trade mark with a reputation is also protected for goods and/or services for which it has not been registered when its use, without due cause, gives rise to unfair advantage or detriment to a third party by reason of the distinctive character or the repute which it has acquired, thus constituting an exception to the principle of trade mark speciality, according to which trade mark protection is limited to the goods and/or services for which it has been registered.

Applying the rule of interpretation *exceptio est strictissimae interpretationis*, given that the law offers a

[23] Judgment of 29 November 2018, Louis Vuitton Malletier v. EUIPO - Bee-Fee Group (LV POWER ENERGY DRINK), T-372/17, ECLI:EU:T:2018:851.

[24] Judgment of 29 November 2018, Louis Vuitton Malletier v. EUIPO - Fulia Trading (LV BET ZAKŁADY BUKMACHERSKIE), T-373/17, ECLI:EU:T:2018:850.

broader protection to registered reputed marks and well-known marks are not registered marks (they enjoy protection without being registered in Romania), we believe that reputed marks cannot be subject to the exception from the principle of speciality, similar to well-known marks. Basically, in the case of a reputed mark, what is protected is the „reputation" of the mark from parasitism by competitors, without extending protection to goods and/or services other than those for which the mark has been registered, whereas in the case of a well-known mark, reputation has the effect of extending protection to the mark. Such a choice on the part of the legislature is understandable, from the point of view of the principle of legal certainty, given that the existence of an appropriation of the well-known mark cannot be verified in the trade mark register.

The proprietor of a well-known trade mark may oppose the registration as a trade mark of a sign identical or similar to his earlier well-known trade mark and may request cancellation of the registration, but if the proprietor of an unregistered well-known trademark is infringed by a third party, his rights (recognised by the special law) are infringed, he will not have access to an action for infringement, since this is a means of protection only for exclusive industrial property rights conferred by a legal title of protection (in the case of a trade mark, a registration certificate), but only to an action in tort or an action for unfair competition. In the latter cases, the proprietor will be required to prove both the use of the sign as a trade mark and the notoriety of his mark.

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- Judgment of 29 November 2018, Louis Vuitton Malletier v. EUIPO - Bee-Fee Group (LV POWER ENERGY DRINK), T-372/17, ECLI:EU:T:2018:851.

THE RIGHT OF CITATION AND CITATION IN THE CASE OF DOCTORAL THESES. CITATION RULES. CITATION SYSTEMS USED

Andrei-Cristian ȘTEFAN[*]

Abstract

The right of citation in doctoral theses is an essential aspect of academic research and knowledge development in various fields. This fundamental concept allows PhD students to support their arguments, validate their hypotheses and strengthen their academic contribution by referring to the works and ideas of other authors. In this article, we aim to explore the role and importance of citation rights in the context of PhD theses. The right of citation serves as a basis for building an academic dialogue between the author and the scientific community. By referring to previous work, PhD students demonstrate that they know their field of study and that they incorporate its contributions into their own research. This strengthens the credibility and relevance of the PhD thesis within the academic community. The right of citation ensures compliance with academic ethics and prevention of plagiarism. By highlighting the sources used and giving proper credit to the original authors, PhD students demonstrate academic integrity and respect for the work of others. This practice promotes transparency and collaboration in research, fundamental to scientific progress and maintaining high academic standards. In addition, the citation right contributes to the development of a solid knowledge base in the field. By connecting with previous work, PhD theses situate their contribution in the existing context and can identify gaps or opportunities for future research. Thus, this citation and referencing process is an engine of academic progress, encouraging innovation and the continuous development of knowledge. Thus, the right of citation is a fundamental pillar of doctoral theses, having multiple roles and importance in the context of academic research. By following this principle, PhD students contribute to building and consolidating knowledge in their areas of expertise, promoting academic ethics and advancing the frontiers of human knowledge.

Keywords: *citation, system, doctoral, theses, academic.*

1. Introduction

Citing is the process of retrieving and/or using information related, discovered and/or invented by another person, whereby the person who uses it mentions who is the rightful owner of the rights to the information/ideas taken.

This process is used obligatorily, but involuntarily, in different proportions, in any academic writing, having an informative role, both for the one who writes a paper, to be able to elaborate it in an academic and/or empirical manner, and for the one who read it to be able to understand the context and the subject, through the perspective desired by the author.

Also, the citation gives the author a more complex perspective on the topic addressed, because this process involves prior information from a significant number of sources and, implicitly, the selection of sources relevant to the perspective addressed.

«In the legal literature, the „right of citation" is defined as the right of limited reproduction, without the consent of the cited author, of a work brought to the public's knowledge and, like any limitation, by way of exception, of subjective rights, it is strictly interpretation. That is why the right to cite must be exercised with strict observance of the conditions imposed by law, because where the right to cite is violated, counterfeiting or plagiarism begins.»[1]

Thus, the right of citation should be seen as a tribute to the reference authors, this being a sign of distinguished appreciation for the scientific value they have brought through their creation, but also of ethics and morality.

2. The origins of the right to quote

The concept of the right to quote has evolved over time and cannot be assigned a precise date. The idea of reproducing and using excerpts from different literary works has existed, in various forms, throughout the history of literature and other writings.

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[1] V. Roș, *The right to cite*, in Romanian Intellectual Property Law Review no. 3/2009, available as a word document, p. 3.

In antiquity, especially in Rome and Ancient Greece, writers used quotations to support their arguments or illustrate ideas. By way of example, I would like to recall a speech by the great Cicero, who stated how Socrates brought philosophy down from heaven to Earth. Thus, the simple reference to the originality demonstrated by Socrates brings an extra originality to Cicero's speech, thus constituting a tribute to the incomparable Socrates.

In the Middle Ages, manuscripts were mostly copied by monks in monasteries. Citation had begun to acquire the valences of today, the authors of those times referring to the author of the reproduced text. The theological works of that time were interspersed with the sayings of the Holy Fathers of the Churches, as well as other canonical writings relevant to that time.

Although it was not recognized as an independent practice, in France in 1812, the right of citation had begun to acquire the valences of the present day. Charles-Emmanuel Nodier wrote: „any borrowings from earlier works, except for quotations, cannot be excused". In 1838, the French author, A. C. Renouard stated in his work „Treaty of copyright in literature, sciences and fine arts" that „to prohibit writers from quoting their predecessors, to refuse for the progress of science and public discussions the use of any passage from -a work in the private domain, is undoubtedly an exaggeration. It must even be said that an author who quotes another, or makes known the one he supports or disapproves of, indicating that he did not want to assume the authorship of another's work, is, of course, out of all conduct guilty. But anything can be abused".[2]

In our country, the Romanian poet Anton Pann, stated that „don't think that in order to make myself master of your poems I joined these booklets of their own accord, but only to make them immortal, composing their melody (...) so that they remain unforgotten their ways through the ages; for which, in my opinion, I reckon you will not blame me. And if I don't write everyone's name to his poem, it's not my fault, it's the fault of those who like to be plagiarists, and instead of the poet's name, they write their own, to deceive those who believe them".[3]

Thus, it can be seen that since ancient times, quoting has been regarded as a tribute to the authors of the works, indicating the appreciation that a quoting person has for the author of the quoted phrase. Thus, looking at the whole, we should ask what level of originality a scientific work without citations has.

In general, the practices of citing and referring to academic sources have evolved over time and experienced significant changes depending on the cultural, social and academic context of different historical periods.

Compared to ancient times, nowadays access to information and technology is easier, which makes the citation process easier and much more ethically and legally important. In antiquity, identifying the source involved a much more elaborate process of identifying and citing relevant passages from scientific works.

However, with the evolution of the human being, but also of technology, access to information was much easier, citation becoming imperatively necessary, not just an option of the one who receives the information. In ancient times, authors naturally gave credit to those who created information before them, stealing ideas being much less common.

Starting from these ideas, a pertinent question can be raised and could represent the subject of a scientific paper in terms of the right of citation, namely „Could evolution represent an involution of ethics?".

3. The right of citation and the relevant legislation

The right of citation is, in its essence, in fact a limitation of the exercise of copyright.

Within the Law no. 8/1996, limitations of copyright are provided in Chapter VI, starting with art. 33.

The provisions of art. 33 of Law no. 8/1996 stipulates the following: (1) The following uses of a work previously brought to public knowledge are permitted, without the author's consent and without payment of any remuneration, provided that they comply with good customs, do not contravene the normal exploitation of the work and not to prejudice the author or the holders of the rights of use:

b) the use of short quotes from a work, for the purpose of analysis, commentary or criticism or as an example, to the extent that their use justifies the length of the quote;

Thus, it can be observed that in the writing of another work of intellectual creation, it is allowed to take over, without the consent of the author of the work, some short quotes, for the purpose of analysis, commentary, etc., if their use justifies the length of the quote.

But to what extent can we refer to a short quote, what does this represent?

Directive no. 2001/29/EC of the European Parliament, does not provide for the condition mentioned by the national legislation, that of using short passages from a work.

Art. 10 of the WIPO Treaty provides for limitations of copyright, however, even this time no reference is made to the extent of the quoted fragment.

[2] *Idem*, p. 1.
[3] *Idem*, p. 2.

In the content of the Berne Convention, of September 9, 1886, in art. 10, the limitations of copyright are reproduced. Thus, para. (1) stipulates that: Quotations extracted from a work already legally known to the public are permitted, provided that they are in accordance with good customs and to the extent justified by the intended purpose, including quotations from articles in journals and periodical collections, in the form of a press magazine.

The identity of legal texts cannot be ignored. It can be seen how art. 33 of Law no. 8/1996, takes over, almost identically, the content of art. 10 of the Berne Convention. However, the Romanian legislator adds the condition of using short quotations from a work, without showing, at any moment, what constitutes a short quotation in its conception.

«The interests of the legislator who adopted the solution to limit the copyright and for the benefit of those who want to quote it are, as always, varied and not easy to identify. But the limitations of the exclusive rights of the authors of works can only be based on practical arguments and on arguments that concern the rights of others and to which the exclusive rights must yield. Or if the latter is the most solid argument to justify the paralysis of the author's rights in front of third parties who want to criticise, analyse, parody, etc. a pre-existing work, means that a right is recognized in favor of the „quoter", hierarchically above the author's right and that the name „right of citation", used, moreover, in the doctrine, is justified.»[4]

4. The right of citation and citation in the case of doctoral theses

I want to confess that in the preparation of this work I wanted to analyse a quote from the words of Ecclesiastes. „What has been will be, and what has happened will happen again, because there is nothing new under the sun. If there is anything to say, „Here's something new!" this was in ancient times, before us."[5]

Trying to outline the structure of this paper, I wanted to start from the analysis of the above-mentioned quote and the impact it still has at the moment in relation to any scientific creation. I thought of an approach from the most authentic perspective possible, thus starting from a quotation from the Bible in the analysis of the right of citation in the elaboration of some scientific papers. I was not surprised when, in reading the bibliographic sources I selected, I noticed that I was not the first or even the only one who wanted to analyse this quote relevant to the topic at hand.

I noticed that Professor Viorel Roș, in his article published in the Romanian Intellectual Property Review, refers to this quote, in the analysis of what Petre Țuțea said.[6] Thus, the words of Petre Tuțea also come to mind, „only God is original".

What I want to point out through these analogies is the difficulty that a PhD student faces in writing the scientific report that he has to prepare. Writing a PhD thesis in the field of law causes innumerable problems in the mind of the PhD student, in particular, how to bring originality when things are quite clear. How could you reinterpret legal texts when they are quite clear.

In the present analysis, we could start from the idea that where there are two jurists, there are three opinions. The use of citations is imperative to bring originality to a doctoral thesis, at least in the field of law. Most of the time, in the field of law, whole chapters on comparative law are used, where European or international legislation, domestic legislation or national or international doctrine are compared.

Thus, the use of citations in doctoral theses, at least in the field of law, is imperative, the choice of relevant citations bringing a degree of originality to the respective paper.

We cannot ignore the words of Ecclesiastes; how could we add value to a scientific work when everything has already been said. How could we bring more originality if we did not comment on certain legal texts.

Besides, how could we evolve if not by commenting on the words of others, by bringing arguments for or against previously evoked phrases. In terms of writing doctoral theses, the use of citations can add scientific value to the research. The inclusion of a large number of bibliographic sources in the content of the doctoral thesis strengthens the credibility of the work, increasing the reader's confidence in the validity of the presented research.

The use of quotations, including their choice, gives a degree of originality to the work. By citing and comparing with other relevant works in the field, the thesis highlights its originality by itself, thus illustrating its contribution to the development of the respective field.

The main problem that PhD students can face in the development of a PhD thesis is represented by plagiarism. Proper citation can ensure transparency in presenting the source of information. In addition, the right to cite provides a form of legal and intellectual protection for authors and their contributions to scientific fields.

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[4] *Idem*, p. 3.

[5] Ecclesiastes, Chapter 1, verses 9-10, Orthodox Bible.

[6] V. Roș, *The right to cite*, *op. cit.*, p. 6.

This becomes critical in environments where the rapid flow of information and easy access to resources can pose copyright and intellectual property challenges.

Through proper citations, PhD students protect their own interests as well as those of other members of the academic world.

First, the right to cite in a paper serves as a tool to validate the author's arguments and conclusions.

When a paper is frequently cited, it not only increases a researcher's credibility, but also places the paper in a wider academic context

Citations not only show recognition of previous contributions, but also allow authors to highlight how new research adds value and innovation to existing discussions in the field.

Second, citing is an ethical practice that shows respect for the work and contributions of other researchers. By clearly citing the sources used, the authors acknowledge the efforts of their predecessors, but also their influence on the direction of research in the reference field.

This ethical transparency not only supports academic integrity, but also strengthens readers' confidence in the validity and relevance of the work.

5. Citation rules

Regarding citation rules, at the international level, on February 23, 1947, the International Organization for Standardization (ISO) was established.

ISO is an international body with the role of making standards in various sectors and activities available to the general public.

Currently, ISO has 163 member countries, including Romania, through the national body, the Romanian Standardization Association.

The main problem regarding the citation rule, encountered by a PhD student, concerns „how long the text we want to cite”[7].

According to Umberto Eco, there are 10 citation rules that must be known and respected when writing an empirical paper, respectively:

- „The fragments subject to interpretive analysis should be of a reasonable size;
- Texts from the critical literature are cited only when their authority corroborates or confirms our claim;
- Quoting implies sharing the idea of the quoted author, except when the fragment is preceded and followed by critical expressions;
- From any quote, the author and the printed or manuscript source must appear;
- If possible, citation of primary sources is done by referring to the critical edition or the most accredited edition (...);
- When studying a foreign author, the citations must be in the original language;
- The reference to the author and the work must be clear;
- When a quote does not exceed two or three lines, it can be inserted within a paragraph, between quotation marks;
- Quotations must be faithful;
- Citing is like testifying in a trial. You must always be able to spot the witnesses and demonstrate that they are credible. That's why the reference must be exact and punctual (do not quote an author without saying from which book and which page) and can be checked by anyone.[8]”

Regarding the development of scientific texts, ISO has developed a set of Rules for the presentation of bibliographic references and the citation of information resources), entitled ISO 690:2010.

Therefore, ISOR 690:2010 presents indications/rules for the presentation of bibliographic references and citations in all types of information resources, except legal documents that have specific rules.[9]

The main rule regarding the right to cite an author in the elaboration of the scientific work is also provided by art. 33 of Law no. 8/1996 which stipulates the conditions under which scientific works can be cited. Thus, it is necessary for the work to be subsequently brought to public knowledge, to be in accordance with good customs, not to contravene the normal exploitation of the work and not to prejudice the author or the holders of the rights of use.

Thus, in the specialised literature it is mentioned that a quote must be exactly the original text of the author,

[7] E.E. Ștefan, *Methodology of Elaboration of Scientific Papers*, University Course, Pro Universitaria Publishing House, 2019, Bucharest, p. 169.

[8] U. Eco, *How to make an undergraduate thesis*, in E.E. Ștefan, *Methodology of Elaboration of Scientific Papers, op. cit.*, , p. 169.

[9] V. Roș, *Rules for citation and preparation of the doctoral thesis, Ethics of scientific research activity*, Power Point presentation, slide 4.

there is even an obligation of fidelity to the text.[10]

At the same time, other authors state that „parts of quotations can be removed only if the remaining part does not distort the original text"[11]. On the other hand, Septimiu Chelcea emphasises the fact that: Regarding the length of a quote, Mircea Eliade said: A quote is valued (in the reader's mind) to the extent that it is short, dense, bright. A full-page quote cancels this image. As regards the rules for citing quotations and footnotes, the provisions of art. 33 of Law no. 8/1996, namely, the use of short quotations, for the purpose of analysis, commentary or criticism, to the extent that their use justifies the length of the quotation.[12]

,,Footnotes must be numbered in ascending order, throughout the work, and not on each page, chapter or section, this way allowing the identification of all citations and bibliographic references; When quoting, the takeover must be exact, the distortion of the meaning through omissions or additions being incompatible with the ethical rules specific to scientific research activity; If ideas previously formulated by other authors are reproduced, between quotation marks or by paraphrasing, this must be indicated, appropriately in accordance with art. 4 para. (1) letter d) from Law no. 206/2004."[13]

A fundamental aspect of citation rules is the selection of a particular citation system, such as: APA (American Psychological Association), MLA (Modern Language Association) and Chicago are just a few of the most well-known examples.

These systems establish precise rules for formatting, ordering and displaying the bibliography, and choosing the right system for each PhD student's field is important for the coherence and clarity of the paper, helping readers to navigate easily among the sources used.

Another important rule consists in the process of checking and ensuring the doctoral student on the correctness of the way of citing information in the text of the paper, because insufficient or incomplete citations can lead to accusations of plagiarism and can affect the credibility of the author, even if he intended or not to defraud

By accurately identifying the author, year of publication, and relevant pages, citations provide readers with enough information to identify and access the original source.

Also, doctoral students must respect the rules for citing indirect sources and quoting information from others, an aspect that must be treated with caution and with great care to avoid involuntary errors and implicitly, as we mentioned before, attracting the accusation of plagiarism. Thus, authors must clearly indicate that the information is from another source and provide full details of the information.

Another aspect of citation rules that is often underestimated is the proper handling of multiple citations in a single sentence or paragraph. This requires attention to detail and consistent presentation of sources so that the reader recognizes each source and its contribution to the essay's overall argument.

Citation rules also include control of electronic sources, in the digital age information is easily accessible online, but citations must be as rigorous as print sources. Bibliographic citations of information from the online environment must include the URL address, date of access, and other relevant information to identify the source.

Citation rules for doctoral theses are not only a formal procedure, but also a set of rules designed to ensure the consistency, reliability and integrity of scientific research. Adherence to these rules not only fulfills academic requirements, but also emphasises the professionalism and ethics of researchers.

There are several internationally agreed citation systems in the academic environment and/or in the development of papers of an empirical nature, especially in the case of doctoral theses. They should represent the standard of ethics and integrity in the academic field.

6. Numerical citation system (European, traditional, author-number)

In Romania, the numerical citation system is the most common, it is also recommended by the Romanian Academy. Regarding the publication of a guide for the use of this citation system, the Romanian Academy did not want to officially publish such a guide, which leads to the lack of a standardised version and a unitary practice. Given that there is no standard variant of this citation system, the variants differ according to aspects such as punctuation, capitalization, abbreviations, abbreviations, etc. Currently, there is a trend in university centers to abandon this system in favor of other specialised systems, according to recommendations found on web pages.

Features of the citation system recommended by the Romanian Academy:

- Insertion of exponent numbers in the text in the upper right part of the last word of the quote, which

[10] M.St. Rădulescu, *Methodology of scientific research. Elaboration of undergraduate theses*, apud E.E. Ștefan, *Methodology of Elaboration of Scientific Works, op. cit.*, p. 170.

[11] N. Gherghel, *How to write a scientific article*, apud E.E. Ștefan, *Methodology of Elaboration of Scientific Works, op. cit.*, p. 171.

[12] Art. 33 of Law no. 8/1996.

[13] V. Roș, *Rules for citation and preparation of the doctoral thesis, Ethics of scientific research activity*, Power Point presentation, slide 11.

refers to a footnote with the same number;

- The use of footnotes, numbered, written in a smaller font than the text;
- The references in the footnotes can also be found in the final bibliography;
- The bibliography is placed at the end of the paper, after the annexes;
- The final bibliography is ordered alphabetically.[14]

One of the essential features of the system promoted by the Romanian Academy is the use of Latin expressions in the footnotes. This practice not only respects a tradition in the writing of scientific papers, but also has the objective of avoiding repetitions and, implicitly, of keeping the sizes of footnotes at reduced levels.

7. Harvard Citation System (author, date)

The „Harvard System" describes styles that use the „author-date" method. This system is used for in-text citations and is based on the recommendations for citing and referencing materials developed by the British Standards Institution. Universities use the general principles of the Harvard System to be able to develop internal guidelines Unlike other systems, the Harvard system does not create complications in rearranging references if the order of citation in the text changes.[15]

„Characteristics:

- *Do not use footnotes for bibliography, only for explanations;*
- *Submissions are made with the same letter (type, size) as in the text of the work;*
- *For two authors, both names are mentioned;*
- *For 3 or more authors, cite the first author followed by et al;*
- *If the author's name is mentioned in the text, only the year is mentioned in parentheses; the same when the year is mentioned in the text (the aim is to avoid repetition);*
- *Short quotes of a maximum of 2-3 lines are integrated into the text and limited by quotation marks; quotations longer than two or three lines are separated into blocks of text and margins are left; do not use quotation marks; the reference to the bibliography appears after the point, in brackets;*
- *At the end of the paper, a list of all cited sources, arranged in alphabetical order, is compiled, which includes all types of sources (books, articles, websites, etc.);*
- *The final bibliography is drawn up separately and includes all the works used for writing the paper, without being cited."*[16]

8. APA (American Psychological Association) citation system

This citation system is an (author, date) type system and is most often used in scientific works in the social sciences and related fields.

APA style is a way of writing and formatting academic documents, such as journal articles and books, and is often used to cite behavioral and social science sources. This approach is detailed in the American Psychological Association (APA) style guide known as the American Psychological Association Publication Manual. The purpose of these standards is to promote reading comprehension and improve the clarity of communication in the social and behavioral sciences. APA style, in its entirety or with modifications, is widely used in hundreds of academic journals, including medical and public health journals, textbooks, and academia for educational activities. The APA Handbook was first introduced in 1952 as a 61-page supplement to the Psychological Bulletin and marked the beginning of the recognition of „APA style". The 6th ed. of the American Psychological Association Publication Manual was published in July 2009 and includes significant changes and updates. This new edition includes expanded ethical guidelines on authorship, plagiarism, self-plagiarism, collaboration with editors in writing articles, and new formats and examples for electronic publishing. APA style uses the author date method for in-text citations, with the author's name and year of publication in parentheses, separated by a comma (and page number, if applicable).[17]

In the case of a government agency or authority, its name is given in brackets. Complete bibliographic information for identifying and editing citations is included in the reference list at the end of the book. APA style discourages the use of footnotes and endnotes, as they may incur additional editorial reproduction costs. The reference list is arranged alphabetically by author or publisher name, and works by the same author or publisher are arranged chronologically by date of publication.

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[14] V. Roș, *Citing systems*, document available in word format, p. 1.

[15] *https://www.armyacademy.ro/cercetare/documente/ghid_practic_ref_bibl.pdf*, accessed on 04.01.2024.

[16] V. Roș, *Citing systems*, document available in word format, p. 3.

[17] *https://www.armyacademy.ro/cercetare/documente/ghid_practic_ref_bibl.pdf*, accessed on 04.01.2024.

For publications of the same year, APA recommends using a lowercase letter (a, b) before the year. References with the same first author but different second authors are sorted alphabetically by the second author's name. If the first and second authors are the same, alphabetical sorting is based on the name of the third author. Sources without authors are ordered alphabetically by title within the same list.[18]

Characteristics

- The final bibliography is arranged alphabetically;
- Does not usually use footnotes for bibliography or Latin expressions;
- May use footnotes for explanations;
- Submissions are made with the same letter (type, size) as in the text of the work;
- Quotations longer than 40 words are separated into blocks of text and left margins; do not use quotation marks; the reference to the bibliography appears after the point;
- For two authors, both names are mentioned;
- For 3-5 authors, all names are mentioned in the first submission, then only the first name followed by et al;
- For more than 6 authors, cite the first author followed by et al;
- In the case of works with an unknown author, mention the title or, in the absence of the title, the first words of the text;
- If the author's name is mentioned in the text, only the year is mentioned in parentheses; the same when the year is mentioned in the text (the aim is to avoid repetition);[19]

9. Chicago Citation System

This citation system is recommended by the Doctoral School of the Nicolae Titulescu University, according to the Doctoral Thesis Drafting Guide that can be found on the website of the University's Faculty of Law.

The Chicago Manual of Style was first published in 1906 and played an important role in standardising citation practices. The 16th ed., published in August 2010, includes expanded recommendations for citing publications in new digital formats.

The Chicago/Turabian style is characterised by its flexibility and uses two main systems: the annotated bibliography, which is common in the humanities such as literature, history, and the arts, and the author's note and bibliography.

In a bibliography system, sources are cited in footnotes or numbered endnotes, each note corresponding to a superscript number in the text. Sources are also listed in the separate bibliography. This system is very flexible and can easily handle different types of sources.

The author data system is commonly used in the physical, natural, and social sciences, and sources are cited briefly in the text in parentheses along with the author's name and year of publication. Each in-text citation is reproduced in the reference list and full bibliographic information is provided.

The two systems are similar in style, except that they use footnotes or endnotes for parenthetical references in the text. Chicago Style recommends consistent treatment of important elements in both citation systems, such as capitalization of titles, use of quotation marks, and abbreviations. Turabian Style, named after its founder Kate L Turabian, has been a paper editor for nearly 30 years and wrote a book called „A Manual for Writers", Chicago Style for Undergraduates and Graduates - He introduced the important rules of the „Manual of Style and Doctoral Dissertation" was first published in 1937. Revised and updated by the University of Chicago Press in 2007, the 7th edition reflects the current needs of academic research.

10. Conclusions

In conclusion, the citation rules in doctoral theses should not be seen only as certain formal procedures, but rather, they represent a set of rules designed to ensure the coherence, credibility and integrity of academic research.

Adherence to these rules not only fulfils academic requirements, but also emphasises the professionalism and ethics of the researcher. A well-cited PhD thesis not only increases academic impact, but also strengthens the foundation of an original and valid contribution to knowledge in the field.

Citation rules in doctoral theses are more than a mere formality, they even become an essential structure in terms of the quality and authenticity of academic research. These are not just formal guidelines, but a complex set of rules designed to ensure consistency, reliability and integrity throughout the scientific research and

[18] *https://www.armyacademy.ro/cercetare/documente/ghid_practic_ref_bibl.pdf*, accessed on 04.01.2024.

[19] V. Roș, *Citing systems*, document available in word format, p. 4.

communication process.

Coherence is one of the main pillars of citation rules and contributes to the uniformity and consistency of bibliographic references. A well-structured and coherent document makes it easier for readers to find sources, but also gives a professional and rigorous character to a work. Thus, following the citation rules not only fulfils formal requirements, but also promotes the organised and clear presentation of information.

Credibility is another important element that citation rules add. Correct citation of sources confirms the authenticity of the information presented, and allows authors to demonstrate their ability to fit into the wider academic context. Proper citation adds validity to the author's argument and assures the reader that the information presented is supported by solid and recognized research in the field.

Academic integrity and ethics are undoubtedly at the heart of following the citation rules.

By citing correctly, authors can acknowledge the work and contributions of their predecessors and avoid plagiarism and copyright infringement. In an academic community that promotes transparency and honesty, adherence to citation ethics reinforces the professionalism of authors and protects the integrity of the academic field as a whole.

The academic impact of a PhD thesis depends directly on how the authors follow the citation rules. A well-cited thesis is not only highly respected in the academic community, but also contributes to the advancement of knowledge in the field.

By citing relevant sources, authors support their own research and add value to current debates by contributing to the development of the field as a whole.

In conclusion, citation rules in doctoral theses are not just a formality, but a complex framework that ensures the coherence, reliability and integrity of academic research. They illustrate the author's respect for academic rules and his commitment to research ethics and professionalism.

Thus, a correct and widely cited PhD thesis represents not only an academic contribution, but also a solid foundation on which new knowledge in the field can be built by other future PhD students.

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- The Berne Convention of September 9, 1886;
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MORAL RIGHTS IN THE CASE OF DOCTORAL THESES. LIMITATIONS OF MORAL RIGHTS

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Abstract

This study attempts an analysis of the doctoral thesis from the perspective of copyright, specifically examining the prerogatives and limitations of copyright when a doctoral thesis is created.

In this regard, the doctoral thesis is defined, and it is specified whether it benefits from moral copyright and what the concept and legal characteristics of moral copyright are.

The legal framework is provided, and the most relevant doctrinal opinions are analysed, along with several examples from case law.

Emphasis is placed on the content of moral copyright in the case of doctoral theses and their limitations.

Keywords: *doctoral thesis, copyright, limitations, prerogatives, scientific work***.**

1. Introduction

Within Romanian society numerous cases of plagiarised doctoral theses have been uncovered in the last 10 years (at least), usually among individuals holding important positions within the state apparatus. Most likely, the number of plagiarised doctoral theses is much higher than those discovered, as only a very small number of theses have been subjected to verification. It is well known that in the post-revolutionary period in Romania, the number of individuals holding a doctoral degree in various fields skyrocketed, not because there was a strong inclination towards scientific study within society members, but rather because possessing a doctoral title, under certain circumstances, provided a material advantage.

Therefore, the purpose of this work is not so much to bring about a significant novelty in the field, but rather to serve as a source of clarification for individuals interested in the scientific value of a doctoral thesis and what concrete protection is afforded to the author within the framework of the doctoral thesis.

Each right is treated individually within the paper, most notably the right to disclose the work, the right to the paternity of the work, the right to the name, the right to the integrity of the work, and the right to retract the work.

2. The Notion of Copyright. The Legal Definition of a Doctoral Thesis

According to art. 1 para. (1) of Law no. 8/1996 on Copyright and Related Rights, republished[1], the copyright over a literary, artistic, or scientific work, as well as over other works of intellectual creation, is recognized and guaranteed under the conditions of this law; copyright is linked to the person of the author[2] and entails attributes of both moral and economic nature. Within the category of works previously mentioned, more precisely in that of scientific works, the doctoral thesis is included, representing, in accordance with art. 4 letter e) of GD no. 681/2011[3] approving the Code of Doctoral Studies, the original scientific work elaborated by a doctoral student as part of doctoral studies, a legal requirement for obtaining the title of doctor.

Scientific works, therefore, including doctoral theses, aim to convey information in a specific field, addressing not emotions, like literary works, but intelligence; these have sparked a series of debates regarding the object of protection - scientific originality or, conversely, precise and accurate expression[4].

According to art. 9 letter a) of Law no. 8/1996, ideas, theories, concepts, scientific discoveries, procedures, methods of operation, or mathematical concepts as such, and inventions contained in a work, regardless of the manner of appropriation, writing, explanation, or expression, cannot benefit from legal copyright protection.

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[1] Published in the Official Gazette of Romania, Part I, no. 60/26.03.1996, republished in the Official Gazette of Romania, Part I, no. 826/05.11.2018.

[2] According to art. 3 para. (1) of the law, the author is the natural person or natural persons who created the work.

In accordance with art. 65 para. (6) of GD no. 68/2011, the doctoral student is the author of the doctoral thesis and assumes the accuracy of the data and information presented in the thesis, as well as the opinions and demonstrations expressed in the thesis.

[3] Published in the Official Gazette of Romania, Part I, no. 551/03.08.2011.

[4] I. Macovei, *Treaty on Intellectual Property Law*, C.H. Beck Publishing House, Bucharest, 2010, p. 436.

We join the opinion expressed in the legal literature[5], according to which, since art. 9 letter a) of Law no. 8/1996 excludes from the scope of copyright protection ideas, theories, and concepts, as well as similar ones, what constitutes the object of this protection in the case of scientific works, therefore also in the case of a doctoral thesis, is the form in which the author, respectively the doctoral student, has presented the result of the research activity undertaken.

3. Enumeration of Moral Rights of the Author

The moral rights of the author of a work constitute strictly personal rights that reflect the legal expression of the relationship between the author and his work and are enumerated in art. 10 of Law no. 8/1996.

In accordance with the aforementioned article, the author of a work has the following moral rights:

- the right to decide whether, how, and when the work will be made known to the public (the right of disclosure of the work);
- the right to claim recognition as the author of the work (the right of paternity);
- the right to decide under what name the work will be made known to the public (the right of attribution);
- the right to demand respect for the integrity of the work and to object to any modification or any distortion of the work, if it prejudices his honor or reputation (the right of integrity of the work);
- the right to withdraw the work, compensating, if necessary, the holders of the rights of use, prejudiced by the exercise of withdrawal (the right of withdrawal of the work). The rationale for moral rights of the author is represented by the *desideratum* of protecting the author's personality.

4. The Notion and Legal Characteristics of Moral Rights of the Author

Moral rights of the author represent those personal prerogatives of the author of the work, which give him the ability to defend both his work and his reputation.

According to art. 14 letter a) of GO no. 80/2013[6] on court stamp duties, actions for the recognition of copyright (without distinction as to whether the copyright is moral or economic - ed.) [...], for the determination of its infringement and the compensation for damages [...], as well as for the taking of any measures to prevent the occurrence of imminent damages, to ensure their repair or to restore the infringed right are stamped with the sum of 100 lei.

Moral rights of the author, non-economic subjective rights, whose content cannot be expressed in monetary terms, present the following legal characteristics, which are met also in the hypothesis of moral rights over doctoral theses:

- strict personal character;

The personal character of copyright is emphasised in art. 1 para. (1) of the law, which provides that copyright is closely linked to the person of the author.

These rights can only be exercised by the author during his lifetime.

In the event of the author's death, certain moral rights of the author (the right of disclosure of the work, the right of paternity of the work, and the right of integrity of the work) may be exercised by heirs or, as the case may be, by the collective management organisation that managed the author's rights or by the organisation with the largest number of members in that specific field of creation.

- imperceptible character;

Moral rights cannot be enforced by the author's creditors in any of the forms of enforcement provided by law.

These moral rights cannot be subject to enforcement and, moreover, the author's creditors would not justify any interest in pursuing non-economic rights[7].

Instead, the author's creditors are entitled and, at the same time, justify an interest in pursuing the author's income resulting from the use of the work.

Thus, according to art. 629 para. (1) CPC, the income and property of the debtor can be subject to enforcement if, according to the law, they are seizable and only to the extent necessary to realise the rights of the creditors.

In the case of works that have not been made known to the public, the author's creditors cannot compel him to exercise his moral right to disclose the work in order to exploit it for the realisation of their claims, and

[5] V. Roș, D. Bogdan, O. Spineanu-Matei, *Copyright and Related Rights*, All Beck Publishing House, Bucharest, 2005, p. 122.
[6] Published in the Official Gazette of Romania, Part I, no. 392/29.06.2013.
[7] G. Olteanu, *Intellectual Property Law*, 2nd ed., C. H. Beck Publishing House, Bucharest, 2008, p. 67.

even more so, the author's creditors cannot substitute him in exercising the moral right to disclose the work[8].

- inalienable character;

Art. 11 of Law no. 8/1996 provides, in para. (1), that moral rights cannot be waived, and they cannot be alienated. Since the legal text does not distinguish, the act of renunciation of the right cannot be exercised either before or after the creation of the work.

In the same context, it is also necessary to mention art. 40 para. (1) of the same legislative act, according to which the author or the copyright holder has the right to assign to third parties only his economic rights, therefore excluding the moral rights of the author.

In the event that, within a legal act, the author of the work renounces or undertakes to renounce his moral rights, the respective contractual clause would be null and void.

Moral rights of the author are not lost even in the event of abandonment of the work[9]; thus, art. 11 para. (1) of Law no. 8/1996 constitutes an exception to the cases of extinction of property rights under common law; according to art. 562 para. (1) CC, the owner of a movable asset may abandon it or, in the case of immovable assets, may renounce, by authentic declaration, to the ownership right over it, registered in the land register. Therefore, unlike the legal regime of common law property, in the case of abandoning the work or renouncing it, no other person will be able to assume the quality of author of the work.

Alin. (2) of art. 11 of Law no. 8/1996 states that, after the death of the author, the exercise of the rights provided for in letters a), b), and d) of art. 10 (the right to decide whether, how, and when the work will be made public; the right to claim authorship of the work; the right to demand respect for the integrity of the work and to oppose any modifications or alterations that may prejudice the author's honor or reputation) shall be transmitted to the heirs, under the conditions of civil law, without time limit.

It is also provided in the same paragraph that in the absence of heirs, the exercise of the enumerated rights shall devolve to the collective management organisation that administered the author's rights or, as the case may be, to the organisation with the largest number of members in the respective field of creation.

This legal text represents an exception to the rule established by art. 953 CC, according to which inheritance constitutes the transmission of the patrimony of a deceased natural person to one or more living persons. With reference to the notion of patrimony, art. 31 para. (1) CC provides that any person (natural or legal) is the holder of a patrimony that includes all rights and obligations evaluable in money and belonging to that person. Therefore, with reference to rights, according to common law, only patrimonial rights are transmitted by inheritance, and not non-patrimonial rights, among which moral rights of the author would be included; however, art. 11 para. (2) of Law no. 8/1996 derogates from common law and allows certain moral rights of the author to be transmitted by succession.

- imprescriptible character;

Regarding extinctive prescription, according to art. 2502 para. (2) point 1 CC, the action concerning the defense of a non-patrimonial right is imprescriptible except in cases where the law provides otherwise. Law no. 8/1996 on copyright and related rights does not contain special provisions regarding the extinctive prescription of the right to action for the defense of moral rights of the author, so the action for the defense of moral rights of the author is extinctive imprescriptible.

The exception of extinctive prescription of the material right to action, eventually invoked with regard to the right to action in protecting the moral rights of the author, is unfounded and will be imposed to be rejected as such by the court.

Furthermore, moral rights of the author do not extinguish through non-use and cannot be acquired by third parties through acquisitive prescription (usucapion).

- perpetual character;

This character of moral rights of the author derives from the premise that the work survives its author, being further marked by the personality of the one who created it, and the personality of the latter must be defended even after his death[10].

The perpetual character of moral rights of the author is not expressly regulated by law; however, for certain moral rights of the author, Law no. 8/1996 provided that their exercise could be transmitted by inheritance (the right to disclose the work, the right to paternity of the work, and the right to respect the integrity of the work).

- absolute character.

The holder of the moral right of the author can exercise it without needing the concurrence of another person; only the holder of the right is determined as an active subject within the legal relationship, the passive

[8] *Ibidem*.
[9] *Ibidem*.
[10] *Idem*, p. 320.

subject being undetermined; this right corresponds to the general and negative obligation not to be violated[11].

5. Content of moral rights of the author in the case of doctoral theses and their limitations

5.1. The right to disclose the work[12] [art. 10 letter a) of Law no. 8/1996]

The right to decide how, if, or when the work will be brought to the public's attention is known in legal doctrine as the right to first publication or disclosure[13]. This right is discretionary, absolute, and indissolubly linked to the person of the author of the work[14].

According to art. 1 para. (2) of the law, the work of intellectual creation is recognized and protected, regardless of being brought to the public's attention, simply by its realisation, even in an unfinished form. However, this legal text does not imply the conclusion that patrimonial rights of the author could arise before the disclosure of the work; these are some of the consequences of exercising the right to disclosure.

The holder of the right to disclose the work has the following prerogatives:

- to decide whether the work will be brought to the public's attention or not;
- to decide the concrete way in which the work will be brought to the public's attention;
- to decide the moment when the work will be brought to the public's attention[15].

It is worth mentioning that disclosure is not synonymous with publication; the latter is only one of the forms of manifestation of disclosure[16].

Also, the right to disclose does not imply the correlative obligation of third parties to publish the work, as it is at their discretion whether, once expressed by the author the right to disclosure, they will proceed concretely to publish the work or not.

The author has a property right over the work and, as such, also the attribute of disposition; therefore, in exercising his right not to disclose the work, he can destroy or abandon it, without allowing third parties to recover, reconstitute, and publish it[17].

In legal doctrine[18], the following problem has arisen: in the hypothesis in which the author destroys his work, what is the specific exercise of the right of author, the moral or the patrimonial one? The solution reached in resolving the problem is that the author, by destroying the work, has exercised his moral right of disclosure, in the sense that he has decided that his work will not be brought to the public's attention (in the hypothesis in which the work has not been disclosed before the moment of destruction) or, as the case may be, the moral right to retract (in the hypothesis in which the work has been disclosed before the moment of destruction); the destruction of the work constitutes a prerogative of the moral rights of the author, even if the patrimonial rights of the author will be affected as a result of this fact.

In accordance with art. 4 para. (1) of the same law, the author will be considered, until proven otherwise (thus relatively presumed), the person under whose name a creation was brought to the public's attention for the first time.

The author of the work can reconsider the decision to disclose it provided the provisions of any already perfected publishing contract are respected.

In the case of a jointly created work, the right to bring it to the public's attention is nuanced depending on whether the work is divisible or indivisible; thus, in the case of divisible work, each co-author can separately exercise the right to bring his contribution to the public's attention; on the other hand, in the case of an indivisible work, co-authors can bring the work to the public's attention only to the extent that each of them expresses their agreement in this regard; if the refusal of one of the co-authors to disclose the common work takes the form of an abuse of right, the court is able to compel him, under the law, to compensate the damage caused to the other co-authors[19].

The solutions mentioned earlier are based on the provisions of art. 5 para. (2), (3), and (4) of Law no. 8/1996; thus, according to these legal provisions, the copyright over the joint work belongs to its co-authors,

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[11] For further developments, see G. Boroi, *Civil Law. General Part. Persons*, 2nd ed., All Beck Publishing House, Bucharest, 2022, p. 58.

[12] The word „*divulgare*" was formed from the Latin language, using the prefix „*dis*", which means dispersion, and the word „*vulgus*", which means people - V. Roș, *op. cit.*, p. 287.

[13] I. Macovei, *op. cit.*, p. 446.

[14] *Ibidem*.

[15] V. Roș, D. Bogdan, O. Spineanu-Matei, *op. cit.*, p. 199.

[16] V. Roș, *op. cit.*, p. 287.

[17] *Idem*, p. 289.

[18] *Idem*, p. 315.

[19] I. Macovei, *op. cit.*, p. 447. See also, in the same vein, L. Dănilă, *Copyright Law and Industrial Property Law*, C.H. Beck Publishing House, Bucharest, 2008, p. 79.

among whom one can be the main author; in the absence of a contrary agreement, co-authors cannot use the work except by mutual agreement; the refusal of consent from any of the co-authors must be well justified; if the contribution of each co-author is distinct, it can be used separately, provided that it does not prejudice the use of the joint work or the rights of the other co-authors.

After the author's death, the exercise of the right to disclose the work is transmitted to the heirs, under the conditions of civil law, without time limit, according to art. 11 para. (2) of Law no. 8/1996.

Posthumous works are those published after the author's death.

If, during his lifetime, the author decided, in exercising the right to disclosure, a right that includes a negative component, namely to oppose the publication of his work, we consider, along with other authors[20], that the author's heirs cannot reverse the right of disclosure already exercised by the author in the sense mentioned; by succession, the author's heirs no longer inherit the right to bring the work to the attention of the public.

Regarding doctoral theses, art. 66 para. (1) of GD no. 681/2011 provides that these, together with their annexes, are public documents and are drafted in digital format; the doctoral thesis and its annexes are published on a website managed by the Ministry of Education, Research, Youth, and Sports, in accordance with the legislation in force regarding copyright. According to para. (2) of the same article, the protection of intellectual property rights over the doctoral thesis is ensured in accordance with the provisions of the law.

Also, according to art. 168 para. (10) of National Education Law no. 1/2011[21], after obtaining the doctoral title, within a maximum period of 180 days, the Higher Education Institution has the obligation to transmit to the National Library of Romania a printed copy of the doctoral thesis and its annexes, in accordance with Law no. 111/1995 regarding the Legal Deposit of Documents, republished, a copy destined for the intangible Fund, as well as a digital copy of these, in electronic format, intended for consultation upon request, at the National Library of Romania, by any interested person, under the conditions of compliance with the legal regulations in force.

The civil offense consisting of the violation of the right to disclosure, namely making a work known to the public without the consent of its author, no longer constitutes a criminal offense[22], but is sanctioned exclusively according to civil law.

5.2. The right to the paternity of the work [art. 10 letter b) of Law no. 8/1996]

The right to claim recognition as the author of the work (the right to authorship) implies the prerogative of the creator of a work to be identified as its author; this right is violated when a person presents the work to the public as belonging to another author than its creator.

This right belongs only to natural persons, not to legal entities[23].

The right to paternity is manifested, as a rule, by the author's request for his name to be associated with the respective work. As we have shown, art. 4 para. (1) of Law no. 8/1996 establishes a relative presumption to the effect that the person under whose name the work was first made known to the public is considered the author until proven otherwise.

Legal doctrine has judiciously argued that the right to the paternity of the work involves two aspects: a first positive aspect, represented by the author's right to claim his authorship; a second negative aspect, represented by the author's right to oppose any infringement of his authorship, any challenge to it by third parties[24].

After the author's death, the exercise of the right to the paternity of the work is transmitted to the heirs, under the conditions of civil law, without time limit, according to art. 11 para. (2) of Law no. 8/1996.

Plagiarism[25] constitutes the disregard of the right to the paternity of the work.

It is the duty of the doctoral candidate not to plagiarise, and likewise, it is incumbent upon third parties not to plagiarise the doctoral thesis of the doctoral candidate. Therefore, in the event that the author of a doctoral thesis uses excerpts or ideas from the work of another author, the former will have the obligation to cite the latter, providing complete data for the identification of both the author and the work. Likewise, the person who,

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[20] V. Roș, *op. cit.*, p. 292.

[21] Published in the Official Gazette of Romania, Part I, no. 18/10.01.2011.

[22] Prior to the amendment of Law no. 8/1996 by Law no. 285/2004 amending and supplementing Law no. 8/1996 on copyright and related rights, published in the Official Gazette of Romania no. 587/30.06.2004, the act in question constituted an offense according to art. 140 lit. a).

[23] I. Macovei, *op. cit.*, p. 449.

[24] V. Roș, D. Bogdan, O. Spineanu-Matei, *op. cit.*, p. 216.

[25] Plagiarism constitutes the fraudulent imitation of a work. - R. Pârvu, C.-R. Romițan, *Copyright Law and Related Rights*, All Beck Publishing House, Bucharest, 2005, p. 80. The word „plagiarism", originally, meant the act of child abduction; for the ancient world, committing plagiarism was equivalent to stealing a child. - V. Roș, *op. cit.*, p. 298.

in creating a work, is inspired by a doctoral thesis, has the obligation to cite the author of the doctoral thesis.

According to art. 197 para. (1) and (2) of Law no. 8/1996, it is an offense for a person to appropriate, without right, in whole or in part, the work of another author and to present it as his own intellectual creation; reconciliation between the parties eliminates criminal liability.

5.3. The right to the name [art. 10 letter c) of Law no. 8/1996]

In the content of the right to decide under what name the work will be made known to the public, the following are included: the right to decide the name or, as the case may be, the pseudonym or the preservation of anonymity (without indicating a name) [26] and the right to demand their indication.

It should be emphasised that the author of the work cannot decide to have his work made known to the public under any name he desires, his right being limited exclusively to indicating his own name (entirely, with just one first name, with the addition of the initial of one of the parents, etc.) or a pseudonym[27].

Likewise, in accordance with other authors[28], we consider that the right to the name is different from the right to the paternity of the work; thus, in the event that a work is published under a pseudonym or anonymously, the author can reveal his identity at any time, subsequent to the moment of publication.

According to art. 4 para. (2) of Law no. 8/1996, when the work has been made known to the public either anonymously or using a pseudonym that does not allow the identification of the author's person, the copyright is exercised by the natural or legal person who makes the work public with the consent of the author, as long as the author does not reveal his identity.

After the author's death, the exercise of the right to the name is not transmitted to the heirs, letter c) being excluded from the enumeration of art. 11 para. (2) of Law no. 8/1996. Therefore, the author's heirs cannot reverse his decision to reveal his identity or, on the contrary, to publish his work under a pseudonym or anonymously once the author, prior to his death, has exercised his right to the name by indicating his own name.

Regarding the pseudonym, according to art. 4 para. (2) of the aforementioned law, it must not allow the identification of the author's person; otherwise, it is considered that the work has been published under their name[29].

Regarding doctoral theses, the name of the doctoral candidate will appear on each copy thereof. We reiterate, in this context, art. 66 para. (1) of GD no. 681/2011, which provides that the doctoral thesis constitutes a public document, which is published on a website administered by the Ministry of Education, Research, Youth and Sports, in compliance with the legislation in force regarding copyright.

Additionally, according to art. 168 para. (10) of National Education Law no. 1/2011, after obtaining the doctoral title, the supervisor of the doctoral work has the obligation to transmit to the National Library of Romania a printed copy of the doctoral thesis, as well as a digital copy thereof, in electronic format, intended for consultation upon request, at the headquarters of the National Library of Romania, by any interested person.

However, upon the publication of the doctoral thesis by a publishing house, as a result of concluding a publishing contract, the doctoral candidate has the right to request that the thesis be published either under their name, under a pseudonym, or anonymously.

Violation of the right to name, specifically bringing a work to the attention of the public under a name other than that decided by the author, falls under the offense of plagiarism[30].

5.4. The Right to Respect for the Integrity of the Work [art. 10 letter d) of Law no. 8/1996]

This right confers upon the author of the work the prerogative to demand respect for the integrity of the work and to oppose any modifications or any infringements on the work if they prejudice his or her honor or reputation.

According to art. 37 of Law no. 8/1996, the transformation of a work is not permitted without the author's

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[26] According to art. 4 para. (2) of the law, when the work has been made public anonymously or under a pseudonym that does not allow the identification of the author, the copyright is exercised by the natural or legal person who makes it public with the consent of the author, as long as the author does not disclose their identity.

[27] V. Roș, D. Bogdan, O. Spineanu-Matei, *op. cit.*, p. 217.

[28] V. Roș, *op. cit.*, p. 301.

[29] V. Roș, D. Bogdan, O. Spineanu-Matei, *op. cit.*, p. 219. The authors have pointed out that, in Romanian literature, a significant number of authors have published their works under pseudonyms, but not with the purpose of concealing their identity, as it was already known to the public (Tudor Arghezi is the pseudonym of Ion Theodorescu, George Bacovia of George Vasiliu, Gala Galaction of George Pișculescu, Ana Blandiana of Otilia Coman, etc.).

[30] Before the amendment of Law no. 8/1996 by Law no. 285/2004 for amending and supplementing Law no. 8/1996 on copyright and related rights, published in the Official Gazette of Romania no. 587/30.06.2004, the discussed act constituted an offense according to art. 141.

consent and without payment of remuneration, except in the following cases:

- if it constitutes a private transformation, not intended for and not made available to the public;
- if the result of the transformation represents a caricature, parody, or pastiche, provided that the result does not create confusion regarding the original work and its author;
- if this transformation is imposed by the purpose of authorised use by the author;
- if the result of the transformation constitutes a summary presentation of works for educational purposes, with the indication of the author.

The work, as it represents the expression of its author's personality, must be brought to the public's attention in the form decided by the author[31].

Respect for the integrity of the work primarily concerns the preservation of its integrity, with no modifications or additions to the work being made without the author's consent; then, respect for the integrity of the work also refers to its „spirit," meaning that the work should not be presented to the public in a context that devalues it[32].

Regarding this latter aspect of the right to respect for the integrity of the work, specialised literature has provided several examples such as the following: the use of religious music in advertising, the reproduction of a religious work in a political context, the use of characters in situations different from those desired by the author, the use of musical works in animated films, staging a theatre play by assigning roles to actors of a different gender than indicated by the author, the removal or addition of a character in a photograph, coloring a black and white photograph, etc[33].

In case law, it has been considered that violations of the right to respect for the integrity of the work include, for example, a faulty translation into a foreign language and the publication of excerpts from a work that distort its general idea[34].

However, including a disclaimer by the producer on the film's credits or a public debate about a work have not been considered violations of the right to respect for the integrity of the work[35].

In the case of anonymous works, legal doctrine has considered that disregard for the integrity of the work is not likely to cause harm to the honor or reputation of the author since the author's identity is not known to the public. [36]

As for doctoral theses, the publisher cannot, on the occasion of publication, modify their text by adding or removing passages or by changing the order of sections or modifying the title. The scientific coordinator, however, during the verification of the doctoral thesis, has the right to provide guidance to the doctoral candidate regarding the manner of drafting the thesis.

After the author's death, the exercise of the right to respect for the integrity of the work is transferred to the heirs, under the conditions of civil law, without a time limit, according to art. 11 para. (2) of Law no. 8/1996.

As for limiting the right to respect for the inviolability of the work, when the right to use it has been assigned, the assignee has the obligation not to harm the integrity of the work, but there may be certain limitations determined by the nature of the assigned right, the type of work, and the contractual provisions regulating the use of the work.

Thus, if a contract for editing a work has been concluded between the author and the publisher, the publisher has the right to correct grammatical, syntactical, spelling, and punctuation errors, but not the author's style[37]. The aforementioned applies equally if a doctoral candidate decides to publish their thesis through a publisher. We do not contest the editor's ability to bring to the author's attention any errors in content, including reasoning, purportedly present in the doctoral thesis to be published, but the rectification or modification of the text can only be carried out exclusively by the author or with their authorization.

Similarly, in the case of scientific works, including doctoral theses, the updating of the work is permitted[38], which is not considered a disregard for the right to respect the inviolability of the work, as long as the update does not alter the author's ideas, theories, or concepts.

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[31] V. Roș, D. Bogdan, O. Spineanu-Matei, *op. cit.*, p. 220.

[32] *Idem*, p. 220 - 221.

[33] V. Roș, *op. cit.*, p. 305.

[34] The High Court of Paris, December 6, 1976, in A. Bertrand, *Le droit d'auteur et les droits voisins*, 2nd ed., Dalloz, Paris, 1999; The Court of Appeal of Paris, October 10, 1957, in A. Lucas, H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Litec, Paris, 1994, cited by V. Roș, D. Bogdan, O. Spineanu-Matei, *op. cit.*, p. 222.

[35] V. Roș, *op. cit.*, p. 306.

[36] *Ibidem*.

[37] *Idem*, p. 307.

[38] I. Macovei, *op. cit.*, p. 451.

5.5. Right to Withdraw the Work [art. 10 letter e) of Law no. 8/1996]

The right to withdraw the work concerns the prerogative of the author to withdraw it from use, regardless of the reason, after having previously made it known to the public. The reason cannot be subject to court censorship; however, third parties harmed by the author's exercise of the right of withdrawal have the right to compensation, respecting the conditions of the law.

In specialised literature, prior to regulation by Law no. 8/1996, exercising the right to withdraw the work unconditionally, without the existence of well-founded reasons, elicited several opinions regarding the limits of this moral right of the author.

In a first opinion[39], it was considered that after the contract was perfected by which the author exercised the right of disclosure, meaning bringing the work to the attention of the public, the right of withdrawal should be limited by the binding force of the respective contract. It is incumbent upon the author to prove the existence of well-founded reasons for exercising this right, with the reasons subject to judicial censorship.

In a second opinion[40], it is considered that the right of withdrawal is an absolute right, which imposes the obligation of its respect by all legal subjects, without the possible reasons invoked by the author in deciding to exercise this moral right being subject to judicial censorship.

In cases of co-authorship, the right of withdrawal of one author may conflict with the disclosure right of the other authors[41]; the solution proposed in legal doctrine is to condition the exercise of the right of withdrawal on the existence and proof of well-founded reasons, which will be assessed concretely by the courts[42].

However, this principle issue does not arise in the case of doctoral theses, which are not produced in co-authorship; instead, if after the drafting of the doctoral thesis, the candidate decides to make modifications with another author, and the work thus modified will be published in co-authorship, the raised problem becomes relevant.

Also concerning the doctoral thesis, in the event that the candidate has decided to publish it, therefore, once they have exercised their right of disclosure, they can decide to withdraw the thesis from civil circulation if it has already been published or they can oppose its publication after the editing contract has been perfected, in both cases compensating the publisher, according to the law.

After the author's death, the exercise of the right of withdrawal does not transfer to the heirs, letter e) being excluded from the enumeration of art. 11 para. (2) of Law no. 8/1996. Therefore, the author's heirs cannot reverse his decision to disclose his work to the public.

6. Conclusions

The research provided a general understanding of the legal framework surrounding doctoral theses, exploring the definitions, moral rights, and practical implications for authors.

The findings of this study are expected to help anyone interested in attempting to write a doctoral thesis or anyone interested in finding out if a doctoral thesis is at fault from a copyright protection point of view. This research seeks to promote academic integrity, foster responsible research practices, and mitigate instances of plagiarism.

Future research on the matter could delve deeper into specific aspects of copyright law relevant to doctoral theses, such as the digital dissemination of academic works, international comparative analyses of copyright and moral rights regimes, and the evolving role of open access initiatives in scholarly publishing.

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[40] D. Cosma, *The Right of Authors to Withdraw or Modify Their Work*, S.C.J. no. 1/1972, pp. 106 *et seq*.

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MORAL RIGHTS IN ROMANIAN AND IN FOREIGN CASE LAW

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Abstract

Moral rights have always been a rather controversial subject in the field of copyright. Imposed in most countries around the world through the Berne Convention, recognized in most jurisdictions to certain degrees, but also partially rejected in others (most importantly, the US), moral rights have often been seen as the `black sheep` of intellectual property. But how did this concerning status affect the national and foreign jurisprudence on moral rights? In order to find out, we will analyse a few main court decisions, both from Romania and from other jurisdictions around the world and we will also make a couple of predictions about the potential future of moral rights in copyright law.

Keywords: *jurisprudence, moral rights, copyright, intellectual property, case law.*

1. Introduction

Actor and filmmaker Stephen Chow famously remarked: „A creation needs not only subjectivity, but also objectivity". While this applies clearly to film production, it is even more applicable to the field of law. The author of a work will begin their creative process out of subjective reasons, like wanting to express their ideas, make their vision seen or heard by the public, obtain recognition. But later their work will be subject to the rule of law and its boundaries, but also its benefits. That being said, the author's moral rights are some of the most important (and potentially controversial) benefits offered by the Romanian law to its authors.

According to art. 10 of the Romanian Law no. 8/1996 regarding copyright and related rights, any author has the following five moral rights[1]: the right to disclose their work, the right to paternity (attribution), the right to their name, integrity of the work and, finally, the right to withdraw their work. Romania has arguably one of the most protective legal systems around the world, when it comes to the author's moral rights.

This could be the result of the influence that French legislation had over Romanian law, given that France was the actual place where moral rights were born far back, in the 19th century[2]. But this could be also the result of Romania's status, as a post-communist country, with a sad history of much censorship and persecution of creative voices[3]. And what was the result of such constriction and silencing authors for so many years? A highly protective legal regime, maybe too protective to some extent and the highest number of moral rights that we see in any other national legislation.

However, while Romania's history of silencing authors in the communist era might have encouraged the legislators to later protect the author's voice in a more extreme way, enforcement of moral rights around the world were the product of a rather modern act: the Berne Convention, adopted in 1886. In its initial form, the Convention did not contain any mention of moral rights. Such rights were introduced later, in art. 6bis, by its revision made at Rome in 1928[4]. In this year, two moral rights were introduced in the Berne convention[5]: the right to attribution and the right to integrity of the work.

As we can see, Romania more than doubled the number of moral rights that were mandatory according to

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[1] Some authors consider Romanian rights in the field of copyright to rather be „patrimonial" or „non-patrimonial", the concept of „moral" rights being actually of French inspiration. See A.P. Seucan, *Drepturi morale și drepturile patrimoniale de autor*, Universul Juridic Publishing House, Bucharest, 2015, p. 22

[2] We could also argue that moral rights were even present from antiquity times, especially when it comes to plagiarism and protection against such acts. But moral rights were first expressly included in Parisian jurisprudence in the 19th century, with lawyer Andre Morillot having a great contribution to their very existence. For more details see V. Roș, *The right of intellectual property. Vol. I Copyright*, related rights and sui generis rights, C.H. Beck Publishing House, Bucharest, 2016, p. 284.

[3] "As mentioned in the doctrine on moral rights, post-socialist countries offer a unique window onto moral rights. Their experience shows an interesting link between the moral rights of authors and the struggle to overcome political repression. The reason for this connection lies in ideology. By a bitter irony, the ideological aspect of socialism imbued all human expression with powerful political connotations. When superimposed upon societies with instinctive respect for culture, the combination of politics and creative expression proved to be a deadly cocktail. As Russian poet, Osip Mandelstam, commented: *"Only in this country is poetry respected - people are killed for it."* M.T. Sundara Rajan, *Moral rights*, Oxford University Press, 2011, p. 187.

[4] For more details see N.R. Dominte, *Dreptul proprietății intelectuale. Protecție juridică*, Solomon Publishing House, 2021, p. 251.

[5] Full text of the Berne convention is available on WIPO website: *https://www.wipo.int/wipolex/en/text/283698*, accessed on 26.02.2024.

international legislation – the Berne Convention. We have not two, but five moral rights in Law no. 8/1996 regarding copyright and related rights. Not to mention that their legal regime is also very protective: these rights are very closely linked to the authors, cannot be waived or assigned under any circumstances and can potentially exist forever, being exercised by the author's heirs for an unlimited period of time. Therefore, if a painter creates a picture today, their children can exercise moral rights of attribution over the picture 50 years from now and their children's children, 100 years from now, without limitations.

But are these very protective and highly inflexible rights really enforced by the courts of law? Is the Romanian and international jurisprudence actually reflecting this protective regime or do moral rights remain a product of law and doctrine, but subject to practical implementation, not so much?

The answer lies somewhere in the middle, as we will explain below.

2. Romanian jurisprudence on moral rights

The moral rights of authors are far less frequently subject of litigation, compared to the economic rights of the author. There are multiple reasons for this, mostly because individuals and legal entities are more likely to have a dispute over money, rather than intangible values. When it comes to Romania, although the law and doctrine are fairly consistent, there seems to be a reluctance to seek protection for moral rights or to mention them in contracts precisely because they have an absolute and comprehensive nature.

Although Romanian courts do not have nearly as many cases concerning non-economic rights of authors, as they do with regarding economic rights, there is nevertheless a substantial body of jurisprudence when it comes to moral rights in various domains: successions, rights transmission, moral damages for their infringement, recognition of the violation.

2.1. Plagiarism - crime and punishment

In 2011, the Bucharest Tribunal ruled on a case[6] of intellectual property law concerning the appropriation of authorship rights of a work without entitlement. Specifically, an individual who copied the translation of a work and presented it as an original piece was sentenced to one year of imprisonment with suspension, for committing the offense of usurping authorship rights.

The claimant, I.E. Cultural Foundation, showed that translation from Russian to Romanian of the work „Memorii" written by L.T., translated by G.S., is not an original work, but rather a plagiarised one. The Foundation accuses G.S. of illicitly appropriating a previous translation, referred to as „Jurnal".

In 2008, a representative of A.H. Publishing House (which published G.S.'s work), contacted the Foundation to propose the assignment of authorship rights for the translation. The Foundation declined, but a few months later, A.H. Publishing House released the work „Memorii" by L.T., translated by G.S.

According to an expertise report from ORDA[7], the difference between the two works, „Memorii" and „Jurnal", were minimal, so no significant intellectual contribution was brought to „Memorii". The later constituted a complete reproduction of the Jurnal's translation, which lacked the personal imprint of the author-translator. During the criminal investigation, it was also shown that „Jurnal", translated from Russian to Romanian, was published in three editions by U Publishing House (in 1975 and 1976, and subsequently in 2000 and 2005). To create a faithful translation of this work, volumes from the original edition were sent from Russia and translators took multiple years to prepare the translated work, after which the original Russian volumes were returned to the library.

The accused G.S. pled guilty to committing the act of plagiarism (unauthorised appropriation of authorship rights of a work). He showed that the director of A.H. Publishing House asked him to create this plagiarised work, by suggesting text modifications and synonymous in certain places. G.S. was assured that the publishing house would acquire the rights over the work and if he refused to make the modifications in question, his collaboration with the publishing house would cease. So S.G. agreed to modify the original translation, but refused to have his name on the cover, opting instead for his literary pseudonym G.S.

G.S. was sentenced to one year of imprisonment for committing the offense of unauthorised appropriation of authorship rights of a work, with suspension.

In the current form of Romanian law no. 8/1996 on copyright, art. 197 states that a person who unlawfully appropriates another's work is punished with imprisonment from 6 months to 3 years. While this might seem as

[6] *https://www.juridice.ro/303830/hotararea-tribunalului-bucuresti-cu-privire-la-insusirea-fara-drept-a-calitatii-de-autor-al-unei-opere.html*, accessed on 26.02.2024.

[7] ORDA or Oficiul Român pentru Drepturile de Autor (Romanian Copyright Office) is a Romanian institution that protects the rights of authors. Find out more at *https://orda.ro*.

a relatively short duration of imprisonment and can also be replaced with a fine, we consider this to still be a very harsh measure for an offense in the field of intellectual property. We find similar durations of imprisonment in the Romanian Criminal Code for an offense of assault in its most serious form (prison between 6 months and 5 years)[8] or for bodily harm due to negligence (prison between 6 months and 2 or three 3 years)[9]. So the legislator has chosen similar penalties for offenses with quite serious consequences, where a person's health is significantly affected. We do not believe that violating the moral right to paternity can be equal to such major offences.

In recent years, the legislative trend in intellectual property has rather leaned towards decriminalising acts in this field, not harshening the penalties. We will see if plagiarism will remain a crime in future changes of Law no. 8/1996, as well. As a proposal *de lege ferenda*, we see many reasons why such an act should be decriminalised and could remain just a civil offence, not a criminal one.

2.2. Rosia Montana - Romanian gold and French research

In another case regarding the right to attribution, from 2005, the Bucharest Court of Appeals issued a decision regarding the lawful authors of a scientific study regarding Rosia Montana and the Romanian Dacian gold. The court rejected the claim of authorship made by a couple of French institutions that were involved in the project. It was decided that these entities cannot hold moral rights over the work, because a series of individual persons were the true legal authors of the study.

In May 2004, the French University Toulouse II-Le Mirail, EPSCT, and the National Center for Scientific Research, EPST from France, sued the Alburnus Maior Miners' Association, alleging copyright infringement regarding the study „Ancient Gold Mines of Dacia". The claimant requested the removal of the study from the website www.rosiamontana.org, symbolic moral damages of 1 Romanian leu, and the publication of a press release with public apologies from the defendant.

The claimants argued that the study was a scientific work, created by representatives of the French institutions and the Romanian History Museum. So publishing the study online without their consent violated their moral rights to disclose of the work and the patrimonial right regarding use of the work, as stipulated by Romanian copyright law. The study was commissioned by the Ministry of Culture and was for private use, not for the general public. So publishing the work can damage their reputation in the academic sphere, but also their relationship with the Romanian authorities.

The court rejected the claims of the French entities, because they failed to establish their status as authors of the study. The study was published online, on www.rosiamontana.org stating a few individuals as authors, not the French claimants. Under Romanian law, these individuals are presumed to be the true authors, until proven otherwise. Also, the contract between the French institutions and the Romanian Ministry of Culture did not specify the authors of the study, reinforcing the presumption of authorship in favour of the individuals mentioned on the website.

In its decision, the court emphasised the distinction between legal entities and natural persons concerning authorship rights. While legal entities may exercise certain copyright-related rights, they cannot be considered authors of a work under Romanian law. This included moral rights, which cannot be held by legal entities, only individuals.

Roșia Montană has been the subject of one of the most significant and highly publicised arbitrations ever to involve Romania. So it is not surprising that it was involved even in other legal disputes, this time regarding intellectual property. However, compared to the Rosia Montana arbitration case, where the opposing parties were also foreign entities, in this case the Romanian counterpart won.

Moral rights are extremely personal in their nature, being more closely linked to the author than any other right. And precisely for this reason, the presumption of authorship provided by art. 4 of Law no. 8/1996 on copyright and related rights was so important in the litigation, the very reason why the defendants won the case. Based on this presumption, those who were mentioned as authors at the first publication of a work are presumed to be authors with full rights, unless someone else can prove otherwise. And in the case of Roșia Montană, the French legal entities failed to rebut this presumption.

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[8] Art. 193 CP: „Assault or other acts of violence (1) Assault or any acts of violence causing physical suffering are punishable by imprisonment from 3 months to 2 years or by a fine. (2) The act that results in traumatic injuries or affects the health of a person, the severity of which is assessed by days of medical care of up to 90 days, is punishable by imprisonment from 6 months to 5 years or by a fine (...)".

[9] Art. 196 CP: „Negligent Bodily Harm (1) The act provided for in art. 193 para. (2), committed negligently by a person under the influence of alcoholic beverages or a psychoactive substance, or in the course of an activity constituting an offense in itself, is punishable by imprisonment from 3 months to one year or by a fine. (2) The act provided for in art. 194 para. (1), committed negligently, is punishable by imprisonment from 6 months to 2 years or by a fine. (3) When the act provided for in para. (2) was committed as a result of non-compliance with legal provisions or precautionary measures for the exercise of a profession or trade, or for the performance of a certain activity, the penalty is imprisonment from 6 months to 3 years or a fine (...)".

The Roșia Montană case is also important because it clearly marks the difference between natural persons and legal entities when it comes to authorship under Romanian law. A legal entity may sometimes exercise copyright, as is the case of collective works, *opere colective,* where the initiator of the work can be a legal entity (art. 6 of Law no. 8/1996) or with collective management organisations, *organisme de gestiune colectiva*, upon the death of the author (art. 11 of Law no. 8/1996). But a legal entity can never be considered the author of a work, in accordance with art. 3 of Law no. 8/1996 and, most importantly, cannot hold moral rights over a work.

2.3. The wall mosaic from Suceava - work integrity or lack thereof

Another very interesting court decision[10] in the field of Romanian moral rights was issued in 2013 by the Romanian High Court of Cassation and Justice (HCCJ). In short, the municipality of Suceava had to pay a significant sum in moral damages to a mural artist, because it issued a demolition permit for a building. One of the walls of this building had a mosaic made by the artist and the work was considered a public monument, protected by the law. Therefore, the right of integrity of the artist was also affected.

In 2008, artist BT sued the municipality of Suceava and Suceava DJCCP (County Directorate for Culture, Cults, and Heritage), seeking over 10 million lei in moral damages for the violation of the moral right to integrity. Initially, Trib. Suceava dismissed the claim, considering that neither of the defendants had passive procedural capacity. Suceava CA rejected the appeal as unfounded, but HCCJ granted the appeal and sent the case for retrial.

The work, spanning over 400 square meters, was created by a plastic artist in collaboration with a painter, using glazed brick mosaic technique. It was located on the wall of a hall belonging to the Suceava Machinery and Spare Parts Enterprise (IUPS), now ROMUPS Suceava. The claimant invoked art. 10 letter d) of Romanian Law no. 8/1996 on copyright regarding the respect for the integrity of the work. This legal provision does not specify how damages for the author's suffered prejudice are determined, so it must be supplemented with general civil law.

The trial took many years and it was sent for retrial by the superior court. Upon retrial, the Tribunal ordered the defendants to pay 100,000 lei in moral damages to the artist for the destruction of the mosaic. The file was taken to appeal even in front of HCCJ which decided in favour of the artist. The inferior courts had already agreed upon the destruction of the mosaic and the moral prejudice inflicted on the artist. So the only thing left to be decided was whether the defendants committed a wrongful act, if there was a culpability element in the form of intent, negligence, or recklessness.

According to art. 2 of Romanian Law no. 182/2000 on the protection of the national movable cultural heritage, the Romanian state must guarantee ownership and ensure the protection of heritage assets. The municipality of Suceava did not register the mosaic in its heritage records as a public monument, but is the result of its own negligence. DJCCP mentioned the mosaic on its website, along with the authors, structure, surface, and year of its creation. And prior to its destruction, there was extensive media coverage against the demolition, precisely due to its artistic value.

To issue the demolition permit, the municipality had to verify whether the work was protected under copyright law, according to letter b) point 2.1 of Annex to Law no. 50/1996 regarding the authorization for construction works. Thus, the technical documentation had to include general information, such as the description of the construction, a brief history, and whether there were heritage or decorative elements.

The Court considered that DJCCP should have taken effective action to conserve the heritage, including judicially, to suspend or annul the demolition permit. Regarding the amount of damages, HCCJ confirmed the amount offered by the lower court to the artist.

[10] HCCJ, 1st civ. s., dec. no. 4502/2013, available on Lege5 website.

Mosaic before demolition

Source: www.monitorulsv.ro

Mosaic after demolition

Source: www.monitorulsv.ro

The above decision is highly valuable in the field of moral rights and their legal regime. In most moral rights cases in Romania, their violation is rather invoked as an accessory to the infringement of patrimonial rights. In other words, the claimant has solid arguments for damages in cases of violation of usage rights (reproduction, distribution of the work, etc.), but also mentions the violation of moral rights alongside these, hoping to strengthen their claim before the court.

However, in the case of the public monument mosaic in Suceava, the claimant's sole request is for moral damages for the violation of a moral right. Moreover, there would have been no other patrimonial rights to violate. The work was created for the municipality, the hall or the materials used were not his, so his right of ownership over a material object was not affected. The work was not illegally copied, distributed on radio or TV without rights, reproduced in violation of copyright, nor was the author's right to use the work affected. The only consequence of the mosaic's destruction was the artist's emotional distress - his feelings were hurt because his prolonged work ultimately amounted to nothing.

The case of the mosaic in Suceava is very similar to the famous Case *Amar Nath Sehgal v. Union of India*, probably the most important case in India regarding moral rights, which we will analyse further.

3. International jurisprudence on moral rights

3.1. The Indian wall mosaic - between art and cultural heritage

In the Case *Amar Nath Sehgal v. Union of India*, the Indian Supreme Court ruled in favour of an artist whose

mural work was destroyed, deciding that his right to the integrity of the work was violated and awarded him moral damages. It was the first time in the history of the Indian judicial system that courts were seized with the question of how moral rights can contribute to defining cultural heritage. Until then, there was no clear understanding of the purpose of moral rights.

In 1959, the Ministry of India commissioned a renowned sculptor, Amar Nath Sehgal, to create a large-scale work, approximately 12x42m, to adorn the central arch walls of the government building Vigyan Bhawan. The mural was approved by the Prime Minister and completed in 1962.

The public was very excited about the work, which depicted life in India, traditions, customs, landscapes, in a unique combination of modern and rural composition. It even became a national symbol, part of the cultural heritage. But in 1979, when the Vigyan Bhawan center underwent renovation, the bronze pieces were disassembled from the walls and stored without the artist's consent. After contacting the authorities' multiple times, with no result, the artist filed a lawsuit against the Indian government, seeking to redress the damage caused by violation of his moral rights.

The author argued that dismantling his complex work into small bronze pieces constituted an act of mutilation. He also showed that the ministry's action damaged his honour and reputation as an artist. And by erasing his name from the work, he was denied the right to claim paternity.

The case reached the court too late for the mural itself to be saved. However, the judge issued a temporary restraining order. The defendants were prohibited from approaching the remaining bronze pieces and causing further harm.

In its final appeal, the case reached the Delhi High Court, which openly expressed its determination to protect individual rights and to correct the power imbalance between individuals and the government. The judge decided that all copyright belongs to Amar Nath Sehgal, who will receive the remaining bronze pieces and approximately 12,000 USD as compensation.

However, the defendant did not permit the enforcement of the court's decision, so Amar Nath Sehgal filed a new action for enforcement. Finally, after no less than 13 years in total, the situation was resolved amicably. The artist waived the monetary damages, in exchange for receiving all surviving bronze pieces.

The mosaic during the visit of the Indian prime-minister

Source: amarnathsehgal.com

We were pleased to discover such an important case on moral rights from Asia, given that most of the jurisprudence mentioned in the legal doctrine is from Europe or the American continent.

Sehgal was able to receive a favourable solution in court because his work had not been completely destroyed. The court understood the value of the remaining bronze pieces, although the artist was just commissioned for the work, he was not the owner of the said building or resulting materials. The case was complicated by the fact that the defendant was the government itself, which had the obligation to protect, conserve, and respect Indian artistic-cultural heritage and the rights deriving from it.

The Case *Amar Nath Sehgal v. Union of India* is similar to the HCCJ dec. regarding a public monument, mosaic mural art from Suceava, which we also addressed above. In both cases, the works were mural art - in Suceava, a mosaic, and in New Delhi, bronze pieces. Also, in both cases on a wall. And in both cases public authorities decided to destroy the works, without asking the author for consent or offering them the remaining

pieces.

Although both lawsuits lasted a long time and reached the supreme national courts, in the Indian litigation the parties eventually settled out of court. In Romania, no agreement was reached outside the court, but the solution was still favourable to the Romanian claimant who received 100,000 lei in damages. On the other hand, Amar Nath Sehgal received 12,000 USD in court, which the public authority refused to pay. But the amount for which the parties finally settled was not public.

Moreover, the litigation in Romania lasted only 5 years, between 2008-2013, while the one in India stretched over a period of no less than 13 years, between 1992-2005. Considering the Romanian legal system and its slowness, it is somewhat surprising to see how in other jurisdictions things can go even slower. Not to mention that the Indian artist was quite renowned, to a degree to which the defendant in the Romanian court case was not.

Finally, it is interesting to observe how similar legal and cultural issues can arise in different corners of the world, truly demonstrating the universal essence of moral rights of authors. Another court case concerning artistic works and their value to the public is the Calatrava bridge, which made the Spanish courts decide if the author's rights or the public interest ranks higher.

3.2. The Calatrava case - bridging the gap between the author and the public interest

One of the most important cases in the field of moral rights in Spain is the case of the Bilbao bridge designed by architect Santiago Calatrava. The bridge was modified by a second architect, at the request of the public authorities, affecting the original author's right to integrity. The court considered the bridge to be a work of art under the law, but with a utilitarian purpose. So public interest prevails over private interest.

Santiago Calatrava is a renowned architect, sculptor, and engineer. He was commissioned by the municipal authorities of Bilbao to design and oversee the construction of a bridge over the Nervion River, which runs right through the city center. The construction was completed in 1997 and became a true symbol of the city. The bridge, called Zubi Zuri, meaning the white bridge in Basque, was part of the municipality's plan to connect the two banks of the river.

Several years later, a new building complex was built on the riverbank by architect Arata Isozaki, near Zubi Zuri bridge. Because of this new building, a footbridge supported by two concrete pillars needed to be built, which would be attached to Calatrava's bridge by removing a section of its balustrade.

Unsatisfied with the situation, Calatrava took legal action against the Bilbao city council and the companies who built the footbridge. He invoked violation of his right to integrity over his work, explaining that he was not asked for permission to remove part of the bridge balustrade. The architect requested that the bridge be restored to its original state and that the footbridge be demolished. He also sought 250,000 euros and if the bridge could not be restored, he demanded damages of 3 million euros.

The Spanish courts decided that Calatrava bridge is protected as a work of art, according to Spanish law. The court decided that the bridge had clearly been modified, in a contrasting style with the initial work, including the colour and materials.

But when the problem arose of the conflict between this private and the public interests, the moral rights of the architect were the ones that lost. The court rejected the request of architect Calatrava. The modification of the work clearly violated his right to integrity, and the authorities should have consulted with Calatrava before making the changes or even asked him to make them himself. But the author will have to tolerate the modifications in question because his work is in the service of the general public. Citizens were to benefit from the modification of the bridge and avoid many flights of stairs by using the footbridge built by Arata Isozaki.

Initially, architect Calatrava did not receive any amount as moral damages for the damage suffered. But in the appeal phase, Calatrava was awarded 30,000 euros in moral damages, upholding the lower court's decision that the bridge should not be returned to its original state.

Source: Wikimedia commons

The Calatrava bridge case has multiple resemblance to the case of the wall mosaic from Suceava and the mural work from India, presented above. Specifically, the court had to balance public interest with private interest and could also award moral damages to the author of the public interest work for the damages suffered - here, disregarding his initial vision and not allowing him to complete his work according to his own plans.

But how can we admit that this interest is absolute? Of course not. This opinion was also shared by the Spanish courts, which confirmed that the work will remain in its current form, but ultimately offered monetary compensation to Calatrava for the moral damage he suffered.

Architectural works are themselves works of art, although they have a predominantly utilitarian purpose. In Romania, they are recognized in Law no. 8/1996 art. 7 letter h) as objects of copyright. However, this type of work also has a special regime, being excluded from the application of legal provisions regarding rental and loan [art. 19 letter a) of Law no. 8/1996], can only be photographed when it comes to the destruction of the work and possible return to the author [art. 26 para. (3) of Law no. 8/1996], are protected from reproductions based on the same architectural project [art. 85 para. (2) of Law no. 8/1996] etc. The law thus recognizes that although architectural works are works of art, they must be subject to special rules, and the law must be adapted to fit them.

In the case of the Calatrava bridge, adding a footbridge to the original construction arose from a public need and changing urban circumstances: the emergence of a building complex on the riverbank, near the Zubi Zuri bridge. A city is a living organism, it changes constantly to fit the needs of its inhabitants. So clearly and architect cannot expect that their artistic vision will be respected at all costs and over an indefinite period of time. If the Spanish courts had decided that this footbridge should be demolished, just because it did not coincide with the original vision of the author-architect, it would have created a dangerous precedent, giving absolute priority to artistic vision at the expense of the practical needs of the population.

In other words, although the architect's right to the integrity of the work was compromised, it is more important that the public benefits from the modifications in question.

3.3. The Flight Stop case - national symbol v. holiday cheer

Snow v. The Eaton Centre Ltd is the most famous moral rights case in Canada, but also one of the most well-known cases of moral rights at an international level. Artist Michael Snow created a sculpture named Flight Stop, for the Eaton Centre complex in Canada. The artwork underwent modifications during Christmas time, with the addition of red bows to the birds in the sculpture, an action which violated the author’s moral right to integrity of the artwork.

In 1979, Michael Snow, a Canadian artist renowned internationally, was commissioned to create a sculpture. The work was to be installed and visible to the public in a large shopping centre and office building in downtown Toronto, named the Eaton Centre. It was supposed to be a permanent sculpture, visible from all levels of the mall.

The installation of the work was done under the supervision of the author: the sculpture was hung from the ceiling of the shopping centre, and a plaque was to indicate the name of the artist and the title of the work. Snow was a well-known artist, exhibiting his works internationally since 1957, using various methods of work and being appreciated for his innovative use of materials.

The artwork was called Flight Stop and consisted of 60 individual elements, all representing birds of

different sizes and in various flying positions. But these were not just any birds - they were Canadian geese, who seemed to be „frozen" in flight. Hence the name of the work, Flight Stop. The buyer of the work was the sub-tenant of the Eaton Centre building, and the piece was partially funded with money from the local lottery. The artwork quickly became a focal point for the community, considered an important piece of art by critics.

In 1982, the marketing director made plans for the Christmas season at the Eaton Centre, which included tying large red bows to the geese in the complex. Also, the image of the modified artwork was to be used on banners, posters and shopping bags. When Snow discovered this „mutilation" of his work, he filed complaints with the mall management, but his requests were ignored.

The sculptor felt that these modifications disturbed the harmony of his composition, altered its character and ultimately affected his artistic reputation. Although the artist had not been consulted about the red bows being applied to the geese, the Eaton Centre management refused to cancel the project. A lot of money had already been spent on promoting the Christmas modified work. Moreover, they considered that adding the bows did not affect the artwork and that Snow was overly inflexible and sensitive as an artist.

In court, neither party contested that they were dealing with a „work" and an „author" according to Canadian law. Snow believed his work had become ridiculous with the addition of ribbons, comparing this act to adding earrings to the Venus de Milo sculpture. He also brought three art experts to testify that Flight Stop had been transformed into kitsch, also attesting to the major importance of the work itself.

Eventually, the court ruled in favour of Snow, ordering the Christmas ribbons to be removed from the artwork. The reason was that they truly distorted or modified the sculpture. Regarding Snow's honor and reputation, the court stated that these were subjective assessments of the author, as long as his assessment was reasonable. It was evident that Snow believed that his honor and reputation were affected by the defendants' actions, a concern supported by other experts in the field, making his concern reasonable. So a violation of the legal provisions regarding the moral right to integrity had truly taken place, given the subjective assessments of the work's author, corroborated with the testimonies of the public and artistic community.

Source: www.cipil.law.cam.ac.uk

This Canadian court decision became famous not only because it gives a lot of power to the artist and their moral rights, but also because of its central theme. Recently, the Christmas holiday has completely changed the way we view shopping in the winter season: the emphasis is more on bright decorations, intensive shopping and less on the fundamental meaning of the holiday. So it was expected that this commercialization of Christmas would also manifest itself in the field of copyright, more precisely, for moral rights.

As observed in the Canadian case Snow v. The Eaton Centre Ltd, sometimes less is more. A work is not necessarily improved by adding elements to it, quite the contrary. The artist's vision may suffer, which in turn may affect his or her image. What might the public think if the author allows a distortion of his creation? It can be appreciated that he doesn't care enough about his work, about the message he wanted to convey.

It is interesting to see the Flight Stop case in contrast with the Calatrava case, mentioned above. The Calatrava bridge was considered to be a building of public interest, so its modifications were confirmed by the court, although the architect was compensated for the violation of his right to integrity. But the changes brought to the Canadian geese were not considered necessary, even if the sculpture was in a mall (so a place dedicated to shopping) and even if the public interest might be to uphold the holiday spirit during Christmas, including

using decorations. The public interest was also brought into question in the Suceava mosaic case, mentioned above – the building would for sure not be rebuilt, but the artist whose work was destroyed received compensation. The same happened to Indian artist Amar Nath Sehgal in his litigation versus the Union of India – his work could not be saved, but he received the remaining bronze pieces. Would the court have stopped the art being destroyed, were he to file a claim in time? We will not know.

But what we see, somehow problematic, in the Case *Snow v. The Eaton Centre* is that sculptor Michael Snow did not create a flock of carved geese to spread the Christmas spirit, but to remind Canadians of a noble animal, a symbol of their homeland. Here, the issue arises when it comes to commerce and commercial interests in general, what is too much? Because, ultimately, Snow's sculpture was not presented in a museum or art gallery. But in a mall, a shopping center whose sole objective is to make people buy as much and as quickly as possible.

From this point of view, the court's decision can be criticised. We believe that not only the status of a work as a piece of art will matter when it is presented in a certain manner, but also the place or context of the presentation. It might be exaggerated to adorn the Mona Lisa with garlands or to put lights on Brâncuși's Bird in Space in December. But what about a sculpture in a public square, where a Christmas market is held? Or with a photography exhibition in a mall, exhibited during the holidays?

Therefore, we believe that a possible violation of the artist's right to integrity must be contextualised, it is not an absolute right, especially since national laws and the Berne Convention expressly mention the impairment of the author's honor or reputation in the case of such a violation. And these concepts are extremely subjective and volatile.

4. Conclusions

When it comes to jurisprudence, the moral rights of the author are brought in a difficult position. Which has also happened because the relationship between moral and patrimonial rights in copyright has long been subject to debate[11]. When does protecting the author become too much? Can the public interest remain in focus, while we encourage the individual's artistic expression and we contribute to the enrichment of our cultural heritage?

Protecting moral rights with criminal legislation might be too much, while not enforcing the moral rights provision of Romanian Law no. 8/1996 might be too little. There are so few Romanian court decisions where the moral rights are taken into consideration and the judge truly protects the author in this sense, but we also see it going in the opposite extreme, with harsh decisions for the violation and prison time in a field where we find it excessive – intellectual property and copyright .

Also, we see that courts merge general provisions in the field of copyright with the legal regime of moral rights, like in the case of legal presumption of authorship. But we also observe that violations of the author's right to integrity is not only a national, but also an international problem, from the Suceava mosaic to the Calatrava bridge, Indian wall art and Canadian geese in Eaton Center.

There is no coincidence that moral rights fall under the international protection of the Berne Convention, alongside national legislation: the artists' work and their problems are universal. And we should not fail to learn from other countries' judicial triumphs or, even more, from their mistakes.

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[11] E.G. Olteanu, *Drepturile morale și creația intelectuală*, Didactică și Pedagogică Publishing House, 2006, p. 81.

THE ROLE OF POSITIVE INTELLIGENCE IN INCREASING PERSONAL AND PROFESSIONAL EFFICIENCY

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Abstract

In our society, marked by rapid changes and constant challenges in both the personal and professional spheres, developing effective strategies to increase individual performance becomes an essential element.

The paper „The Role of Positive Intelligence in Increasing Personal and Professional Efficiency" aims to explore the impact of positive intelligence on individual efficiency, while also trying to provide a new perspective on how positive thinking and psychological well-being contribute to improving personal and professional performance. Further, positive intelligence refers to the individual's ability to manage their emotions and thoughts and to create productive and constructive mental states.

By cultivating a mindset trained to relate to difficult situations from a more positive perspective, individuals can unlock new levels of creativity, resilience and motivation, vital elements for success in any field of activity. Approaching the theme of positive intelligence not only as an abstract concept or an idealisation of well-being, but as an essential and practical mental competence for overcoming obstacles and achieving the best personal and professional version, this paper aims to offer a new and applicable perspective on how each person can use this internal resource to sculpt their path to success and fulfilment.

Positive intelligence involves the ability of any individual to transform negative or self-destructive thoughts into constructive thoughts, same as to maintain focus on the positive aspects, even in less pleasant or even difficult situations.

Keywords: *positive intelligence, personal performance, professional performance, productivity, efficiency.*

1. Introduction

In an ever-changing society, where personal and professional challenges are becoming increasingly complex and time and energy consuming, the ability to remain productive has become essential for success. Therefore, the concept of positive intelligence is placed as a defining element in personal and professional development, providing the necessary skills to go through difficulties with an optimistic and constructive perspective. This paper aims to analyse the role of positive intelligence in increasing personal and professional efficiency, highlighting how this form of intelligence can transform the way individuals face challenges, manage stress, and achieve their goals. Positive intelligence, a term treated by psychologist Shirzad Chamine[1], refers to the psychological ability to remain positive and constructive in the face of life's challenges. This type of intelligence not only contributes to the emotional well-being of each person but plays a crucial role in improving performance and efficiency in daily activities. The methodology adopted in the study combines theoretical literature study with empirical evidence based on workplace observations. The intended results are to highlight a significant correlation between the level of positive intelligence and the personal and professional efficiency of individuals. Moreover, the study will highlight the mechanisms by which positive intelligence acts as a catalyst for success, including by improving emotional resilience, stimulating creativity, and strengthening interpersonal relationships. This paper aims to analyse the mechanisms by which positive intelligence influences individual attitude, decisions, and strategies, highlighting its impact on personal and professional performance. It will also explore practical strategies through which individuals can develop and maintain a sustainable state of positive intelligence, with the last goal of maximising their potential in all aspects of life.

In developing the objectives of this paper, we started from the premise that positive intelligence refers to a person's ability to maintain a positive mental state, which allows him to face challenges, recover quickly from failures and perform at a high level both in his personal and professional life. The main goal is to introduce and explore the concept of positive intelligence, highlighting the origin of the theory, its main components and how

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[1] See S. Chamine, *Positive intelligence*, Marshall Goldsmith, 2012.

it differs from other types of intelligences or emotional competences. For a better understanding of the topic, I will analyse the impact of positive intelligence on personal effectiveness and further examine how developing positive intelligence can improve self-efficacy, emotional resilience, and the ability to manage stress, thus contributing to better personal efficiency. Exploring the role of positive intelligence in the professional environment as well as analysing the impact of positive intelligence on professional performance, including team collaboration, leadership, creativity, and innovation, as well as good conflict management also outlines another objective of this paper.

Another goal I have in mind is to analyse how cultivating a positive mental perspective can influence employee satisfaction and engagement with their organisations, as well as identifying strategies for developing positive intelligence.

At the end of this paper, I will present the benefits of implementing positive intelligence in organisations, including the long-term benefits of promoting a culture based on positive intelligence for organisations, including reducing absenteeism, increasing productivity, and improving the organisational climate.

2. The concept of „positive intelligence"

Positive intelligence is a concept that combines principles from the field of positive psychology and artificial intelligence to promote human well-being and development. This concept emphasises the use of technology and cognitive skills to enhance well-being, personal growth and improve quality of life. The concept of „positive intelligence" refers to a person's ability to manage their own mind in a way that allows them to feel and act from a state of mental positivity. Our success and happiness in life depend not only on our skills or knowledge, but also on how we manage our own thoughts and emotions[2]. Emotions play a role in negotiation, regardless of status at the negotiating table. While it's important that these emotions don't get in the way of signing a mutually beneficial deal, they can be used as an advantage. It has been shown that positive emotions increase feelings of confidence at the negotiating table, while feelings of anxiety or nervousness can be transformed into enthusiasm. It is necessary to have a high level of emotional intelligence to read the emotions of other parties. This can allow for a better understanding of the implications and does less to establish explicit claims. In addition to understanding a negotiation process, emotional intelligence can help manage and use emotions advantageously.

At the heart of positive psychology, we find a new type of personality, namely the positive personality, which is, on the one hand, the owner and creator of a positive experience, on the other hand, the one that bears the influences of the cultural contexts in which it is located, forming precisely dependent on them. That is why it is imperative to ask the following questions: what are the essential characteristics of this type of personality („matured" in the terminology of the humanistic psychology of Maslow and Rogers; „optimal" in Coan's terminology).[3]

At the same time, in numerous specialised studies we find that self-determination is supported by satisfying needs such as the need for competence, the need for attachment and the need for autonomy. When these needs are met, the individual's existence is in a condition of intrinsic motivation, and he is capable to, become capable of meeting high challenges. Just as humans cannot live on water alone, but without food, they cannot live unless they satisfy all three basic psychological needs.[4]

The development of positive intelligence is not limited to the concept of optimism. More than that, it's about cultivating healthy and strong thinking that can effectively get through life's challenges, turning obstacles into opportunities for personal and professional growth. It has been shown that one of the most significant effects of positive intelligence is improved performance. People with high levels of positive intelligence are better prepared to cope with stress and unpredictable situations, which allows them to better focus on daily tasks. This is identified by increased productivity and better quality of work. Positive intelligence also contributes to improving interpersonal relationships, both in the professional and personal environment.

The ability of any individual to maintain a positive attitude helps build a more pleasant work environment, supporting cooperation and effective communication between colleagues. In your personal life, it can help strengthen relationships by promoting empathy and understanding. Positive intelligence is closely related to

[2] *Ibidem*.

[3] See M. Zlate, *Ego and personality*, Trei Publishing House, 2004.

[4] See R.M. Ryan, E.L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, American Psychologist 55, 1, p. 68-78, 2000.

emotional resilience, which is identified by the ability to recover quickly from stressful or negative events. People with high levels of positive intelligence tend to perceive failures as learning opportunities and are less prone to long-term stress and anxiety. This approach contributes to overall well-being and maintaining an optimistic outlook on life. Positive intelligence also has a perfect influence on the decision-making process.

A positive outlook can help evaluate options more concisely and make decisions based on logical and rational thinking, rather than being dominated by negative emotions or stress. This is extremely important in situations that require solving complex problems or making important decisions. Therefore, positive intelligence can stimulate creativity and innovation. Positive thinking fosters free thinking and opens the way to exploring new ideas without fear of imminent failure. This is essential for professional and personal progress, allowing individuals to explore innovative solutions to existing problems. Although intelligence is a part, a side of personality, it interacts not only with each of the other parts or sides of personality, but also with the whole, which is personality itself. Intelligence is the engine of evolution, general and individual, which occurs in vital situations that involve its subordination to a double need: to avoid what is harmful, on the one hand, to retain what is good, useful, on the other hand.[5]

The impact of positive intelligence on personal effectiveness is profound and multidimensional. Cultivating such a skill can not only transform the way we work and interact with others, but it can also improve our quality of life by increasing personal happiness and satisfaction.

In the professional environment, positive intelligence can have multiple benefits including resilience, collaboration and interpersonal relationships, productivity, and job satisfaction. In terms of resilience, it is worth mentioning that employees with a high level of Positive Intelligence can more easily navigate through the inevitable changes and challenges of the work environment. They may see failures as opportunities for learning and growth, which helps them recover quickly from disappointments or failures.

At the level of collaboration and interpersonal relationships, people with a developed positive intelligence tend to be more empathetic and better at building and maintaining professional relationships. These qualities are essential for teamwork, negotiation, and leadership. Another benefit is productivity, on the principle that a positive mind is often more open to new ideas and creative approaches to problem solving.

Employees who practise positive thinking are more likely to be productive because reduced stress allows them to focus better on tasks. Job satisfaction supported by positive intelligence can contribute to greater career satisfaction because individuals are able to better manage stress, establish stronger relationships with peers, and find meaning and purpose in their work.

Managers with high positive intelligence are often seen as more charismatic, inspiring, and able to motivate teams. They create a positive work environment that encourages innovation and employee engagement. To develop positive intelligence, the individual may adopt various strategies aimed at identifying and reducing internal „saboteurs”—those internal critical voices that fuel negativity and self-doubt. In conclusion, integrating positive intelligence into organisational culture not only improves employee well-being, but can also lead to increased overall performance of the organisation. Organisations should encourage and support the development of this type of intelligence through training programs and initiatives that promote the psychological and emotional well-being of their employees. There is a link between positive intelligence and performance at work. The ability to approach conflict constructively is yet another skill of those with high positive intelligence. This can reduce tensions at work and improve overall satisfaction.

Research in the field has analysed various methods of determining positivity and calculating the positive-negative ratio, the results seem to have been quite similar. The findings of various studies were summarised as follows[6]:

- an analysis of more than two hundred different scientific studies, testing a total of more than 275 000 of people, concluded that higher Positive Intelligence Quotient, leads to much higher pay and success in work, marriage, health, sociability, friendship, and creativity;[7]
- people in sales with a higher Positive Intelligence Quotient, sell up to 37% more than their competitors with lower Positive Intelligence Quotient;[8]

[5] See M. Zlate, *The foundations of psychology*, Pro Humane Publishing House, Bucharest, 2000.

[6] See S. Chamine, *Positive intelligence*, Marshall Goldsmith, 2012.

[7] See S. Lyubomirsky, L. King, E. Diener, *The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?*, Psychological Bulletin, 131, no. 6/2005, pp. 803-855.

[8] See M. Seligman, *Learned Optimism: How to Change your Mind and Your Life,* Vintage, New York, 2006.

- negotiators with a higher Positive Intelligence Quotient, are more likely to extract concessions, strike deals, and forge important business relationships as part of negotiated contracts;[9]
- employees with a higher Positive Intelligence Quotient, take fewer sick days and are less likely to be overwhelmed or resign;[10]
- doctors who have increased their Positive Intelligence Quotient, make accurate diagnoses 19% faster;[11]
- students who have increased their Positive Intelligence Quotient, score markedly better on maths tests;[12]
- CEOs with a higher Positive Intelligence Quotient, are more likely to lead happy performers who believe their work environment fosters high performance;[13]
- managers with a higher Positive Intelligence Quotient are more precise and careful in making decisions, reducing the effort required to implement them.[14]

With a view to cultivate a work environment where positive intelligence is valued and promoted, organisations can take several steps to support employees and provide a beneficial framework for personal and professional development. I chose to mention here personal development because these two are interrelated, and personal experiences have a direct implication in professional achievements. Organisations can provide trainings and workshops to manage stress and develop resilience, encourage positive feedback among colleagues, promote work-life balance, recognise, and reward employee achievements, and create an inclusive and supportive environment that encourages free expression. The existence of a link between positive intelligence and job satisfaction suggests that the development of positive thinking can have beneficial effects for both employees and their organisations. By cultivating these qualities, happier and more productive work environments can be created. Developing positive intelligence is a fascinating concept that focuses on cultivating a mindset that allows individuals to face life's challenges with a more optimistic and resilient attitude.

Positive intelligence involves the ability to transform your mind from a saboteur into an ally by focusing on the positive aspects and finding constructive solutions to problems.

2.1. A comparison between positive intelligence and traditional intelligence or intelligence quotient (IQ)

Positive intelligence and intelligence quotient (IQ) are two distinct concepts in the field of human intelligence. IQ refers to a result obtained from a standardised test that measures various cognitive skills, such as verbal and numerical reasoning, memory, problem-solving skills, and others. IQ is often considered to be a yardstick for measuring a person's overall intelligence and is traditionally used to assess an individual's intellectual capabilities compared to others in the same age group. On the other hand, positive intelligence refers to an approach to human intelligence that emphasises the development and use of cognitive and emotional skills to achieve successful and fulfilling results in life.

The concept of positive intelligence has been developed by several psychologists, including the American psychologist Martin Seligman, and focuses on aspects such as optimism, resilience, gratitude, and self-discipline.

While IQ focuses on a person's cognitive and rational capabilities, positive intelligence also has a view in the emotional and social aspects of intelligence. It is possible for a person to have a high IQ but not to have developed skills in the field of positive intelligence, such as the ability to manage emotions, have healthy social relationships, or adapt to changes.

IQ is a traditional measure of general intelligence, while positive intelligence refers to the skills and traits that contribute to success and happiness in life. These are two different concepts, but they can be complementary because a person can benefit from both high cognitive intelligence and developed skills in the

[9] See S. Kopelman, Ashleigh S. Rosette, L. Thompson, *The Three Faces of Eve: Strategic Displays Of Positive, Negative, and Neutral Emotions in Negotiations*, Organisational Behavior and Human Decision Processes, 99, 2006, pp. 81-101.

[10] See Gallup, *Healthways*, Well Being Index, 2008.

[11] See C.A. Estrada, A.M. Isen, M.J. *Young, Positive Affect Facilitates Integration of Information and Decreases Anchoring in Reasoning Among Physicians,* Organisational Behavior and Human Decision Processes, 72, pp. 117-135.

[12] See T. Bryan, J. Bryan, *Positive Mood and Math Performance*, Journal of Learning Disabilities, 24, no. 8, October 1991, pp. 490-494.

[13] See S. Achor, *The Happiness Advantage: The Seven Principles of Positive Psychology that Fuel Success and Performance at Work*, Crown Business, New York, 2010, p. 41.

[14] See B.M. Staw, S.G. Barsade, *Affect and Managerial Performance, A Test of Sadder-but-Wiser vs Happier-and-Smarter Hypotheses,* Administrative Science Quarterly, 38, no. 2/1993, pp. 304-331.

field of positive intelligence. The differences and characteristics of positive intelligence and traditional intelligence (IQ) can be highlighted as follows:

- Central point: IQ focuses on cognitive and intellectual skills such as logical reasoning, memory, and problem-solving skills. It is a quantifiable measure of a person's cognitive capabilities. On the other hand, positive intelligence emphasises aspects such as optimism, resilience, creativity, and social skills. This refers to the ability to use and develop these traits to achieve success and satisfaction in life;
- Outcome orientation: IQ is often used to assess a person's potential to achieve success in areas such as maths, science, languages, and other tasks that require cognitive skills. Instead, positive intelligence is all about achieving positive outcomes and satisfaction in various aspects of life, including interpersonal relationships, career, health, and overall well-being;
- Holistic approach: IQ provides a limited measure of intelligence, focusing mainly on cognitive aspects. In contrast, positive intelligence takes a more holistic approach, integrating the emotional, social, and motivational aspects of human intelligence. It recognizes the importance of managing emotions, building positive relationships, and acquiring coping and conflict resolution skills;
- Development and intervention: IQ is looking to be relatively stable over a person's lifetime, although there may be some flexibility depending on factors such as education and environment. On the other hand, positive intelligence can be developed and improved through appropriate strategies and interventions. By practising positive skills and developing healthy mindsets, a person can increase the level of positive intelligence.

It is important to note that positive intelligence and IQ are not necessarily in opposition or competition with each other. They can coexist and influence each other's performance and success. For example, a high IQ can facilitate learning and problem-solving, while positive intelligence skills can enhance social relationships and emotional well-being. IQ is a measure of cognitive capabilities, while positive intelligence refers to the skills and traits that contribute to success and happiness in life.

Both concepts are relevant in human assessment and development, and an integrated approach that harnesses both can be beneficial for a balanced and fulfilling life.

2.2. Proposals for specific approaches to practising gratitude and cultivating positive relationships

Further, I will provide some examples of specific approaches to practising gratitude, developing optimism, cultivating positive relationships, and discovering personal meaning at work:

- Practising gratitude at work:
  - Organise a regular team or individual achievement recognition session where you focus on the positives and appreciate the contributions of colleagues.
- Development of optimism at work:
  - Try to see challenges or failures as an opportunity for learning and growth. Think about possible solutions and how you can approach these situations in a positive way;
  - Get involved in projects or activities that excite you and allow you to showcase your creativity and talents. Focus on the positive aspects of your work and identify reasons why you are grateful for your career and job.
- Cultivating positive relationships at work:
  - Be kind and respectful to colleagues and collaborators. Listen carefully and show interest in their perspective and experience;
  - Get involved in team activities and spend time socialising with colleagues outside of work hours. Organise events or activities that foster strong bonds and strengthen relationships among colleagues.
- Discovering personal meaning at work:
  - Find a purpose or mission in your work. Identify personal values and interests that can be integrated into your work responsibilities;
  - Get involved in projects or activities that allow you to manifest your talents and skills. Look for professional development and career growth opportunities that help you achieve your personal goals.

These approaches can help improve job satisfaction and engagement, promoting a positive and constructive atmosphere. Try to integrate them into your daily routine and apply them to your relationships and activities from work.

Trying to support the above information, I've conducted a questionnaire with 15 coherently formulated statements. Further, I've used a Likert scale[15], a popular method in social and psychological research to measure attitudes or perceptions. These statements were analysed by a total of 90 people, active from a professional point of view. At the same time, the interpretation of the results of this questionnaire supports the conclusions of this paper and argues them, as follows:

STATEMENT NO. 1: I find that being able to find positives in difficult situations improves my performance at work. A large majority (71.4%) strongly agree with this statement, which suggests that this mentality is valued and can be considered as having a strong impact on professional performance. However, a small fraction of respondents (10.7%) feels moderately inclined towards this idea, which could indicate either scepticism about the impact of positivism on job performance or perhaps a different interpretation of what „difficult situations" or „performance at work" means. The above results tend to confirm the hypothesis that there is a widespread perception about the benefits of optimism and positive thinking on professional efficiency.

STATEMENT NO. 2: My ability to remain calm and focused under pressure contributes to my professional success. The majority of respondents (72.5%) completely agree with the statement that their ability to remain calm and focused under pressure greatly contributes to their professional success. A significantly smaller, but still notable proportion (27.6%) almost completely agree with this statement, suggesting that they recognize the importance of this capability. Most respondents believe that the ability to remain calm and focused under pressure is crucial to their professional success. This may reflect a widespread recognition of the importance of emotional resilience and stress management in the work environment. The fact that such a large proportion choose the highest option suggests that many professionals have confidence in their ability to handle stressful situations effectively. The difference between the percentages of those who chose options 4 and 5 could indicate variations in individual perception of their own competence or different experiences of pressure and stress at work. I choose to highlight here a strong conviction among participants about the importance and prevalence of stress management skills and self-control as key factors of professional success.

STATEMENT NO. 3: Positive intelligence helps me cope with constructive criticism without feeling discouraged. Most of the respondents (65.5%) indicated that they feel very capable of dealing with constructive criticism by selecting the most positive option available (option 5). This shows a clear trend that most people surveyed believe they have a good ability to handle constructive feedback without feeling discouraged. A significant percentage of respondents (31%) choose option 4, indicating that they feel quite well equipped to deal with constructive criticism, but perhaps not with the same confidence or comfort as those who chose option 5. This group can see the value of constructive feedback and is likely open to improvement, even though there is room for increased confidence in their own criticism management capabilities. Only a small percentage (3.4%) of all respondents choose option 3, suggesting they feel relatively insecure or uncomfortable with dealing with constructive criticism. This minority group may need additional support to develop effective strategies and see constructive criticism as an opportunity for personal and professional growth.

STATEMENT NO. 4: Effectively managing negative emotions positively influences my relationships at work. In this case, 6.9% of respondents chose option 3 on the Likert scale, suggesting that a relatively small minority believe that effectively managing negative emotions has a moderate impact on workplace relationships. They are neither neutral nor very convinced that there is a strong correlation, possibly indicating scepticism or personally varied experiences. Further, 20.7% chose option 4, which indicates a greater recognition of the importance of managing negative emotions for improving professional relationships. These participants tend to agree with the statement, but not absolutely. This may suggest that they see the value of good emotion management, but they also recognize that other factors may play a role in relational dynamics in the workplace. The majority, 72.4%, chose option 5, showing strong agreement with the idea that effectively managing negative emotions is crucial to maintaining or improving workplace relationships. This response suggests that most participants consider emotional competencies to be extremely important and beneficial in a professional context. The results indicate a clearly positive trend: most respondents firmly believe in the importance and benefits of effectively managing negative emotions for improving professional relationships. This strong consensus highlights the value people place on emotional intelligence and the ability to effectively navigate emotional challenges in the workplace to create a more harmonious and productive work environment.

[15] See L.J. Robert, B.M. Grant, *Survey Scales, A Guide to Development, Analysis and Reporting*, Guilford Publications, 2016.

STATEMENT NO. 5: Practising gratitude helps me maintain a positive attitude, which improves the quality of my work. This time, 17.2% of respondents chose option 3, suggesting that a relatively small portion of the group surveyed believe there is a moderate connection between practising gratitude and improving positive attitude/increasing the quality of work. Of the total respondents, 13.8% chose option 4, indicating that there is an even smaller segment that feels a strong connection between these aspects, but not necessarily a complete agreement. An overwhelming majority of 69% opted for option 5, showing that most respondents firmly believe in the benefits of practising gratitude over positive attitude and quality of their work. These results clearly show that most people involved in the survey believe that practising gratitude has a significant positive impact on their attitude and the quality of the work they do. It emphasises the importance of a positive mindset in the work environment and the beneficial effects of gratitude on professional performance.

STATEMENT NO. 6: The ability to stay motivated in the face of obstacles has a direct impact on my professional effectiveness. To this statement, 10.3% of respondents chose option 3 on the Likert scale. This suggests that a relatively small number of people consider themselves moderately able to maintain motivation in the face of obstacles. In the context of professional effectiveness, they might be seen as having moderate confidence in their ability to stay motivated when encountering difficulties. Further, 17.2% chose Option 4 on the Likert scale and this indicates that a larger portion of respondents feel quite able to keep their motivation when faced with challenges, suggesting greater professional effectiveness compared to those who chose option 3. Most of the respondents, namely 72.4% chose Option 5 on the Likert scale. This significant proportion indicates that most respondents consider themselves very capable of maintaining motivation in the face of obstacles. This high level of confidence in one's ability to remain motivated under pressure suggests that these individuals perceive their professional effectiveness as very high. In essence, the results suggest that most people involved in the survey feel very capable of maintaining their motivation in the face of obstacles, which is perceived to have a positive impact on their professional effectiveness. A smaller percentage feel this to a moderate or quite large degree, indicating variations in their perception of their own resilience and professional effectiveness.

STATEMENT NO. 7: Using humour in tense workplace situations helps create a more enjoyable and productive environment. Only 10.3% of respondents chose Option 3 on the Likert scale, suggesting a neutral or moderate stance towards the claim that using humour in tense workplace situations helps create a more enjoyable and productive environment. As for option 4, it was chosen by a proportion of 20.7% indicating an agreement, but not the strongest possible, with the statement. These respondents are probably convinced that humour has a positive impact, but perhaps with some reservations. Option 5 was chosen by 69%, showing strong agreement with the idea that humour can improve atmosphere and productivity in the workplace. This significant percentage suggests that most respondents firmly believe in the benefits of humour in the professional context. These findings underscore the perceived value of humour as a stress management tool and facilitator of a positive and productive organisational culture. In practice, this could encourage leaders and employees to integrate humour more into their daily interactions, while being sensitive to the diversity of individual reactions to humour.

STATEMENT NO. 8: Cultivating empathy improves my professional and personal relationships. To this statement, 10.3% chose option 3 on the Likert scale, and suggest that a small fraction of respondents believe that cultivating empathy improves their professional and personal relationships at an average level. These individuals may see the benefits of empathy, may not be completely convinced, or have experienced these benefits to a limited extent. Option 4 on the Likert scale was chosen by 20.7%, and we can note that a higher proportion of respondents recognize the positive effects of empathy on their relationships compared to those who chose option 3. They probably perceive empathy as important and helpful in improving their interactions with others, but perhaps not at the highest level possible. A majority of 69% strongly agreed with the statement that cultivating empathy significantly improves professional and personal relationships. This group sees empathy not only as beneficial, but essential for developing and maintaining healthy, productive relationships. There is a clear recognition of the importance of empathy as a social-emotional skill that helps create a more harmonious environment and develop strong interpersonal bonds. These results underscore the importance of cultivating empathy not only for individual well-being, but also for qualitatively improving our daily interactions. It is a strong indication that investing in personal and professional development by practising and encouraging empathy can have profound and lasting effects on our society.

STATEMENT NO. 9: The ability to see failures as learning opportunities contributes to my ongoing professional development. In terms of the ability to see failures as opportunities, 3.4% of respondents chose

option 3 on the Likert scale. This suggests that a minority of participants see failures as opportunities to learn in a neutral or moderate way, which could indicate uncertainty or a lack of a strong belief that this process contributes significantly to their professional development. Option 4 was chosen by 34.5%, indicating a higher level of agreement with the statement. This significant percentage suggests that one-third of the group believe that the ability to see failures as valuable lessons is important for their professional growth and development. Of the total respondents, 62.1% chose option 5, indicating a strong agreement with the idea that recognizing and valuing failures as learning moments is essential for continuous professional development. This is the overwhelming number of respondents and highlights a clearly positive trend towards capitalising on failures as tools for learning and growth. In conclusion, the survey results show a predominantly positive attitude towards the importance of recognizing failures as learning opportunities in the context of continuous professional development. Most participants recognize the value of this perspective for professional growth, which may indicate an organisational or professional culture that encourages resilience and learning from mistakes.

STATEMENT NO. 10: Setting positive and achievable goals increases my professional and personal satisfaction. This time, only a small fraction of respondents (3.4%) position themselves neutrally towards the statement, suggesting that most have a clear opinion (either positive or negative) about the impact of goal setting on their professional and personal satisfaction. A significant percentage (31%) agree that setting positive and achievable goals increases their job and personal satisfaction. This indicates that many see clear value in goal setting as a means of improving satisfaction in their lives. The majority of respondents (65.5%) strongly agree with the statement, which suggests that there is a strong belief among participants that setting positive and achievable goals is extremely beneficial for increasing their professional and personal satisfaction. In conclusion, the results indicate a strong consensus among respondents on the importance and value of setting positive and achievable goals for improving professional and personal satisfaction. This positive trend could be used to emphasise the importance of goal setting in personal and professional development, within organisations, coaching programs, or individual self-improvement initiatives.

STATEMENT NO. 11: Positive intelligence helps me manage stress and anxiety better, thus influencing my overall well-being. Option 3, on the Likert scale, indicates a neutral or moderate level of agreement with the statement and was chosen by 6.9% of respondents. Further, 13.8% chose option 4, suggesting a stronger agreement and in the end, 79.3% chose option 5, showing total or very strong agreement with the statement that positive intelligence helps them better manage stress and anxiety. Interpreting these results suggests that the most people surveyed firmly believe that positive intelligence has a significant impact on their ability to manage stress and anxiety, thereby helping to improve their overall well-being. These results could be used to argue for the importance of developing positive intelligence as an integral part of wellness and mental health programs, given the obvious perceived impact on stress and anxiety management.

STATEMENT NO. 12: I can inspire and motivate others with my positive and energetic attitude. To this statement, 3.4% of respondents chose option 2 on the Likert scale, which indicates a low level of confidence or ability to inspire and motivate other people through their positive and energetic attitude. Further, 17.2% chose option 3, suggesting a moderate or neutral level of the same ability, and option 4 was chosen by 17.2%, indicating a high level of ability to inspire and motivate. Option 5 shows a very high confidence in their ability to inspire and motivate others through their attitude and was chosen by 62.1% of respondents. Interpretation of these results suggests that most people involved (62.1%) consider themselves extremely capable of inspiring and motivating others through their positive and energetic attitude. This could indicate an overall positive perception of one's own interpersonal abilities and personal influence among respondents. Compared to the lower percentages for lower options on the Likert scale (3.4% for option 2 and about 17.2% for each of options 3 and 4), it can be inferred that there is a clear tendency towards positive self-assessment in terms of the ability to have a motivating impact on others. This distribution suggests optimism and confidence among participants regarding their own social skills and their effect on others. It is important, however, to consider the specific context of the group responding to the survey (*e.g.*, background, age, experience) for a more precise and relevant interpretation of the data.

STATEMENT NO. 13: Regular exercise and meditation help maintain a positive mental state, which is reflected in my professional and personal performance. A very small percentage of respondents strongly disagree that regular exercise and meditation help improve their mental state and performance (3.4%). This suggests that almost all participants see value in these practices. A larger minority than the first category, but still a relatively small percentage of participants are neutral on this topic (10.3%). This could indicate that some

of them may not have personally experienced the benefits of exercise and meditation, or perhaps they have not practised them enough to notice an impact on their mental state or performance. About a quarter of respondents agree that regular exercise and meditation have a positive impact on their mental state and performance (24.1%). This is a significant proportion that recognizes the benefits of these practices. The majority of participants (62.1%,) completely agree with the statement that regular exercise and meditation contribute positively to their mental state and professional and personal performance. This indicates a widespread recognition of the importance and effectiveness of these activities in improving overall well-being.

STATEMENT NO. 14: My relationships are richer and more satisfying when I apply the principles of positive intelligence in my interactions with others. In this case, 10.3% of respondents chose option 3 on the Likert scale. This suggests that a relatively small proportion of participants believe that applying positive intelligence principles in interactions with others has a moderate impact on enrichment and satisfaction in their relationships. These individuals may still be undecided about the full impact of positive intelligence or have varied experiences. Further, option 4 has been chosen by a proportion of 17.2%, indicating a higher level of agreement (but not completely) that applying the principles of positive intelligence contributes significantly to improving the quality of their relationships. This suggests that a larger portion of respondents recognize the benefits of positive intelligence, but there may be room for even stronger conviction or even more positive outcomes. The majority of 72.4% chose option 5, which indicates strong agreement with the statement that their relationships are richer and more satisfying when they apply the principles of positive intelligence. This is an overwhelming majority and suggests that most participants experienced significant improvements in the quality of their relationships by applying these principles. The results indicate a predominantly positive perception of the impact of positive intelligence on the quality of interpersonal relationships. Most of the respondents (72.4%) are firmly convinced of its benefits, while the rest remain moderately optimistic or possibly require more evidence or personal experience to be completely convinced.

STATEMENT NO. 15: I believe that the continuous development of positive intelligence is essential for long-term success both in career and personal life. To this last statement, 7.2% of respondents chose option 4 on the Likert scale, which suggests that they agree on the importance of continuously developing positive intelligence for long-term success. As for option 5, it was chosen by 82.8% indicating full and unreserved agreement with the proposed statement. This suggests that a large majority consider developing positive intelligence essential for career and personal life success, showing not only a generalised consensus on the subject, but also a widespread recognition of the value of positive intelligence as a key factor in achieving personal success and fulfilment.

3. Conclusions

In conclusion, increasing professional efficiency through positive intelligence can be achieved through several methods and practices, among which I will specify the following: developing self-awareness, practising mindfulness, stress management techniques, cultivating empathy and positive relationships, setting realistic goals, continuous learning and practising gratitude.

Developing self-awareness can be achieved by understanding your own thoughts, emotions and reactions is essential. This helps you recognize when you're in a negative or limiting mental state and change direction toward a more positive and constructive approach. Further, mindfulness techniques help you stay anchored in the present, reducing stress and anxiety. This can improve focus and productivity, allowing you to work more efficiently. If we talk about stress management techniques, learning effective ways to cope with stress can reduce its impact on your professional efficiency. Cultivating empathy and positive relationships can increase job satisfaction and facilitate effective collaboration. Empathy helps you understand and value the perspective of others, which can lead to a more harmonious and productive work environment. I will continue to mention setting realistic goals, having in mind that setting clear but flexible goals can guide your efforts and keep you motivated. Celebrating small victories along the way can foster a positive attitude. Also, adopting an open mindset and dedication to lifelong learning can enrich your skills and competences, making you more adaptable and prepared for various professional challenges. Least but not last, taking time to reflect on what you're grateful for can change your perspective on your professional and personal life, promoting an overall sense of well-being.

By implementing these practices into your professional life, you can not only increase your professional efficiency, but also improve your overall quality of life.

Positive intelligence isn't just about being happy, it's about consciously using positive emotions and thoughts to build resilience and effectively navigate the complexity of the modern professional world.

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THE IMPACT OF REINTEGRATION INTO THE PROFESSIONAL ENVIRONMENT AFTER PARENTAL LEAVE ON THE PERFORMANCE OF EMPLOYEES IN THE PRIVATE SECTOR IN ROMANIA

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Abstract

Ensuring performance at work for people returning from parental leave is an important and sensitive topic for both employees and employers. Reintegrating into work after an extended absence can be challenging, but there are strategies and practices that can facilitate this process. The topic of this research is particularly relevant in the current context, given the importance of increasing the balance between personal and professional life of employees and ensuring an efficient reintegration into the work environment after a break period.

Human resources motivation is a fundamental aspect for any organisation, as it is proven that motivated employees are more engaged and have higher productivity at work. Employees who return to work after a period of absence may be exposed to a series of challenges, such as adapting to changes in the work environment, finding a balance between parenting and professional responsibilities and further resuming the previous work rhythm. It is therefore essential to identify how HR motivation can be supported and encouraged at this stage. Positive intelligence is, in fact, the ability to identify opportunities and solutions, and to have a positive attitude in the face of challenges.

The results of this research are intended to be transformed into valuable information for both managers and human resources professionals, but also for employees who return to work after the end of parental leave. By understanding this reintegration process more deeply and identifying effective practices, organisations can create a more supportive work environment and support employees in achieving professional and personal success.

Keywords: *work performance, parental leave, motivation, responsibilities, reintegration, positive intelligence.*

1. Introduction

Human resource motivation, positive intelligence and performance at work are complex and interconnected topics that have captured the interest of researchers in the field of human resource management. Motivating human resources is essential to ensure the presence of engaged and productive employees. Theories of motivation, such as Maslow's theory of basic needs, Vroom's theory of expectations, and self-determination theory, laid the foundation for a better understanding of motivation at work. These theories highlight the importance of meeting employee needs, expectations of effort and performance, and personal autonomy and competence in achieving job satisfaction and performance. When it comes to people returning to work after parental leave, motivational factors can vary and can be influenced by changes in personal and professional life.

The methodology for this research includes steps as review of the literature, data collection and in the end analysis of data. Review of the literature, involves conducting an extensive study of the specialised literature, related to human resources motivation, positive intelligence, performance at work and reintegration of employees after parental leave. This study in the literature is the theoretical basis of the research.

The second stage of research is data collection. At this stage I will use several methods of data collection, such as questionnaires, interviews, and observations.

For this study I collected quantitative and qualitative data from employees returning to work after parental leave, managers, and representatives of human resources departments. The aim is to gain a detailed understanding of the experiences, perceptions and needs of these employees in the reintegration process.

The third stage of the research is represented by the analysis of data and their interpretation, for identifying patterns, trends, and relationships between variables relevant to the topic of the study.

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The study aims to use mixed research methods, both qualitative and quantitative, for developing an action plan, to improve communication between employee and manager, and at the same time to identify ways of motivation, depending on the characteristics of each category of employees, ensuring performance at work.

Regarding the objectives, an important objective is to identify specific strategies and interventions from both the employee, organisations, and the government side, which can support and encourage motivation and performance at work. This paper aims to focus on organisational needs, personal development programs or policies for reconciling work and personal life that can be effective in promoting motivation and performance of these employees.

2. Implications of the process of reintegration and performance at work

The idea of self-improvement moved from the extremes of management theory and human resources cultivation, managing to occupy a central position today. The phenomenon is largely due to a reorientation from „control" strategies to „engagement" strategies in the management of organisations. This radical change has given rise to a wide range of methods of self-improvement[1]. Positive motivation is how managers lead with the vision of the future, not that of the past; they focus their attention on actions not just analysis; they see solutions not just problems, they are in control and less controlled[2]. Work-life balance is often disrupted in terms of allocating time for work versus family or other personal projects. While a more balanced allocation of time is always helpful, you can instantly improve your work-life balance using the Positive Intelligence Quotient, Brain[3]. Positive intelligence is identified by the ability to see opportunities, have a positive attitude, and develop resources needed to face challenges. It can play a determining role in the process of employees' reintegration into the workplace after completion of parental leave. The positive approach and ability to find creative solutions can help to adapt quickly to changes in the work environment and maintain high performance. Specialised studies show that professional success does not depend on academic training and claim that it is based on that emotional capacity, called emotional intelligence[4]. Emotional intelligence was analysed from two perspectives: the hereditary perspective and the acquired perspective. There are people who throughout their lives need to train and develop their emotional intelligence. Academic intelligence does not change throughout life, but emotional intelligence can be acquired through training and practice[5].

Positive intelligence is a branch of positive psychology that focuses on the positive aspects of the individual and the human experience. It deals with the development of human qualities such as optimism, resilience, gratitude, empathy, and altruism. Returning to work after parental leave ends can be a complex and challenging time for employees. Research on this topic has highlighted the importance of psychological support and coping resources to facilitate effective reintegration and ensure a smooth and successful transition to the work environment for employees. Another important aspect of positive motivation is creating a work environment where employees feel engaged and have a strong emotional connection to the goals and values[6] of the organisation. This can be achieved by clarifying and communicating the mission, vision, and organisational values and by involving employees in decision-making processes. When employees feel connected to a larger purpose and understand the positive impact of their work, it can be a powerful source of motivation.

Also, inspirational leadership and the example set by leadership are essential in positive motivation. When leaders are role models and demonstrate a positive attitude, dedication, and engagement, they can influence and motivate employees to do the same. Leaders should provide and support employees' personal and professional development, providing opportunities for learning and growth[7]. The basic idea of leadership is that it means influence. If you want to lead, you will need to convince your team to work with you[8].

In Romania, performance management is based on a series of approaches and tools, which may vary depending on the size and sector of activity of the organisation. Some of the common aspects of performance management in Romanian organisations: setting clear goals (SMART), planning, monitoring, and evaluating

[1] See Molden, J. Maxwell, *Good leaders ask extraordinary questions*, Amaltea Publishing House, Bucharest, 2016.
[2] See J. Owen, *How to Lead*, Pearson Publishing House, USA, 2017.
[3] See S. Chamine, *Positive Intelligence*, Curtea Veche Publishing House, Bucharest, 2012.
[4] See I. Dumitru, *Emotional intelligence and irrational beliefs,* Sitech Publishing House, Craiova, 2016.
[5] See D. Goleman, *Working with Emotional Intelligence*, Bloomsbury Publishing, 2000.
[6] See B. Tracy, *Motivation,* The Brian Tracy Success Library, USA, 2013.
[7] See N. Drake-Knight, *Continue and Begin Fast Coaching*, UK, 2019.
[8] See Molden, J. Maxwell, *op. cit., loc. cit.*

performance, feedback and development, rewards and recognition, communication, and engagement. Many executives complain about the same phenomenon when it comes to their attempts to improve individual or team performance through advising, sustained feedback on the performance-evaluation relationship, conflict resolution and stabilisation, skills development workshops and team-buildings. People show resilience to change, even when they seem to think they want it[9]. Daniel Goleman, author of „Emotional Intelligence", returns to readers' attention with an original perspective on one of the resources improperly exploited today: attention, as a secret ingredient of performance. In an age where distractions lurk everywhere and are impossible to remove, Daniel Goleman demonstrates that, more than ever, we need ever sharper attention to face adversity and thrive[10]. A good reintegration of employees returning from parental leave can bring many benefits to the organisation, such as talent retention and development, improved employee morale and increased productivity.

The analysis of the applicability of the requirements of employees on parental leave, for a successful reintegration, from the employer's perspective, involves adapting policies, providing the necessary support, effective communication and cultivating a family-friendly work environment. By implementing these measures, the employer can support a smooth and successful transition of employees in their professional activity after the leave period.

Our mind and cognitive processes have a significant influence on our personality and how we make decisions. Personality is a unique structure built around our interpretations of the world and how we process and assign meaning to our events and experiences[11].

2.1. Intended purpose and expected results

The main purpose of this study is to identify the best methods by which each manager can motivate his employees, having in mind the characteristics of each category of employees. At the same time, this paper proposes a thorough analysis of how the reintegration in the working market of people who have a period of absence of up to 2 years, due to maternity leave and parental leave, and the construction of a new model of motivational management based on these results. The research will use the opinions of the two parties involved, namely, employee and employer, and aims to meet them, with a well-structured plan for a successful reintegration, in terms of lower costs, aiming at motivating performance.

Regarding the population's participation in economic activity, the latest data of the National Institute of Statistics show that, out of the total employed population, women accounted for 42.6%.[12] These data are part of the archive of the National Institute of Statistics and belong to studies from 2020. Also from this source, we learn that approximately 52.4% of the number of live births have salaried mothers. Therefore, we are talking about a high percentage of women who need support to return to work and continue their careers. In the paper „Reconciliation of professional and family life", published by the National Institute of Statistics of Romania, the following situation is brought to our attention: most people stayed at home between 1 and 2 years, the highest share being registered among people aged 25-34 years.[13] It turns out that 76.7% of those who temporarily interrupted their activity to care for children, the interruption was in the form of parental leave.

The results of research on the proposed topic show that few things are more important to the leader-subordinate relationship than connection. One of the most important aspects for employees is trust and a sense that the manager cares, and that their work is appreciated.

Motivating employees who return to work, after a period of absence of up to 2 years, is a long process that requires effort from both parties involved, and at the same time involves adopting a courageous attitude in front of the fear of failure. Making a complete radiography of this situation and proposing viable solutions is the purpose of this research. It is a complex approach to reduce prejudices on the Romanian working market to a minimum, and to get rid of business decisions made through less good calculations. At the same time, it also aims to open the employee in connection with a possible preparation for leaving the working market, for a determined period.

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[9] See S. Chamine, *op. cit., loc. cit*.

[10] See D. Goleman, *Focus*, Curtea Veche Publishing, Bucharest, 2014.

[11] See Oliver et all, *The Handbook of Personality*: Theory and Research, The Guilford Press, USA, 2021.

[12] See *Reconciliation of work and family life,* National Institute of Statistics, Bucharest, Romania, *https://insse.ro/cms/ro/content/reconcilierea-vieții-profesionale-cu-cea-familială, last* time consulted on 01.04.2024.

[13] *Ibidem*.

Each person faces at some point in his career a lot of problems, obstacles, barriers. Some of them let these things defeat them because they fail to think creatively, and because they do not find the strength to fight hardships, or they lack self-confidence. Employees can be motivated by a leader with vision, a man who knows how to objectively evaluate himself and see beyond appearances. The manager's support for continuing their career, from the same point they were in, before entering parental leave is the main requirement for 66% of the total 877 people surveyed. At the same time, 70% of these people worry about performance at work after the period of absence. Regarding the process of readjusting to work, 37% said it was difficult. Regarding how this process is managed by management, 52.3% said that poor management contributes to the decision to change jobs, followed by 43.9% who named the manager's lack of motivation and coach capacity as a determining element in making this decision. Regarding the determining aspects in the employee's motivation process towards performance, 95.4% of the 877 people surveyed named the work environment, the atmosphere at the office, job security and the relationship with superiors as priority factors.

2.2. Practical suggestions that can help in the process of motivating staff who return to work after a period of absence of up to 2 years, due to Parental Leave

- Flexible Hours - Schedule flexibility: Introducing flexible working hours or the option of working from home (teleworking) can be very helpful. This allows parents to adjust their working hours according to the needs of the family;
- Adaptation period and more specifically gradual reintroduction: An adaptation period, during which the employee returns to work with an initial part-time schedule, can facilitate the transition;
- Training and Development: Training programs: Updating professional knowledge and skills through courses or trainings can help people returning from parental leave feel more prepared and confident in their abilities;
- Psychological Support: Advising and support: Providing access to everyday feedback or coaching services can help employees better manage stress and improve their work-life balance;
- Effective Communication - Open Dialogue: Maintaining open communication between employee and manager/HR is crucial. Regular discussions about mutual expectations, performance feedback and any concerns about reintegration are essential;
- Flexibility in Performance Appraisal - Adapting objectives: It is important that performance targets are realistic and adapted to the employee's new situation. This includes recognising that the period immediately following returning from leave may require a readjustment of expectations;
- Creating an Inclusive Environment: Family friendly policies: Developing an organisational culture that supports work-life balance is beneficial for all employees.

By implementing these strategies, organisations can ensure that the transition back to work after parental leave is as smooth as possible for employees, thereby helping to maintain a high level of job satisfaction and performance. These practices not only support employees at this important stage, but also help create a positive and productive work environment for all team members.

The above results were obtained after processing a questionnaire, to which a total of 877 people responded.

The purpose of this questionnaire is to identify the needs, perceptions, and expectations of people returning to work after a period of absence of up to 2 years. We want to identify viable future solutions to better manage these situations on the labour market.

2.2.1. Questionnaire presentation conducted on a homogeneous sample with 877 respondents

The questionnaire consists of 17 questions, of which, 2 open questions, for identifying the objective point of view of the interviewed persons, and to have a multitude of diversified answers, 6 dichotomous questions and 9 questions with answers of choice.

Table 1. The field of activity in which the interviewees work

Sales/Customer Support	203	23.14%
Administrative	144	16.4%
Management	117	13.34%

IT	42	4.79%
Independent	17	1.94%
Medicine	44	5.01%
Accounting	15	1.71%
Finance	20	2.28%
Human resources	8	0.91%
Engineering	14	1.59%
Legal	11	1.25%
Marketing	5	0.57%
Research	8	1.6%
Construction	5	0.57%
Pharmaceuticals	11	1.25%
Others	213	24.29%

Source: Questionnaire with 877 respondents conducted by the author

According to the data exemplified in the table above, we can see the diversity of the fields of activity in which the interviewed persons work. There is a share of 23.14% of sales/customer service staff, an area that requires more attention, in terms of how each day is organised, and ways of motivation with direct impact, on both material performance and customer satisfaction.

Table 2. Determining reasons in the process of returning to work, before or at the end of Parental Leave

Finance	363	41.3%
Financial, Social, Career	119	13.5%
Finance, Social	94	10.72%
Financial, Career	85	9.7%
Career	60	6.84%
Social	42	4.78%
Employer requirement	19	2.17%
Social, Career	18	2.05%
Financial, Employer Requirement	11	1.25%
Finance, Social,	11	1.25%
Financial Employer Requirement	5	0.57%
Financial, Employer Requirement	4	0.46%
Career, Employer requirement	4	0.46%
Social, Employer requirement	2	0.22%
Others	40	4.56%

Source: Questionnaire with 877 respondents conducted by the author

Regarding the reasons behind the decision to return to work, before the end of the parental leave, respectively at its end, we find especially the financial reason with 41.3%, Career with 6.84% and Social with 4.78%. It is worth mentioning that, for most of the people surveyed, these 3 elements are priorities, being mentioned together most of the time.

Table 3. Concerns about returning to work after completion of parental leave.

Caring about separation from the child	581	66.9%
Employer/management attitude	148	17%
Changes within your company that you haven't been informed about	176	20.3%
Reduced workload and time due to family responsibilities	537	61.8%

Source: Questionnaire with 877 respondents conducted by the author

Regarding concerns about returning to work after completing parental leave, 66.9% said "Worry about separation from the child", 61.8% - "Reduced workload and time due to responsibilities to the family, followed by changes within the company, about which they were not informed, for 20.3% and "Employer/management attitude" for 17%. With these elements, we can identify viable solutions to reduce these potential factors with direct influence on workplace performance.

Table 4. Accommodation, needs and flexibility

We discussed and received the necessary support	269	32.2%
We discussed, but nothing could be done about it	66	7.9%
I didn't think there could be these possibilities	200	23.9%
I didn't think about that	249	29.8%

Source: Questionnaire with 877 respondents conducted by the author

Regarding the integration of people who are absent from the working market, for a period of up to 2 years, for parental leave, it can be seen from the table above, that 29.8% did not try to discuss with the employer about things such as accommodation, needs, flexibility. A percentage of 32.2% discussed and received the necessary support, 23.9% are not informed about the existence of these possibilities, and for 7.9% nothing could be done in this regard, following the discussion with the management of the company where they operate.

Table 5. What would make you change your job after the end of Parental Leave?

Lack of support from employer/management	434	52.3 %
Lack of motivation manager and coach capacity	364	43.9 %
Changes that have taken place and were brought to your attention too late	138	16.6 %
Changing professional perceptions	121	14.6 %

Source: Questionnaire with 877 respondents conducted by the author

It happens extremely often to hear about people who choose to change jobs after the end of parental leave.

This is due, according to the respondents' statement, mainly to the lack of support from the employer/management, for a percentage of 52.3%. At the same time, the manager's lack of motivation and coach capacity is a problem for 43.9%, followed by the changes that took place, about which they received no information for 16.6%, and the change in professional perceptions for 14.6%. Regarding the management of the process of returning to work, 37% said it was a difficult process, 5.3% said it was a very difficult process, followed by 14.5% who said everything went great, and 10.3% chose to change jobs. Given this statistic, I believe that the manager plays an extremely important role in the process of reintegration at work, of this category of people. An easier reintegration involves a reassessment of the employee with everything that means priorities, skills, plans and potential, for establishing a reintegration plan, motivating the employee towards performance.

Table 6. What is the first question you think about the process of returning to work?

Will I still have the same position within the company?	191	22.5 %
Who will be my manager?	83	9.8%
Will I need new skills and knowledge?	263	30.9 %
Will I still perform the same?	600	70%

Source: Questionnaire with 877 respondents conducted by the author

According to the above statistics, 70% of the people surveyed question their performance at work after the period of absence due to parental leave. At the same time, uncertainty about skills and knowledge is a concern for 30.9% of them. It seems, however, that there are also people who question the existence of their job or rather

the position they occupied, and here we are talking about a percentage of 22.5%. There is also a relatively small percentage of people who think that management has changed during this period, but have not been informed, 9.8%.

Table 7. Do you consider that you have the manager's support for continuing your career, from the same point where you were before entering parental leave?

Yes	556	66%
No	232	27.6%
I don't know	89	10.14%

Source: Questionnaire with 877 respondents conducted by the author

Regarding the continuation of their career from the same point where they were before the period of absence, 66% say they receive the manager's support in this regard, 27.6% consider that they will not benefit from this support, and for 10.14% there is still uncertainty. Career can be an extremely important stimulus in the development process of each person. This is a good opportunity for a manager with leadership skills to meet even the hardest challenges to which the company may be subjected, while helping the employee to evolve. The ability of a manager to identify the employee's need, and to use everyone's potential, is a key element in the motivation process.

Table 8. What is your perception of the current Manager?

My manager always shows interest in my career	139	15.85%
I have total confidence in my manager; he/she has always been honest with me	158	18.01%
I have always been rewarded and appreciated for my work/performance	211	24.06%
None of the above	369	42.07%

Source: Questionnaire with 877 respondents conducted by the author

The way the manager is perceived is very important in strengthening a healthy manager-employee relationship. For finding out the perception of the interviewed persons, we proposed four characteristics of a manager, for analysis, namely: „My manager always shows interest in my career", „I have total confidence in my manager; he/she has always been honest with me", I have always been rewarded and appreciated for my work/performance. Most, namely 42.07% say they cannot attribute these characteristics to their manager.

Table 9. What aspects do you consider decisive in the employee's motivation process at work?

Working environment	19	2.1%
Socialization	16	1.82%
Job security	25	2.85%
Relationship with superiors	5	0.57%
All listed above	837	95.4%

Source: Questionnaire with 877 respondents conducted by the author

We proposed for analysis 4 key elements of the motivational process at work, for achieving performance. The work environment, the atmosphere at the office, safety at work, the relationship with superiors, were agreed by a percentage of 95.4%.

Question 1: What expectations do you have from your employer for an easier readjustment to work?

In most of the completed questionnaires, aspects such as understanding, patience, support, communication, trust, constructive feedback, transparency, encouragement, attention to the needs and necessities of each person, flexibility and realistic expectations could be identified. As a summary of the answers, I quote:

- „Employment in the same position, and possibly training to refresh knowledge."
- „Discussions about the new position, in advance, so that I can process the information and prepare if necessary."
- „Support in integration, through early connection (not at the last minute)."

- „To be able to set realistic goals together, and a plan for learning/adapting to new requirements or technologies."
- „Training as for a new employee, presenting current projects and changes."
- „Offering equal opportunities compared to other colleagues, keeping your career path, keeping your position."
- „Access to training and coaching/mentoring to keep me up to date with changes during my absence, timely feedback and active guidance."
- „Support and motivation to achieve performance."

Question 2: How do you think your employer could motivate you to regain confidence in your capabilities?

The answers of those surveyed include a total of defining aspects of a leader. We have seen a successive repetition of statements such as:

- „Giving tasks with difficulty level gradually. Appreciation for things done well and feedback where there are things to improve."
- „Granting the same post."
- „Treat me the same as they did before I went on parental leave; If I were assigned lighter projects, it is clear that he does not trust my capabilities."
- „Real feedback on performance."
- „Taking on the same role, receiving new projects and trusting employees."
- „Courses/assessments, responsibilities commensurate with potential, performance bonuses if I achieve my goals."
- „Through appreciation and validation."
- „Regular feedback, openness to communication, patience and empathy, encouragement throughout progress and when successes occur."
- „The manager can motivate me through behaviour, adapted to my professional needs."
- „Objective evaluations/feedback (based on facts and examples) and confidence that they can lead or be part of high-impact projects."

In addition to these statements, we also frequently state: support, patience, encouragement, communication, support of ideas, autonomy, independence, appreciation of work, recognition, training, pleasant atmosphere at work, positive attitude.

In conclusion, I would like to express a point of view of a Human Resources Manager, within a Romanian Courier Company, regarding the return of an employee to work, after a period of absence of up to 2 years, due to parental leave.

2.2.2. Interview - Human Resources Manager Romania

How does business influence a mother's return to work? - is not influenced in any way. During parental leave, the employment contract is suspended, and the position is temporarily replaced. Consequently, in terms of costs, the business is not influenced. It can be, just taking into consideration that an experienced person leaves, and another comes who does not know the business (or maybe knows) depends.

- **Question no. 1**: What are the key factors for a successful reintegration?

There can be many: - granting all rights, which are rightful in the company, on the respective position updated (*e.g.*, during the CIC period salary increases were granted).

When the employee returns, his salary must be updated to the level of the other employees in the department, or to the percentage with which the rest have been updated. Any internal regulations contain regulations vis-à-vis maternity protection at work: hours worked, whether the returning mother is breastfeeding or not, working position, breaks, etc.

- **Question no. 2:** How important is motivation for this category of employees?

I would say it is a key factor, considering that the period spent at home with the child, in most cases demotivates the mother, she no longer feels a person who can perform, be aware of changes, be competitive, etc.

- **Question no. 3**: How long does it take to achieve performance at work, after a period of absenteeism, due to maternity/parental leave?

It depends on a case-by-case basis. It can be in a month, or it may not be at all. It depends a lot on the person, on the conditions in the family, if there are problems vis-à-vis the child (he does not go to kindergarten, he is sickly). I would say between 3 months and 1 year. From experience, most of the time it is the maximum time option, *e.g.*, 1 year.

- **Question no. 4:** How do you evaluate the costs of reintegrating a mother versus hiring another person in the same position?

They can sometimes be a little higher, given the sound in the company, compared to a new employee, overall, the difference is not significant. There are pluses and minuses that ultimately compensate.

3. Conclusions

The reintegration of employees into the workforce after parental leave is a critical stage in their career development and in maintaining organisational performance. Human resource motivation and positive intelligence play a key role in this process and can significantly influence employee performance. Therefore, my aim is to investigate how these factors can be optimised to encourage successful reintegration and high performance at work.

As I mentioned, I chose to take a mixed approach to data collected and combine both qualitative and quantitative methods. Interviews with employees who returned to work after parental leave provided a better understanding of their experiences, as well as the challenges faced, and strategies used to motivate themselves and improve their performance.

Based on the results and conclusions obtained in my research, I developed practical recommendations and strategies for organisations in managing the reintegration of employees after parental leave such as flexible hours, adaptation period and more specifically gradual reintroduction, updating professional knowledge and skills through courses or trainings, access to feedback or coaching services, effective communication, and flexibility in performance appraisal. It is important that performance targets are realistic and adapted to the employee's new situation. This includes recognising that the period immediately following returning from leave may require a readjustment of expectations and Creating an Inclusive Environment.

These recommendations aim at motivating human resources, integrating the notion of positive intelligence and performance at work in this specific situation. It is also vital that organisations adopt effective measures to support employees in their return to work, and to maximise results at individual and organisational level.

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SMART AGENT-BASED FRAMEWORK FOR MULTIPLE SIMULTANEOUS BILATERAL NEGOTIATIONS TO SUPPORT BUSINESS PROCESSES

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Abstract

This paper introduces an innovative agent-based intelligent framework aimed at modelling and facilitating simultaneous and parallel negotiations among organisations operating within the same industrial sector. The challenge lies in capturing the dynamic nature of the environment, where negotiations involving multiple attributes and participants are competing for a diverse array of resources. The quest for enhanced competitiveness has prompted companies to establish specialised business units to navigate the pursuit of new partnerships, necessitating seamless interoperability.

However, the current state of Enterprise Interoperability is susceptible to the disruptive influence of external factors, making it vulnerable to fragmentation. To adapt to necessary changes, continual adjustments must be made, albeit at the risk of introducing conflicts with existing concepts, potentially jeopardising interoperability with partner organisations or necessitating widespread modifications. In response, this paper proposes a collaborative framework to facilitate negotiations aimed at enhancing interoperability among organisations operating within the same industrial domain, leveraging a model-driven, cloud-based infrastructure and services.

The objective of this study is to provide assistance to autonomous microgrids that lack the capacity to secure large contracts independently. Addressing interoperability challenges, the paper advocates negotiation activities as a fundamental solution. Negotiation serves as a means for all microgrids within the collaborative network to reach mutually acceptable resolutions. The paper presents a negotiation approach wherein intelligent agents assess and modify offers and counteroffers, supported by a communication protocol among these agents.

Keywords: *Automated Negotiation, microgrid, smart agents, dynamic environment, Network Enterprises, Virtual Enterprise.*

1. Introduction

Enterprises are forging specialised business units to seek and align with optimal partners and suppliers, ensuring their solutions resonate with strategic objectives. In a landscape marked by evolving solutions, platforms, trends, standards, and regulations, this pursuit demands continual updates to solutions, interfaces, methods, and quality standards. The ability of enterprises to seamlessly exchange information, internally among departments or externally with external parties, defines Enterprise Interoperability (EI). While large enterprises establish market standards and influence their supply chains accordingly, Small and Medium Enterprises (SMEs) face greater vulnerability to environmental fluctuations, necessitating constant adaptation for interoperability within their ecosystems. Sustainable EI (SEI) entails maintaining interoperability throughout the lifecycle of enterprise systems and applications, requiring continual maintenance and adaptation to evolving conditions and partners.

Recent advancements in information technology have given rise to virtual organisations, exemplified by the concept of Virtual Enterprises (VEs) or Networks of Enterprises. These alliances, formed by independent companies, pool skills and resources to enhance profitability, facilitated by computer networks. In this context, the paper aims to develop a conceptual framework and associated informational infrastructure to support collaboration activities, particularly negotiations, within Network Enterprises.

The concept of Virtual Enterprise (VE) or Network of Enterprises has emerged to identify situations wherein multiple independent companies collaborate to establish a virtual organisation, aiming to enhance profitability. Defined by Camarinha-Matos, „a Virtual Enterprise (VE) is a temporary alliance of enterprises that come together to share skills and resources, facilitated by computer networks”[1].

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[1] L.M. Camarinha-Matos, H. Afsarmanesh, *Collaborative Networked Organizations*, Kluwer Academic Publisher Boston, 2024.

Focusing on the intersection of communication technologies and industrial relationships, the paper delineates two main directions: leveraging the Internet and Informatics for interpersonal communication and envisioning efficient coordination of information technologies to streamline activities. In this respect, the objective of the paper aligns with the continual pursuit of enhancing profitability through fostering collaborative endeavors. The paper underscores the importance of supporting SMEs in virtual alliances, enabling them to subcontract tasks and negotiate within inter-organizational alliances.

Negotiation plays a pivotal role in these alliances, serving as a means for achieving common agreements to support collaborations. By exemplifying negotiation processes within scenarios involving microgrids—autonomous entities managing contracts, programs, and resources—the paper introduces a smart framework for coordinating simultaneous negotiations in dynamic environments.

These scenarios underscore the flexibility required to support negotiation processes while respecting the autonomy of partners. The collaborative infrastructure must enable minimal exchange of information, ensuring that each participant retains decision-making power over its contracts, resources, and clients. Ultimately, the objective is to foster cooperation among competing entities within virtual alliances, enhancing responsiveness to market demands while maintaining individual autonomy.

The following sections describe the challenge of automated negotiations, the collaborative microgrid architecture, the coordination components that manage different negotiations, the description of the negotiation process among autonomous microgrids and the final considerations of this paper.

2. The Challenge of Automated Negotiations

In simple terms, negotiation is a discussion between two or more participants trying to find a solution to a problem. This interpersonal or intergroup process can occur at both the individual level and the level of an industrial organisation or even internationally (diplomatic). Therefore, we will identify several characteristics of the negotiation process that are common across most research domains. To distinguish between the mechanisms that drive negotiation and aspects that are not directly related to negotiation but influence the process, we will present a synthetic view of negotiation, structured into three categories of dimensions:

- the participant involved in the negotiation;
- the context in which the negotiation takes place;
- the mechanism that drives the negotiation.

Regarding the participant in a negotiation, in most disciplines studying negotiation mechanisms (excluding computer science), the participant is usually human. In this section, we will detail two aspects of the participant in a negotiation:

- the individual dimension, which describes the human aspects of the participant;
- the social dimension, which characterises the possible roles in a negotiation.

We have proposed this division with the aim of distinguishing between the characteristics of participant behavior that may influence the negotiation process and the possible constraints imposed by the negotiation process.

In daily negotiations, the success of any transaction depends heavily on the human factor, on the players negotiating these transactions. The participants are unique individuals with different personalities and motivations, exhibiting distinct behaviors shaped by their own emotions and psychology. A different perspective can be found in books that make a clear distinction between the mind of the participant - responsible for developing negotiation strategies and reasoning mechanisms - and the heart of the participant, which characterises the emotional, psychological, and intuitive aspects of negotiation[2] [Thompson, 2020].

Another approach emphasises that skilled negotiators can learn to manipulate their own emotions and those expressed by other participants very effectively. Thus, two different negotiations can be identified: one with one's own emotions and another with the person on the other side of the table[3] [Gray, 2007]. Therefore, they are free to respond constructively to their adversaries. This means that the best negotiators seek, and probably succeed in finding, certain expressions of the emotional behaviors of other participants, which recur with a certain regularity. By identifying these regularities, attached to the individual dimension of the different participants, negotiators can refine their own behavior based on the behaviors of others.

[2] L.L. Thompson, *The Mind and Heart of the Negotiator*, 7th ed., Northwestern University, Publisher Pearson, 2020.
[3] B. Gray, *Negotiating With Your Nemesis*, 2007, *https://doi.org/10.1111/j.1571-9979.2003.tb00789.x*.

2.1. The negotiation participant

During a negotiation, the rhythmicity of certain actions by the participants is linked to the values attached to the social dimension that identifies the roles participants play in the negotiation process.

Multiple roles are proposed in negotiation studies. Considering that, most often, the characteristics of these roles do not have the same dimensions, we have structured the proposed roles based on three aspects: i) the goals participants try to achieve, where the roles are: seller and buyer; ii) the involvement of the participant in the negotiation process, where the roles are: initiator and guest; iii) the power of the participants over the negotiation process execution, where the roles are: mediator and active participant.

Seller/Buyer: The seller is the one who possesses an object or a service and tries to sell it. The buyer has a complementary goal; they are seeking a specific object or service to purchase. We can observe that the two roles are linked not only by the notion of goal but, especially, by the typical negotiation scenario where one party requests something and the other is willing to offer it;

Initiator-Guest: Another possible scenario may involve negotiation being initiated because the parties want to create something new that neither can do alone. In this second scenario, the difference between goals is not as visible to make a clear separation between the seller and the buyer. In this case, a more precise distinction between participants can be made at the level of the actions taken to initiate the negotiation process. The initiator is the one who starts the negotiation, and the guest is the participant proposed to enter into this process;

Mediator and Active Participant: A common characteristic of the participants, with the roles presented above, is that they have the capacity and decision-making power over the negotiation. Active participants are those who decide the final outcome of the negotiation and, at the same time, are the direct beneficiaries of the outcome.

A distinct role, from those presented before, is the mediator role. Mediators, or intermediaries, are neutral individuals who help a group negotiate more effectively. Mediators can be internal or external (*i.e.*, coming from an organisation with no interest in the current negotiation). In both cases, they must be accepted by all members of the group involved in the negotiation.

Taking into account more precise and detailed scenarios, roles can complement each other: a seller can become an initiator or guest in a negotiation, while the buyer can also initiate a negotiation or be invited. A participant's behavior in a negotiation is framed within certain limits according to the values attached to the two dimensions - individual and social. Thus, these two dimensions delimit a space within which the participant can negotiate in their own way. The conduct of a negotiation depends not only on the involved participants but also on the context in which the negotiation takes place, bringing new dimensions.

2.2. The negotiation context

The concept of context, its structuring, and characteristics are the subject of many studies. In the following, we will attempt to propose a new way of structuring the context, by listing certain dimensions of the environment and constraints that can influence the negotiator's behavior or the conduct of the negotiation process. According to our study, the dimensions of context that have a significant influence on the negotiation process are: culture, power, and time. Culture is always an important dimension in a negotiation. A more precise case is the diplomatic negotiation of a conflict where culture plays a central role in influencing the negotiation process.

The notion of culture is often associated with national cultures. However, culture is much more complex, encompassing the beliefs, attitudes, and behaviors of various groups. At the same time, culture differentiates individuals based on their religious or ideological beliefs, professions, educational backgrounds, age, or gender (male/female).

Given these cultural variables that have significant variations across different cultures, theories of negotiation and conflict resolution attempt to develop general hypotheses about how a particular person or group, regardless of their cultural background, may behave in negotiations.

Therefore, we can say that cultural attitudes and behaviors can influence the conduct of a negotiation across multiple dimensions[4] [Moor et Woodrow, 2004]:

- the execution of negotiation stages;
- negotiation strategies and tactics;

[4] C. Moor, P. Woodrow, *Mapping Cultures-Strategies For Effective Intercultural Negotiations*, 2004, *https://mediate.com/mapping-cultures-strategies-for-effective-intercultural-negotiations/*.

- the role, relationships, and trust between negotiation participants;
- orientation towards profit or success.

While national or cultural approaches to negotiation are difficult to characterise, generalisations are frequently described. These generalisations are presented by various negotiation studies as a kind of guide for participants to integrate the negotiation process into a much broader context. Thus, the cultural dimension manifests in language patterns, behavior, and activities and provides norms for acceptable interactions and communication patterns used in a negotiation process.

In general, power can encompass everything that establishes and maintains the authority relationship between two or more individuals. Thus, power covers all social relationships and the most subtle influences through which one person can have authority over others.

Kenneth Ewart Boulding[5] [Boulding, 1990] proposes three types of power: integrative power, coercive power, and power of change.

- integrative power is defined by the ability to obtain from others what we need and want concretely.
- at the opposite pole, coercive power is defined by the ability to obtain something without regard for others.
- different from the other two cases, where power is associated with a single entity, the power of change is seen as an equitable relationship between multiple parties. The power of change is a concept similar to negotiation: "I want you to do something, and to convince you to do it, I offer you something you need."

Adding this more economic aspect to power - beyond authority - we can view power as a measure of the relationship between the parties involved in a negotiation. Thus, in a negotiation, power becomes a relative power used by negotiators to establish the extent of the dependency of the relationships that existed before the negotiation, the relationships revealed during the negotiation, and the relationships desired at the end of the negotiation.

Parties can evaluate their power, in relation to another party, by comparing their capabilities in terms of human and material resources available, necessary qualifications and knowledge, possible sanctions and reprisals, and also organisational authorities. These different aspects help a participant in a negotiation to find out if their relationship with the other party is based on independence, dependence, or interdependence and, often, to determine if one negotiator or another is motivated to share the gain, take it, or offer it.

According to Kersten[6] [Kersten *et al.*, 2002], there are two different time orientations: monochronic and polychronic. Monochronic time orientations are linear, sequential, and assume a focus on one thing. Polychronic time orientations assume the simultaneous existence of multiple things and the involvement of multiple people.

From a negotiation perspective, the differences between the two cultural time orientations are as follows:

- for polychronic cultures, the time required for a negotiation is elastic and more important than the entire schedule, communication involves a large flow of information without all being relevant;
- for monochronic cultures, the negotiation schedule is fixed and communication is based on relevant and sequentially launched information.

Another approach that views time as a variable in the negotiation process is also divided into two dimensions, depending on the negotiation stage in which time is considered: the beginning of the negotiation or the end of the negotiation.

At the beginning of the negotiation, time is a synchronisation variable. Negotiation works in the same way; if synchronisation is not chosen well, negotiations will not reach any result. This applies in particular to mediation negotiation, where the mediator must negotiate with the parties only when they are ready to participate, in order to facilitate reaching a consensus.

At the end of the negotiation, time is a variable that affects the conduct of the negotiation. Time can also be the subject of negotiation - parties may negotiate when the negotiation should stop - or it is only a variable that characterises, for each party, the urgency of reaching a result.

Thus, time can influence not only the outcome of a negotiation but also how this outcome is achieved.

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[5] K.E. Boulding, *Three Faces of Power*, Publisher SAGE, 1990, p. 264.

[6] G. Kersten, S.T. Köszegi, R. Vetschera, *The Effects of Culture in Anonymous Negotiations*, Experiments in Four Countries, in J.F. Nunamaker & R.H. Jr. Sprague (eds.), Proceedings of the 35th Hawaii International Conference on System Sciences (pp. 1-36), IEEE Computer Society Press, 2002, *http://hdl.handle.net/20.500.12708/66000*.

2.3. The negotiation mechanism

All the dimensions detailed so far impose constraints on the dynamics of the process without presenting the means used to characterise and drive the negotiation process. In the following, we will present the stages of a negotiation and the main dimensions that characterise the mechanisms used during the negotiation process.

A negotiation process usually consists of two main stages:

- pre-negotiation (or negotiation planning) - refers to the discussions that precede formal negotiations and often includes procedural questions: who will be involved? where and when will the negotiations take place? how will they be structured? what will be the subject of negotiation? The answers to these questions will be values for the dimensions defined above, such as participant or time. Before answering other questions, new dimensions and possible values must be defined;
- negotiation - refers to interactions regarding the exchange of proposals and counter-proposals formulated based on negotiation strategies.

Considering the division of the negotiation process into these two stages, three main dimensions must be taken into account:

- manipulated information, the relative dimension of the data defining the framework and content of the negotiation;
- negotiation protocols, the relative dimension of the messages (language, content, sequences, number of participants) exchanged between participants;
- reasoning or negotiation strategies, the relative dimension of modelling the reasoning of the participants involved in negotiation that they use to achieve their objectives.

In the early stages of negotiation planning, negotiators need to determine their goals, foresee what they want to achieve, and prepare for the negotiation process. Depending on their goals, the parties will gather comprehensive lists of all information and data that help them define what is being negotiated and how it is being negotiated.

Often, negotiators exchange and/or negotiate the list of issues to be discussed beforehand. Consultation between negotiators, prior to the actual negotiation, allows them to agree on lists of information that define the subject of negotiation by attributes to be discussed, as well as other negotiation characteristics such as the negotiation venue, time and duration of the session, the parties involved in the negotiation, and the techniques to follow if the negotiation fails. As emphasised above, the purpose of the negotiation planning phase is not to attempt to solve the problem but to obtain information that will allow for a clearer picture of the true issues to be negotiated. This picture forms the basis for choosing the strategy to be used in negotiation by each involved party.

The object of negotiation contains the attributes that one of the participants wants to negotiate. In some cases, only one attribute is negotiated (for example, price), but in other cases, multiple attributes need to be negotiated, such as the time required to fulfil an order, the quality of the products, etc. Before starting the negotiation, a participant not only specifies the attributes of the object but also tries to be very precise in depicting these measurable objectives. By setting possible values for the attributes to be negotiated, a participant identifies a set of negotiation objects rather than just one object. Depending on the values set for attributes, the set includes: i) at most one object - the best possible outcome, ii) at least one object - the least acceptable outcome, iii) a target object - a fixed result.

After deciding on the object of negotiation, negotiators must prioritise their goals and evaluate possible differences between them. Negotiators need to understand what their goals and positions are and must identify the desires and fears underlying these goals. They also need to identify which are the most important questions and whether the different attributes they negotiate on are related or independent.

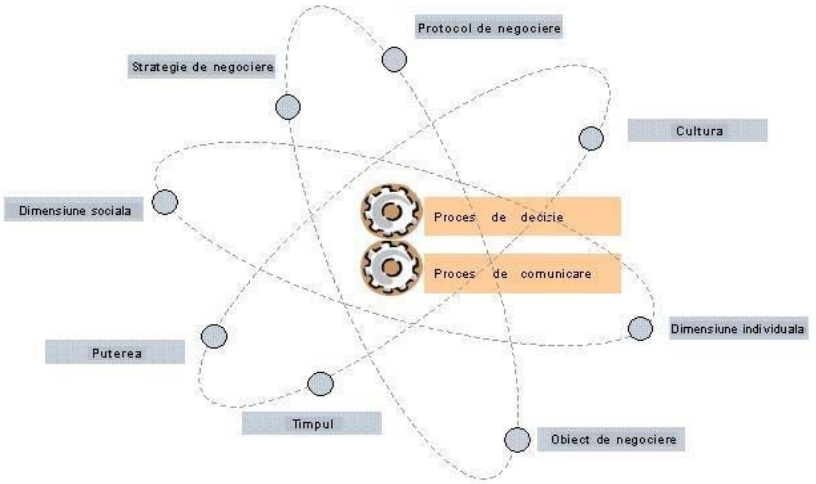
Because negotiation objects typically involve more than one attribute, it is useful for negotiators to anticipate different ways to classify attributes. Thus, they can identify the attributes they consider most important to be more flexible in negotiating the attributes they consider less important.

Thus, analysing values for this dimension provides participants with a better understanding of the dynamics and development of the negotiation and allows them to predict the best negotiation strategies that can be employed immediately.

Through this interdisciplinary study, according to the three considered directions (negotiation participant, negotiation context, and negotiation mechanisms), we can discern several common characteristics and

dimensions of negotiation. Also, this approach clearly identifies two distinct processes that form the negotiation process (Figure 1): the decision-making process and the communication process.

Figure 1. The structure and dimensions of a negotiation process



The decision-making process is the process through which a participant considers the identification of future proposals. This process is mainly influenced by the dimensions: strategy and negotiation object. Thus, to make an appropriate decision, the participant must be able to reason considering all these dimensions. Negotiating means making an exchange. Therefore, the exercise of negotiation involves the existence of a communication process throughout the negotiation process. This process is mainly shaped by the dimension of negotiation protocol. The choice of negotiation protocol or the definition of the different rules to be followed during the negotiation are also influenced by: the social dimension of the participant, which depending on the assigned role determines certain limits in communication, the cultural dimension that identifies norms regarding communication patterns adopted by a participant, the temporal dimension that causes the communication process to unfold according to a linear or branching scheme (*i.e.*, monochronic and polychronic), and finally, the power dimension which can reduce a negotiation to a simple exchange of orders. The two processes are not independent but interrelated. During a negotiation, participants must be able to formulate new proposals in accordance with the values of the dimensions considered in the negotiation and communicate them while respecting the rules of communication.

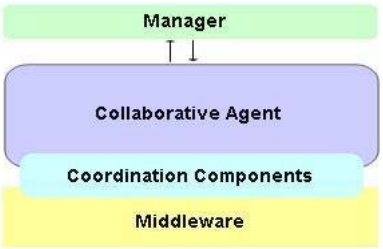
3. The Collaborative Microgrid Architecture

The primary objective of the proposed software infrastructure is to facilitate collaborative efforts within virtual microgrid enterprises (VMEs). In VMEs, partners are independent entities operating in the same sector but dispersed geographically.

Given the constraints stemming from the autonomy of VME participants, the negotiation process emerges as the primary mechanism for effectively sharing information and resources.

Figure 2 depicts the architecture of the collaborative microgrid system.

Figure 2. The architecture of the collaborative microgrid system



The proposed architecture comprises four main layers[7]: Manager, Collaborative Agent, Collaborative Coordination Components, and Middleware. The Manager layer is responsible for overseeing each organisation within the microgrid alliance. The Collaborative Agent layer aids the manager in coordinating negotiations both globally (with various participants on different tasks) and locally (with different participants on the same task), liaising with Collaborative Agents from other partners through the Middleware layer. The Coordination Components layer manages the constraints associated with coordinating multiple negotiations happening simultaneously. A Collaborative Agent is charged with managing negotiations involving its own organisation (*e.g.*, as an initiator or participant) with various microgrid alliance partners.

Each negotiation progresses through three main stages: initialization, refinement, and closure. During the initialization stage, the Negotiation Object and Negotiation Framework are defined. Past negotiation data, either locally available or provided by the negotiation infrastructure, can assist in selecting negotiation participants. In the refinement stage, participants exchange proposals on the negotiation object to address their respective constraints[8]. The manager, with support from the Collaborative Agent, may contribute to shaping and evolving negotiation frameworks and objects. Ultimately, decisions rest with the manager. For each negotiation, a Collaborative Agent oversees one or more negotiation objects, a framework, and the negotiation's status. Managers can specify global parameters such as duration, maximum message exchanges, maximum candidates considered in negotiation and contract, tactics, and protocols for Collaborative Agent interactions[9].

4. The Collaborative Coordination Components

To tackle the intricate array of negotiation scenarios within microgrid contexts, we introduce five distinct components[10]:

- subcontracting (or Contracting) handles the subcontracting of tasks by facilitating proposal exchanges among predetermined participants;
- the Block component ensures complete subcontracting of a task by a single partner;
- the Divide component oversees the dissemination of constraints across multiple slots, negotiated concurrently and stemming from the division of a single task;
- the Broker automates partner selection to initiate negotiations;
- the Transport component establishes coordination between two ongoing negotiations to synchronise on common transport arrangements for both tasks.

These components possess the capability to assess received proposals and, if deemed valid, generate new proposals based on their specific coordination constraints[11]. From our perspective, managing coordination problems between multiple negotiations can be categorised into two distinct classes of components:

- coordination components in a closed environment: These components base their actions on the ongoing negotiation and handle coordination constraints solely using information from their current negotiation graph (Subcontracting, Contracting, Block, Divide);
- coordination components in an open environment: These components also rely on ongoing negotiations but manage coordination constraints based on available information in data structures representing certain characteristics of other negotiations in the system (Broker, Transport).

Contrary to closed environment components, which handle coordination constraints for a single negotiation at a time, open environment components enable coordination among multiple negotiations concurrently. The novelty of this software architecture lies in its four-tier structure, each addressing a specific aspect of the negotiation process. Unlike traditional architectures that only coordinate proposal exchanges within a single negotiation, our proposed architecture facilitates complex negotiation coordination. This is achieved through the introduction of coordination components, which oversee all simultaneous negotiations involving alliance partners. These coordination components serve two main functions: mediating between the

[7] A. Creţan, C. Coutinho, B. Bratu, R. Jardim-Goncalves, *A Framework for Sustainable Interoperability of Negotiation Processes*, Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011.

[8] V. Bui, R. Kowalczyk, *On constraint-based reasoning in e-negotiation agents*, in AMEC III, LNAI 2003, pp. 31-46.

[9] P. Faratin, *Automated service negotiation between autonomous computational agent*, PhD thesis, Department of Electronic Engineering Queen Mary & West-field College, 2000.

[10] A. Creţan, C. Coutinho, B. Bratu, R. Jardim-Goncalves, *op. cit., loc. cit.*

[11] L. Vercouter, *A distributed approach to design open multi-agent system*, in 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000, pp. 32-49.

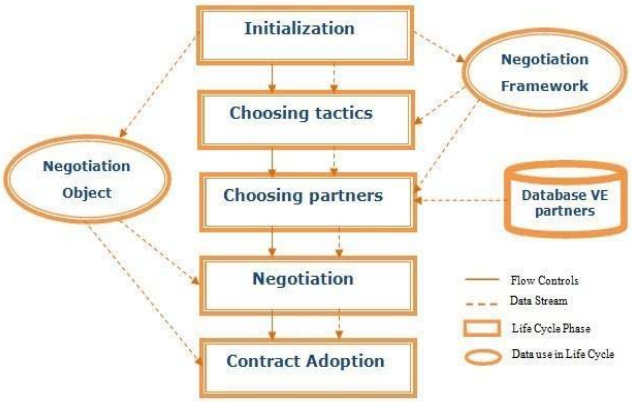
negotiation image at the Collaborative Agent level and the Middleware level, and implementing various types of behavior for specific negotiation scenarios. Hence, each component corresponds to a particular negotiation type. Therefore, this paper has developed a framework for describing negotiations within virtual microgrid enterprises. To establish a generic, non-selective, and flexible coordination framework, we first structured the negotiation process. This structure, delineated into phases specific to different negotiation stages (initialization, negotiation, contract adoption), provides a formal description of the negotiation process.

The advantage of this negotiation process structure lies in its ability to properly identify coordination elements, dependencies among ongoing negotiations within the microgrid enterprise, and modalities for managing these negotiations at the coordination component level.

5. The structure of the negotiation process within microgrid alliance

In accordance with our approach to negotiation, participants engage in proposing offers, with each participant retaining autonomy to terminate a negotiation by either accepting or rejecting an offer received. Additionally, a participant may, depending on their role, extend invitations to new participants during a negotiation. To exemplify this approach, we provide a schematic representation of the negotiation process using the negotiation and coordination mechanisms proposed in this study. The negotiation process depicted in Figure 3 is segmented into five stages: initialization, tactic selection, partner selection, negotiation, and contract adoption.

Figure 3. The structure of the negotiation process within microgrid alliance



Initialization: The Manager initiates task subcontracting, defining and conveying the properties and constraints of the negotiation object and framework to the Collaborative Agent. This process begins by instantiating the Subcontracting component, which subsequently initiates further negotiation stages based on Manager-defined constraints. It includes inviting coordination components such as Contracting, Broker, etc., and conducts negotiations concerning proposal construction and evaluation for the subcontracted task.

Tactic Selection: Utilising negotiation tactics specified in the negotiation framework, coordination is broken down into various schemes. We incorporate three tactics corresponding to three coordination schemes: Block, Divide, and Transport.

Partner Selection: Two options for partner selection are considered:

- among known partners: The Manager initiating the outsourcing can set constraints on the pool of potential alliance contractors. This involves utilising job descriptions earmarked for subcontracting and accessing a database of alliance partners and/or their respective adhesion contracts;
- among unknown partners: In this scenario, the infrastructure manages the entire partner search activity through the Broker component.

Negotiation: At this juncture, during proposal exchanges, the negotiation object evolves in line with constraints set by the Manager on negotiated attributes of the subcontracting task. The ultimate aim is to construct an Instantiated Negotiation Object from the initial negotiation object specification. This instantiated object comprises attributes accepted by all partners and serves as the basis for contract establishment.

Contract Adoption: In the final negotiation phase, negotiation properties are finalised. Here, the Collaborative Agent seeks Manager validation for the negotiation outcome and communicates with agents from other partners. Depending on the responses received, the Manager may decide to either restart or suspend negotiations or proceed to the contracting phase to reach an agreement.

The negotiation process involves multiple parties engaged in bilateral negotiations, each with distinct criteria, constraints, and preferences determining their individual interests. The job under negotiation is described as a multi-attribute object, with each attribute linked to local constraints, evaluation criteria, and global constraints affecting other attributes.

6. Conclusions

Operating within a microgrid alliance entails achieving tasks that cannot be handled individually by a single microgrid for optimal alignment with customer requirements. The proposed smart agent-based framework seeks to facilitate the fulfilment of various objectives for small and medium-sized enterprises (SMEs) by facilitating collaboration among the multiple organisations gathered within a virtual enterprise. Therefore, the proposed architecture offers the following capabilities:

Defining the structure of the negotiation process: participants, interaction protocol, negotiation protocol, tactics, coordination components, negotiation object, and negotiation strategies.

Modelling all negotiations for a microgrid as a series of simultaneous bilateral negotiations that agents can manage independently.

Modelling coordination among concurrent negotiations through a set of coordination components and synchronisation mechanisms at the middleware level.

Consequently, this paper introduces an innovative agent-based smart framework that achieves the coordination of multiple simultaneous negotiations concerning a multi-attribute object among numerous participants.

A distinctive aspect of the negotiation framework presented in this study, as opposed to negotiations with fixed options (acceptance or rejection), is its ability to modify proposals by incorporating new information (such as new attributes) or adjusting the initial values of certain attributes (for example, in the case of microgrids, the price of electricity may be adjusted). Operating within the business-to-business interaction context necessitates modelling the unforeseen and dynamic aspects of this environment. An organisation may engage in multiple concurrent negotiations, each potentially resulting in the acceptance of a contract that would subsequently impact resource availability and alter the context for other ongoing negotiations.

In this study, we focus solely on interactions related to subcontracting or contracting tasks within our collaboration framework. The negotiation process may culminate in a contract, where supply schedule management and the successful completion of the contracted task become integral parts of the outsourcing process. To illustrate our approach, we have devised a hypothetical scenario involving a consortium of distributed microgrids forming a virtual enterprise. This scenario underscores a key objective related to its applicability across various industry domains.

In terms of future research directions, one avenue worth exploring is integrating the negotiation and coordination processes with contract management. This approach would enable coordination not only between negotiations and the contracts they generate but also with the execution dependencies of those contracts. Another potential avenue is the development of a tool that empowers users to define negotiation protocols based on the constrained negotiation interaction possibilities. This would entail addressing coordination challenges in negotiation protocol administration and protocol construction.

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EXPLORING CRYPTOCURRENCY ADOPTION TRENDS IN EUROPE: A COMPARATIVE ANALYSIS OF GERMANY, FRANCE, AND ROMANIA

Valentin Gabriel CRISTEA[*]

Abstract

Cryptocurrencies have emerged as a significant innovation in the financial landscape, with their adoption varying across different regions. This paper investigates the adoption trends of cryptocurrencies in three European countries: Germany, France, and Romania. By examining regulatory frameworks, public sentiment, and market dynamics, we aim to provide insights into the factors influencing cryptocurrency adoption in these nations. Furthermore, we explore the relationship between digital banks and cryptocurrencies, analysing the potential synergies and challenges associated with their integration. Finally, we offer future projections and suggest areas for further research to better understand the evolving landscape of cryptocurrencies in Europe.

The motivation for studying cryptocurrency adoption in Europe stems from the region's diverse regulatory frameworks, cultural attitudes, and economic landscapes. Understanding the dynamics of cryptocurrency adoption in specific European countries can provide valuable insights into the broader trends shaping the future of finance. Moreover, as digital banking continues to gain prominence, exploring the intersection between digital banks and cryptocurrencies becomes imperative. The regulatory frameworks surrounding cryptocurrencies in Germany, France, and Romania exemplify the diverse approaches adopted by European countries in response to the emergence of digital assets. While Germany and France have made significant strides in implementing comprehensive regulatory frameworks, Romania's regulatory landscape remains in the early stages of development.

Keywords: *Cryptocurrencies, trends, digital banks, market dynamics, financial markets.*

1. Introduction

By conducting a comprehensive analysis of cryptocurrency adoption in Europe, this paper aims to contribute to our understanding of the factors shaping the future of finance in the digital age. Through empirical research and case studies, we seek to inform policymakers, industry stakeholders, and the general public about the opportunities and challenges presented by cryptocurrencies and their integration with digital banking services.

1.1. Overview of cryptocurrencies and their significance in the financial sector

Cryptocurrencies[1] have revolutionised the financial landscape, offering a decentralised alternative to traditional monetary systems. With their decentralised nature and blockchain technology underpinning their operation, cryptocurrencies have gained significant traction worldwide. Europe stands as a key player in this global phenomenon, with countries like Germany, France, and Romania showcasing varied attitudes and approaches towards cryptocurrency adoption.

1.2. Motivation for studying cryptocurrency adoption in Europe

The motivation for studying cryptocurrency adoption in Europe stems from the region's diverse regulatory frameworks, cultural attitudes, and economic landscapes. Understanding the dynamics of cryptocurrency adoption in specific European countries can provide valuable insights into the broader trends shaping the future of finance. Moreover, as digital banking continues to gain prominence, exploring the intersection between digital banks and cryptocurrencies becomes imperative.

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[1] B.M. Lucey, S.A. Vigne, L. Yarovaya, Y. Wang, *The cryptocurrency uncertainty index*, Financ. Res. Lett. 45, 102147, 2022.

1.3. Scope and structure of the paper

This paper aims to investigate the adoption trends of cryptocurrencies in Germany, France, and Romania, offering a comparative analysis of regulatory environments, public sentiment, and market dynamics. By delving into the nuances of each country's approach towards cryptocurrencies, we seek to uncover the factors influencing adoption and identify potential areas for collaboration and growth.

Furthermore, the integration of cryptocurrencies into the digital banking sector presents both opportunities and challenges. Digital banks, characterised by their innovative approach to financial services and emphasis on digital technologies, are poised to play a significant role in shaping the future of cryptocurrency adoption. Understanding how digital banks navigate regulatory landscapes, integrate cryptocurrency services, and address consumer needs is essential for predicting the trajectory of this evolving relationship.

Through this exploration, we aim to provide policymakers, financial institutions, and cryptocurrency enthusiasts with a comprehensive understanding of the European cryptocurrency landscape. By analysing regulatory frameworks, public sentiment, market dynamics, and the relationship between digital banks and cryptocurrencies, we hope to shed light on the opportunities and challenges inherent in this rapidly evolving ecosystem. Ultimately, this paper sets the stage for future research and collaboration aimed at unlocking the full potential of cryptocurrencies in Europe's digital economy.

2. Regulatory Frameworks

2.1. Examination of cryptocurrency regulations in Germany, France, and Romania

Germany has emerged as a key player in the European cryptocurrency market, with a regulatory framework characterised by a balance between innovation and investor protection. The country recognizes cryptocurrencies as „units of account" and financial instruments, subjecting them to regulatory oversight by the Federal Financial Supervisory Authority (BaFin). Notably, Germany has implemented the Fifth European Anti-Money Laundering Directive (AMLD5), requiring cryptocurrency exchanges and custodial wallet providers to register with BaFin and comply with stringent anti-money laundering (AML) and know-your-customer (KYC) regulations. Moreover, Germany's stance on Initial Coin Offerings (ICOs) remains cautious, with the regulator emphasising investor protection and transparency.

France has adopted a progressive approach towards regulating cryptocurrencies, aiming to foster innovation while safeguarding investors and maintaining financial stability. The country's regulatory authority, the Autorité des Marchés Financiers (AMF), oversees cryptocurrency-related activities and has implemented measures to combat illicit activities and ensure market integrity. France introduced a regulatory framework for ICOs in 2019, providing issuers with optional approval from the AMF, subject to compliance with disclosure requirements and investor protection measures. Additionally, France has proposed legislation to establish a regulatory sandbox for blockchain and cryptocurrency projects, allowing experimentation under controlled conditions while engaging with regulators.

Romania's regulatory stance towards cryptocurrencies is relatively nascent, reflecting the broader Eastern European trend of cautious observation and gradual adaptation. While the National Bank of Romania (BNR) has issued warnings about the risks associated with cryptocurrencies and advised caution to investors, comprehensive regulatory frameworks are yet to be established. Romania has not implemented specific legislation addressing cryptocurrencies, leaving the regulatory landscape fragmented and subject to uncertainty. However, recent developments indicate a growing interest in regulating digital assets, with proposals for regulatory frameworks and tax treatment under consideration.

2.2. Comparison of regulatory approaches and their impact on adoption

Recent Developments: Across Europe, recent developments in cryptocurrency regulation reflect a growing recognition of the need for comprehensive regulatory frameworks to address the evolving nature of digital assets. In Germany, amendments to the Banking Act (KWG) have been proposed to facilitate the issuance and custody of cryptocurrencies by banks, signalling a potential shift towards mainstream adoption. Similarly, France has introduced legislation to enhance regulatory clarity for cryptocurrency service providers and promote innovation through the establishment of a digital assets sandbox. In Romania, ongoing discussions among

policymakers, regulatory authorities, and industry stakeholders highlight the need for coordinated efforts to develop a cohesive regulatory framework that balances innovation with investor protection.

2.3. Analysis of recent developments and proposed legislative changes

The regulatory frameworks surrounding cryptocurrencies in Germany, France, and Romania exemplify the diverse approaches adopted by European countries in response to the emergence of digital assets. While Germany and France have made significant strides in implementing comprehensive regulatory frameworks, Romania's regulatory landscape remains in the early stages of development. Moving forward, collaboration between policymakers, regulatory authorities, and industry stakeholders will be essential to foster innovation, ensure market integrity, and facilitate responsible cryptocurrency adoption across Europe.

3. Public Sentiment and Awareness

Public sentiment and awareness play a crucial role in shaping the adoption and acceptance of cryptocurrencies within a society. In this section, we delve into the attitudes, awareness levels, and perceptions of cryptocurrencies in Germany, France, and Romania, providing insights into the factors influencing public sentiment in each country.

3.1. Survey of public attitudes towards cryptocurrencies in each country

In Germany, public sentiment towards cryptocurrencies is characterised by a mix of curiosity, scepticism, and cautious optimism. While a segment of the population views cryptocurrencies as a novel investment opportunity with the potential for high returns, others express concerns about volatility, security risks, and regulatory uncertainty. Despite these reservations, there is a growing awareness of cryptocurrencies driven by media coverage, educational initiatives, and the emergence of cryptocurrency-related businesses. Moreover, the involvement of established financial institutions and regulatory clarity provided by BaFin contribute to increasing trust and legitimacy within the German cryptocurrency ecosystem.

In France, public sentiment towards cryptocurrencies is marked by a progressive outlook and growing interest in blockchain technology. The French population exhibits a relatively high level of awareness regarding cryptocurrencies, attributed to extensive media coverage, educational programs, and government initiatives aimed at promoting digital innovation. While some individuals remain cautious due to concerns about volatility and regulatory ambiguity, there is a growing acceptance of cryptocurrencies as a legitimate asset class and medium of exchange. Moreover, France's proactive approach towards regulating cryptocurrencies and fostering blockchain[2] innovation contributes to a favorable environment for cryptocurrency adoption and experimentation.

In Romania, public sentiment towards cryptocurrencies is characterised by a blend of curiosity, scepticism, and limited awareness. Despite the increasing popularity of cryptocurrencies globally, awareness levels among the Romanian population remain relatively low, with many individuals having limited understanding of the technology and its potential implications. Scepticism towards cryptocurrencies is fuelled by concerns about volatility, security risks, and lack of regulatory oversight. However, there is a growing interest in cryptocurrency investment and trading among tech-savvy individuals and young adults. Initiatives aimed at raising awareness and educating the public about cryptocurrencies are gaining traction, albeit at a slower pace compared to other European countries.

3.2. Assessment of awareness levels and perceived risks and identification of key influencers shaping public opinion

Public sentiment and awareness of cryptocurrencies vary across Germany, France, and Romania, reflecting the diverse socio-cultural contexts and regulatory environments within each country. While Germany and France exhibit relatively higher levels of awareness and acceptance, Romania lags behind due to limited education and regulatory clarity. Moving forward, initiatives aimed at raising awareness, fostering education, and enhancing regulatory transparency will be essential to facilitate informed decision-making and promote responsible

[2] Y. Lee, B. Son, S. Park, J. Lee, H. Jang, *A survey on security and privacy in blockchain-based central bank digital currencies*, J. Internet Serv. Inf. Secur. 11 (3), 2021b, p. 16-29.

cryptocurrency adoption across Europe. Additionally, efforts to address concerns about security, volatility, and regulatory uncertainty will play a crucial role in building trust and confidence in cryptocurrencies among the general public.

4. Market Dynamics

The cryptocurrency market dynamics in Germany, France, and Romania are influenced by a myriad of factors, including regulatory frameworks, technological advancements, investor sentiment, and economic conditions. In this section, we delve into the market trends, trading volumes, and adoption rates of cryptocurrencies in each country, providing insights into the evolving landscape of digital assets.

4.1. Analysis of cryptocurrency market trends and trading volumes

Germany boasts a vibrant cryptocurrency market characterised by robust trading volumes, a diverse range of cryptocurrency exchanges, and a growing ecosystem of blockchain startups. The country's regulatory clarity provided by BaFin has instilled confidence among investors and facilitated the emergence of cryptocurrency-related businesses. Bitcoin and Ethereum remain popular investment choices among German investors, with a significant portion of trading activity occurring on regulated exchanges. Moreover, the integration of cryptocurrencies into traditional financial services, such as banking and asset management, signals a maturing market landscape in Germany.

France: France's cryptocurrency market exhibits steady growth and increasing adoption driven by favorable regulatory measures, government support for blockchain innovation, and a tech-savvy population. The country's proactive approach towards regulating cryptocurrencies has fostered investor confidence and facilitated the emergence of cryptocurrency exchanges and service providers. French investors show a preference for a diverse range of cryptocurrencies, including Bitcoin, Ethereum, and altcoins, with trading activity concentrated on both domestic and international platforms. Furthermore, France's efforts to promote blockchain research, education, and adoption across various sectors contribute to the overall dynamism of the cryptocurrency market.

Romania: Romania's cryptocurrency market is characterised by a burgeoning interest in digital assets, driven by tech-savvy individuals, young investors, and the growing adoption of digital payment solutions. While regulatory uncertainty and limited awareness pose challenges, Romania's cryptocurrency market exhibits potential for growth, fuelled by increasing internet penetration and smartphone usage. Bitcoin remains the most widely recognised and traded cryptocurrency in Romania, with a burgeoning community of enthusiasts, traders, and entrepreneurs. Moreover, the integration of cryptocurrencies into online commerce and peer-to-peer transactions reflects the evolving nature of the Romanian cryptocurrency landscape.

4.2. Comparison of popular cryptocurrencies and their adoption rates and Examination of factors driving market growth or hindering adoption

The cryptocurrency market dynamics in Germany, France, and Romania underscore the diverse trends and opportunities present within the European landscape. While Germany and France exhibit robust market infrastructure, regulatory clarity, and growing investor confidence, Romania's market is characterised by nascent development and untapped potential. Moving forward, efforts to enhance regulatory clarity, promote investor education, and foster innovation will be essential to drive sustainable growth and mainstream adoption of cryptocurrencies across Europe. Moreover, collaboration between policymakers, industry stakeholders, and the public will be crucial in navigating the evolving challenges and opportunities within the dynamic cryptocurrency market.

5. Digital Banks and Cryptocurrencies

5.1 Overview of digital banking landscape in Europe

Digital banks, characterised by their innovative approach to financial services and emphasis on digital technologies, are increasingly exploring the integration of cryptocurrencies into their offerings. In this section, we examine the relationship between digital banks and cryptocurrencies, exploring the potential synergies, challenges, and future implications of their integration in Germany, France, and Romania.

5.2. Exploration of digital banks' integration of cryptocurrency services

Expanded Financial Services: Digital banks can leverage cryptocurrencies to offer expanded financial services to their customers, including cryptocurrency wallets, trading platforms, and investment products. By providing access to cryptocurrencies, digital banks can cater to the growing demand for diversified investment options and alternative financial assets.

Enhanced Customer Experience: Integrating cryptocurrencies into digital banking platforms can enhance the overall customer experience by providing seamless access to both traditional and digital assets. Customers can conveniently manage their cryptocurrency holdings alongside their fiat currencies within a single interface, streamlining their financial management process.

Innovation and Differentiation: Digital banks that embrace cryptocurrencies differentiate themselves in the competitive financial landscape, positioning themselves as innovative and forward-thinking institutions. By offering cutting-edge financial services and embracing emerging technologies, digital banks can attract tech-savvy customers and stay ahead of traditional banking competitors.

5.3. Evaluation of benefits, challenges, and regulatory considerations

Regulatory Compliance: Digital banks must navigate complex regulatory frameworks surrounding cryptocurrencies, including anti-money laundering (AML) and know-your-customer (KYC) requirements. Ensuring compliance with evolving regulations is essential to mitigate legal risks and maintain regulatory legitimacy.

Security Concerns: Cryptocurrencies are susceptible to security vulnerabilities, including hacking, fraud, and theft. Digital banks must implement robust security measures, such as multi-factor authentication, encryption, and cold storage solutions, to safeguard customers' cryptocurrency holdings and mitigate cybersecurity risks.

Volatility and Risk Management: Cryptocurrency markets are highly volatile, with prices subject to rapid fluctuations and market speculation. Digital banks must educate customers about the inherent risks of investing in cryptocurrencies and implement risk management strategies to protect against potential losses.

5.4. Future Implications

Mainstream Adoption: The integration of cryptocurrencies into digital banking platforms can facilitate mainstream adoption by providing a user-friendly gateway for customers to access digital assets. As digital banks continue to expand their cryptocurrency offerings and improve usability, cryptocurrencies may become increasingly integrated into everyday financial transactions.

Financial Inclusion: Digital banks that offer cryptocurrency services can promote financial inclusion by providing access to digital assets for underserved populations, including the unbanked and underbanked. By democratising access to financial services and digital assets, digital banks can empower individuals to participate in the global economy.

Regulatory Evolution: The integration of cryptocurrencies into digital banking poses regulatory challenges and opportunities, prompting policymakers to develop clear and coherent regulatory frameworks to govern digital asset transactions. As regulatory clarity improves and compliance standards evolve, digital banks and cryptocurrencies may become more seamlessly integrated into the broader financial ecosystem.

In conclusion, the integration of cryptocurrencies into digital banking represents a transformative opportunity for the financial industry, offering expanded financial services, enhanced customer experiences, and opportunities for innovation. While challenges such as regulatory compliance, security concerns, and risk management must be addressed, the future implications of this integration are profound, potentially leading to mainstream adoption, financial inclusion, and regulatory evolution within the digital banking landscape.

6. Case Studies

Examining case studies of digital banks integrating cryptocurrencies provides valuable insights into successful strategies, challenges faced, and lessons learned. In this section, we present case studies of prominent digital banks in Germany, France, and Romania that have embraced cryptocurrencies in their offerings.

6.1. Examination of prominent digital banks offering cryptocurrency services. Case studies of successful integration strategies and user experiences

N26 (Germany): N26, a leading digital bank based in Germany, has strategically integrated cryptocurrencies into its platform to cater to the evolving needs of its customer base. Through partnerships with cryptocurrency exchanges and wallet providers, N26 offers seamless access to cryptocurrency trading and investment options within its mobile banking app. By providing a user-friendly interface, transparent pricing, and robust security features, N26 has attracted a diverse customer base seeking to diversify their investment portfolios with digital assets. Moreover, N26's proactive approach to regulatory compliance and customer education has enhanced trust and confidence among users, positioning the bank as a trusted partner in the cryptocurrency space.

Revolut (France): Revolut, a digital banking app with a strong presence in France, has embraced cryptocurrencies as a core component of its product offering. By enabling users to buy, sell, and hold cryptocurrencies directly within the app, Revolut has democratised access to digital assets for its customer base. Additionally, Revolut offers features such as cryptocurrency price alerts, recurring purchases, and instant transfers between fiat and cryptocurrencies, enhancing the overall user experience. Despite regulatory challenges and market volatility, Revolut has navigated the cryptocurrency landscape adeptly, expanding its cryptocurrency services to meet the growing demand among its customer base.

ING Bank (Romania): ING Bank, a multinational banking institution with operations in Romania, has embarked on a cautious approach towards integrating cryptocurrencies into its digital banking platform. While ING Bank acknowledges the potential of cryptocurrencies as a disruptive force in the financial industry, the bank prioritises regulatory compliance, risk management, and customer protection. ING Bank collaborates with fintech partners and blockchain startups to explore innovative solutions for digital asset management, cross-border payments, and decentralised finance (DeFi). By adopting a collaborative approach and closely monitoring regulatory developments, ING Bank aims to position itself at the forefront of digital banking innovation in Romania while mitigating potential risks associated with cryptocurrencies.

6.2. Lessons learned and best practices for other financial institutions

Regulatory Compliance: Digital banks must prioritise regulatory compliance and work closely with regulatory authorities to navigate the evolving regulatory landscape surrounding cryptocurrencies.

User Experience: Providing a seamless and intuitive user experience is critical for driving adoption of cryptocurrency services within digital banking platforms. User-friendly interfaces, transparent pricing, and robust security features enhance customer satisfaction and trust.

Education and Awareness: Educating customers about the risks and opportunities associated with cryptocurrencies is essential for promoting responsible investing and mitigating potential losses. Digital banks should invest in educational resources and customer support to empower users to make informed decisions.

Case studies of digital banks integrating cryptocurrencies illustrate the diverse approaches, strategies, and outcomes observed in Germany, France, and Romania. While successful integration requires careful consideration of regulatory compliance, user experience, and customer education, the potential benefits of offering cryptocurrency services within digital banking platforms are significant. By learning from successful case studies and addressing challenges proactively, digital banks can capitalise on the opportunities presented by cryptocurrencies to enhance their offerings, attract new customers, and drive innovation within the financial industry.

7. Future Projections and Research Directions

As the intersection between digital banks and cryptocurrencies continues to evolve, future projections and research directions offer valuable insights into the potential trajectory of this dynamic relationship. In this section, we explore anticipated developments, emerging trends, and areas for further research in the context of Germany, France, and Romania.

7.1. Predictions for the future of cryptocurrency adoption in Europe

Research directions may include comparative studies of regulatory approaches across European countries, analysis of regulatory compliance costs for digital banks, and assessments of the impact of regulatory harmonisation on cryptocurrency adoption.

7.2. Exploration of potential collaborations between digital banks and cryptocurrency platforms. Identification of areas for further research, including regulatory harmonisation, technological advancements, and consumer behavior analysis

Regulatory Harmonisation: Future projections suggest that regulatory harmonisation across Europe will play a pivotal role in shaping the integration of cryptocurrencies into digital banking platforms. As policymakers work towards establishing clear and coherent regulatory frameworks governing digital assets, digital banks will benefit from greater legal certainty, reduced compliance costs, and expanded market opportunities.

Technological Advancements: The future of digital banks and cryptocurrencies is closely intertwined with technological advancements, including developments in blockchain technology, digital identity solutions, and decentralised finance (DeFi). Research into innovative technologies such as blockchain interoperability, privacy-preserving protocols, and self-sovereign identity systems will inform the evolution of digital banking services and enable new use cases for cryptocurrencies. Additionally, studies on the scalability, security, and sustainability of blockchain networks will contribute to the development of robust infrastructure for digital asset management within digital banking platforms.

Consumer Behavior Analysis: Understanding consumer behavior and preferences regarding cryptocurrency adoption within digital banking is essential for designing tailored products and services that meet customer needs. Future projections indicate a growing demand for user-friendly cryptocurrency solutions, personalised investment advice, and seamless integration with traditional banking services. Research directions may include surveys, focus groups, and behavioral experiments to assess consumer attitudes, motivations, and decision-making processes related to cryptocurrency adoption. Moreover, analysis of user engagement metrics, transaction patterns, and feedback mechanisms will provide valuable insights into customer satisfaction and retention strategies for digital banks.

Financial Inclusion and Accessibility: Future projections suggest that digital banks and cryptocurrencies have the potential to promote financial inclusion and accessibility by providing affordable, accessible, and inclusive financial services to underserved populations. Research directions may include studies on the impact of digital banking and cryptocurrency adoption on financial inclusion metrics, such as access to banking services, credit availability, and wealth accumulation. Moreover, analyses of user demographics, socioeconomic factors, and geographic disparities will inform targeted interventions and policy initiatives aimed at reducing financial exclusion and narrowing the digital divide.

In conclusion, future projections and research directions offer a roadmap for navigating the evolving landscape of digital banks and cryptocurrencies in Germany, France, and Romania. By addressing regulatory challenges, embracing technological innovations, understanding consumer behavior, and promoting financial inclusion, digital banks can harness the transformative potential of cryptocurrencies to enhance their offerings, drive innovation, and create value for customers and society at large. Continued research and collaboration among policymakers, industry stakeholders, and academia will be essential to realise the full potential of this dynamic relationship and shape the future of finance in the digital age.

8. Conclusions. Summary of key findings and insights. Implications for policymakers, financial institutions, and cryptocurrency enthusiasts. Call to action for continued research and collaboration in this evolving field

The integration of cryptocurrencies into digital banking platforms represents a transformative opportunity for the financial industry in Germany, France, and Romania. As digital banks embrace emerging technologies and respond to evolving consumer preferences, the relationship between digital banks and cryptocurrencies is poised to shape the future of finance in significant ways. In this paper, we have explored regulatory frameworks, public sentiment, market dynamics, case studies, and future projections to provide a comprehensive understanding of this dynamic relationship.

From regulatory clarity and technological innovation to consumer behavior and financial inclusion, key themes have emerged that highlight both the opportunities and challenges inherent in the integration of cryptocurrencies into digital banking. Regulatory frameworks play a crucial role in fostering trust, ensuring market integrity, and facilitating responsible innovation within the digital banking sector. Public sentiment and awareness shape consumer attitudes, market dynamics, and adoption trends, influencing the trajectory of cryptocurrencies in the mainstream financial landscape. Market dynamics reflect the diverse trends, opportunities, and challenges present within the cryptocurrency ecosystem, highlighting the importance of regulatory compliance, risk management, and market transparency.

Through case studies, we have examined successful strategies, challenges faced, and lessons learned by digital banks in integrating cryptocurrencies into their offerings. From established players like N26 and Revolut to multinational institutions like ING Bank, digital banks have demonstrated varying approaches and outcomes in embracing cryptocurrencies as part of their product suite. Future projections and research directions offer insights into anticipated developments, emerging trends, and areas for further exploration in the evolving relationship between digital banks and cryptocurrencies.

In conclusion, the integration of cryptocurrencies into digital banking represents a paradigm shift in the financial industry, offering expanded financial services, enhanced customer experiences, and opportunities for innovation. By addressing regulatory challenges, embracing technological advancements, understanding consumer behavior, and promoting financial inclusion, digital banks can unlock the transformative potential of cryptocurrencies to create value for customers, drive growth, and shape the future of finance in the digital age. Continued collaboration among policymakers, industry stakeholders, and academia will be essential to navigate the opportunities and challenges ahead and realise the full potential of this dynamic relationship.

By conducting a comprehensive analysis of cryptocurrency adoption in Europe, this paper aims to contribute to our understanding of the factors shaping the future of finance in the digital age. Through empirical research and case studies, we seek to inform policymakers, industry stakeholders, and the general public about the opportunities and challenges presented by cryptocurrencies and their integration with digital banking services.

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MONEY OR DIGITAL MONEY: TO BE OR NOT TO BE?

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Abstract

The emergence of digital currencies has sparked debates about the future of money, raising questions about the viability of traditional currencies in an increasingly digital world. In this article, we delve into the evolving landscape of money, exploring the advantages and challenges of digital currencies and their potential impact on traditional financial systems. Through a detailed analysis, we aim to provide insights into the prospects of digital money and its implications for society, economy, and financial institutions, focusing on case studies from Germany, France, the UK, and the USA.

The advancements in technology, particularly in fields such as cryptography, computer science, and networking, have played a pivotal role in shaping the very essence of money. Breakthroughs like cryptographic hashing, public-key cryptography, and peer-to-peer networking have served as the cornerstone for the emergence of digital currencies and blockchain-based platforms. These technological strides have democratised access to financial services, fostering inclusivity and granting individuals unprecedented control over their financial affairs.

In essence, the historical narrative surrounding the evolution of money underscores its timeless significance as a cornerstone of human civilization. From the rudimentary barter systems of ancient societies to the cutting-edge digital currencies of today, money has continually adapted to meet the evolving needs of society and leverage the latest technological innovations. As we navigate the complexities of the digital era, a deep understanding of money's historical origins provides invaluable insights into its future trajectory and the transformative potential inherent in digital currencies.

Keywords: *Cryptocurrencies, trends, digital currency, digital banks, market dynamics, financial markets.*

1. Introduction

In an age characterised by rapid technological advancement and digital transformation, the concept of money is undergoing a profound evolution. From its traditional forms of coins and banknotes to the emergence of digital currencies, money has transcended physical boundaries and assumed new digital identities. In this introductory discourse, we embark on a journey to explore the intricate interplay between the timeless concept of money and the disruptive innovations of digital currencies.

1.1. Overview of the evolving concept of money

Money, as a medium of exchange, unit of account, and store of value, has been a fundamental pillar of human civilization for millennia. Its evolution reflects the changing needs, values, and aspirations of societies across time and space. However, the advent of digital technologies has ushered in a new era of financial innovation, challenging conventional notions of money and reshaping the global financial landscape.

1.2. Introduction to digital currencies[1] and their growing popularity

At the forefront of this transformation are digital currencies, decentralised forms of money that exist purely in digital form and operate independently of central authorities. Led by pioneering technologies such as blockchain[2] and distributed ledger technology (DLT), digital currencies promise to revolutionise the way we transact, store value, and conceptualise wealth. Bitcoin, the first and most well-known digital currency, captured the world's imagination with its decentralised nature, limited supply, and potential to disrupt traditional financial systems.

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[1] D.K.C. Lee, L. Yan, Y. Wang, *A global perspective on central bank digital currency*, China Econ. J. 14 (1), 2021a., p. 52-66.

[2] Y. Lee, B. Son, S. Park, J. Lee, H. Jang, *A survey on security and privacy in blockchain-based central bank digital currencies*, J. Internet Serv. Inf. Secur. 11 (3), 2021b., p. 16-29.

1.3. Significance of exploring the future of money in the digital age

The growing popularity of digital currencies underscores the need to critically examine their implications for the future of money in the digital age. As digital currencies gain traction among consumers, businesses, and governments, questions arise about their impact on financial stability, monetary policy, and the broader economy. Moreover, the rise of digital currencies raises fundamental questions about the nature of money itself, challenging long standing assumptions about its functions, properties, and societal significance.

Against this backdrop, exploring the future of money in the digital age takes on heightened importance. It is not merely a theoretical exercise or speculative endeavor but a pressing imperative for policymakers, economists, technologists, and society at large. Understanding the opportunities and challenges presented by digital currencies requires a multidisciplinary approach that encompasses economics, finance, technology, law, and ethics. By critically examining the evolving concept of money and the disruptive innovations of digital currencies, we can gain valuable insights into the future of finance and shape a more inclusive, efficient, and resilient financial system for generations to come.

2. Historical perspective

2.1. Brief history of money and its evolution over time

Money, as we understand it today, has traversed a fascinating journey throughout human civilization, evolving in response to societal needs, technological advancements, and economic imperatives. This historical narrative unveils the intricate tapestry of money's evolution, from its rudimentary origins to the digital currencies of the modern era, all shaped by the relentless march of innovation.

The concept of money predates recorded history, with early human societies resorting to primitive forms of barter to facilitate trade. Goods and commodities such as grain, livestock, and precious metals served as mediums of exchange, enabling individuals to exchange surplus resources for desired goods and services. However, the inherent limitations of barter, including the lack of divisibility, portability, and uniformity, necessitated the emergence of more sophisticated forms of money.

The advent of coinage in ancient civilizations marked a pivotal milestone in the evolution of money. From the Lydian staters of ancient Greece to the Roman denarii, metallic coins standardised weights and measures, facilitating commerce and fostering economic growth. Coins, stamped with sovereign emblems and intrinsic value, symbolised state authority and became ubiquitous symbols of wealth and power.

2.2. Emergence of digital currencies and their predecessors

As societies evolved and trade expanded, paper money emerged as a complement to metallic coins, offering greater convenience and flexibility in transactions. The earliest forms of paper money, issued by Chinese merchants and banks during the Tang Dynasty, represented promissory notes redeemable for precious metals. Over time, governments began issuing paper currencies backed by reserves of gold or silver, laying the foundation for modern fiat currencies.

The advent of digital currencies represents the latest chapter in the saga of money's evolution, propelled by the transformative potential of digital technologies. The precursors to digital currencies, such as electronic funds transfers (EFTs) and digital payment systems, laid the groundwork for the digitization of money. However, it was not until the emergence of Bitcoin in 2008 that the concept of decentralised digital currencies gained widespread attention.

2.3. Role of technological advancements in shaping the concept of money

Bitcoin[3], introduced by the pseudonymous Satoshi Nakamoto, pioneered the use of blockchain technology to create a peer-to-peer electronic cash system. Blockchain, a distributed ledger maintained by a network of computers, enables secure and transparent transactions without the need for intermediaries. Bitcoin's decentralised nature, fixed supply, and cryptographic security challenged conventional notions of money and ignited a global phenomenon.

[3] S. Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 2008, retrieved from *https://bitcoin.org/bitcoin.pdf*.

The role of technological advancements, particularly in cryptography, computer science, and networking, has been instrumental in shaping the concept of money. Innovations such as cryptographic hashing, public-key cryptography, and peer-to-peer networking have enabled the development of digital currencies and blockchain-based platforms. These technological breakthroughs have democratised access to financial services, fostered financial inclusion, and empowered individuals to control their finances in unprecedented ways.

In conclusion, the historical perspective on money's evolution underscores its enduring importance as a fundamental pillar of human civilization. From the barter economies of ancient times to the digital currencies of the modern era, money has adapted and transformed in response to changing societal needs and technological innovations. As we navigate the complexities of the digital age, understanding the historical roots of money provides valuable insights into its future trajectory and the transformative potential of digital currencies.

3. Advantages of Digital Money. Financial Sovereignty and Control

Digital currencies empower individuals to have complete control over their finances, free from the constraints of traditional banking systems. With digital wallets and decentralised platforms, users can manage their funds directly, without reliance on intermediaries or financial institutions. This newfound financial sovereignty allows individuals to transact, save, and invest with greater autonomy and flexibility, enhancing their financial well-being and empowerment.

3.1. Accessibility and inclusivity: Digital currencies offer greater accessibility to financial services, particularly for underserved populations. Borderless Transactions and Global Connectivity

Digital currencies facilitate seamless cross-border transactions, enabling individuals and businesses to transact with counterparts around the world without the need for intermediaries or currency conversions. By eliminating barriers such as exchange rates, transaction fees, and processing delays, digital currencies promote global connectivity and foster international trade, investment, and remittances. This borderless nature of digital money opens up new opportunities for economic growth, cooperation, and collaboration on a global scale.

3.2. Efficiency and cost-effectiveness: Digital transactions are faster, cheaper, and more convenient compared to traditional banking methods. Programmable Money and Smart Contracts

Digital currencies are programmable by nature, allowing developers to create smart contracts and decentralised applications (DApps) that automate and enforce the execution of predefined agreements or transactions. Smart contracts enable a wide range of use cases, including escrow services, crowdfunding, supply chain management, and decentralised finance (DeFi). By automating trustless transactions and eliminating the need for intermediaries, programmable money enhances efficiency, reduces costs, and expands the possibilities for innovation in financial services.

3.3. Security and transparency: Blockchain technology ensures secure and transparent transactions, reducing the risk of fraud and counterfeiting. Financial Inclusion and Empowerment

Digital currencies have the potential to promote financial inclusion by providing access to financial services for underserved populations, including the unbanked and underbanked. With the proliferation of mobile phones and internet connectivity, individuals in remote or marginalised communities can access digital wallets and participate in the global economy. Moreover, the low barriers to entry and minimal account requirements of digital currency platforms make it easier for individuals to open and use accounts, regardless of their socioeconomic status or geographic location.

3.4. Innovation and decentralisation: Digital currencies enable innovation in financial services and promote decentralisation, empowering individuals to control their finances

Decentralised Finance (DeFi) Ecosystem: Digital currencies are driving the emergence of decentralised finance (DeFi) ecosystems, comprising a diverse array of blockchain-based applications, protocols, and financial instruments. DeFi platforms enable users to access a wide range of financial services, including lending, borrowing, trading, asset management, and derivatives, without relying on traditional financial intermediaries. By leveraging blockchain technology and smart contracts, DeFi ecosystems offer greater transparency, efficiency,

and accessibility compared to traditional financial systems, fostering innovation and democratising access to financial services for all.

In conclusion, the new advantages of digital money underscore its transformative potential to revolutionise the financial landscape and empower individuals worldwide. From promoting financial sovereignty and global connectivity to enabling programmable money and decentralised finance, digital currencies offer unprecedented opportunities for innovation, inclusion, and empowerment in the digital age. As the adoption of digital money continues to accelerate, it is imperative for policymakers, industry stakeholders, and society at large to embrace its potential and navigate the opportunities and challenges ahead.

4. Challenges of Digital

4.1. Money Regulatory uncertainty: The lack of clear regulations poses challenges for the widespread adoption of digital currencies and raises concerns about consumer protection and financial stability

Navigating the regulatory landscape: The nebulous regulatory environment surrounding digital currencies presents a significant hurdle to their widespread adoption. The absence of clear and consistent regulations creates uncertainty for businesses, investors, and consumers alike, inhibiting mainstream acceptance and impeding the development of robust financial infrastructure. Moreover, regulatory ambiguity raises concerns about consumer protection, market integrity, and financial stability, highlighting the urgent need for comprehensive and forward-thinking regulatory frameworks.

4.2. Volatility and risk: Digital currencies are highly volatile, posing risks for investors and merchants alike

Tackling volatility and risk: Digital currencies are characterised by extreme price volatility, rendering them susceptible to sudden fluctuations and speculative trading activities. This inherent volatility poses risks for investors, merchants, and financial institutions, complicating investment decisions, transaction settlements, and risk management strategies. Furthermore, the speculative nature of digital currency markets can exacerbate price bubbles and market distortions, potentially leading to systemic risks and financial instability.

4.3. Privacy and anonymity: While digital currencies offer privacy features, they also raise concerns about anonymity and potential misuse for illicit activities

Balancing privacy and transparency: While digital currencies offer enhanced privacy features compared to traditional financial systems, they also raise concerns about anonymity and potential misuse for illicit activities. The pseudonymous nature of digital currency transactions can facilitate money laundering, terrorist financing, and other illicit activities, posing challenges for law enforcement agencies and regulatory authorities. Achieving the delicate balance between privacy and transparency remains a key challenge for the digital currency ecosystem, necessitating innovative solutions and collaborative efforts to mitigate risks and uphold regulatory compliance.

4.4. Technical limitations: Scalability, interoperability, and energy consumption are among the technical challenges facing digital currencies. never written and seen before

Addressing technical limitations: Digital currencies face various technical challenges, including scalability, interoperability, and energy consumption, that impede their widespread adoption and usability. Scalability issues, such as network congestion and slow transaction processing times, hinder the scalability of digital currency networks and limit their capacity to handle large transaction volumes efficiently. Interoperability challenges, meanwhile, restrict the seamless exchange of value between different digital currency networks and traditional financial systems, hindering cross-border transactions and interoperable financial services. Additionally, the energy-intensive consensus mechanisms used in some digital currency networks raise concerns about environmental sustainability and energy consumption, prompting calls for more eco-friendly alternatives and energy-efficient technologies.

In conclusion, while digital currencies offer transformative potential in reshaping the future of finance, they also face significant challenges that must be addressed to realise their full benefits. Overcoming regulatory uncertainty, volatility, privacy concerns, and technical limitations requires concerted efforts from policymakers, industry stakeholders, and the broader community to foster innovation, promote responsible use, and build a more resilient and inclusive financial ecosystem.

5. Case Studies: Germany, France, UK, and USA

5.1. Germany: The case of N26 showcases how the digital bank has integrated cryptocurrencies into its platform to provide users with access to a diverse range of financial services

Germany: N26, a leading digital bank in Germany, has emerged as a pioneer in integrating cryptocurrencies into its platform, offering users seamless access to a diverse range of financial services. By partnering with cryptocurrency exchanges and integrating digital wallet functionality, N26 has enabled its customers to buy, sell, and hold cryptocurrencies directly within their banking app. This integration not only provides users with greater convenience and flexibility but also reflects N26's commitment to embracing innovative financial technologies and meeting the evolving needs of its customer base.

5.2. France: Revolut's success in France highlights the growing acceptance of digital currencies and the role of digital banks in fostering adoption

France: Revolut, a prominent digital bank operating in France, has experienced significant success in fostering the adoption of digital currencies among its user base. Through its user-friendly interface, Revolut has made it easy for individuals in France to buy, sell, and manage cryptocurrencies, effectively democratising access to these emerging assets. The growing acceptance of digital currencies among French consumers underscores the shifting attitudes towards traditional banking and the increasing demand for alternative financial services. Revolut's success in France highlights the pivotal role of digital banks in driving the mainstream adoption of digital currencies and catalysing financial innovation.

5.3. UK: The UK's regulatory approach to digital currencies, including the Financial Conduct Authority's oversight of cryptocurrency businesses, provides insights into regulatory frameworks

UK: The United Kingdom has adopted a proactive regulatory approach towards digital currencies, with the Financial Conduct Authority (FCA) playing a key role in overseeing cryptocurrency businesses and ensuring compliance with regulatory standards. The FCA's regulatory framework provides clarity and transparency for digital currency businesses operating in the UK market, fostering confidence among investors and consumers alike. By implementing robust regulatory safeguards and promoting responsible innovation, the UK has positioned itself as a leading jurisdiction for digital currency businesses seeking to operate in a secure and regulated environment.

5.4. USA: Case studies such as Coinbase and Gemini illustrate the challenges and opportunities faced by digital currency exchanges in the highly regulated US market

USA: In the United States, digital currency exchanges such as Coinbase and Gemini have emerged as prominent players in the highly regulated market. These exchanges face a myriad of challenges, including regulatory compliance, cybersecurity risks, and customer trust, as they navigate the complex regulatory landscape of the US financial system. Despite these challenges, Coinbase and Gemini have capitalised on the growing interest in digital currencies among American consumers and investors, leveraging their robust infrastructure and regulatory compliance to provide reliable and secure trading platforms. The experiences of Coinbase and Gemini underscore the opportunities and challenges inherent in operating digital currency exchanges in the highly regulated US market, highlighting the importance of regulatory clarity and compliance in fostering trust and legitimacy within the industry.

In conclusion, the case studies of Germany, France, the UK, and the USA offer valuable insights into the evolving landscape of digital currencies and the role of digital banks and regulatory frameworks in shaping their adoption and acceptance. As digital currencies continue to gain traction globally, these case studies provide

valuable lessons for policymakers, industry stakeholders, and consumers alike, highlighting the opportunities and challenges inherent in the digital currency ecosystem.

6. Impact on Traditional Financial Systems

6.1. Disruption of traditional banking: Digital currencies threaten to disrupt traditional banking models by providing alternative financial services and reducing reliance on intermediaries

Disruption of traditional banking: Digital currencies have emerged as a disruptive force, challenging traditional banking models by offering alternative financial services and diminishing reliance on traditional intermediaries. With the rise of decentralised finance (DeFi) platforms and peer-to-peer lending protocols, individuals can access a wide range of financial products and services, including lending, borrowing, and asset management, without the need for traditional banks. This decentralisation of financial services threatens the traditional banking paradigm, compelling banks to adapt to changing consumer preferences and technological advancements or risk becoming obsolete in the digital age.

6.2. Central bank digital currencies (CBDCs): Central banks are exploring the issuance of CBDCs to modernise payment systems, enhance financial inclusion, and maintain monetary sovereignty

Central bank digital currencies (CBDCs): Central banks around the world are exploring the potential issuance of CBDCs as a means to modernise payment systems, enhance financial inclusion, and maintain monetary sovereignty. CBDCs represent digital representations of fiat currencies issued by central banks, providing a secure and efficient means of transacting in the digital economy. By leveraging blockchain technology and smart contracts, CBDCs offer the potential to streamline payment processes, reduce transaction costs, and extend financial services to underserved populations. However, the implementation of CBDCs poses complex challenges, including technological scalability, privacy concerns, and implications for monetary policy, requiring careful consideration and coordination among policymakers, regulators, and stakeholders.

6.3. Challenges for monetary policy: The proliferation of digital currencies poses challenges for monetary policymakers, including managing inflation, controlling money supply, and maintaining financial stability

Challenges for monetary policy: The proliferation of digital currencies presents significant challenges for monetary policymakers, as they grapple with managing inflation, controlling money supply, and maintaining financial stability in an increasingly digitalised financial landscape. Unlike traditional currencies, digital currencies are not subject to the same regulatory oversight and monetary policy tools employed by central banks, making it difficult to influence their value and supply. Furthermore, the decentralised nature of digital currencies and the global reach of digital currency markets complicate efforts to regulate and stabilise financial markets. As digital currencies continue to gain traction, monetary policymakers must adapt their policy frameworks and regulatory approaches to address the unique challenges posed by the digital currency ecosystem, ensuring the stability and resilience of the global financial system in the digital age.

7. Societal and Economic Implications: Financial inclusion

7.1. Digital currencies have the potential to promote financial inclusion by providing access to banking services for the unbanked and underbanked

Financial inclusion: Digital currencies hold the promise of promoting financial inclusion by extending access to banking services for individuals who are currently unbanked or underbanked. By leveraging mobile phones and internet connectivity, digital currencies enable individuals in remote or marginalised communities to participate in the formal financial system, conduct transactions, and access a wider range of financial services. This increased accessibility to banking services can empower individuals to save, invest, and build credit histories, thereby fostering economic stability and resilience among historically marginalised populations.

7.2. Economic empowerment: Digital currencies empower individuals to participate in the global economy, facilitate cross-border transactions, and reduce remittance costs

Economic empowerment: Digital currencies empower individuals to engage in the global economy, facilitating cross-border transactions and reducing the costs associated with remittances and international transfers. Through decentralised platforms and peer-to-peer networks, individuals can transact directly with one another, bypassing traditional financial intermediaries and their associated fees. This newfound economic empowerment enables individuals to seize opportunities for entrepreneurship, investment, and wealth creation on a global scale, unlocking economic potential and fostering innovation in emerging markets.

7.3. Wealth distribution and inequality: The adoption of digital currencies may exacerbate wealth inequality, as early adopters and technologically savvy individuals benefit disproportionately

Wealth distribution and inequality: While digital currencies offer opportunities for economic empowerment, they also have the potential to exacerbate wealth inequality, as early adopters and technologically savvy individuals may benefit disproportionately from their adoption. The decentralised nature of digital currencies and the speculative nature of digital currency markets can lead to wealth concentration among a select group of individuals or entities, widening the gap between the haves and the have-nots. Moreover, disparities in access to technology, education, and financial literacy may further exacerbate existing inequalities, perpetuating systemic barriers to wealth accumulation and economic mobility.

In conclusion, the societal and economic implications of digital currencies are multifaceted, offering both opportunities and challenges for individuals and communities around the world. While digital currencies hold the potential to promote financial inclusion, economic empowerment, and innovation, policymakers, industry stakeholders, and civil society must address the risks of wealth inequality and exclusion to ensure that the benefits of digital currencies are shared equitably and contribute to sustainable economic development for all.

8. Conclusions

8.1. Summary of key findings and insights

In conclusion, our exploration of the impact of digital currencies on various aspects of society and the economy has revealed a complex and dynamic landscape characterised by both opportunities and challenges. Key findings indicate that digital currencies have the potential to promote financial inclusion, economic empowerment, and innovation, yet they also pose risks such as exacerbating wealth inequality and challenging traditional financial systems.

8.2. Reflections on the future of money in the digital age

Looking to the future, it is evident that digital currencies will continue to play a significant role in shaping the future of money in the digital age. As technological advancements and regulatory frameworks evolve, digital currencies are poised to become increasingly integrated into mainstream financial systems, offering new avenues for financial services and economic participation.

8.3. Call to action for policymakers, industry stakeholders, and the public to navigate the evolving landscape of digital currencies responsibly.

In light of these developments, there is a pressing need for policymakers, industry stakeholders, and the public to collaborate in navigating the evolving landscape of digital currencies responsibly. Policymakers must enact clear and forward-thinking regulations to ensure consumer protection, market integrity, and financial stability in the digital currency ecosystem. Industry stakeholders must prioritise transparency, accountability, and responsible innovation to build trust and legitimacy within the digital currency industry. Lastly, the public must educate themselves on the opportunities and risks associated with digital currencies and make informed decisions about their use and investment.

In essence, the future of money in the digital age will be shaped by the collective actions and decisions of policymakers, industry stakeholders, and the public. By working together to address the challenges and

opportunities presented by digital currencies, we can build a more inclusive, efficient, and resilient financial system that benefits individuals and communities worldwide.

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THE IMPACT OF TAX INCENTIVES ON THE PERFORMANCE OF THE CONSTRUCTION SECTOR IN THE CONTEXT OF THE COVID-19 PANDEMIC

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Abstract

The construction sector plays a key role in the economic development of a country, providing not only essential infrastructure, but also many jobs. In this context, the Romanian government has implemented in 2019 a series of fiscal measures aimed at stimulating growth and ensuring the financial sustainability of this crucial segment. The objective of this paper is to establish whether wage tax reductions for construction employees have contributed to economic growth, whether these tax incentives have provided the necessary support for the pursuit of the construction sector business during the Covid-19 pandemic and to what extent the managers of companies in this sector have been able to protect and even develop their business under these conditions. Macroeconomic analysis of the construction sector in Romania based on data provided by the National Institute of Statistics shows that these tax incentives have had a positive impact on the activity of construction companies. Annual increases in turnover, average number of employees and number of companies in the construction sector have occurred in each year of application of the tax facilities, although the COVID-19 pandemic slowed down the pace of growth in 2020 and 2021. Even though many firms closed down or became insolvent due to the pandemic in 2020 and 2021, the construction sector in Romania generated the highest share of Gross Value Added (GVA) compared to the rest of the EU in 2022. The analysis carried out in the second part of this paper focused on the financial performance of five companies in the specialised construction sector (NACE code 4399) and showed significant increases in profitability and labour productivity in the period 2019-2022. The managers of these companies took full advantage of the tax facilities and managed to develop their business during this period, securing a stable position in the Romanian construction market.

Keywords: *tax incentives, Covid-19 pandemic, profitability, rates of return, labour productivity.*

1. Introduction

In 2018, the construction sector in Romania was adrift, with contractors in the sector facing a lack of manpower and financial liquidity and implicitly, a reduced capacity to undertake works and thus contribute to public and private investments. In this economic context and considering the revolt of the Construction Employers, GEO no. 114 was adopted at the end of 2018, through which the Government adopted tax measures aimed at recovering this branch of the economy. Although the construction sector was declared a priority for a 10-year period and the facilities provided in the form of salary tax reductions for construction employees were promised until 2028, some of these were eliminated as from 2023.

The objective of this paper is to underline the role the tax incentives played during the period of their application, whether they provided the necessary support for the pursuit of the construction sector business during the Covid-19 pandemic and to what extent the managers of the companies managed to protect and even develop their business under these conditions.

The impact of tax incentives on the financial performance of the Romanian construction sector during the timeframe 2019-2022, marked by the Covid-19 pandemic, is analysed from two perspectives: macroeconomic and microeconomic. The macroeconomic analysis of the activity in the construction sector in Romania under the impact of the tax incentives implemented since 1 January 2019 is based on data provided by the National Institute of Statistics. The study carried out in 2019 outlines that these incentives had a positive impact on the activity of

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construction companies: total turnover increased by 27.4% related to 2018, the average number of employees increased in one year by 37,843 and the number of companies in the construction sector increased by 7.37%, all these contributing to an increase in the share of this sector in Romania's GVA from 6.6% in 2018 to 7% in 2019. Annual increases in these indicators also occurred during the following period, although the COVID-19 pandemic slowed the pace of growth in 2020 and 2021.

The microeconomic analysis carried out in the second part of the paper focused on the financial performance of five companies chosen from Top Business Romania 2023 and Top Business Bucharest 2023 in the construction sector - NACE code 4399, considering that large companies have a high potential for carrying out public investment projects, thus contributing more to the development of the national economy. Based on the financial information of these companies, taken from *www.risco.ro*, we calculated and analysed the evolution of economic, financial and commercial rates of return and labour productivity during the timeframe 2018-2022, using the comparison method. It points out a significant increase in rates of return in 2019 compared to 2018, a downward trend in 2020 and 2021, both due to the challenges brought by the pandemic and the increase in construction material and fuel prices, followed by a further increase in financial performance in 2022. It results from this analysis that payroll tax relief has been instrumental in increasing the profitability of construction companies during the timeframe 2019-2022.

2. Tax incentives granted in the construction sector, from GEO no. 114/2018 to Act no. 296/2023

At the end of 2018, the construction sector became a priority for the government programme, as in recent years the sector has been facing difficulties in providing skilled labour and unfair competition. This led to a decrease in the average number of employees during the timeframe 2016-2018 by 2%, *i.e.*, around 8,000 people[1]. At the same time, turnover in the construction sector was declining and more and more companies went out of business.

Under these circumstances, the Romanian Government gave in to pressure from the employers of construction companies and, on 29 November, an agreement was signed for the adoption of sustainable growth measures based on investment over a 10-year period, declaring the construction sector to be a "priority of national importance for the Romanian economy"[2].

Thus, on 28 December 2018, GEO no. 114 was adopted, which established for employees in the construction sector the increase of the minimum wage and certain tax incentives, valid as from 1 January 2019. These incentives are granted only for salaries obtained from employers with a turnover obtained from the construction sector representing at least 80% of the total turnover. Given that the minimum gross basic salary in 2019 was RON 2,080, GEO no. 114/2018 established a minimum gross wage for the construction sector, not including bonuses and other allowances, of RON 3,000 per month, for normal working hours on average 167.333 hours per month, representing RON 17.928/hour[3]. At the same time, for gross salary income and similar income between RON 3,000 and RON 30,000, employees benefited from an exemption from paying 10% tax on salaries and 10% health insurance contribution (CASS), as well as a reduction in the public insurance contribution (CAS) rate by 3.75 p.p., from 25% to 21.25%[4].

At the end of 2022, by GEO no. 168/08.12.2022, the minimum gross basic salary for the construction sector was increased to RON 4,000 per month, for normal working hours comprising on average 165.333 hours per month, for the timeframe 1 January 2023-31 December 2028[5]. At the same time, the maximum salary limit for which facilities are granted was lowered from RON 30,000 to RON 10,000. This change has caused dissatisfaction among employers in the construction sector, as the taxation of salaries above RON 10,000 has been implemented during a period of time when construction materials were on the rise and during the winter period when work in this sector was fewer and harder to carry out due to bad weather.

At the end of October 2023, Act no. 296/2023 is published in the Official Gazette, which provides that as of 1 January 2024, employees in the construction sector „benefit from the reduction of the public insurance contributions (CAS) by the percentage points corresponding to the contribution rate to the privately

[1] *https://federatiaconstructorilor.ro/files/docs/AcordConstructiiFPSC-GuvernulRomaniei.pdf*.
[2] *https://static.anaf.ro/static/10/Anaf/legislatie/OUG_114_2018.pdf*.
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[4] M. Grigore, V. Ștefan-Duicu, *Fiscalitate*, Publishing House of the „Nicolae Titulescu" University, Bucharest, 2023.
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administered pension fund provided in Act no. 411/2004 - 4.75."[6] Thus, the CAS rate withheld from salary income changes from 21.25% to 20.25% as of January 2024. Although the construction sector was declared a priority sector for a 10-year period and the facilities granted by GEO no. 114/2018 were promised until 2028, at the end of October 2023, Act no. 296/2023 repealed art. 154 para. (1) letter (r), *i.e.*, beginning with November 2023 income, employees in the construction sector no longer benefited from the 10% CASS exemption. Act no. 296/2023 also provides that the wages tax exemption and the reduction of the CAS rate will apply only to the place where the employees' basic function is located.

By GEO no. 93/31.10.2023, the Government increased again the minimum salary for the construction sector from RON 4,000 to RON 4,582 per month for normal working hours averaging 165.333 hours per month, representing on average RON 27.714/hour.

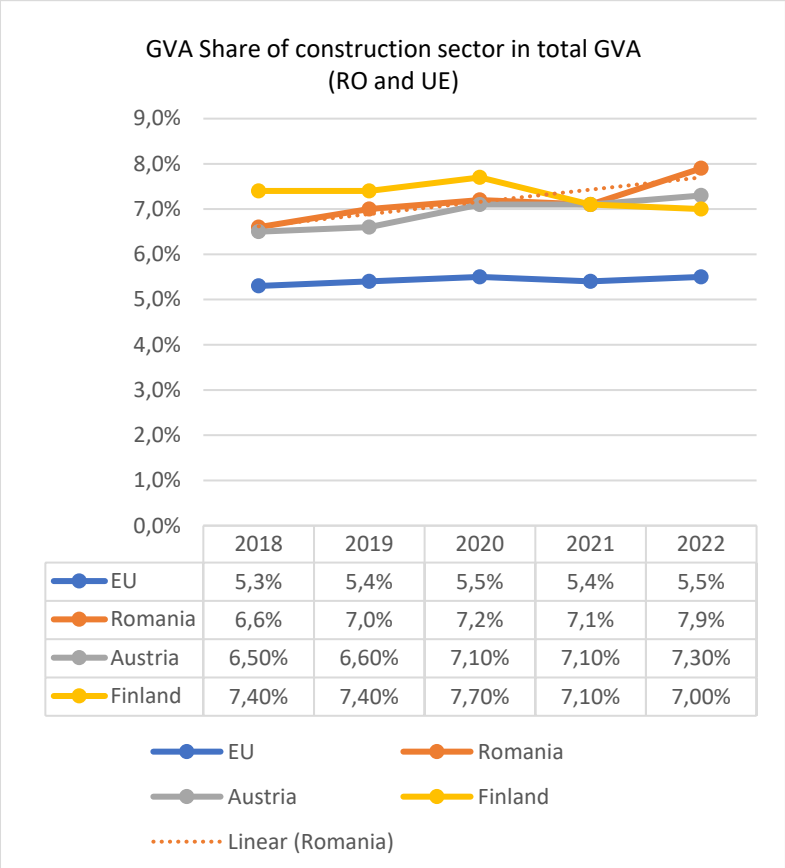
This progressive phasing out of facilities granted to employees in the construction sector comes in an unstable political climate, with rising prices for fuel and the main materials used in this sector, due to the war in Ukraine, which was one of the main suppliers of iron to our country.

3. Impact of tax incentives on construction activities in Romania

A way to measure the growth of the construction sector as an impact of the facilities applied during the timeframe 2019-2022 is through GVA, generated by this economic activity as a share of total GVA.

In 2018, the share of this sector in total GVA was 6.6% in Romania, while the EU average was 5.3%. In Romania, the value of this branch of the economy has increased every year, reaching in 2022, pursuant to data provided by Eurostat (chart 1), the highest share in GVA in comparison with the rest of the European Union, namely 7.9%, followed in second place by Austria with a share of 7.3% and in third place by Finland with 7.0%, while the EU average is 5,5%.

Chart 1



	2018	2019	2020	2021	2022
EU	5,3%	5,4%	5,5%	5,4%	5,5%
Romania	6,6%	7,0%	7,2%	7,1%	7,9%
Austria	6,50%	6,60%	7,10%	7,10%	7,30%
Finland	7,40%	7,40%	7,70%	7,10%	7,00%

Source: Eurostat Housing in Europe - 2023 interactive edition - Eurostat (europa.eu)

[6] *https://static.anaf.ro/static/10/Brasov/Brasov/contributii_296_nou.pdf*.

In order to analyse the impact of the tax incentives applicable from 2019 on the construction sector, we will analyse the evolution of the turnover, the number of employees and the number of companies in this sector as from 2018 (when no tax relief was applied) to 2022. The period analysed covers three distinct stages of the Covid-19 pandemic: pre-pandemic, pandemic and post-pandemic.

3.1. The impact of tax incentives on sales in the construction sector in Romania

According to the NIS, in 2019, the first year when tax incentives in the construction sector were granted, turnover increased by 27.4% compared to 2018 (Table 1).

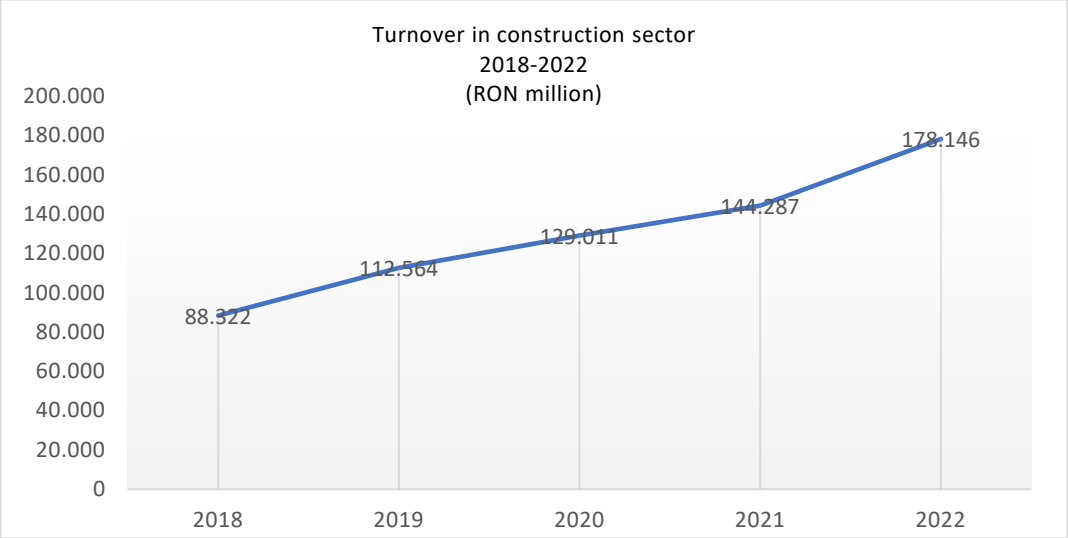
Table 1. Total turnover in construction sector in Romania

Year	Turnover in construction (RON million)	Relative change N/(N-1)
2018	88,322	-
2019	112,564	27.4%
2020	129,011	14.6%
2021	144,287	11.8%
2022	178,146	23.5%

Source: NIS Press release template (insse.ro)

Throughout the period of tax relief, turnover increased year-over-year, even though the growth rate during the timespan 2020-2022 was slower than in the first year with tax relief (Chart 2).

Chart 2



Source: NIS Press release template (insse.ro)

3.2. Impact of tax incentives on the number of employees in the construction sector in Romania

In compliance with the data provided by NIS, in 2019 the average number of employees increased by 39,921 compared to 2018 (Table 2).

Table 2. Annual increase in the average number of employees

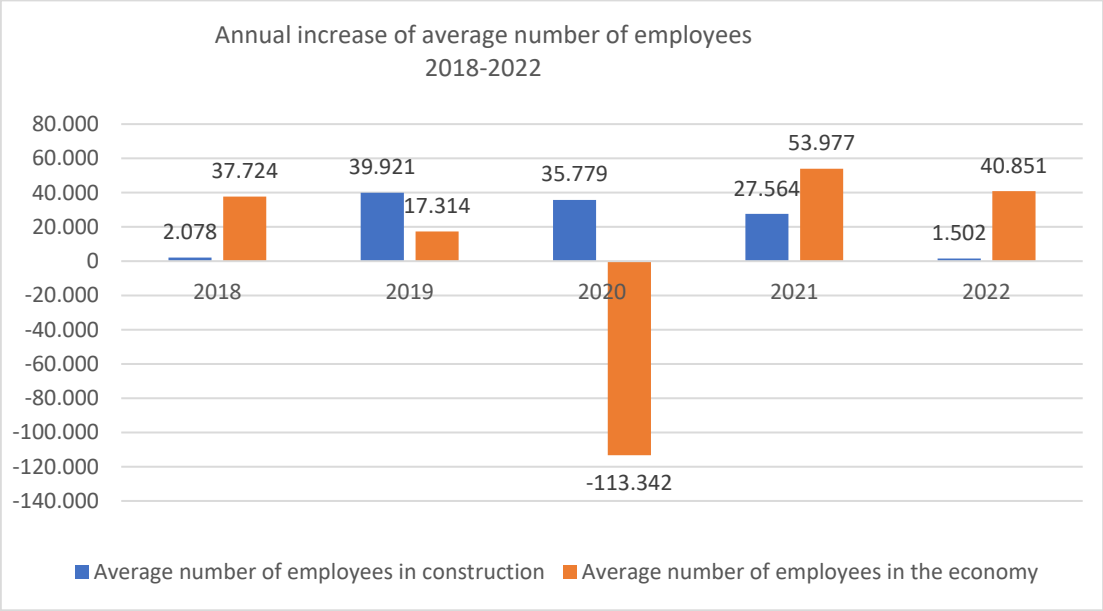
Year	Employees in construction		Total number of employees in the economy	
	Average no.	Absolute change N/(N-1)	Average no.	Absolute change N/(N-1)
2017	354,191	-	4,082.296	-
2018	356,269	2,078	4,120.020	37,724
2019	396,190	39,921	4,137.334	17,314
2020	431,969	35,779	4,023.992	-113,342
2021	459,533	27,564	4,077.969	53,977
2022	461,035	1,502	4,118.820	40,851

Source: NIS Press release template (insse.ro)

The increase in the minimum wage and tax relief have improved competitiveness among construction companies, which have increased their activity, leading to an increase in the contribution of this sector to the total economy in a troubled and particularly difficult period. The construction sector, together with the IT sector, became the engine of the Romanian economy during the pandemic.

Following the implementation of facilities pursuant to GEO no. 114/2018, construction is one of the few sectors of the economy where the average number of employees has increased year over year after 2019, even during the pandemic period. The tax incentives provided have made the development dynamics of this sector in 2020 to be contrary to that of the economy, as can be seen in Chart 3.

Chart 3



Source: NIS Press release template (insse.ro)

The reduction in taxation of salary income has also brought a change in the way of thinking of workers in this industry, who have begun to look for Romanian companies instead of those from the EU. Thus, one of the effects of the tax incentives has been to stabilise the existing labour force, decrease the number of workers going abroad and even the return to Romania of those in this sector.

In early March 2020, when the COVID-19 pandemic locked people in their dwellings and limited travel, many Romanians working abroad decided to return home, scared of the unknown. Some of them looked for jobs with Romanian construction companies, attracted by the increased salary income resulting from tax cuts.

During the pandemic period, when the hotel and catering sector was collapsing and many of the service companies on the market went out of business, both skilled and unskilled labour force was needed in construction. While the slogan „stay at home if you care" was on everyone's lips and being widely used in the media as a form of protection against the COVID-19 virus, construction company owners were looking for ways to complete contracts they had started and needed people to work on the sites.

The state of emergency in the pandemic brought new challenges and construction companies had to adapt to the new rules that were changing from week to week, forcing the sector to face a new deadlock. As regards the employees working on construction sites across the country, companies had to look for new ways to protect and incentivise them to stay active but healthy. Most companies chose to stay in business, with managers taking responsibility to their workers and to the authorities.

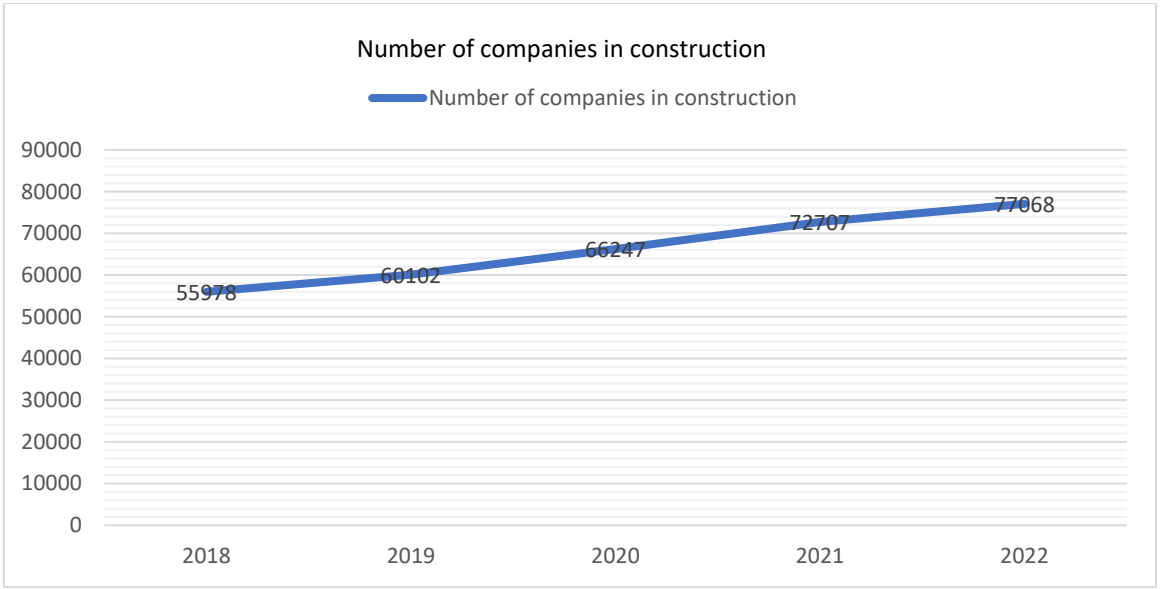
The impact of the COVID-19 pandemic on the construction sector can be seen in the uncertainty of business development, but tax incentives, digitisation programmes implemented by the authorities and private investment contributed to the economic recovery of this sector in Romania.

3.3. Impact of tax incentives on the number of companies in the construction sector in Romania

Pursuant to the National Institute of Statistics, the number of companies in the construction sector increased from 55,978 in 2018 to 77,068 in 2022 as indicated in Chart 4.

The tax incentives provided by GEO no. 114/2018 kept this branch in continuous activity even during the pandemic period, when other companies went out of business. A necessary measure for the pursuit of the business was to adapt the way of working on construction sites to the new rules of protection and social distancing. Companies had to invest money in efficient equipment and sanitary protective materials, disinfectants and change the organisation of work on the site, respecting social distancing and not allowing people to swap between sites. With all these measures, many construction companies suffered financial losses, being unable to meet deadlines, lost contracts due to a lack of employees who were either ill or quarantined and unable to attend sites.

Chart 4



Source: https://insse.ro/cms/sites/default/files/com_presa/com_pdf/actv_intrep_2022r.pdf

In addition to staffing problems, companies were also faced during the pandemic with problems in delivering the materials imported and subsequently, with their prices rising at an alarming rate. Rising prices for building materials and fuel contributed to a fall in profits for the companies in this sector. Ensuring financial liquidity was another real issue during this time span, leading to major delays and even suspension of activity.

The evolution of the construction sector over the timespan 2018-2022 is summarised in Table 3.

Table 3. Evolution of construction sector during timeframe 2018-2022

	Indicators	Unit of measurement	2018	2022	Absolute change (2022/2018)	Relative change (2022/2018)
1.	Number of enterprises	number	55,978	77,068	21,090	37.68%
2.	Average number of employees	persons	356,269	461,035	104,766	29.41%
3.	Turnover	RON million	88,322	178,146	89,824	101.70%
4.	Gross result for the year	RON million	9,755	22,068	12,313	126.22%
5.	Gross investments	RON million	18,873	41,047	22,174	117.49%
6.	Gross value added	RON million	26,139	55,857	29,718	113.69%

Source: NIS

Between 2018 and 2022, the number of businesses in the construction sector increased by 37.68%, leading to an increase in the average number of employees in this sector by 29.41%. We may definitely state that the tax incentives granted have reduced undeclared work and thus in 2022 the average number of employees reached 461,035 people.

Turnover in the construction sector has increased pursuant to data posted on the NIS website by more than 100% during the last 5 years.

The 117.49% increase in gross investment in this sector is reflected in a gross result for the financial year 2022 that is RON 12,313 million higher than in 2018.

4. Evolution of the financial performance of companies in the specialised construction sector (NACE code 4399) during the timespan 2018-2022

The NACE code 4399-Other specialised construction activities class represents about 0.15% of the total number of economic agents in Romania[7]. This class includes specialised construction activities comprising: geotechnical and hydrogeological studies and surveys; construction of foundations; construction of piles, micro-piles, braces and injections for land reinforcement and improvement; design and performance of underground water supply; insulation works; rental of cranes and construction equipment for general use with operators; construction of uncovered swimming pools, etc.

The turnover, net profit and number of employees for the 10 largest Romanian companies in this sector in 2022 are listed in Table 4, in descending order by turnover.

Table 4. Main competitors in the specialised construction sector in Romania

	Company	Turnover (RON)	Net profit (RON)	No. of employees
1	Activ Group Management SRL	245,598,906	85,387,412	485
2	Maristar SRL	196,853,373	37,580,270	195
3	Electro Vest SRL	147,779,136	7,263,698	159
4	Deme Macarale SRL	85,620,328	10,513,439	177
5	Presto Steel Construction SRL	82,248,369	1,391,868	34
6	77 Insat Ve Taahhut SA Istanbul Suc Constanta	76,068,000	9,899,034	31
7	Mega Edil SRL	75,589,827	12,451,634	90
8	S.U.C.P.I SA	67,707,127	3,471,863	203
9	Kronstarr BAU Company SRL	67,082,015	3,317,124	41
10	Freyrom SA	62,396,842	8,240,188	64

Source: www.risco.ro

At national level, Activ Group Management is the leading company with a 41% increase in turnover in 2022 compared to 2021 and a net profit of RON 85,387,412, with 485 employees.

[7] *https://www.topfirme.com/caen/4399.*

As it may be seen in Table 5, at the level of the Municipality of Bucharest, Union General Construct is in first place, with a net profit of 26,842,497 RON in 2022, with only 14 employees. According to data published by risco.ro, this company achieved an increase in turnover in 2022 of 5165% compared to the year 2021.

Table 5. Main competitors in the specialised construction sector in Bucharest

	Company	Turnover (RON)	Net profit (RON)	No. of employees
1	Union General Construct S.A	30,686,051	26,841,497	14
2	Recon si Doje SRL	29,653,789	3,492,461	135
3	Trustul pt servicii cu utilaje diverse SRL	27,761,328	1,797,630	174
4	Allspace Interiors SRL	18,246,033	4,345,677	23
5	Geosond SA	18,164,150	3,424,901	51
6	Calitek Group SRL	17,298,869	552,416	36
7	Grit Constructii Lucrari Speciale SRL	16,873,242	828,519	13
8	Trylon TSF SRL	15,627,334	2,384,256	96
9	WTM Group Montaj SRL	18,831,038	2,531,047	61
10	Dewatering& Silent Piling SRL	14,327,343	2,069,894	17

Source: www.risco.ro

In order to study the profitability of companies in this construction sector and its evolution during the period 2018-2022, we have chosen a sample of 5 companies from Tables 4 and 5, direct competitors in the country and in Bucharest, in compliance with the following criteria:

- based on the specifics of the activity, pursuant to the main works carried out, in order to cover the whole range of activities specific to NACE code 4399;
- participation in tenders for the implementation of investment projects financed by the Romania's National Recovery and Resilience Plan or the European multiannual budget;
- at least 10 years' experience on the Romanian market.

The 5 companies we will analyse in terms of turnover, net profit or loss and return rates are:

a) ACTIV GROUP MANAGEMENT SRL, the main competitor in the whole country on NACE 4399 class - main activity rental of equipment and machinery for construction works, with operators (1st place in Top Business Romania 2023 and 1st place in Top Profit Romania 2023, NACE code 4399);

b) GEOSOND SA - design and performance of geotechnical works applied to construction, geological-technical research, exploration and use of underground mineral resources (1st place in Top Business Romania 2023, sector 6 Bucharest, NACE code 4399);

c) MEGA EDIL SRL - water supply works, sewerage, water treatment and purification plants, road rehabilitation and asphalting works, land improvement works (1st place in Top Business Romania 2023, for Buzău county, NACE code 4399);

d) FREYROM SA - construction of bridges and passages, renovation and consolidation of works of art (1st place in Top Business Romania 2023, sector 3, Bucharest, NACE code 4399);

e) CALITEK GROUP SRL - commercial, industrial, medical, office and high-profile residential projects, mechanical, electrical and sanitary construction services - MEP Engineering (2nd place in Top Business Romania 2023, for Small Enterprises, sector 2, Bucharest, NACE code 4399).

In order to measure the economic-financial performance of these companies, we will calculate the following ratios and indicators that allow a systematic analysis of the management at a given time, but also in its evolution over a period of several successive years, providing appropriate information on the causes and effects of changes[8]:

Return on Assets Ratio: ROA = $\frac{Net\ Income}{Average\ Total\ Assets} x\ 100$

Return on Equity Ratio: ROE = $\frac{Net\ Income}{Average\ Shareholder\ s\ Equity} x\ 100$

[8] M. Grigore, V. Ștefan-Duicu, *Managementul financiar al firmei*, Publishing House of the „Nicolae Titulescu" University, Bucharest, 2024.

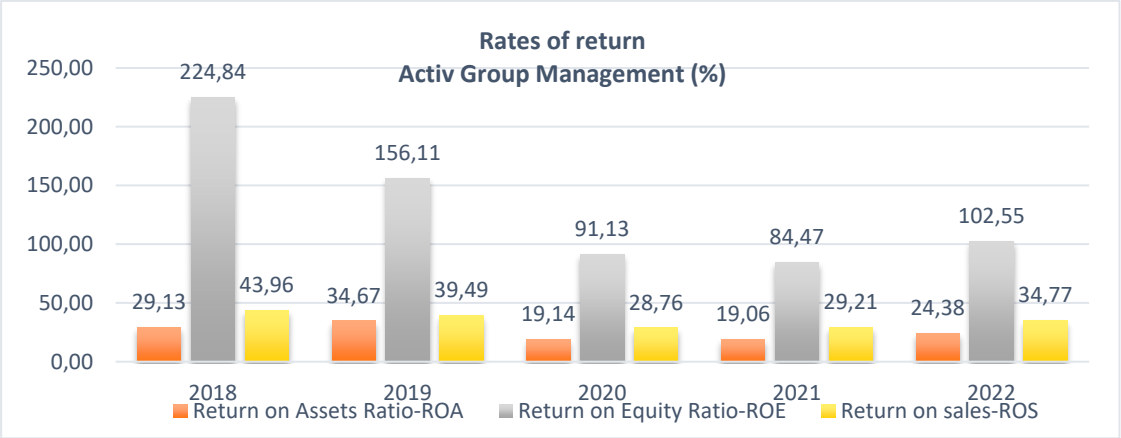
Return on sales: ROS = $\frac{Net\ Income}{Turnover} x\ 100$

Labour productivity: WP = $\frac{Turnover}{Number\ of\ employeess} x\ 100$

a) Analysis of the financial performance of ACTIV GROUP MANAGEMENT SRL

The company Activ Group Management SRL, which ranks first at national level among the companies with NACE code 4399, has recorded an increase in turnover of RON 214,225,811 during the timespan 2018-2022 and an increase in the number of employees from 45 people in 2018 to 485 people in 2022. The company went from a micro-entity to a large company with more than 400 employees in 5 years. Although the net result has increased every year, the rates of return have decreased due to investments made by the company management in machinery. Equity increased from RON 741,419 in 2018 to RON 86,587,772 in 2022, a very large increase for this period with pandemics and political instability (Chart 5). 2021 was the hardest year for Activ Group Management, the return on assets ratio was 19.06%, the lowest level during the whole period under analysis. The return on equity ratio also decreased in 2021 by 6.66 p.p. compared to 2020, reaching to 84.47%, the lowest level during the whole period 2018-2022. Even if the trend is downward, we still note high levels of the rates of return throughout the period analysed, especially in the case of the return on equity ratio which varies between 84.47% (in 2021) and 224.84% (in 2018).

Chart 5



Source: own processing based on financial data posted on www.risco.ro

In terms of labour productivity (Table 6) we notice a downward trend in the first 3 years of the tax relief implementation, which was due to a higher rate of growth in the number of net employees than in turnover. For instance, in 2019 the number of employees increased by 4.3 times and turnover by 3.6 times. However, we notice an increase in labour productivity in 2022 compared to 2020 and 2021.

Table 6. Labour productivity of Activ Group Management SRL

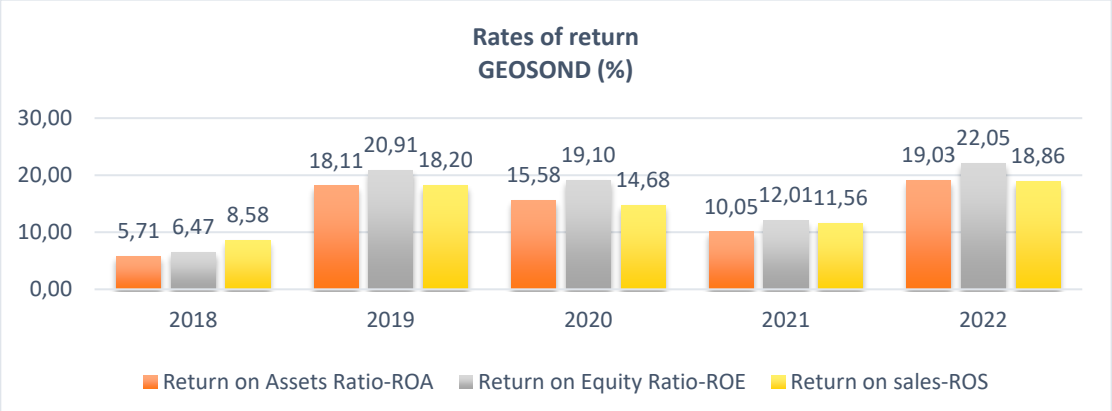
Year	2018	2019	2020	2021	2022
Labour productivity (RON/employee)	697,180	584,693	489,564	440,213	506,389

Source: own processing based on financial data posted on www.risco.ro

b) Analysis of the financial performance of GEOSOND SA

GEOSOND SA, 1st place in Top Business Romania 2023, sector 6 Bucharest, NACE code 4399, has taken full advantage of the tax facilities that came into force on 1 January 2019 and this can be seen in the financial results obtained in the first year of their implementation.

Chart 6



Source: own processing based on financial data posted on www.risco.ro

Turnover increased by RON 5,633,973 in 2019 and net result by RON 1,798,252 compared to 2018. These increases led to a doubling of the return on sales and a tripling of ROA and ROE in 2019 compared to 2018, as shown in Chart 6. The effects of the pandemic are reflected in lower rates of return in 2020 and especially in 2021, when turnover and net profit fall significantly, as equity and total assets increase. Although ROA, ROE and ROS remain above 2018 levels in 2021, they fall to almost half of what they were in 2019. In 2022, the level of turnover increases by RON 3,130,977 compared to 2021 and by RON 4,501,702 compared to 2019. This leads to high values of all rates of return, the highest in the period under analysis. Labour productivity follows the trend of turnover (Table 7) increasing in each year, except in 2021 when the decrease in turnover by RON 2,730,636 leads to a decrease in labour productivity by RON 61,864/employee.

Table 7. Labour productivity of GEOSOND SA

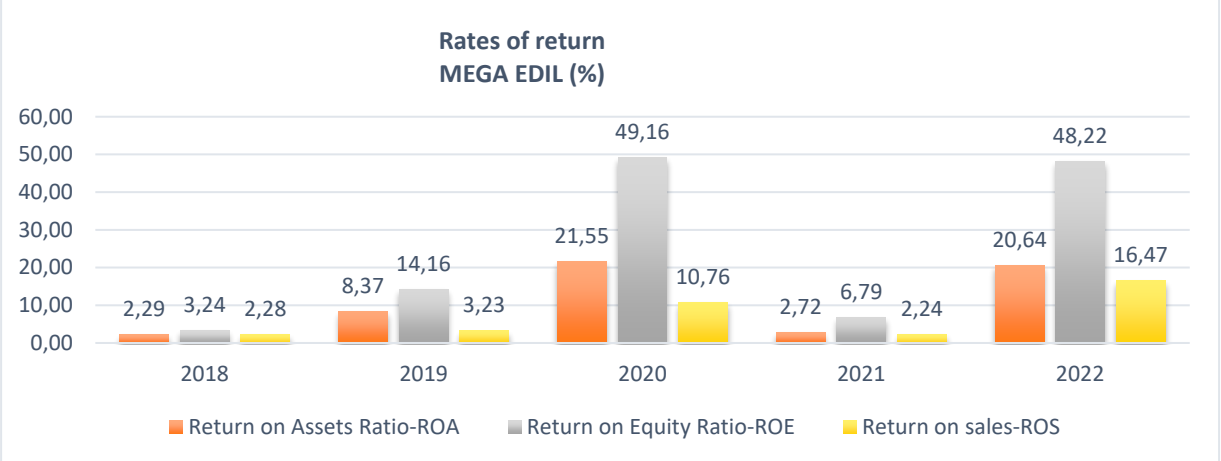
Year	2018	2019	2020	2021	2022
Labour productivity (RON/employee)	182,465	284,634	362,527	300,663	356,160

Source: own processing based on financial data posted on www.risco.ro

c) Analysis of the financial performance of MEGA EDIL SRL

MEGA EDIL SRL ranks 7th in the country ranking and 1st in Buzău County Top Business, according to NACE code 4399, with a turnover of RON 75,589,827 in 2022 and 90 employees. In 2019, the company had an increase of RON 1,554,4911 in its net result and the turnover increased 3.22 times compared to the previous year, reaching the amount of RON 61,619,299, which resulted in an increase in all rates of return in the first year of tax incentives implementation.

Chart 7



Source: own processing based on financial data posted on www.risco.ro

In compliance with Chart 7, the highest values of the rates of return are recorded in 2020: the return on equity ratio is 49.16% (compared to 3.24% in 2018 and 14.16% in 2019), the return on assets ratio is 21.55%, 19.26 p.p. higher than in 2018, while the return on sales is 10.76%, 4.7 times higher than in 2018. The challenges posed by the COVID-19 pandemic are reflected in the financial results of 2021, when due to rising material prices and fuel price increases, the company is forced to reduce the number of employees from 119 to 105. The net result decreases by RON 7,557,001 compared to 2020, the rates of return also decreasing, approaching the level of 2018. In 2022, the company management succeeded in reducing the value of debts, increasing the equity by RON 6,532,229 and the net result reached the highest value in the whole period under analysis, namely RON 12,451,634. This leads to a spectacular increase in all rates of return. While ROA and ROE are about 1 p.p. lower than in 2020, the return on sales reaches the maximum of the period, 16.47%, 5.71 p.p. more than in the previous year 2020. Labour productivity follows the trend in turnover and rates of return. It increases dramatically in 2019 and moderately in 2020, declines in 2021 and peaks in 2022 (Table 8).

Table 8. Labour productivity of MEGA EDIL SRL

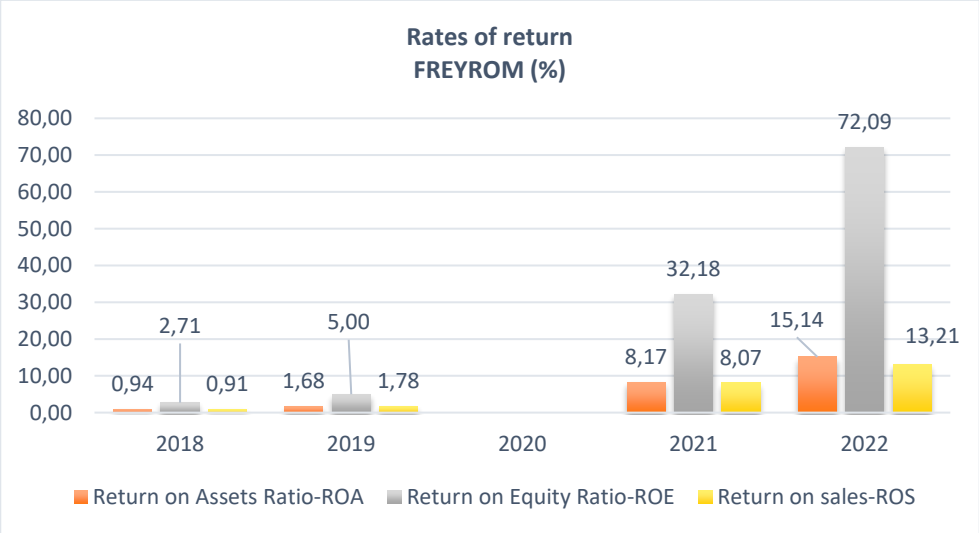
Year	2018	2019	2020	2021	2022
Labour productivity (RON/employee)	225,196	604,111	709,338	649,376	839,887

Source: own processing based on financial data posted on www.risco.ro

d) Analysis of FREYROM's financial performance

FREYROM SRL ranks 10th in the national ranking and 1st in Top Business Romania 2023, sector 3, Bucharest, for NACE code 4399, with a turnover of RON 62,396,842 in 2022. In 2019, the company almost doubles its profit, although the turnover decreases by about RON 500,000. Even if the rates of return double compared to the previous year, they are very low (5% ROE and less than 2% ROA and ROS). In 2020 the pandemic brings big challenges and although the turnover increases by RON 8,098,147 compared to the previous year, the company makes a loss of RON -1,997,386. For this year, it is not possible to calculate rates of return.

Chart 8



Source: own processing based on financial data posted on www.risco.ro

In 2021, the company obtained a net profit of RON 2,026,581 and the rates of return are 8.17% ROA, 32.18% ROE and 8.07% ROS, these values being several times higher than in 2018 and 2019. As in the case of the other companies analysed, the year 2022 brings spectacular increases in net profit, which increases by RON 6,213,607 and in the rates of return, which double compared to the year 2021. Labour productivity of FREYROM SRL oscillates around RON 450-500 thousand/employee during the timespan 2018-2021, doubling its value in 2022, as can be observed in Table 9.

Table 9. Labour productivity of FREYROM SRL

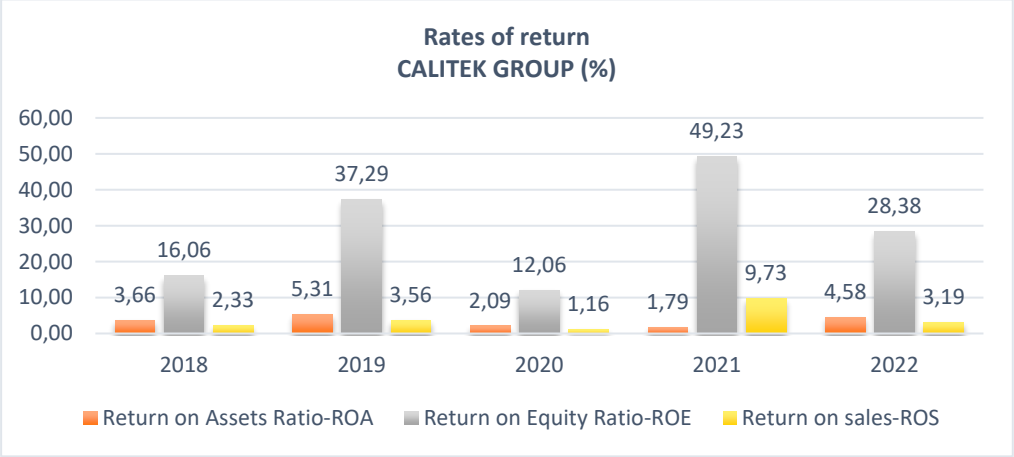
Year	2018	2019	2020	2021	2022
Labour productivity (RON/employee)	500,200	433,451	509,362	448,557	974,951

Source: own processing based on financial data posted on www.risco.ro

e) Analysis of the financial performance of CALITEK GROUP

For the company CALITEK GROUP SRL - 2nd place in Top Business Romania 2023, for Small Enterprises, sector 2, Bucharest, NACE code 4399, the same growth trend can be noticed in 2019, as for the entire construction sector. The implementation of the facilities led to an increase in turnover by RON 832,747 and in net result by RON 145,525 compared to the previous year. As a result, the return on sales increases from 2.33% to 3.56% and the return on assets ratio from 3.66% to 5.31%. As equity decreased in 2019 and profit increased, the return on equity ratio increased from 16.06% to 37.29%.

Chart 9



Source: own processing based on financial data posted on www.risco.ro

The year 2020, when the pandemic also started in our country, was difficult for Calitek. Although turnover increased by more than RON 5,300,000, the net result halved. This fact in conjunction with an increase in equity of around RON 1,300,000 resulted in ROA, ROE and ROS falling below 2018 values.

The net result in 2021 recorded the maximum value of the period under analysis (RON 1,351,789), which led to the highest level of the return on equity ratio (49.23%) and the return on sales (9.73%). In 2022 the net result falls to more than half of the previous year and this leads to a decrease in all rates of return.

In terms of labour productivity (Table 10), we observe an upward trend in the first 2 years of the tax relief, which was due to the increase in turnover. In 2021, sales decreased compared to the previous year and the average number of employees increased, which leads to a reduction in labour productivity. The company recovers in 2022, when labour productivity is at its highest level of the period analysed, due to the fact that turnover increases while the number of employees remains unchanged from the previous year.

Table 10. Labour productivity of CALITEK GROUP SRL

Year	2018	2019	2020	2021	2022
Labour productivity (RON/employee)	285,753	366,521	473,673	386,102	480,524

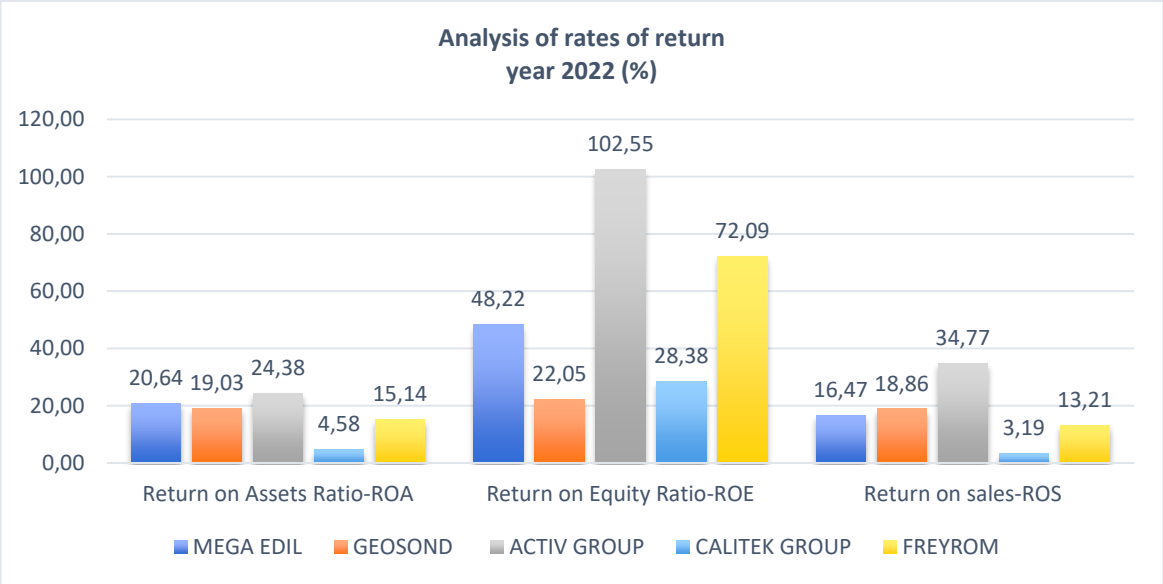
Source: own processing based on financial data posted on www.risco.ro

A comparative analysis of the labour productivity of the 5 companies indicates a very high increase in 2022 compared to 2018 for 4 of them. The only exception is the company Active Group Management, which records a 27% decrease in labour productivity during this time span, explained by the fact that the number of employees increased by about 11 times during the timeframe 2018-2022, while the turnover only by about 8 times.

From the point of view of net result, the companies under analysis had an increase in each year due to tax incentives, with two exceptions: in 2020, during the pandemic period, Calitek had a profit below the one achieved in 2018, while Freyrom had a loss (RON - 1,997,386).

Comparing the financial performance of the five companies in the field of specialised construction in 2022, we see that the first place with the highest rates of return is the company Activ Group (Chart 10). It stands out with a return on equity ratio of more than one hundred percent (102.55%). Freyrom holds the second place, with a ROE of 72.09%, followed by Mega Edil with 48.22% and Calitek Group with 28.38%. Geosond has the lowest return on equity ratio - 22.05%.

Chart 10



Source: own processing based on financial data posted on www.risco.ro

From the point of view of economic returns, the 5 companies are at small differences, the first place is held by Activ Group with a return on assets ratio of 24.38%. Mega Edil is on the second place with a difference of only 3.74 p.p. from Activ Group, while the lowest rate of 4.58% pertains to the company Calitek Group.

In terms of commercial profitability, Activ Group is also on the first place with a return on sales of 34.77%, followed by Geosond with 18.86%, almost half of the first place. The last ranked is Calitek Group with a ROS of 3.19%. These low rates of return are due to the decrease in financial performance, which is also reflected in the net result, which is RON 799,373 lower than last year 2021.

5. Conclusions

The incentives on construction workers' salaries, introduced by Government Emergency Ordinance no. 114/2018 from 2019, consisted of a 23.75% decrease in payroll taxes (of which: 10% payroll tax, 10% CASS and 3.75% CAS) and the establishment of a minimum salary well above the level of the economy. A first effect has been the reduction of undeclared work and the stabilisation of the labour force in this sector, with the average number of employees in the construction sector increasing by 37,843 after only one year of the facilities granted. Secondly, it can be seen that turnover in the construction sector increased by 27.4% in 2019 compared to 2018. The granting of the facilities also led to an increase in the number of firms in this sector, by 4,132 more within one year and by 21,090 by the end of 2022.

This growth in construction sector activity has been an important source of additional budget revenue collection, which has fully compensated for the losses resulting from wage tax cuts. For instance, the increase in turnover has meant an increase in VAT collected and higher corporate taxes or taxes on microenterprise income (especially considering the high number of newly established companies).

The emergence of the COVID-19 pandemic in early 2020 has caught this industry in full swing, with economic growth in 2019 helping firms to ease the burden of the SARS-CoV-2 virus. At the same time, the fact that the vast majority of construction sites were outdoors made it easier for people to work with a lower risk of

illness. All companies were affected by the pandemic, but depending on the strategy and solutions implemented by management, some partially went out of their business in 2020 and had poorer results, others felt the effects of the pandemic only in 2021, when rising material prices led to more modest financial results.

The study conducted at the macroeconomic level, as well as at the level of the top five companies in the specialised construction sector, points out that despite the negative effects of the pandemic felt in 2020-2021, the stimulation of construction workers by offering high net salaries allowed the stabilisation of skilled staff and specialists, which led to an increase in profitability and labour productivity.

In conclusion, the facilities granted to the construction sector have played a determining role not only in the development of the companies in this sector, but also of the entire national economy, contributing to an increase in the share of this sector in Romania's Gross Value Added from 6.6% in 2018 to 7.9% in 2022, the highest value among EU Member States.

Keeping the tax incentives for 10 years, until 31 December 2028, as originally foreseen in GEO no. 114/2018, would have been a real benefit leading to the growth of this sector. The changes made at the end of 2023 by GEO no. 93/31 October 2023 have created controversy in the business community. The majority of economists believe that all tax incentives should be removed, while entrepreneurs in the sector argue that giving up the promised facilities will lead this branch of activity into a new economic impasse.

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RECYCLING - VECTOR OF THE CIRCULAR ECONOMY. SYSTEM ANALYSIS FROM THE BOTTLENECK THEORY PERSPECTIVE

Elena Mihaela ILIESCU[*]

Mirela-Cristina VOICU[**]

Abstract

The objective of the European Union, as a major player on the global socio-economic and political scene, as set out in the European Green Pact, is to achieve climate neutrality by 2050, while ensuring an equitable and socially inclusive economic framework and context.

The circular economy has thus become mainstream, attracting the attention of academia, the media and of the responsible socio-economic and political actors at a national, European and international level.

Thus, a new trajectory of consumption has emerged: buy - use - repair/recycle - reuse, a paradigm which is the very hypothesis of this study.

This is because, despite favorable auspices, the transition to the circular economy has not performed well in recent years and recycling, a key driver of the circular economy, has not performed as expected. In this context, there is a question that has not yet been clearly and generally answered - Why has the recycling process failed to reach the expected level?

Based on this situation, the general objective of the study is to identify the causes that lead to the blockage of the recycling process, which will create the prerequisites for identifying solutions that will lead to the efficiency and effectiveness of the whole system. To this end, a qualitative analysis, based on both theoretical and empirical perspectives, of the recycling system through the lens of bottlenecks theory was conducted.

Given the still precarious environmental culture and the reluctance of most producers and consumers towards the environment and the climate change threat, this study aims to contribute to identifying, raising awareness and popularising the role that circular economy stakeholders in general, and recycling stakeholders in particular, can play in ensuring sustainable micro-, meso-, macro-, euro- and global economic development. As a specific objective, the study aims to contribute to encouraging recycling and minimising waste disposal.

Keywords: *circular economy, recycling, bottleneck analysis, optimization, waste.*

1. Introduction

Environmental degradation and climate change are ongoing dangers with the potential to proliferate if national and international strategies for recovery and transition to a rational and competitive economy in terms of resource use in general and natural resources in particular, are not implemented efficiently and effectively.

In this context, the circular economy has become mainstream in the last decades, being the focus of attention of academia, the media, as well as socio-economic and political actors at national, EU and international level. This is because the circular economy advocates minimising waste and reducing resource consumption by optimising the life cycle of material economic goods. As a result, there has been a paradigm shift in resource use, production and consumption. Thus, after acquisition and use, instead of disposal and replacement, processes such as reduction, recycling, remanufacturing, reuse, reconstruction, regeneration (the well-known 'R' strategies of the circular economy) are encouraged.

But despite the media coverage, numerous scientific reports and studies, and above all the bold roadmaps for achieving climate neutrality adopted by EU and international bodies and implemented by national governments, the transition to a circular economy has slowed globally.

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According to the report „Circularity Gap 2024"[1] most of the raw materials used still come from virgin sources and the share of secondary materials, reused, has decreased over the last five years from 9.1% in 2018 to 7.2% in 2023[2] .

This raises a question that has not yet been answered clearly and generally accepted: Why has the transition to the circular economy not been as successful as expected?

Starting from this hypothesis, although the circular economy is a holistic process that aims at minimising waste and thus optimising resource use through multidirectional actions, this paper will focus on recycling, the most widely known and debated pillar of the circular economy, and will have as its overall objective to identify the causes that lead to the blocking of the expected results, which will allow the identification of solutions for optimising the whole recycling system.

To this end, a qualitative analysis, both theoretical and empirical, of the material recycling system has been carried out through the lens of bottleneck theory.

2. Circular economy - recycling - bottleneck theory. Interconnected conceptual overview

The field of circular economy is still a young[3] and growing one, both in theory and in practice. Given that there is no unanimously accepted definition of the circular economy, this paper will refer to the one formulated by Julian Kirchherr et al., after analysing 114 definitions presented in the literature, namely: „A circular economy describes an economic system that is based on business models which replace the 'end-of-life' concept with reducing, alternatively reusing, recycling and recovering materials in production/distribution and consumption processes, thus operating at the micro level (products, companies, consumers), meso level (eco-industrial parks) and macro level (city, region, nation and beyond), with the aim to accomplish sustainable development, which implies creating environmental quality, economic prosperity and social equity, to the benefit of current and future generations."[4] The more recently formulated definitions for the period 2017-2022 keep the same general principles (the 4 Rs and sustainable development) and adds an indispensable condition for ensuring the effectiveness of the process - collaboration between the 4 major stakeholders of this process: producers, consumers, decision-makers and academia[5].

Recycling, although intensely discussed and even disputed, is therefore a vector of the circular economy[6], the importance of the process being supported both in theory and in practice. This is because, conceptually, recycling has been and is the most frequently mentioned 'R' in the definition of the circular economy, and practically, because it makes an important contribution to the efficient management of resources and the reduction of environmental pressure through the reduction and recovery of waste and of the repeated use of resources in the economic cycle. A prime example of the usefulness of recycling is the data on recycling of paper, where the production of recycled paper generates 70% less pollution than the production of the same amount of paper from virgin raw materials[7]. Another argument in favor of making recycling more efficient is the data published in the EU Monitor, which estimates that globally in 2019, plastic production and incineration generated more than 850 million tons of greenhouse gas emissions into the atmosphere, and that these emissions could rise to 2.8 billion tons by 2050 without improved recycling.[8]

Although examples of this kind are numerous and diverse, it cannot be overlooked the fact that there are also scientific studies in which solid arguments can be found on the negative impact of recycling on the

[1] Annual survey, conducted and published since 2019 by Deloitte and Circle Economy Foundation.

[2] *Circle Economy Foundation, The Circularity Gap Report 2024. Executive summary, Netherlands*, published by Circle Economy Foundation, 2024, p. 2.

[3] Although the field of circular economy took shape in the 1970s, it has seen substantial attention and development since 2012. According to Kirchherr & al in *Conceptualising the circular economy: An analysis of 114 definitions, in Resources, Conservation & Recycling,* vol. 127, December 2017, p. 226, 73% of the definitions available at that time had been formulated after 2012.

[4] J. Kirchherr, D. Reike, M. Hekkert, *Conceptualising the circular economy: An analysis of 114 definitions, in Resources, Conservation & Recycling,* vol. 127, December 2017, pp. 224-225.

[5] J. Kirchherr et al.*, Conceptualising the Circular Economy (Revisited): An Analysis of 221 Definitions, Resources, Conservation & Recycling*, vol. 194, April 2023, p. 4.

[6] According to Kirchherr et al.'s 2017 and 2023 statistical analyses of the definition of the circular economy, recycling has always been a basic principle of the circular economy, even a binding element of the various approaches (until 2012 it appeared in definitions with a frequency of 90-94%, with the frequency of use dropping to 70-80%, but as the number of "R-matrix" variables increased.

[7] V. Kumar, J.S. Kalra, D. Verma, S. Gupta*, Process and Environmental Benefit of Recycling of Waste Papers,* International Journal of Recent Technology and Engineering, vol. 8, issue 2S12, September 2019, p. 104.

[8] EU Monitor, *Plastic waste and recycling in the EU: facts and figures*, published by European Parliament, on 18.01.2023, *https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkufaw0m3zy4?ctx=vjxzjv7ta8z1*, last time consulted on 01.04.2024.

environment and society, supported by the fact that the recycling industry itself involves pollution and greenhouse gas emissions, high electricity consumption, poor quality of most secondary raw materials and the possibility of their contamination with harmful chemicals, high costs of resource management are passed on to buyers through high resource management fees and charges, etc. Under these circumstances, given that the contribution of the recycling industry to sustainable economic and social development cannot be ignored, there is a need for segment-specific cost-benefit analysis and at the same time analysis to identify bottlenecks in the process, so that optimal recycling strategies can be built and implemented to achieve environmental objectives.

„Bottlenecks" are those integral elements that limit the overall performance of the system and can manifest themselves in multiple spheres of human activity, from scientific research, economics, ecology, politics, and in general in all areas of human activity and existence. Therefore, determining bottlenecks and identifying solutions to eliminate or at least reduce these limitations is a prerequisite and a dynamic process that needs to be applied, reviewed and adjusted continuously in order to improve performance and achieve objectives.

From a recycling perspective, bottlenecks theory refers to those structural, process and cognitive elements and processes that limit its overall efficiency or effectiveness. In this sense, recycling should be approached holistically, as an integrated system, comprising intermediate processes, diverse typologies of the production process and a multifactorial matrix of actors involved. Thus, if we consider that recycling is a complex process comprising collection, sorting, processing and transformation of waste into new products, either directly or by processing the resulting secondary raw materials, the bottlenecks analysis must address each of these steps. In addition, the fact that, from a waste transformation perspective, recycling is divided into three categories - material recycling (paper, cardboard, glass, metal, aluminium, plastic), energy recycling (conversion of waste into energy) and organic recycling (conversion of organic waste into compost or biogas) - requires a separate identification of bottlenecks according to the specifics of each type of recycling. Also, in identifying bottlenecks, causal factors and remedies, the different perceptions of the various stakeholder categories (municipal, governmental and intergovernmental public institutions, recycling industry producers, producers and traders of economic goods that need to adapt their activity according to the legislative provisions) should be taken into account, consumers, education and research institutions, national and international NGOs, media, consultants, certification and standardisation organisations, investors and financial institutions interested or involved in financing initiatives to improve recycling rates).

3. Recycling system efficiency through the bottleneck view. Current context

Identifying and resolving/minimising bottlenecks is key to optimising recycling efforts and achieving environmental targets, and requires a comprehensive, multi-stakeholder approach that takes into account infrastructure, technologies used, political context, as well as culture, education and the state of stakeholder collaboration.

Given the broad spectrum and particularities of each type of recycling, this bottlenecks analysis was limited to one type, namely materials recycling, and the bottlenecks were identified by critically documenting the recycling phenomenon from the most recent primary and secondary data sources, presented centrally in the references section. In order to achieve the overall objective of the research, at least one potential solution was determined for each identified bottleneck, as will be seen below.

Bottleneck - underdeveloped collection infrastructure leading to low collection rates of recyclables.

Solutions:

- improving collection methods by making collection points more accessible and simplifying conditions (in addition to dedicated collection streams, wider use of mixed waste sorting);
- increasing individual awareness and responsibility, promoting social responsibility, involving local communities in protecting the environment through sustained and accessible information adapted to the behavioral profile of each category of users of recyclable products;
- as well as stimulating recycling behavior by providing rewards by stakeholder category.

Bottleneck - most secondary raw materials from recycled materials[9] are of poor *quality* and can only be used for the production of lower quality economic goods (*e.g.*, plastic chairs, flowerpots, packaging).

Solutions:

[9] Recyclable materials are those materials that can be transformed into new products (paper, plastic, glass, aluminium, metal, etc.).

- expanding advanced mechanical[10] recycling, as it allows even contaminated waste to be recycled and gives secondary raw materials a higher quality, similar to virgin raw materials, which will allow them to be used to produce higher quality economic goods (in the automotive, cosmetics, beverage, etc. industries);
- improving waste recovery by expanding Research & Development and innovation in this sector, leading to the modernization of recycling facilities.

In this respect, S&P Global Platts Analytics[11] estimates that by 2030, more than 1.7 million tons of virgin polymers will be replaced by mechanically recycled plastics (a significant increase compared to the 688 000 tons produced in 2020)[12].

Bottleneck - dependence on primary (virgin) raw materials due to low recycling rates

For example, a report on the circularity of PETs[13] in Europe, carried out in 2022 by Eunomia at the request of Zero Waste Europe[14], shows that the recycling rate for all PETs[15] (bottles, packaging, even textiles and car parts) was 23% and the rate of use of recycled[16] PETs (rPETs) in the production of other PETs was 24%**.**

Solutions:

- efficient collection of recyclable materials through large-scale implementation of landfill returns systems which is a global best practice;
- facilitate access to finance for the purchase and large-scale use of advanced technological sorting and treatment facilities for household and industrial waste (as per European Parliament Report A9-0290/2022 A2A, AVR and EEW facilities) that ensure the decontamination and use of materials previously considered non-recyclable.

Bottleneck - major bottlenecks in the availability of recycled content as demand for high quality recycled materials has increased substantially, as companies, as a result of legislation but also voluntary commitments, are also targeting environmental objectives such as increasing the proportion of recycled content.

At EU level, it was decided to implement a directive[17] in 2022 setting a collection target of 90% recycling of single-use plastic bottles by 2029 (with an interim target of 77% by 2025). These bottles should contain at least 25% recycled plastic in their manufacture by 2025 (for PET bottles) and 30% by 2030 (for all bottles).

Solution: closed-loop recycling, in as many production cycles with the same destination, would ensure a more efficient supply of recyclable materials by reducing the time needed for the whole recycling process, reducing the degree of contamination and therefore waste (for example, although each recycling decreases the quality of the paper, it can be recycled 6-7 times, aluminium and glass can be recycled indefinitely).

Bottleneck - recycling in this closed loop is done at a low rate.

For example, of the 1.8 million tons of flakes from recycled bottles, only 31% were put back into the recycling loop as new containers, with the remaining 69% being converted into other products, usually of lower quality and even non-recyclable.[18]

Solutions:

- increasing the quantities of recycled products recovered in all waste streams;
- introduction of extended producer responsibility (EPR) schemes.

Bottleneck - negative publicity regarding the recycling process by publicising and promoting the idea that the use of recycled products has negative effects on health, but also about the negative influence on the environment of the production of technologies needed for the recycling process and even the recycling process itself.

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[10] Recycling method that can be applied to paper, plastic, glass, textiles or metal and that consists of grinding, washing, separating, drying, regranulating and finally recompiling the collected materials. It is the most popular method, but other methods are also used in recycling: composting, incineration, anaerobic digestion, chemical recycling (specific to plastics).

[11] A leading independent provider of data and analysis for commodity and energy markets, founded in 1909.

[12] S&P Commodity Insights, *Recycled plastics market becoming more liquid and globalised as demand soars*, 2021, *https://commodityinsights.spglobal.com/Download-Asset-Recycled-Plastics.html*, last time consulted on 01.04.2024.

[13] Andy Grant *et al.*, *How circular is PET,* Brussels, published by Eunomia & Zero Waste Europe, February 2022, p. 18.

[14] Zero Waste Europe is an NGO Supported by the EU LIFE Programme.

[15] The weight of packages entering the recycling operation versus the weight of packages placed on the market (equivalent of the EU measurement method for recycling).

[16] The weight of recycled PET versus the weight of virgin PET in packaging.

[17] Directive (EU) 2019/904 on the reduction of the environmental impact of certain plastic products and Implementing Decision (EU) 2022/162.

[18] Eco Synergy*, PET, marea decepție eco: de ce nu se reciclează cel mai reciclabil tip de plastic ?,* 13.04.2022, *https://ecosynergy.ro/pet-marea-deceptie-eco-de-ce-nu-se-recicleaza-cel-mai-reciclabil-tip-de-plastic/*, last time consulted on 01.04.2024.

There are concerns from users of economic goods containing recycled materials about the toxicity of the resulting products, and these concerns have even been confirmed by recent scientific studies. For example, the presence of chemicals in food and beverages bottled in PET containers is widely publicised and debated, and is caused by multiple factors, from the actual production process to the conditions of filling, storage, distribution, sorting or reprocessing for a new life cycle.

A negative contribution to the perception of the usefulness of the recycling process is also made by the inequality with which measures to achieve sustainable development goals are applied, which creates inequality and unfair competition for fair play actors. A good example of this is the EU's goal of becoming the first climate-neutral continent by 2050, which forces European investors to make much greater financial efforts than their competitors in China or the US, and this financial pressure is of course reflected in the prices of the offered products.

Solutions:

- firstly, reviewing the rules on the use, labelling, traceability and chemical stability of recycled materials (*e.g.*, EU Regulation 10/2011 on plastic materials and articles intended to come into contact with food);
- investing in technologies for more efficient cleaning;
- stricter monitoring of storage conditions;
- investment in research and innovation in emerging technologies (chemical depolymerization);
- encouraging certification to increase both industry and consumer confidence;
- encouraging EU countries to consider reducing VAT on recycled products.

In recent years, efforts and progress have been made to improve recycling infrastructure, increase awareness and involvement of the population in the recycling process, and collaboration between stakeholders throughout the value chain. Although there are shortcomings in the way the process works, there are still measures and tools that can be further diversified and applied to increase the efficiency and effectiveness of the process, the difficulty is that to be truly sustainable and have lasting effects, they must be implemented in a harmonised and equitable way on a global scale, always taking into account the social, economic and environmental implications. In order to respect the principle of equity, solutions may vary depending on the region and local context.

4. Conclusions

There are no general solutions to ensure circularity in the economy, they may vary depending on the region and the local context, but increasing the efficiency and effectiveness of the waste recycling process can only be ensured by treating it as a holistic process, which means supporting investments in the whole infrastructure of the system, *i.e.*, collection, sorting, recycling and creating end markets for secondary raw materials.

An overview of the analysis of the bottlenecks reveals the following general conclusions: bottlenecks occur at every stage of recycling, resolving the bottleneck at the waste collection level is a first solution for the bottlenecks at later stages as well, but the unblocking solutions must be applied synchronously otherwise bottlenecks of the opposite nature - pressure from the supply side of waste or recycled raw materials - may occur.

As a result, complementary solutions such as: large-scale development and implementation of easy waste return systems (a worldwide best practice), but also of mixed waste sorting, increasing the quantities of recycled products recovered in all waste streams, reducing contamination of recyclable products, extended producer responsibility systems, harmonising quality standards for secondary raw materials and encouraging their certification in order to increase user confidence, financial motivation for stakeholders (reduced VAT for recycled products, easier access to finance for all entrepreneurs involved in the recycling process, generalisation and streamlining of the guarantee-return system).

The creation and implementation of fair and comprehensive binding rules is also a necessary market intervention with a decisive role to play in achieving sustainable development goals through greener, more circular economies. The outcome of the European Parliament elections in June 2024 also poses a risk to the future direction of European legislation, including from an environmental policy perspective. This is because, for the first time in the history of the European Parliament, polls show a strong chance of a majority for right-wing populist parties, parties which, in addition to their neo-nationalist and anti-globalization doctrine, are also

associated with anti-environmental ideologies, which puts the future of the EU's agenda, including the Environmental Action Program, in doubt.

Given that bottlenecks, as we have already pointed out, make their presence felt in all spheres of human activity, the present study also faced a number of limitations. Thus, the analysis was limited to recycling as a vector of the circular economy, since the article aimed at identifying and eliminating or at least moderating the factors that cause bottlenecks in this process, but it could be extended to all the traditional 4 Rs (reduce, reuse, recycle, recover), or even to the more detailed framework of the modern circular economy, the 9 Rs (refuse, rethink, reduce, reuse, repair, refurbish, remanufacture, repurpose, recycle, recover).

Moreover, this study is limited to one „B" out of the 3 of the analysis of the optimization matrix of any human activity in general, in this case, the recycling of materials. Therefore, the aim is to continue the scientific approach to extend the analysis of the recycling process from a complex perspective, taking into account the correlation between all the 3 quadrants of the „3 B" analysis - bottleneck, blind spots, and blended finance.

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THE LEVEL OF USING PAYMENT INSTRUMENTS IN THE TRANSFER OF DIGITAL CURRENCY

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Abstract

Globally, in recent years there has been a significant decrease in the number of cash transactions, followed by a decrease in the use of credit cards. Digital payments and e-commerce have undergone tremendous changes, revolutionising the way we buy and pay for various goods and services. E-commerce has ushered in a new era of online shopping, while digital payments have made transactions more convenient, fast and secure. The study analyses the evolution and changes regarding currency transfer, highlighting the importance of cardless digital payments. The convenience, security and cost efficiency they offer have led to their widespread adoption in various industries. The world of digital payments and e-commerce is undergoing rapid transformation, with technological advances and changing consumer behaviour driving the industry's evolution. Recently, especially after the pandemic, there has been a major change in the way people make payments, indicating a clear preference for electronic means, to the detriment of cash. Electronic payments provide full visibility and transparency throughout the entire payment process for both the customer and merchants. It is certain that digital payments and e-commerce will continue to be major drivers of global economic growth and innovation, and the main purpose of digital payments is to increase the convenience, speed and security of conducting financial transactions.

Keywords: *digital currency, card, money transfer, online payments, virtual wallet, augmented reality.*

1. Introduction

Over the years, technology has become more and more part of people's lives. With implications in all areas, it proves its usefulness on a daily basis, precisely because of the speed with which you can perform certain services. One of the most well-known implications of technology in recent years among people everywhere has turned out to be the online payment method.

Online payment has become everyone's preferred method to pay off their debts, especially when they want to purchase things from various online marketing platforms, pay bills, fees, taxes and more.

Electronic payments consist of the transfer of financial values through online transactions. These are represented as any type of payment that is not made using cash, when we swipe a debit or credit card in a store's card terminal. Being much more efficient than the classic cash payment method, online payment is now in continuous evolution, precisely because it has become part of people's habits. Customers can now buy and shop from their smartphone.

A digital payment is thus the transfer of money or digital currency from one account to another using digital payment technologies such as mobile wallets or mobile payment applications[1]. Digital payments are identified with electronic payments.

With the advent of electronic banking and the Internet in the 1990s, the first digital payment systems emerged. The company First Virtual Holdings created in 1994 the first online payment system. Customers could use credit cards for online payments by accessing this technique.

All transactions, regardless of whether they involve the purchase of goods, financial assets or services, have two settlement components: the delivery of goods or services and the transfer of funds - payments. Globally,

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[1] A. Kwilinski, E-*Commerce and Sustainable Development in the European Union: A Comprehensive Analysis of SDG2, SDG12, and SDG13*, Forum Sci, Oeconomia 2023, 11, pp. 87-107.

payment systems include a complete set of instruments, intermediaries, rules, procedures and interbank funds transfer systems that facilitate the circulation of money within a country or currency area. In this sense, a payment system comprises the following main elements or processes: payment instruments, which are a means of authorising and sending a payment (the means by which the payer gives the bank authorization for the funds to be transferred or of the means whereby the payee instructs his bank for the funds to be collected from the payer); processing (including clearing), which involves the payment instruction to be exchanged between the banks (accounts) in question; an agreement between the banks involved (for example, the payer's bank must compensate the beneficiary's bank, either bilaterally or through the accounts the two banks hold with a third-party settlement agent).

In the early 2000s, global online payment processor PayPal became an important pillar of online payments. PayPal allowed users to make online payments without providing merchants with their credit card information, which provided online shoppers with a high degree of security and convenience

In the late 2000s, the introduction of smartphones paved the way for mobile payments. Customers use their mobile phones to make payments using mobile payment applications such as Apple Pay, Google Wallet, Samsung Pay, etc.

Near Field Communication (NFC) technology is a wireless communication standard used to securely transmit payment information from the phone to the merchant's payment system.

Mobile payments have grown in popularity in recent years, with many consumers choosing to make payments using their mobile phones. The growing adoption of mobile payments has had a significant impact on the trends shaping digital payments.

Thus, mobile payments have become more secure as biometric authentication, facial recognition, and fingerprint recognition have been introduced to ensure that only the authorised user can order payments.

The growing adoption of mobile payments is having a major impact on shaping digital payments. As more and more people use smartphones and other mobile devices to conduct their daily lives, mobile payments are becoming preferred by consumers. This trend is expected to continue in the coming years, with predictions suggesting that mobile payments will account for a significant percentage of all digital payments by 2025.

A payment link is an electronic address generated by a platform that provides this service. The link contains information such as the product, the amount and the number of instalments, and the system creates the corresponding link.

This link can be shared via text message, social media or emails, sending the consumer to a page with all the details of the transaction, the customer enters the payment information, and after confirmation, the transaction is completed.

2. The evolution of online payments

Due to the fact that they operate both nationally and internationally, online payment processing companies manage to increase their number of users in an alert manner.

Thanks to the transformations implemented in banking procedures around the world, digital wallets have seen significant growth as users can create financial accounts within minutes and access them digitally. Another factor contributing to the development of digital wallets is the rapid growth of e-commerce, the integration of NFC technology - which allows cardless transactions via smartphones, and the use of QR codes at POS (especially in China).

Recent data indicates that globally, the most used digital wallet brands include Apple Pay, Google Pay, Alipay and PayPal. These global wallets have led to a fabulous growth in credit and debit card payments.

The share of direct credit card payments is decreasing, cards still fulfil an essential function, *i.e.*, payment instruments that are the basis of digital payments. After a brutal pandemic and a slowdown in global trade, consumers around the world still appreciate access to credit through credit cards[2]. Credit cards accounted for 20% of e-commerce volume in 2022 and 26% at POS. What is interesting to note, according to Worldpay surveys, is that a significant percentage of 22% of consumers use their credit cards to fund their digital wallets. This may misrepresent the true power of credit cards as a payment method, as the wallet ends up being the tracked

[2] J. Baltgailis, A. Simakhova, *The Technological Innovations of Fintech Companies to Ensure the Stability of the Financial System in Pandemic Times*, Mark. Manag. Innov. 2022, pp. 55-65.

method of purchase instead of the credit card. Recent data indicates a downward trend in credit card transactions in the future[3].

Debit cards remain the most used payment method, both in terms of number of transactions and volume. Cards are the perfect choice because of their ease of use - they only require a PIN or even a simple tap for contactless transactions. It is worth noting that the use of cards, both credit and debit, is the preferred tool for recurring payments. More recently, card payments have found a place in mobile wallets, as consumers can securely store their information for multiple card types or use a digital virtual card that works similarly.

According to a report by J.D. Power, the debit card remains the most used payment instrument at POS in the United States, with more than 77% of consumers indicating they use it. The use of debit cards for physical transactions is also prominent in the UK. According to data from UK Finance 3, 1 in 2 payments in 2023 were made with a debit card. For context, 95% of UK adults have a debit card (compared to the global average of 51% and 85% in Europe), and contactless technology has permeated everyday life in all spheres of activity. Card payments in the euro area increased by 15.6% to €36.5 billion in early 2023 compared to the first half of 2022. The total value of card payments increased by 14.1% to €1.5 trillion, which indicates an average value of around €40 per transaction. At the same time, the number of contactless card payments initiated at a physical terminal increased by 24.3%, up to 20.9 billion euros, compared to the first half of 2022, the total value increasing by 25.9%, up to 0.5 trillion euros.

Table no.1. The rate of use of payment instruments in euro area countries in the first half of 2023 compared to 2022

	Card payments		Credit transfers		Direct debits		E-money payments	
	2023-H1	Change from 2022-H1 (pp)	2023-H1	Change from 2022-H1 (pp)	2023-H1	Change from 2022-H1 (pp)	2023-H1	Change from 2022-H1 (pp)
Belgium	57.0	1.6	31.8	-0.7	8.9	-0.7	1.0	-0.4
Germany	40.5	4.5	25.8	-0.6	33.5	-3.9	0.1	0.0
Estonia	65.0	-0.3	33.9	-0.2	-	-	-	-
Ireland	60.8	-6.1	23.0	8.9	4.2	-1.1	9.6	-2.3
Greece	73.0	0.7	22.8	-0.4	1.2	-0.1	1.8	0.0
Spain	66.6	1.4	16.2	0.2	14.5	-1.6	1.3	0.0
France	62.8	2.9	18.3	0.5	15.4	-2.3	0.3	0.0
Croatia**	57.3	-	34.9	-	1.5	-	3.4	-
Italy	56.6	0.6	17.3	-1.6	5.6	1.0	17.1	0.5
Cyprus	70.1	2.4	16.5	0.1	5.6	-0.6	3.2	-0.1
Latvia	61.1	1.6	36.2	-2.4	0.0	0.0	2.4	0.9
Lithuania	78.1	11.7	15.4	1.5	0.0	0.0	4.9	-13.0
Luxembourg***	6.0	0.6	2.0	-0.2	0.6	0.3	91.2	-0.7
Malta	55.5	-2.2	10.1	-3.4	1.7	-0.7	26.6	6.9
Netherlands	49.1	0.8	32.3	-0.7	18.2	-0.1	0.1	0.0
Austria	54.2	2.5	25.9	-1.5	18.2	-0.9	0.2	0.0
Portugal	75.5	1.7	11.4	-0.3	7.6	-1.2	2.9	0.1
Slovenia	57.8	5.0	31.0	-1.0	7.5	-3.2	0.8	0.0
Slovakia	63.5	1.0	34.0	-0.6	2.3	-0.3	0.1	0.0
Finland	64.2	0.8	34.7	-1.0	.	.	.	.

Source: ECB[4]

[3] L. Charfeddine, M. Umlai, *ICT sector, digitization and environmental sustainability: A systematic review of the literature from 2000 to 2022*, Renew. Sustain. Energy Rev. 2023, pp. 184.

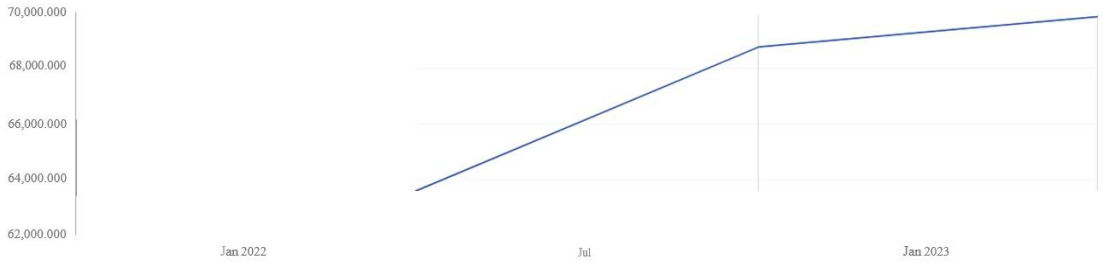
[4] ** Percentages may not add up to 100% as remaining payment services, being cheques, money remittances and other payment services, are not shown. A dash (-) indicates data are not available or not applicable, a dot (.) indicates that data are confidential.*

*** The changes in percentage points between 2023-H1 and 2022-H1 are not available, as at the time of publishing data for the first half of 2023, Croatia has not yet reported back data for 2022 under the requirements of the Regulation ECB/2020/59.*

**** In the special case of Luxembourg, a very high number of e-money payments are executed on accounts held in their vast majority by non-residents but recorded in the In the special case of Luxembourg, a very high number of e-money payments are executed on accounts*

In the first part of 2023, card payments accounted for 54% of total transactions, while credit transfers accounted for 22%, direct debits 15% and e-money payments 7%. The remaining 2% included checks, money orders and other payment services. In the first half of 2023 the total number of cashless payment transactions in the euro area increased by 10.1% to €67.0 billion compared to the first half of 2022, while the corresponding total value decreased by 4.5%, up to 111.4 trillion euros.

Number of total payment transactions - sent - from: Euro area changing composition, to: World, Euro area, half-yearly



Source: ECB https://data.ecb.europa.eu

E-commerce has transformed the way we shop, allowing consumers to buy goods and services from anywhere in the world just a few clicks away. Also, e-commerce has given companies the opportunity to reach a much larger number of customers at a much lower cost. However, some online merchants restrict online cross-border sales based on citizenship or nationality, domicile or location - geo-blocking. Such geo-blocking practices include: denying access to websites from other member states and/or situations where access to a site is allowed, but the foreign customer is prevented from completing the purchase process or is asked to pay with a card of debit or credit from a specific country.

E-commerce is constantly evolving as new technologies and trends emerge to shape the sector. Mobile commerce has grown due to the rise of mobile payments. Customers can now buy and shop from their smartphones, making shopping much more accessible. Platforms like Facebook, Instagram and Pinterest have evolved into new e-commerce channels - social commerce. Businesses can now sell their items directly through social media, making it easier for consumers to find and buy products. Data analytics and artificial intelligence are now being used by e-commerce companies to personalise the shopping experience for customers[5]. Personalization and personalised advertising are increasingly popular.

3. E-commerce and digital payments

Digital payments and e-commerce will continue to evolve. Cryptocurrencies such as Bitcoin and Ethereum are becoming more commonly accepted as a payment method. With the rise of voice assistants like Amazon Alexa and Google Assistant, new perspectives are emerging for voice commerce. Voice commands can now be used by customers to make purchases, check out various products, etc.

Augmented reality (AR) is gaining popularity in e-commerce. Before making a purchase, shoppers can use AR technology to examine how things will fit into their environment.

In the future, artificial intelligence will play a bigger role in digital payments and e-commerce. AI will be used to improve the consumer experience, personalise orders and secure systems.

While digital payments have made transactions more accessible, there are still many people who have access to digital payment systems. Those without access to banking institutions may face foreclosure.

As digital payments and e-commerce evolve, we face various ethical issues that need to be considered. The influence of digital payments on financial inclusion is one example.

held in their vast majority by non-residents but recorded in the Luxembourg data due to the methodology applied. Therefore, the relative importance of all the other payment instruments in Luxembourg, as presented in the table, appears to be lower than their actual domestic importance. When disregarding e-money, the relative importance of the main payment instruments in the first half of 2023 is as follows: card payments (68.4%), credit transfers (22.3%), direct debits (7%).

[5] V. Lang, V. Lang, *Digitalisation and digital transformation*, in Digital Fluency: Understanding the Basics of Artificial Intelligence, Blockchain Technology, Quantum Computing, and Their Applications for Digital Transformation, Springer: Berlin/Heidelberg, Germany, 2021, pp. 1-50.

Personalised suggestions and targeted advertising can lead to the collection of significant amounts of personal data. There is a danger that this information could be misused or hacked, leading to privacy violations.

Blockchain technology is sure to play a major role in the future of digital payments and e-commerce[6]. This provides a secure and decentralised way to transfer value, making it an ideal solution for digital payments. Blockchain-based payment systems are already being developed and implemented by a growing number of companies and are likely to see widespread adoption in the coming years.

4. Conclusions

Digital payments and e-commerce have seen continuous evolution. The development of electronic commerce and mobile payments had a decisive impact on the behaviour of paying and buying goods and services. As digital payments and e-commerce continue to evolve, we will witness the emergence of new technologies and trends.

The trend towards online shopping shows no signs of slowing down. In fact, e-commerce is expected to continue to grow at a rapid pace, driven by factors such as the convenience of online shopping, the increasing availability of high-speed Internet connections, and the growing number of digital payment options. As e-commerce continues to grow, we can expect more innovative business models to emerge, such as subscription-based services, on-demand delivery, and social commerce.

Another trend that is likely to shape the future of digital payments and e-commerce is the growing importance of artificial intelligence and machine learning. These technologies are already being used to improve fraud detection and prevention, as well as to personalise the shopping experience for consumers. In the future, we can expect to see even more sophisticated uses of AI and machine learning in the digital payments and e-commerce space, from predictive analytics that help retailers forecast demand to chatbots that provide real-time customer support.

However, as the world of digital payments and e-commerce continues to evolve, there are also challenges that need to be addressed. Cybersecurity is one of these challenges, as the growing use of digital payments and the increasing amount of personal and financial data exchanged online make the digital industry a prime target for cybercriminals. In addition, regulatory rules will need to evolve to keep pace with the rapidly changing digital payments and e-commerce landscape, ensuring that consumer rights are protected and businesses can operate within a clear and consistent legal framework.

Systems must be put in place to ensure that e-commerce does not exclude small businesses and that digital payments do not lead to financial exclusion. We must also ensure that data analytics and artificial intelligence are used in e-commerce in ways that preserve customer privacy and data security.

The future of digital payments and e-commerce is certain, and we can make it more inclusive and secure by adopting new technologies and ethical practices.

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UNDERSTANDING THE INFLUENCE OF HEDONIC MOTIVATION AND FEAR OF MISSING OUT (FoMO) ON ONLINE IMPULSE PURCHASE INTENTIONS OF DISCOUNTED PRODUCTS

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Abstract

In the fast-paced world of online commerce, understanding the psychological drivers behind consumers' impulse purchase intentions of discounted products is essential for businesses seeking to optimise their e-commerce strategies and drive sales. This article aims to synthesise key insights into the interplay between hedonic motivation, fear of missing out (FoMO) and other psychological factors influencing online impulse buying behavior. Hedonic motivation, driven by the pursuit of pleasure and enjoyment, plays a central role in shaping consumers' preferences, choices, and purchase decisions. When coupled with the fear of missing out (FoMO), characterised by the fear of being excluded from rewarding experiences or opportunities, hedonic motivation intensifies consumers' desire to act quickly and make impulsive purchases, particularly when presented with limited-time discounts or attractive offers. Discounted products, with their perceived value and scarcity, serve as potent triggers for impulsive buying behavior, as consumers strive to capitalise on the opportunity for pleasure and gratification while avoiding feelings of regret or exclusion. Factors such as social comparison, emotional triggers, and perceived risk further influence consumers' online impulse purchase intentions, driving them to seek validation, relief, or reassurance through their purchasing decisions. Businesses can leverage these insights to design targeted marketing strategies, personalised offers, and compelling shopping experiences that resonate with consumers' hedonic motivations and address their fears of missing out. By employing behavioral nudges, visual appeals, and social proof cues, businesses can create a sense of urgency, enhance perceived value, and mitigate perceived risk, ultimately driving impulse purchases and increasing conversion rates in the competitive digital marketplace. By considering the multifaceted impact of hedonic motivation, FoMO and other psychological factors on consumers' online impulse purchase intentions of discounted products, businesses can create engaging online shopping experiences that foster customer satisfaction, loyalty, and long-term success.

Keywords: *hedonic motivation, fear of missing out (FoMO), purchase intention, discount, impulse buying behavior.*

1. Introduction

In the digital age, the dynamics of consumer behavior have been significantly influenced by various psychological factors. Two such factors, hedonic motivation and the fear of missing out (FoMO), play crucial roles in shaping consumer decision-making, particularly in the context of online shopping and in the realm of online impulse purchases of discounted products. This paper aims to explore how hedonic motivation and FoMO impact the intention to make impulse purchases of discounted products in online settings.

The hedonic consumption is „a reflection of modern consumption”[1] and it is associated with the fact that the traditional consumer, who primarily sought to meet their needs, has been replaced by the modern consumer, who engages in consumption with the dual objectives of leveraging the act and deriving enjoyment from it[1]. The allure of hedonic motivation lies in its ability to tap into individuals' intrinsic desires for pleasure, enjoyment, and emotional gratification. In the context of online shopping, consumers are often drawn to products that promise sensory delight, emotional satisfaction, or experiential enjoyment[2]. Whether it's the thrill of discovering a great deal, the excitement of instant gratification, or the anticipation of owning a coveted item at a discounted price, hedonic motivations play a pivotal role in driving impulse buying behaviors, especially when presented with enticing offers and promotions.

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[1] Akgün & Diktaş, 2017, last consulted on 22.02.2024.

[2] Srivastava & Maurya, 2023, last consulted on 24.02.2024.

Similarly, the fear of missing out (FoMO) is „a unique term introduced in 2004 and then extensively used since 2010”[3] that has become increasingly prevalent in the digital age, fuelled by the pervasive influence of social media and the constant stream of updates showcasing others' experiences, purchases, and lifestyles. This fear of being left out or missing out on rewarding opportunities can lead consumers to engage in impulsive buying behaviors, particularly when presented with time-sensitive discounts or limited-time offers. The fear of regretting not seizing a perceived opportunity drives individuals to make quick, unplanned purchases to avoid feeling excluded or deprived.

Understanding the complex interplay between hedonic motivation and FoMO is essential for unravelling the underlying mechanisms driving online impulse purchase intentions of discounted products. By delving deeper into how these psychological factors interact and influence consumer decision-making processes in the digital marketplace, researchers and marketers can gain valuable insights into designing targeted strategies that effectively stimulate impulse buying behavior and capitalise on consumers' hedonic motivations and FoMO tendencies.

Against this backdrop, this study seeks to explore the nuanced relationship between hedonic motivation, FoMO and online impulse purchase intentions, specifically focusing on the context of discounted products. By examining the underlying mechanisms and boundary conditions governing these psychological factors, this research aims to provide valuable insights into how businesses can leverage consumer psychology to optimise marketing strategies, enhance online shopping experiences, and drive sales in the competitive digital landscape.

The studied matter is important for several reasons. Firstly, understanding the underlying motivations driving consumers' impulse purchases of discounted products is crucial for businesses looking to optimise their online marketing strategies and drive sales. By uncovering the role of hedonic motivation and FoMO, businesses can tailor their promotional efforts and create compelling shopping experiences that resonate with consumers' desires and fears. Secondly, with the rise of e-commerce and the increasing prevalence of online shopping, the study sheds light on the psychological mechanisms shaping consumer behavior in the digital marketplace, contributing to the broader understanding of online consumer psychology.

This paper intends to address this matter by analysing the relationship between hedonic motivation, FoMO and online impulse purchase intentions of discounted products. Through analysis and interpretation of the specialised literature, this paper aims to provide insights into how businesses can leverage hedonic motivation and FoMO to stimulate impulse purchases and drive revenue in the competitive online marketplace.

The paper builds upon existing specialised literature in the fields of consumer psychology, marketing, and e-commerce. It draws on theoretical frameworks and empirical studies that have explored the role of hedonic motivation, FoMO and impulse buying behavior in various contexts. By synthesising and extending existing knowledge, the paper contributes to the ongoing knowledge of online consumer behavior and provides novel insights into the specific dynamics of impulse purchases of discounted products in the digital age.

2. Hedonic motivation and consumer behavior

Currently it is believed that many of the values influencing consumer attitudes and behaviors are undergoing significant changes within the modern marketing paradigm. In simpler terms, the traditional understanding that ‘consumption is a planned behavior’ has been replaced by the idea that ‘consumption is an action pursued for happiness rather than solely as a necessity’[4].

At its core, hedonism is a consistent „lifestyle devoted to pleasure”[5], centered on self-indulgence and prioritising personal enjoyment. Therefore, hedonic motivation refers to the desire for pleasure, comfort and entertainment or the avoidance of pain and unpleasant feelings. In the realm of consumer behavior, it often drives individuals to seek gratification, enjoyment from their purchases and overall well-being. When applied to online shopping, hedonic motivation manifests as the pursuit of products that offer sensory pleasure, emotional satisfaction, or experiential enjoyment. In the context of discounted products, consumers may be motivated by the thrill of finding a good deal, the excitement of instant gratification, or the anticipation of owning a desirable item at a lower price.

[3] Gupta & Sharma, 2021, last consulted on 10.03.2024.
[4] Akgün & Diktaş, 2017, last consulted on 22.02.2024.
[5] Çavuşoğlu *et al.*, 2021, last consulted on 05.03.2024.

Hedonic motivation plays a fundamental role in shaping consumer behavior across various contexts, both online and offline. Hedonic motivations are often contrasted with utilitarian motivations, which are goal-oriented, efficient, deliberate, taken with a conscious attitude[6] and driven by practical considerations such as functionality, efficiency, and problem-solving.

„Consumer-oriented businesses know that the behavioral intentions of consumers will be affected by the elements that create a hedonic shopping experience" because „consumers expect to gain more than benefits from the product"[7]. Therefore, „businesses try to use hedonic factors that would cause consumers to decide momentarily and that are subjective and impulsive"[8].

One of the key ways in which hedonic motivation influences consumer behavior is through the consumption of goods and services that provide emotional and sensory enjoyment. This can include indulging in luxury items, treating oneself to experiences such as dining out or travelling, or purchasing products that evoke positive emotions and enhance one's mood.

In the context of online shopping, hedonic motivation manifests in various ways, shaping consumers' preferences, choices, and purchase decisions. E-commerce platforms offer a plethora of products and experiences that cater to hedonic desires, ranging from fashion and beauty items to entertainment products and leisure activities. The convenience and accessibility of online shopping further amplify hedonic motivations, allowing consumers to satisfy their desires for pleasure and enjoyment with just a few clicks.

Moreover, hedonic motivations often intersect with social and psychological needs, driving consumers to seek products and experiences that facilitate self-expression, social identity, and belongingness. For instance, individuals may purchase luxury fashion items not only for their quality and aesthetics but also to signal status, prestige, and belonging to certain social groups. Similarly, consumers may be drawn to experiential products and services that enable them to create meaningful memories, connect with others, and enrich their lives emotionally and socially[9].

Importantly, hedonic motivation influences not only what consumers buy but also how they perceive and evaluate products and brands. Products that evoke positive emotions, sensory pleasure, and emotional engagement are more likely to be perceived favorably and preferred over utilitarian alternatives. Additionally, hedonic experiences associated with a brand or product can contribute to brand loyalty, repeat purchases, and positive word-of-mouth, as consumers seek to recreate pleasurable experiences and emotional connections over time.

On the other hand, hedonic consumption „can cause unwanted psychological tensions in consumers such as guilt"[10]. According to Çavuşoğlu *et al.*, the decision to buy a discounted product is often perceived as a means to alleviate this guilt or cope with the situation. Consequently, it is believed that individuals inclined toward hedonic shopping are more likely to intend to purchase discounted items. Put differently, the positive psychological impact of discounts during periods of heightened shopping activity is expected to influence purchasing intentions.

In summary, hedonic motivation plays a central role in driving consumer behavior, shaping preferences, choices, and purchase decisions in both offline and online settings. By understanding the underlying drivers of hedonic motivation and its implications for consumer behavior, businesses can design tailored marketing strategies, product offerings, and shopping experiences that resonate with consumers' desires for pleasure, enjoyment, and emotional gratification, ultimately driving engagement, satisfaction, and loyalty in the competitive marketplace.

3. Fear of missing out (FoMO) and consumer behavior

FoMO is a pervasive psychological phenomenon and feeling, characterised by the fear of being left out or missing out on rewarding experiences or opportunities that others are enjoying[11]. In the context of online shopping, FoMO arises from the constant exposure to social media, where individuals witness their peers' purchases, experiences, and lifestyle updates. „FoMO is characterised by the desire to stay continually connected

[6] Novela *et al.*, 2020, last consulted on 12.03.2024.
[7] Çavuşoğlu *et al.*, 2021, last consulted on 05.03.2024.
[8] *Ibidem*.
[9] Srivastava & Maurya, 2023, last consulted on 24.02.2024.
[10] Çavuşoğlu *et al.*, 2021, last consulted on 05.03.2024.
[11] Gupta & Sharma, 2021, last consulted on 10.03.2024.

with what others are doing"[12]. This fear can drive consumers to engage in impulsive buying behaviors to avoid the regret of not seizing a perceived opportunity, especially when products are offered at discounted prices for a limited time. FoMO is fueled by the constant stream of social media updates, where individuals are exposed to curated snapshots of others' lives, experiences, and purchases. This perpetual exposure to the highlights of others' activities can create „a range of negative life experiences and feelings, such as a sense of social inferiority, loneliness"[13], inadequacy, insecurity, and anxiety, as individuals compare their own lives and possessions to those portrayed online. The fear of missing out on exciting events, trendy products, or exclusive deals can drive individuals to engage in impulsive behaviors, including unplanned purchases and excessive consumption, in an attempt to alleviate feelings of exclusion or regret.

In the context of consumer behavior, FoMO has profound implications for individuals' attitudes, motivations, and decision-making processes, particularly in relation to online shopping and discounted products. Discounted products, with their limited-time offers and perceived scarcity, are particularly potent triggers for FoMO-driven behaviors. The fear of missing out on a bargain or losing out on a valuable opportunity can intensify consumers' motivation to act quickly and make impulse purchases. Time-limited discounts create a sense of urgency and competition, heightening consumers' anxiety about missing out on a good deal if they hesitate or delay their purchase decisions.

FoMO has been „found to be associated with various problematic behaviors, such as compulsive social media use and online social comparisons"[14]. Moreover, the social aspect of FoMO plays a significant role in influencing consumer behavior in the context of discounted products. Consumers are often motivated to purchase discounted items not only for the practical benefits of saving money but also for the social validation and status associated with scoring a great deal. Sharing one's purchases on social media platforms can serve as a form of self-expression, social currency, and validation-seeking behavior, as individuals seek affirmation and recognition from their peers for their savvy shopping decisions.

Additionally, the fear of missing out on a discounted offer can lead consumers to engage in herd behavior, where they follow the actions and choices of others in order to avoid feeling left behind or excluded. This herd mentality can result in a surge of impulse purchases, as consumers perceive discounted products as desirable and valuable simply because others are buying them.

In summary, fear of missing out (FoMO) exerts a powerful influence on consumer behavior, particularly in the context of online shopping and discounted products. The fear of being excluded from rewarding experiences or opportunities drives individuals to engage in impulsive behaviors, seek social validation, and make quick purchase decisions to alleviate feelings of anxiety and regret. By understanding the psychological mechanisms underlying FoMO-driven behaviors, businesses can design targeted marketing strategies, create compelling offers, and leverage social proof to capitalise on consumers' fear of missing out and drive sales in the competitive retail landscape.

4. Impact of hedonic motivation and FoMO on online impulse purchase intention

The interaction between hedonic motivation and FoMO creates a potent catalyst for online impulse purchases of discounted products. „Consumers with a tendency to hedonic consumption display more unplanned buying behavior" and their decisions "are largely spontaneous"[15]. „Discounts and discounted products affect hedonic shopping"[16]. Therefore, consumers driven by hedonic motivation are inclined to seek out products that promise immediate pleasure or gratification, making them susceptible to impulse buying behaviors, particularly when presented with discounted offers. Additionally, the fear of missing out amplifies the sense of urgency and scarcity associated with limited-time discounts, further motivating individuals to make impulsive purchase decisions to avoid feeling excluded or deprived.

The interplay between hedonic motivation and fear of missing out (FoMO) exerts a significant influence on consumers' online impulse purchase intentions, particularly when it comes to discounted products. Impulse purchase intentions are affected by many different factors, such as: „psychological effects, socio-cultural

[12] Gupta & Sharma, 2021, last consulted on 10.03.2024.
[13] *Ibidem*.
[14] Jabeen *et al.*, 2023, last consulted on 15.03.2024.
[15] Çavuşoğlu *et al.*, 2021, last consulted on 10.03.2024.
[16] *Ibidem*.

determinants, demographic parameters, situational effects and effects of marketing efforts"[17]. Understanding this impact is crucial for businesses seeking to leverage psychological drivers to stimulate sales and drive revenue in the competitive online marketplace.

The relationship between hedonic motivation, FoMO and online impulse purchase intention of discounted products can manifest in various forms, such as:

- **Heightened sense of urgency.** Discounted products, often accompanied by limited-time offers or countdown timers, create a sense of urgency and scarcity that amplifies consumers' fear of missing out[18]. The combination of a perceived opportunity for pleasure (hedonic motivation) and the fear of losing out on a good deal (FoMO) prompts consumers to act quickly and make impulsive purchase decisions before the offer expires. This heightened sense of urgency can significantly boost online impulse purchase intentions, as consumers feel compelled to seize the opportunity while it lasts.
- **Increased perceived value.** The presence of discounts and promotional offers enhances the perceived value of products in the eyes of consumers. When consumers perceive that they are getting a bargain or a special deal, it activates their hedonic motivation by offering the promise of pleasure and gratification at a lower cost. Moreover, the fear of missing out on such a valuable opportunity further intensifies consumers' desire to make the purchase, as they strive to avoid feelings of regret or loss associated with passing up a discounted offer. This heightened perception of value can lead to impulsive buying behavior, as consumers are motivated to capitalise on the perceived benefits of the discount before it's too late[19].
- **Impulse buying triggers.** Triggers play an important role since „impulse buying is a shopping behavior that occurs unplanned, emotionally interested, where the decision-making process is done quickly without thinking wisely and consideration of the overall information and alternatives"[20]. The combination of hedonic motivation and FoMO serves as powerful triggers for impulse buying behavior in online environments. Hedonic motivations prompt consumers to seek out products that offer immediate pleasure, enjoyment, or emotional gratification, while FoMO creates a sense of urgency and anxiety about missing out on rewarding experiences or opportunities. When presented with discounted products that align with their hedonic desires and trigger their fear of missing out, consumers are more likely to succumb to impulsive impulses and make unplanned purchases without careful consideration of the consequences.
- **Role of emotional triggers and escapism.** Emotional triggers and escapism also play a significant role in influencing online impulse purchase intentions of discounted products. In hedonic consumption „buying behavior is carried out with emotions rather than senses"[21]. Consumers may turn to online shopping as a form of emotional coping mechanism or stress relief, seeking temporary distraction or gratification from their worries or anxieties. Also, according to Westbrook and Black (1985) „consumers often engage in hedonic consumption with the motivation to escape from reality and move away from the routine of life"[22]. The allure of discounted products can provide a welcome escape from the pressures of everyday life, offering consumers a brief respite and a sense of excitement or pleasure. By tapping into consumers' emotional states and offering discounted products that cater to their desires for relaxation, indulgence, or self-care, businesses can effectively stimulate impulse purchases and create positive shopping experiences that resonate with consumers' hedonic motivations and emotional needs.
- **Influence of trust signals and proofs.** Social proof, in the form of user reviews, ratings, and testimonials, can play a crucial role in influencing online impulse purchase intentions, particularly in the context of discounted products. When consumers see others taking advantage of a discounted offer or expressing satisfaction with their purchases, it validates the attractiveness and credibility of the deal. This social validation reinforces consumers' hedonic motivations by signalling that the discounted product is desirable and worth purchasing. Additionally, the fear of missing out on a popular or highly recommended product can further drive impulse buying behavior, as consumers seek to align themselves with the preferences and behaviors of their peers. Trust signals, such as secure payment options, trust badges, and customer reviews, help build credibility and reassure consumers about the reliability and legitimacy of the discounted offer. Positive reviews and testimonials from

[17] Durmaz, Özgüner & Özkan, 2022, last consulted on 21.03.2024.
[18] Tiemessen, Schrafenberger & Acar, 2023, last consulted on 20.02.2024.
[19] *Ibidem*.
[20] Tirtayasa, Nevianda & Syahrial, 2020, last consulted on 16.03.2024.
[21] Akgün & Diktaş, 2017, last consulted on 22.02.2024.
[22] *Ibidem*.

satisfied customers serve as social proof, indicating to potential buyers that others have had positive experiences with the product or brand[23].

- **Impact of social comparison and social influence.** According to Tauber (1972) hedonic consumption motivations are divided in two distinct categories: personal and social reasons[24]. Social comparison and social influence play significant roles in shaping online impulse purchase intentions, especially in the context of discounted products. Consumers often engage in social comparison by comparing their own purchases and possessions to those of others, particularly on social media platforms where they are exposed to curated images of others' lifestyles and purchases. This comparison can fuel feelings of inadequacy or envy, driving consumers to make impulse purchases in an attempt to keep up with or surpass their peers. Additionally, social influence from friends, family, influencers, and online communities can further amplify consumers' fear of missing out and influence their impulse purchase decisions[25]. Positive endorsements, recommendations, and testimonials from trusted sources can create social proof and validate the attractiveness of discounted products, motivating consumers to act quickly to avoid missing out on a perceived opportunity.
- **Impact of pricing strategies.** Pricing strategies play a crucial role in influencing consumers' online impulse purchase intentions of discounted products. Businesses employ various pricing tactics, such as dynamic pricing, price bundling, and psychological pricing, to influence consumers' perceptions of value and trigger impulsive buying behavior. Dynamic pricing adjusts prices in real-time based on factors such as demand, inventory levels, and consumer behavior, creating a sense of urgency and scarcity that motivates consumers to make impulsive purchases. Price bundling combines multiple products or services into a single package at a discounted price, appealing to consumers' desire for value and encouraging impulse buying. Psychological pricing techniques, such as using odd or charm prices (*e.g.*, 9.99 instead of 10), create the perception of a better deal and trigger impulsive purchases by appealing to consumers' subconscious biases and heuristics.
- Discounts and reduced-price items significantly influence hedonic shopping, particularly during specific times of the year or on particular days or occasions (Black Friday, Christmas or Easter period etc.)[26]. During these periods, it is observed that consumers prioritise shopping and consequently increase their purchases.
- **Influence of personalization and targeting.** „Consumers' online impulsive buying activity accounts for 40% of total internet consumption”[27]. Therefore, personalised marketing tactics, such as tailored recommendations and targeted advertisements, are a necessity and can further amplify the impact of hedonic motivation and FoMO on online impulse purchase intentions of discounted products. By leveraging data analytics and machine learning algorithms, businesses can identify consumers' preferences, interests, and past purchase behaviors to deliver personalised offers and promotions that resonate with their hedonic desires and fear of missing out. For example, offering exclusive discounts or limited-time offers based on a consumer's browsing history or previous purchases can create a sense of exclusivity and urgency, motivating them to act impulsively to secure the deal before it expires.
- **Role of visual and emotional appeals.** Visual and emotional appeals play a crucial role in capturing consumers' attention and stimulating their hedonic motivations and FoMO. Eye-catching visuals, vibrant colors, and engaging multimedia content can evoke positive emotions and sensory pleasure, enhancing the appeal of discounted products and triggering consumers' desire to make an impulse purchase. Additionally, emotional storytelling and persuasive messaging can tap into consumers' aspirations, desires, and fears, compelling them to act quickly to avoid missing out on the emotional rewards associated with the discounted offer. By leveraging visual and emotional appeals effectively, businesses can create immersive online shopping experiences that drive impulse purchase intentions and increase conversion rates[28].
- **Influence of behavioral nudges.** Behavioral nudges can also play a significant role in shaping online impulse purchase intentions, especially in the context of discounted products. Techniques such as scarcity tactics (*e.g.*, „only 3 items left in stock”), urgency prompts (*e.g.*, „sale ends in 24 hours”), and social proof cues (*e.g.*, „bestseller”) capitalise on consumers' psychological biases and cognitive shortcuts to encourage impulsive

[23] Arulanandam, Malini & Oktaningtias, 2020, last consulted on 28.02.2024.
[24] Akgün & Diktaş, 2017, last consulted on 22.02.2024.
[25] Deliana *et al.*, 2024, last consulted on 01.03.2024.
[26] Çavuşoğlu *et al.*, 2021, last consulted on 10.03.2024.
[27] Fadillah & Kusumawati, 2021, last consulted on 12.03.2024.
[28] Dwiputrianti *et al.*, 2023, last consulted on 11.03.2024.

buying behavior[29]. For instance, scarcity tactics trigger consumers' fear of missing out by creating the perception of limited availability, while urgency prompts activate their hedonic motivations by emphasising the time-sensitive nature of the offer.

- **Impact of cognitive biases and decision heuristics.** These biases and heuristics, such as availability bias, confirmation bias, and scarcity heuristic, influence how consumers perceive and evaluate discounted offers, ultimately driving impulsive buying behavior[30]. For example, availability bias leads consumers to overestimate the prevalence or importance of discounted products they have recently encountered, increasing their likelihood of making impulsive purchases. Confirmation bias causes consumers to seek out information that confirms their preexisting beliefs or desires, leading them to interpret discounted offers in a way that supports their impulse buying intentions. The scarcity heuristic, on the other hand, causes consumers to assign greater value to items that are perceived as scarce or in high demand, prompting impulsive purchases in response to limited availability or time-sensitive discounts.
- **Impact of environmental and situational factors.** Environmental and situational factors can also influence consumers' online impulse purchase intentions of discounted products. Factors such as time pressure, mood, and social context can shape consumers' decision-making processes and increase their susceptibility to impulsive buying behavior. For example, consumers may be more likely to make impulsive purchases when they are in a hurry or feeling stressed, as they seek quick solutions or rewards to alleviate their discomfort. Similarly, positive mood states, such as excitement or anticipation, can enhance consumers' hedonic motivations and increase their willingness to make impulsive purchases of discounted products. Social context, including the presence of peers or influencers, can also influence consumers' impulse purchase intentions by providing social validation and reinforcement of the discounted offer[31]. By understanding these environmental and situational factors, businesses can tailor their promotional strategies and create optimal shopping environments that facilitate impulse purchases of discounted products.
- **Impact of trust and reputation.** Trust and reputation play a crucial role in influencing consumers' online impulse purchase intentions of discounted products. Consumers are more likely to make impulsive purchases from brands and retailers they trust, as they perceive them as reliable and credible sources. Positive reviews, ratings, influencers and testimonials can enhance consumers' confidence in the discounted products and alleviate any concerns about quality, authenticity, or reliability[32]. Conversely, negative reviews or a lack of trustworthiness can deter consumers from making impulsive purchases, as they may perceive the discounted offer as too risky or unreliable. By building and maintaining trust through transparent communication, exceptional customer service, and consistent delivery of high-quality products, businesses can instil confidence in consumers and drive impulse purchases of discounted products.
- **Impact of perceived risk and uncertainty.** Perceived risk and uncertainty can also influence consumers' online impulse purchase intentions of discounted products. Consumers may hesitate to make impulsive purchases if they perceive the discounted offer as too good to be true or if they have concerns about the quality, authenticity, or reliability of the product or seller. Additionally, uncertainty about the future availability of the discount or the potential consequences of the purchase (*e.g.*, regret, financial strain) may deter consumers from acting impulsively. Businesses can mitigate perceived risk and uncertainty by providing transparent information, clear return policies, and assurances of product quality and authenticity, thereby instilling confidence and reducing barriers to impulsive buying behavior.
- **Impact of cognitive load and decision fatigue.** Cognitive load and decision fatigue can significantly influence consumers' online impulse purchase intentions of discounted products. Cognitive load refers to the mental effort required to process information and make decisions, while decision fatigue occurs when individuals experience mental exhaustion from making repeated choices. In the context of online shopping, consumers are often bombarded with numerous options and information, leading to cognitive overload and decision fatigue[33]. As a result, consumers may resort to impulsive buying behavior as a way to simplify their decision-making process and alleviate cognitive strain. Businesses can capitalise on consumers' cognitive load and decision fatigue by presenting discounted products in a clear, concise manner and minimising decision-making barriers, such as

[29] Tiemessen, Schrafenberger & Acar, 2023, last consulted on 20.02.2024.
[30] *Ibidem*.
[31] Mahmud et al., 2023, last consulted on 15.03.2024.
[32] *Ibidem*.
[33] Logan, Bright & Grau, 2018, last consulted on 15.03.2024.

excessive options or complex pricing structures. By streamlining the shopping experience and reducing cognitive demands, businesses can increase the likelihood of impulsive purchases and drive sales of discounted products.

- **Impact of mobile shopping and instant gratification.** The proliferation of mobile shopping apps and on-the-go browsing has further intensified the impact of hedonic motivation and FoMO on online impulse purchase intentions. With smartphones enabling instant access to e-commerce platforms and real-time notifications about discounts and promotions, consumers are constantly exposed to opportunities for spontaneous purchases. The convenience and immediacy of mobile shopping cater to consumers' desire for instant gratification, making them more susceptible to impulsive buying behaviors, especially when presented with attractive discounts and limited-time offers. By optimising their mobile shopping experiences and leveraging push notifications and in-app promotions, businesses can capitalise on consumers' hedonic motivations and fear of missing out to drive impulse purchases and boost sales of discounted products.
- **Impact of technological innovations.** Technological innovations, such as augmented reality (AR), virtual reality (VR), and artificial intelligence (AI), are increasingly shaping consumers' online shopping experiences and influencing their impulse purchase intentions of discounted products. AR and VR technologies allow consumers to visualise and interact with products in immersive virtual environments, enhancing their engagement and satisfaction with the shopping experience. AI-powered recommendation engines analyse consumers' browsing and purchase history to offer personalised product recommendations and promotions tailored to their preferences and interests, increasing the likelihood of impulsive purchases. By embracing these technological innovations and integrating them into their e-commerce platforms, businesses can create innovative and engaging online shopping experiences that drive impulse purchases of discounted products while providing value and convenience to consumers.
- **Impact of behavioral economics principles.** Behavioral economics principles play a significant role in influencing online impulse purchase intentions of discounted products. Concepts such as loss aversion, anchoring, and scarcity bias can shape consumers' decision-making processes, particularly in response to limited-time offers and attractive discounts[34]. Loss aversion theory suggests that individuals are more motivated to avoid losses than to acquire gains, making them particularly sensitive to the fear of missing out on a discounted opportunity. Anchoring bias occurs when consumers use the original price of a product as a reference point, perceiving the discounted price as a significant savings and prompting impulsive purchases. Scarcity bias leads consumers to place greater value on items that are perceived as scarce or in high demand, driving impulse purchases in response to limited availability or time-sensitive offers. By leveraging these behavioral economics principles, businesses can strategically frame their discounts and promotions to capitalise on consumers' cognitive biases and drive impulse buying behavior.
- **Impact of ethical and legal considerations.** Ethical, regulatory and legal considerations also play a role in influencing consumers' online impulse purchase intentions of discounted products. Consumer protection laws and regulations govern various aspects of online commerce, including pricing practices, advertising disclosures, and consumer rights. Businesses must comply with these regulations to ensure transparency, fairness, and trust in their marketing and promotional activities. Failure to do so can undermine consumers' confidence in the discounted offers and deter them from making impulsive purchases. By adhering to ethical and legal standards and providing clear and accurate information about discounted products, businesses can build trust and credibility with consumers, facilitating impulse purchases and fostering long-term relationships in the digital marketplace.
- **Post-purchase satisfaction and regret.** The impact of hedonic motivation and FoMO extends beyond the point of purchase to influence consumers' post-purchase satisfaction and regret. While hedonic motivations may initially drive consumers to make impulsive purchases of discounted products, the subsequent experience of ownership and consumption plays a crucial role in shaping their overall satisfaction and perceived value. If the product fails to meet consumers' expectations or fails to deliver the anticipated hedonic benefits, it may lead to feelings of post-purchase regret and dissatisfaction. Conversely, if the product exceeds expectations and delivers on its promised benefits, it can reinforce consumers' positive perceptions and increase their likelihood of repeat purchases and brand loyalty. Thus, businesses must carefully manage consumers' post-purchase experiences to mitigate potential regrets and maximise long-term satisfaction and loyalty.
- **Impact of post-purchase rationalisation and cognitive dissonance.** After making an impulse purchase

[34] Tiemessen, Schrafenberger & Acar, 2023, last time consulted on 20.02.2024

of a discounted product, consumers may engage in post-purchase rationalisation to justify their decision and alleviate any feelings of cognitive dissonance. Post-purchase rationalisation involves reinterpreting or downplaying any negative aspects of the purchase and emphasising its positive attributes to maintain a positive self-image and reduce feelings of regret. For example, a consumer who impulsively buys a discounted item may rationalise the purchase by convincing themselves that they saved money, received good value for their purchase, or treated themselves to a well-deserved reward. By understanding the role of post-purchase rationalisation in consumers' decision-making processes, businesses can design post-purchase communications and follow-up interactions to reinforce consumers' positive perceptions of their impulse purchases and minimise any potential regrets or doubts.

By considering these factors, businesses can gain deeper insights into the complex interplay between hedonic motivation, FoMO and other psychological drivers influencing consumers' online impulse purchase intentions of discounted products. In conclusion, the impact of hedonic motivation and FoMO on online impulse purchase intentions of discounted products is influenced by a multitude of factors, including personalization, visual appeals, perceived value, social proof, behavioral nudges, trust and reputation, behavioral economics principles, pricing strategies, technological innovations, mobile shopping, regulatory considerations, ethical considerations, post-purchase rationalisation, and cognitive dissonance. By recognizing and leveraging these psychological drivers effectively in their e-commerce strategies, businesses can create compelling online shopping experiences that drive impulse purchases, increase conversion rates, and foster long-term customer loyalty in the competitive digital marketplace.

5. Conclusions

This paper has delved into the nuanced interplay between hedonic motivation, characterised by the pursuit of pleasure and enjoyment, and the fear of missing out (FoMO), a pervasive anxiety stemming from the desire to stay connected and informed. By synthesising existing literature and empirical studies, several key insights have emerged. Understanding the interplay between hedonic motivation and FoMO sheds light on the underlying mechanisms driving online impulse purchase intentions of discounted products. Marketers and retailers can leverage these insights to design targeted strategies that capitalise on consumers' desire for pleasure, excitement, and fear of missing out. By creating engaging online shopping experiences, offering attractive discounts, and leveraging social proof, businesses can effectively stimulate impulse buying behavior and capitalise on consumers' hedonic motivations and FoMO tendencies in the digital marketplace.

Based on all the aspects mentioned above, marketers can take into consideration the following practical implications and marketing strategies:

- **Create a sense of urgency.** Utilise limited-time offers, countdown timers, and flash sales to create a sense of urgency among consumers. Highlight the scarcity of discounted products and emphasise that the offer is available for a limited time only, tapping into consumers' fear of missing out and driving impulse purchase intentions.
- **Offer exclusive deals and rewards.** Reward loyal customers with exclusive discounts, early access to sales, or special promotions. By offering exclusive deals, businesses can enhance consumers' hedonic motivation and sense of privilege, encouraging them to make impulsive purchases to access these exclusive benefits.
- **Leverage social proof and user-generated content.** Encourage satisfied customers to share their experiences with discounted products through reviews, ratings, and testimonials. Utilise user-generated content on social media platforms to showcase real-life examples of consumers enjoying the discounted products, building trust and social proof to stimulate impulse purchase intentions. By incorporating trust signals and social proof into their e-commerce platforms, businesses can alleviate consumers' concerns and increase their confidence in making impulsive purchases of discounted products. Additionally, leveraging influencer marketing and user-generated content can further enhance social proof and encourage impulse buying behavior among consumers.
- **Implement personalised recommendations.** Use data analytics and machine learning algorithms to deliver personalised product recommendations and promotions based on consumers' browsing history, purchase behavior, and preferences. Tailor discounts and offers to align with consumers' interests and past interactions, increasing the relevance and appeal of discounted products and driving impulse purchases.
- **Optimise mobile shopping experience.** Optimise the mobile shopping experience to cater to

consumers' on-the-go browsing habits and desire for instant gratification. Streamline the checkout process, minimise friction points, and utilise push notifications to alert consumers about new discounts or promotions, facilitating impulse purchases of discounted products on mobile devices.

- **Utilise visual and emotional appeals.** Leverage engaging visuals, vibrant colors, and emotional storytelling to capture consumers' attention and stimulate their hedonic motivations. Utilise imagery and messaging that evoke positive emotions and sensory pleasure, enhancing the appeal of discounted products and triggering impulsive buying behavior.
- **Offer bundled deals and add-on incentives.** Offer bundled deals or add-on incentives to increase the perceived value of discounted products and incentivize impulse purchases. For example, offer complementary products or services at a discounted price when purchased together, encouraging consumers to take advantage of the bundled offer and make impulsive purchases.
- **Provide clear and transparent pricing.** Ensure that pricing information is clear, transparent, and easy to understand to build trust and credibility with consumers. Avoid hidden fees or surcharges and provide upfront information about discounts, savings, and any terms or conditions associated with the offer, reducing uncertainty and increasing consumers' confidence in making impulsive purchases.
- **Foster a sense of community and exclusivity.** Create online communities or loyalty programs where customers can engage with each other and feel a sense of belonging. Offer exclusive perks, such as access to member-only events or early product launches, to reward loyal customers and make them feel valued. By fostering a sense of community and exclusivity, businesses can tap into consumers' desire for social connection and status, driving impulse purchase intentions of discounted products.
- **Provide social sharing incentives.** Encourage customers to share their purchases on social media platforms by offering incentives such as discounts, rewards, or entry into giveaways. User-generated content shared by satisfied customers can serve as powerful social proof and influence others' impulse purchase decisions. By incentivizing social sharing, businesses can amplify the reach of their discounted products and stimulate impulse purchases among a broader audience.
- **Use influencer marketing.** Partner with influencers or brand ambassadors who resonate with the target audience to promote discounted products authentically. Influencers can create engaging content, such as unboxing videos or product reviews, that showcases the benefits and appeal of discounted products. Their endorsement can enhance consumers' trust and confidence in the offer, driving impulse purchase intentions and increasing sales.
- **Implement retargeting strategies.** Utilise retargeting ads to reach consumers who have previously visited the website or shown interest in specific discounted products but did not complete a purchase. Remind them of the offer and highlight its benefits to rekindle their interest and encourage them to make an impulse purchase. By staying top-of-mind with retargeting efforts, businesses can capitalise on consumers' previous engagement and drive conversions.
- **Offer easy returns and hassle-free experiences.** Provide a seamless and hassle-free shopping experience, including easy returns and flexible payment options, to alleviate consumers' concerns and reduce barriers to impulse purchases. Assure customers that they can shop with confidence and easily return or exchange discounted products if they are not satisfied, enhancing their trust and willingness to make impulsive purchases.
- **Monitor and analyse consumer behavior.** Continuously monitor and analyse consumer behavior, including browsing patterns, cart abandonment rates, and conversion metrics, to identify opportunities for optimising discount strategies and improving the online shopping experience. Use data-driven insights to refine targeting, messaging, and promotional efforts, ensuring that they resonate with consumers' hedonic motivations and FoMO.

By implementing these practical marketing strategies, businesses can effectively leverage the influence of hedonic motivation and fear of missing out to drive online impulse purchase intentions of discounted products, increase conversion rates, and foster long-term customer loyalty in the competitive digital marketplace.

Further research in this area could explore the moderating effects of individual differences, such as personality traits and demographic factors, on the relationship between hedonic motivation, FoMO and online impulse purchase intentions. Additionally, investigating the role of contextual factors, such as the presentation

of discounts, social influence cues, and the perceived credibility of online retailers, could provide deeper insights into the mechanisms driving impulsive buying behavior in online environments.

Moreover, longitudinal studies could offer valuable insights into the long-term effects of hedonic motivation and FoMO on consumer purchase behavior, including post-purchase satisfaction, repeat purchase intentions, and brand loyalty. Understanding how these psychological factors influence the entire consumer decision-making process, from initial attraction to post-purchase evaluation, can help businesses develop more holistic and effective marketing strategies tailored to meet the evolving needs and preferences of online shoppers.

In conclusion, the influence of hedonic motivation and FoMO on enhancing online impulse purchase intentions of discounted products underscores the importance of understanding and leveraging consumer psychology in digital marketing efforts. By tapping into consumers' desires for pleasure, excitement, and social connection, businesses can create compelling online shopping experiences that drive impulse purchases and foster customer engagement and loyalty in the competitive online marketplace.

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FINANCIAL PERFORMANCE ANALYSIS OF THE COMPANY THROUGH PROFITABILITY RATIOS

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Abstract

Financial analysis involves applying methods and techniques of analysis to financial reports and other related data to obtain useful information. This information is regarded as a significant relationship between data and their trends, showing a company's performance and financial position, as well as the results or consequences of previous management decisions. Additionally, they are used to make forecasts that can directly impact the decisions of financial statement users. Current and potential investors are interested in a company's future profitability. Therefore, the continuity of a company's past profits should represent a prediction of future profits. Many external users, such as creditors, are interested in knowing the level of a company's solvency rather than its profitability.

Performance is a widely used concept in both literature and practice. In many cases, defining this concept is insufficient; often the focus is on measuring performance, which varies for each individual information user, rather than defining the concept of performance. Achieving performance involves meeting a primary necessary condition, namely, developing and implementing a specific system of indicators for measurement. In general, any economic entity, whether it is a micro-enterprise or a corporation, must have a current performance measurement system. This system is very important for the success and continuity of the entity's activities.

This paper aims to highlight how a company's performance can be estimated and determined, respectively, measuring the extent to which the company's objectives have been achieved over a period of time. From this perspective, unachieved objectives, the reasons for not achieving them, and possible improvement methods for the future can be observed. The strengths and weaknesses of the company are identified in the performance evaluation stage specific to financial management, resulting in an analysis of behavior and identifying methods to improve activities.

Keywords: *performance, profitability, financial analysis, financing, profit.*

1. Introduction

Being a plurivalent concept, financial performance provides the necessary information for interested information users. For example, in the case of companies listed on stock exchanges, the stock market performance of the enterprise is important, calculated using specific indicators such as stock prices and dividend payouts. The increase in the market value of a company is an opportunity for potential investors interested in investing.

Profitability can be defined as the ability of an enterprise to make a profit through the use of production factors and owned capital, regardless of their source. Profitability is one of the most comprehensive forms of expressing efficiency.

The two categories of indicators used in expressing and calculating profitability are profit and profitability rates. Profit attests to the absolute magnitude of profitability, while profitability rates show the extent to which the capital or resources used by the enterprise generate profit.

Financial performance is an objective that all managers strive to achieve. Economic information leads to a profound understanding of the situation, the entire economic context, and the factors that determine the fluctuation of certain indicators. Economic and financial analysis provides all the necessary information for management and leadership decisions. Additionally, it is the scientific discipline that enables the exposure of economic reality and the understanding of the company's current state, compared to previous periods or direct

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competitors, through the application of specific theories and methods for deciphering the language of accounting.

2. Technical approach to profitability rates

2.1. Profitability rates

Profitability rates are efficiency indicators calculated according to the input/output model, where the output represents various forms of profit, and the input is represented by capital (either own or permanent), resources consumed by the enterprise, parts of assets or total assets, and revenues. The profitability rate is a relative measure and expresses the extent to which a company's capital generates profit. Profitability rates can be expressed in different forms depending on the type of profit desired to be calculated (net profit or gross profit). This rate is useful for different categories of information users. For example, indicators calculated based on capital are of interest to existing or potential investors, while indicators calculated using consumed resources are of interest to managers of the company.

The main profitability rates are:

- Commercial profitability rate;
- Cost profitability rate;
- Economic profitability rate;
- Financial profitability rate.

2.1.1. Commercial profitability rate

The validation of a company's management quality is observed in the appreciation of its products in the market in which it operates, by consumers. This situation is highlighted by the turnover.

The commercial profitability rate refers to the efficiency of a company's commercial activity. It establishes a connection between profit and net turnover. Specialised literature[1] presents several models for calculating the commercial profitability rate, with the most commonly used being the following:

a) $R_c = \frac{Pr}{CA} \times 100$

b) $R_{Mb} = \frac{Mb}{CA} \times 100$

c) $R_{cn} = \frac{Pn}{CA} \times 100$

, where:

R_c - commercial profitability rate;

R_{cn} - net commercial profitability rate;

R_{Mb} - gross sales margin rate;

CA - net turnover;

Pr - net profit to turnover;

M_b - gross margin to cost of goods sold;

P_n - net profit.

Current legislation[2] states that large companies are recommended to calculate and present, in the explanatory notes of their financial statements, indicators that show economic and financial performance. An example of such indicators is the gross profit margin rate of sales. Considering that these rates are calculated based on accounting profit, they will be influenced by the accounting policies applied by the company in question (inventory valuation method, fixed assets depreciation method, provision policy).

In international literature[3], the net commercial profitability rate (Return on Sales) is commonly encountered. This is calculated based on information from the Comprehensive Income Statement and can be more easily calculated by external information users, as they do not have access to the management accounting information of the company in question. One factor that can affect the net commercial profitability rate is the tax policy adopted by the company, which can influence the size of the profit. In addition to this, the net commercial profitability rate can also be influenced by other operations carried out within the company, other than sales.

In order to obtain pertinent and relevant information regarding the company's performance, financial

[1] See V. Robu, I. Anghel, E.C. Şerban, *Analiza economico-financiară a firmei*, Economică Publishing House, 2014, *http://opac.biblioteca.ase.ro/opac/bibliographic_view/200443?pn=opac%2FSearch&q=vasile+robu#multimediaArea*.

[2] See Order of the Ministry of Public Finances no. 1402/2014 and Law no. 82/1991, republished.

[3] See R.C. Higgins, *Analysis for Financial Management*, Business One Irwin, 1992.

analysts recommend analysing the evolution of the net commercial profitability rate over a period of 3 to 5 years. This should be compared with the sector's average rate of activity and the net commercial profitability rate for other companies in the same line of business as the analysed company.

Generally, the commercial profitability rate should be compared with:

- the sector average;
- the commercial profitability rate of the main direct competitor in the market;
- commercial profitability rates from previous periods;
- the level predicted by the Stock Exchange.

The main categories of information users interested in knowing the commercial profitability rate are: managers, investors, and the main competitors in the market.

2.1.2. The cost profitability rate

The cost profitability rate (or the rate of return on consumed resources) shows the relationship between the profit related to turnover and the total expenses related to sales. The factors influencing the rate of consumed resources are unit costs, unit selling prices, and the quantity sold across product structures.

Considering the reporting on operating activities, the cost profitability rate is calculated as follows:

$$R_r{}^{rc} = \frac{RE}{Che} \times 100 \quad [4]$$

, where RE - operating result;

Che - operating expenses.

The factors influencing the rate of consumed resources are unit costs, unit selling prices, and the quantity sold across product structures.

Discussing based on the presented relationship and taking into account the other components of operating income, such as other operating revenues and expenses, variations in inventory production and fixed asset production, and real estate investments. Therefore, these elements should not be included in the calculation of the cost profitability rate since they are not related to the sale of goods.

Therefore, the agreed calculation variant for the rate of return on consumed resources is:

$$R_r{}^{rc} = \frac{Pr}{Ch^{CA}} \times 100 \quad [5]$$

, where:

Pr - The profit related to turnover;

Ch - expenses related to turnover.

In specialised literature[6] opinions stating that the optimal level of the cost profitability rate falls within the range of 9% to 15%.

2.1.3. Economic profitability rate

Economic profitability rate is one of the most important rates due to the fact that it provides the performance of the total assets usage of the company and the capital invested in obtaining it.

Specialised literature provides more computation methods, out of which we present:

$$R^e = \frac{Operating\ result(RE)}{Operating\ assets\ (Ae)} \times 100$$

or

$$R^e = \frac{Gross\ operating\ result(EBE)}{Total\ assets\ (At)} \times 100$$

or

$$R^e = \frac{Gross\ Profit}{Total\ assets\ (At)} \times 100$$

The economic profitability rate can be constructed using various types of results, as presented in the formulas provided, which leads to a different representation of the outcome:

- if operating profit is used, an economic profitability rate independent of fiscal policy and financing policy will be calculated;
- if gross operating surplus is used, an economic profitability rate independent of the policy regarding the depreciation of fixed assets will be calculated;

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[4] See V. Robu, I. Anghel, E.C. Șerban, *Analiza economico-financiară a firmei*, Economică Publishing House, 2014, *http://opac.biblioteca.ase.ro/opac/bibliographic_view/200443?pn=opac%2FSearch&q=vasile+robu#multimediaArea*.

[5] *Ibidem*.

[6] *Ibidem*.

- if gross operating surplus is used, an economic profitability rate useful for company managers will be calculated, resulting in a higher rate;

If we were to transpose the calculation relationship of the economic profitability rate into international theory and practice, this rate is known by the formula:

$$ROA = \frac{EBIT}{TA} \times 100$$

, where:

ROA - *return on assets*;

EBIT - *earnings before interests and taxes*;

TA - *total assets*;

The category of information users interested in the values provided by this rate are creditors.

Factorial analysis of economic profitability rate

$$R^e = \frac{Gross\ profit}{Total\ assets(At)} \times 100 = \frac{CA}{At} \times \frac{Pr}{CA} \times 100$$

2.1.4. The financial profitability rate

The financial profitability rate measures how profitable the investment made by the owners of capital has been. If the financial profitability rate is higher than the cost of equity capital, the company creates additional value for shareholders through its activities.

The financial profitability rate is determined using the following calculation method:

$$Rf = \frac{Net\ profit(Pn)}{Equity(Kp)} \times 100$$

Factorial analysis of the financial profitability rate

After DU PONT, as follows:

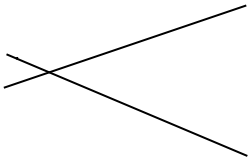
$Rf = \frac{Pn}{Kp} \times 100 = \frac{Vt}{At} \times \frac{At}{Kp} \times \frac{Pn}{Vt} \times 100$, where:

$\frac{Vt}{At}$ - Total assets turnover ratio;

$\frac{At}{Kp}$ - The average equity multiplier or the financial leverage ratio;

$\frac{Pn}{Vt}$ - Net profit to RON 1 sales.

Figure 1. Factorial analysis model of the financial profitability rate



Managers can influence the financial profitability rate by monitoring and affecting the following elements:

- sales generated through asset utilisation;
- the method of financing assets from equity and debt;
- the net profitability of revenues.

When analysing and calculating the total asset turnover ratio, it's important to consider the company's industry sector. For better efficiency in total asset utilisation, this indicator should have a higher value. Similarly, the higher the equity multiplier, the higher the financial profitability rate, but it's worth mentioning that this indicator also reflects the company's level of indebtedness. A high level of indebtedness poses a significant risk to the company.

Another important point to mention is that this indicator is influenced by the company's industry sector and the assets it holds. For example, companies with a consistent cash flow from operating activities and a high level of predictability may result in a high equity multiplier. Net profit per unit of revenue reflects the company's ability to adopt an efficient pricing policy and its ability to control expenses.

Studies show that companies with a high net profit per unit of revenue tend to have a lower economic profitability rate, while those with a low net profit per unit of revenue tend to have a higher economic profitability rate. This is because of the practice of high commercial markup, which increases net profit per unit of revenue but has a pronounced effect on the total asset turnover ratio, unfavorably influencing it for the

company.

The factors influencing investors' interest are:

- the economic profitability rate of assets;
- the company's level of indebtedness.

Regarding the role of financial leverage on the level of financial profitability, we can present two scenarios:

1. „Risk - Profit" case: the company achieves additional economic performance beyond the cost of borrowing, increasing the remuneration of the company's shareholders as the financial leverage increases (Rf > Re);

2. „Risk - Loss" case: obtaining loans increases the level of financial leverage, but does not generate an economic profitability of assets that exceeds the interest rate; thus, the financial profitability is lower than the economic profitability (Rf < Re).

The financial profitability rate provides information to parties who invest in companies not listed on the capital market. Once these companies enter the capital market and become known to external information users, for shareholders, the possibility of making high profits from their investment merges with information about the stock price.

2.2. Breakeven point

The breakeven point (also known as the critical point or equilibrium point) represents the level of activity of a company at which the revenues from the sale of goods or services are equal to the variable expenses related to the volume of activity and total fixed expenses, resulting in zero profit.

Expenses are classified into fixed expenses and variable expenses. Variable expenses remain constant per unit of product because the total variable expenses increase directly proportional to the volume of sales, while fixed expenses vary per unit of product because total fixed expenses are constant and decrease inversely proportional to the increase in the volume of activity.

The breakeven point reflects the relationship between operating expenses and the volume of activity that must be achieved so that the revenues from the sale of goods cover the expenses incurred.

The methods of computation and analysis of the breakeven point varies depending on the study conducted: per product or for the entire enterprise.

The advantages arising from conducting and analysing profitability based on the breakeven point are:

- determining the production size at which the company's operations become profitable;
- showing the volume of production needed to achieve a certain level of profit;
- indicating the degree of utilisation of production capacity associated with the breakeven point;
- calculating the period of time in which the company will recover its expenses;
- highlighting the correlations between production dynamics and cost dynamics;
- determining the maximum profit that will be obtained under certain conditions.

2.3. The impact of profitability rate over a company's development

Many companies use internal analysis systems or standards that divide the impact on decisions affecting performance, total revenues, or shareholder forecasts into components. Regarding the analysis of a company's financial position, focusing on the importance and role of financial profitability rate, it starts from the relationship between assets, capital, and liabilities.

It is important for a company to understand the financial structure on which it can operate profitably, as well as the level of indebtedness it employs without having adverse effects on its financial profitability. Failure to meet this condition can lead to financial imbalance. Financial profitability is an indicator that is directly influenced by the efficiency of the capital employed (the rate of economic profitability), the commercial policy (the rate of commercial profitability), and the financial policy of the enterprise.

Profit reflects a portion of the enterprise's capital and is an important source of financing for the enterprise. It rewards the participation of capital owners through dividends. The growth of profit indicates the efficiency of the activity from the perspective of equity capital.

Rates of economic profitability and rates of financial profitability are extremely important for information users, but there are many difficulties in their use, some of which are represented by the result of the capital taken into account.

2.4. Analysis of Profitability Ratios at ZENTIVA S.A.

Zentiva S.A. is a pharmaceutical company. It produces, sales and develops a wide range of generic and OTC (over-the-counter) medicines.

The company's net turnover recorded an increase in 2021 compared to the previous year by approximately 22,57% (Net turnover 2021 = 683.865.264 RON, Net turnover 2020 = 557.960.940 RON). The average selling price of finished products and goods produced and marketed by ZENTIVA S.A. per unit sold recorded an increase of 12,74% during the analysed period (average selling price 2021 = 4,69 RON compared to average selling price 2020 = 4,16 RON).

The company's management categorises the price increase as a result of changing the product mix by significantly increasing the share of products related to hospitals and chronic diseases.

Table no. 1. Information on turnover ZENTIVA S.A.

Element	2020	2021
Net income of goods sales (mln RON)	540,4	667,9
Quantity sold (mln units)	129,8	142,4
Average selling price (RON / sold unit)	4,16	4,69

Source: Workings on the annual report of ZENTIVA S.A., at: https://www.zentiva.ro/-/media/files/zentivacom/investors/ro/financial-reports/2021/aprilie

The share of external sales in the total turnover decreased in 2021, from 43,2% (241,1 million RON in 2020) to 42,4% (290,2 million RON in 2021).

2.4.1. Turnover net profit analysis

Table no. 2. Status of operating profit ZENTIVA S.A.

Element	2020	2021
Turnover	557.960.940	683.865.264
Operating expenses	(506.450.323)	(625.778.854)
Operating profit	73.345.277	116.046.580

Source: Workings on the annual report of ZENTIVA S.A., at: https://www.zentiva.ro/-/media/files/zentivacom/investors/ro/financial-reports/2021/aprilie

Model: Pr = CA x $\underline{pr}$

Absolute change of the turnover profit indicator:

$\Delta Pr = Pr1 - Pr0 = 116.046.580 - 73.345.277 = 42.701.303$ RON

This increase was mainly driven by the growth in turnover.

2.4.2. Analysis of the commercial profitability rate

Validation of a company's management quality is observed in the appreciation of its products on the market by consumers. This situation is highlighted by the turnover. The commercial profitability rate refers to the efficiency of a company's commercial activity. It connects profit with net turnover.

In the following, we will calculate the commercial profitability rate for ZENTIVA S.A. using the information presented above.

Computation formula: $R_c = \frac{Pr}{CA} \times 100$

Regarding 2020:

$$R_c = \frac{Pr}{CA} \times 100 = \frac{73.345.277}{557.960.940} \times 100 = 13,15\%$$

Regarding 2021:

$$R_c = \frac{Pr}{CA} \times 100 = \frac{116.046.580}{683.865.264} \times 100 = 16,97\%$$

$$\Delta R_c = R_{c1} - R_{c0} = 16,97 - 13,15 = +3,82\%$$

The level of commercial profitability rate is influenced by the structure of the sold production, the average selling price (excluding VAT), and the total unit cost. The increase in operating profit during the studied period signifies an enhancement in the commercial activity efficiency of the enterprise, in this case, rising by 58,22% compared to 2020. Generally, the growth in the commercial profitability rate related to operating activity reflects a favorable status and is primarily attributed to the adherence to the equation Sales Index > Expenditure Index. It is worth mentioning that the expenditure index slightly precedes the sales index (Expenditure Index = 123,56%, Sales Index = 122,57%).

Net commercial profitability rate

Computation formula:

$$R_{cn} = \frac{Pn}{CA} \times 100$$

Regarding 2020:

$$R_{cn0} = \frac{65635440}{557.960.940} \times 100 = 14,94\%$$

Regarding 2021:

$$R_{cn1} = \frac{105563554}{683.865.264} \times 100 = 15,39\%$$

$$\Delta R_{cn} = R_{cn1} - R_{cn0} = 15,39 - 14,94 = +0,45\%$$

For the analysis of the net commercial profitability rate, we have selected the indicator "Net Income/Loss for the Financial Year" from the Statement of Comprehensive Income. It can be observed that in 2020, the net commercial profitability rate increases due to the revaluation of buildings and land in amount of 21.227.460 RON, while in 2021, the net commercial profitability rate decreases due to the "Other elements of comprehensive income" element in amount of (337.035) RON. As we have outlined in the first part of the report, the company's fiscal policy influences this indicator. The net commercial profitability rate of ZENTIVA S.A. increased by 0,45 percentage points from 2020 to 2021, which represents a favorable situation for the company.

2.4.3. The analysis of the cost profitability rate

The rate of return on consumed resources, or the rate of return on costs, shows the relationship between the profit related to turnover and the total expenses related to sales. The factors influencing the rate of consumed resources are: unit costs, unit selling prices, and the volume of sales on product structures.

Computation formula: $R^{rc} = \frac{Pr}{Ch^{CA}} \times 100$

Regarding 2020:

$$R^{rc} = \frac{Pr}{Ch^{CA}} \times 100 = \frac{73.345.277}{506.450.323} \times 100 = 14,48\%$$

Regarding 2021:

$$R^{rc} = \frac{Pr}{Ch^{CA}} \times 100 = \frac{116.046.580}{625.778.854} \times 100 = 18,54\%$$

$$\Delta R^{rc} = {R_1}^{rc} - {R_0}^{rc} = 18,54 - 14,48 = +4,06\%$$

Regarding Zentiva S.A., following the analysis conducted, it is notable that the rate of return on consumed resources increases in 2021 compared to 2020 by 4,06 percentage points, which is a positive outcome for the company. This implies the efficient use of consumptions related to turnover (efforts), yielding the desired results (effects).

2.4.4. The analysis of economic profitability rate

The economic profitability rate shows the performance of the total assets used by the enterprise and the capital invested to obtain them.

Computation formula:

$$R^e = \frac{Gross\ profit}{Total\ assets\ (At)} \times 100$$

Regarding 2020:

$$R^e = \frac{Gross\ profit}{Total\ assets\ (At)} \times 100 = \frac{80549018}{1033264019} = 7,80\%$$

Regarding 2021:

$$R^e = \frac{Gross\ profit}{Total\ assets\ (At)} \times 100 = \frac{80549018}{119210366} = 11{,}36\%$$

$$\Delta R^e = {R_1}^e - {R_0}^e = 11{,}36 - 7{,}8 = +3{,}56\%$$

Factorial analysis of economic profitability rate

$$R^e = \frac{Gross\ profit}{Total\ assets\ (At)} \times 100 = \frac{CA}{At} \times \frac{Pr}{CA} \times 100$$

Table no. 3. Statement of profit before tax for ZENTIVA SA

Element	2020	2021
Total assets	1.033.264.019	1.049.605.515
Turnover	557.960.940	683.865.264
Profit before tax	8.0549.018	119.210.366

Source: Computation on the Annual report of the Administration Council of ZENTIVA S.A., at: https://www.zentiva.ro/-/media/files/zentivacom/investors/ro/financial-reports/2021/aprilie-2022/scd_zentiva-raport-anual-2021-ro.pdf?la=ro-ro&hash=89104B445CAC4B0646222249878FFA7CAF3F16BB

The modification of the indicator depending on:

1. The influence of changes in the total asset turnover:

$$\Delta\frac{CA}{AT} = \frac{CA1}{AT1} \times \frac{Pr0}{CA0} \times 100 - \frac{CA0}{AT0} \times \frac{Pr0}{CA0} \times 100 = +1{,}61\%$$

2. The influence of changes in the commercial profitability rate

$$\Delta R_c = \frac{CA1}{AT1} \times \frac{Pr1}{CA1} \times 100 - \frac{CA1}{AT1} \times \frac{Pr0}{CA0} \times 100 = +1{,}95\%$$

Based on the analysis conducted, it is noted that the economic profitability rate increased by 3,56% in 2021 compared to 2020, as a result of the significant influence of the increase in commercial profitability, in line with an acceleration of total asset turnover. The increase in the economic profitability rate in 2021 compared to the previous year reflects high performance of the funds invested in the company's activities.

In the analysed case, the total asset turnover expressed in the number of rotations is attributed to an optimal correlation between the dynamics of total assets (Total Asset Index = 101,58%), compared to that of sales (Sales Index = 122,57%).

As an efficiency ratio, we understand that it reveals appropriate management of economic resources within the company (Sales Index > Current Asset Index).

Thus, the asset turnover calculated as Total Assets over Sales had an influence of +1,61 percentage points on the increase in economic profitability rate. The main causes of this situation could be:

- avoiding excess acquisitions;
- utilising unused fixed assets;
- assessing the workforce to influence production rhythm;
- timely collection of receivables.

The commercial profitability rate is the main influencing factor, leading to an increase in the economic profitability rate by +1,91%. This is a result of the following:

- increasing sales;
- enhancing the company's bargaining power with suppliers and obtaining advantageous purchase prices;
- improving the sales structure by increasing the proportion of items with higher profit margins;
- accelerating inventory turnover;
- optimising expenses;
- adjusting commercial policies;
- avoiding excessive acquisitions;
- better asset management to prevent fixed asset depreciation;
- workforce qualification;
- reducing accounts receivable collection periods;
- accelerating current asset turnover;
- improving the return on fixed assets through their intensive use and considering their performance.

2.4.5. The analysis of financial profitability rate

The financial return rate indicates the measure to which the investment made by the owners of capital has been profitable. If the financial return rate is higher than the cost of equity, the company generates additional value for shareholders through its activities.

Computation formula:

$$Rf = \frac{Net\ profit(Pn)}{Equity(Kp)} \times 100$$

Regarding 2020:

$$Rf = \frac{Net\ profit(Pn)}{Equity(Kp)} \times 100 = \frac{65635440}{785364075} \times 100 = 8{,}36\%$$

Regarding 2021:

$$Rf = \frac{Net\ profit(Pn)}{Equity(Kp)} \times 100 = \frac{105563554}{890772594} \times 100 = 11{,}85\%$$

$$\Delta Rf = Rf_1 - Rf_0 = 11{,}85 - 8{,}36 = +3{,}49\%$$

Factorial analysis of the financial profitability rate

After DU PONT system, as follows:

$$Rf = \frac{Pn}{Kp} \times 100 = \frac{Vt}{At} \times \frac{At}{Kp} \times \frac{Pn}{Vt} \times 100$$

Figure 2. Model of factorial analysis of the financial profitability rate

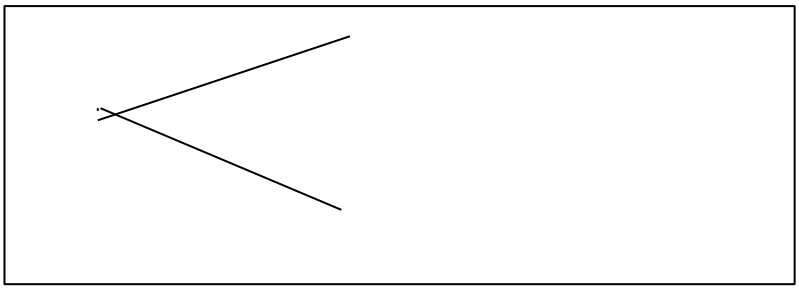


Table no. 4 Computation of the financial profitability rate for ZENTIVA S.A.

Crt. no	Indicators	Symbol	2020	2021	Indicator (%)
1	Total revenue (RON)	Vt	591.042.942	748.973.128	126,72%
2	Total assets (RON)	At	1.033.264.019	1.049.605.515	101,58%
3	Shareholders' equity (RON)	Kp	785.364.075	890.772.594	113,42%
4	Net profit (RON)	Pn	65.635.440	105.563.554	160,83%
5	Total asset turnover (number of turnovers)	Vt/At	0,57	0,71	126,72%
6	Equity multiplier	At/Kp	1,32	1,18	126,72%
7	Net profit per 1 RON of total revenue	Pn/Vt	0,11	0,14	126,92%
8	Financial profitability rate (percentage points)	Rf	8,36%	11,85%	141,80%

Source: authors' analysis

The influence of asset turnover ratio:

$$\Delta\frac{Vt}{At} = (\frac{Vt1}{At1} - \frac{Vt0}{At0}) \times \frac{At0}{Kp0} \times \frac{At0}{Kp0} \times \frac{Pn0}{Vt0} \times 100 = 2{,}068$$

The equity multiplier factor:

$$\Delta\frac{At}{Kp} = \frac{Vt1}{At1} \times (\frac{At1}{Kp1} - \frac{At0}{Kp0}) \times \frac{Pn0}{Vt0} \times 100 = -1{,}088$$

Net profit per 1 RON of total revenue (RON)

$$\Delta\frac{Pn}{Vt} = \frac{Vt1}{At1} \times \frac{At1}{Kp1} \times \left(\frac{Pn1}{Vt1} \times \frac{Pn0}{Vt0}\right) \times 100 = 2{,}513$$

Financial profitability increased by 3.49 percentage points during the 2020-2021 period, which is a favorable economic and financial situation. This increase was mainly due to a 48% increase in net profit and a 13,42% increase in equity.

The asset turnover ratio represents total revenue per 1 RON of total assets. During the 2020-2021 period, this indicator increased by 0,14 rotations, leading to a 2,068 percentage point increase in financial profitability. The total revenue index of 127,72% was higher than the total asset index of 101,57%. The efficiency of total assets increased due to efficiency in the operating and/or financial areas;

The equity multiplier or financial leverage ratio decreased by 0,14 percentage points during the 2020-2021 period, resulting in a 1,088 percentage point decrease in financial profitability. The total asset index was lower than the equity index (101,58% compared to 113,42%). Therefore, there was an increase in the firm's leverage, having a negative impact on financial profitability because the leverage effect of borrowing is negative, indicating that the assumed financial risk is not under control;

The net profit margin represents net profit per 1 RON of total revenue and increased by 0,03 during the 2020-2021 period, leading to a 2,513 percentage point increase in financial profitability. In this case, the net profit index was higher than the total revenue index (160,83% compared to 126,72%), reflecting increased productivity and increased commercial profitability.

Managers can improve financial profitability by monitoring and influencing the financing of assets from equity and liabilities. Regarding the role of financial leverage on the level of financial profitability, considering the values of economic profitability rate of +3.56% and financial profitability rate of 11,85%, we deduct that the financial profitability rate is higher than the economic profitability rate. Therefore, we are in the "risk-profit" scenario, meaning that the company achieves economic performance exceeding the cost of borrowing, thus increasing shareholder remuneration.

3. Conclusions

From the analysis conducted on ZENTIVA S.A., it resulted that the company has a stable economic and financial situation, with most of the calculated indicators showing favorable increases for the company.

The most significant increase at the level of fixed assets is represented by the element Rights to use assets, which increased by 62,79% during the studied period. This increase is due to the fact that the company recognized, at the level of fixed assets: the leasing of cars for company personnel, the leasing of the assembly line, and the lease contract for the storage space held by FM Logistic. Overall, fixed assets recorded an increase of 2,27%.

Considering that ZENTIVA S.A.'s main activity is production, current assets have a very high proportion of the company's total assets - 76,77%. An important proportion of current assets is represented by Cash-pooling - receivables from affiliated parties. The company mentioned in the annual reports that in 2020, this category was included in the Cash and cash equivalents element, resulting in a 51,17% share of this element in 2020, transferring to the respective category in 2021.

Most of the Equity elements do not change during the studied period: Subscribed capital, Capital premiums, and Revaluation reserves. Legal reserves and other reserves recorded an increase of 3.397.329 RON.

Overall, equity recorded an increase of 13,42% during the studied period.

Regarding the absolute change in long-term liabilities elements, most of them recorded decreases, indicating that the company manages its debts correctly.

The proportion of Long-term liabilities in Total liabilities and equity is 10,87%. The proportion of current liabilities in Total Liabilities is 89,13%. Total liabilities in Total liabilities and equity represent 15,13%. There was a slight increase of 1,58% in the liability side.

Net sales revenue increased by 22,57% during the 2020-2021 period, which is a favorable situation for the company. A significant increase in revenue is represented by the element Other operating income, which recorded a growth of 153,98%.

Marketing expenses decreased considerably in 2021 compared to 2020 by approximately 50%, indicating that ZENTIVA S.A. did not allocate a large budget for advertising.

As seen in the previous financial statements, provisions were carried forward in 2021, reflected in the profit and loss account, resulting in a 763,13% increase in the element Reversals from/provisions expenses.

Operating profit recorded an increase of 58,22% during the studied period. Gross profit in 2021 was 119.210.366 RON, registering a 48% increase compared to 2020.

In 2020, the net commercial profitability rate increased due to the revaluation of buildings and land in the amount of 21.227.460 RON, while in 2021, the net commercial profitability rate decreased due to the element Other elements of the global result in the amount of (337.035) RON.

Regarding Zentiva, following the analysis conducted, it is noteworthy that the rate of return on consumed resources increased in 2021 compared to 2020 by 4,06 percentage points, which is a positive consequence for the company.

Following the analysis conducted, it is observed that the economic profitability rate increased by 3,56% in 2021 compared to 2020, as a result of the significant influence of the increase in commercial profitability, in line with an acceleration of total asset turnover. The increase in the economic profitability rate in 2021 compared to the previous year practically reflects the high performance of the funds brought in the company's activity.

Financial profitability increased by 3,49 percentage points during the 2020-2021 period, which is a favorable economic and financial situation, a growth that was mainly due to a 48% increase in net profit and a 13,42% increase in equity. The company aims to continue its activity and expand in the pharmaceutical market.

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ENSURING COMPETITIVE ADVANTAGE THROUGH AGILE MARKETING

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Abstract

Recent events have taught us that change can occur with surprising speed. Those who had the ability to adapt to these changes continued to operate and succeed. The success of these companies was determined, among other things, by the speed of reaction to change. The rapid changes in the market impose an increasingly acute need for a marketing activity that is more agile by the day, translated into a reaction to change at least as fast by marketers. The competitive advantage belongs to those marketers and brands who can plan faster, experiment more effectively, and constantly adapt in order to accelerate success.

Today's society has become much too complex to be stabilised, structured and forecasted so agile marketing is quickly becoming a requirement for successful business operations. Agile marketing is a new approach in the field of marketing management based on a series of practices aimed at solving the rigidities of traditional marketing. Agile marketing is the current way of doing marketing in volatile markets with informed consumers and fast-reacting competition. Agile principles can support companies of any size by allowing large projects to be broken down into distinct units, continuous improvement of results, and rapid adaptation in response to internal or external environment changes.

In this context, the following paper reveals important aspects regarding the methodology and instruments of agile marketing to serve as a guide in incorporating agile practices into the marketing planification process in order to achieve changing business goals more efficiently.

Keywords: *agile marketing, competitive advantage, management marketing, Scrum, Kanban.*

1. Introduction

We are in the age of changes that happen in the blink of an eye. Extrapolating, we can affirm with the same conviction that this situation is valid in any market. In this context, a reaction speed that is at least as fast is required from marketers. The need for them to be more agile by the day, capable of quick and efficient reactions to the changes identified in the market, is becoming more and more acute. The competitive advantage belongs to those marketers and brands who can plan faster, experiment more effectively, and constantly adapt to accelerate success[1].

Today's society has become much too complex to be stabilised, structured and forecasted so that agile marketing has become an orientation that is increasingly required in the company's activity. In addition events such as the pandemic, climate change or the war have determined significant changes in the markets' conjuncture on which the companies operate. A more careful analysis of what constitutes agility in the marketing activity and the impact of this orientation on companies is therefore required.

Agile marketing is the current way of doing marketing in volatile markets with informed consumers and fast-reacting competition. Agile marketing is a new approach in the field of marketing management based on a series of practices aimed at solving the rigidities of traditional marketing, encouraging team members to work better together to achieve customer-centric goals and constantly identify weaknesses and unnecessary steps to quickly adjust and optimise company operations[2].

Unfortunately, currently, the literature does not fully elucidate the advantages and benefits of adopting agile marketing practices and their impact on improving a company's marketing capabilities. Likewise, there are

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[1] See P. Roetzer, *The Marketing Growth Hackathon: Spend Less Time Planning, More Time Doing*, in Ready North, 2018, *https://www.readynorth.com/blog/the-marketing-growth-hackathon-spend-less-time-planning-more-time-doing*, last consulted on 16.06.2023.

[2] See L. Moi, F. Cabiddu, *An agile marketing capability maturity framework,* Tourism Management, vol. 86, 2021, *https://fardapaper.ir/mohavaha/uploads/2021/05/Fardapaper-An-agile-marketing-capability-maturity-framework.pdf*, last consulted on 16.06.2023.

even fewer systematic studies conducted from an academic perspective on agile marketing approaches. Thus, the present study is intended to contribute to the development of the theory and to a clearer conceptualization of the benefits and specific strategy of agile marketing through the systematic analysis of the relevant literature. The study presented in the following is useful for research specialists but also for practitioners who want a more efficient and strategic marketing activity.

2. The role and place of agile marketing in a company's activity

The concept of agility was introduced in the 1930s in the automotive industry in order to divide tasks in an efficient way and carry out the activity under optimised resources conditions[3]. Specialists in the field, such as Jeff Sutherland, emphasise that Agile was born from Lean thinking and that Agile would represent, from a conceptual point of view, a set of Lean principles and practices. Lean is a philosophy in which the activity follows a learn-measure-build cycle, with the company performing many tests, frequently connecting to customer needs, understanding their value, and focusing its key processes on continuous improvement. Marketing activity guided by these coordinates will lead to sustainability, intelligent development and success[4].

However, the roots of agile marketing lie in the IT field of the 90s when agile methodologies were developed for software development.

In February 2001, at a meeting in Snowbird Station, Utah, 17 software developers developed the Manifesto for Agile Software Development to address the problems of the traditional waterfall approach to software development at the time, an approach characterised by the slow process considering that the requirements were changing at a much too fast pace, a situation that ultimately led to obtaining an already outdated software[5].

Similarly, on June 11, 2012, a group of marketing specialists met for a two-day discussion, now considered the Zero Sprint[6], held to exchange ideas about agile marketing and concluded with the elaboration of the *Agile Marketing Manifesto*[7] designed to provide a series of necessary coordinates for marketing teams looking to become more agile. The values promoted by agile marketing according to the above-mentioned manifesto are formulated as follows[8]:

- Focus on customer value and business outcomes;
- Delivering value as quickly and as often as possible rather than chasing perfection;
- Learning based on experience and data rather than opinion and convention;
- Consumer-oriented collaboration and not silos and hierarchies;
- Response to change and not the pursuit of a static plan.

Being agile in marketing means using data and analytics to continuously identify opportunities or solve problems in real time, quickly test, quickly evaluate results, and quickly iterate[9].

From the dynamic capability theory perspective, agility is defined as the company's dynamic ability "to manage uncertainty […] to effectively redistribute/redirect its resources towards value creation and to protect (and capture) the value of high-yield activities" taking into account its internal and external context[10]. In other words, agile marketing implies a greater responsiveness to the ever-changing consumer needs and the consequent harmonisation of marketing objectives with existing resources. This approach requires that the company has the capacity to reconfigure marketing activities in an extremely short time, to quickly adapt to the

[3] See M. Nuseir, A. Aljumah, *Digital marketing adoption influenced by relative advantage and competitive industry: a UAE tourism case study,* International Journal of Innovation, Creativity and Change, vol. 11, issue 2, 2020, *https://www.researchgate.net/publication/339789075_Digital_Marketing_Adoption_Influenced_by_Relative_Advantage_and_Competitive_Industry_A_UAE_Tourism_Case_Study*, last consulted on 24.06.2023.

[4] See *Visual guide to Agile methodologies for modern product management*, Miro Blog, *https://miro.com/blog/choose-between-agile-lean-scrum-kanban/*, last consulted on 10.08.2023.

[5] See P. Sachdeva, D. Kumar, *Strategic Marketing: Agile Marketing Developments,* Journal of Positive School Psychology, vol. 6, no. 5, 2022, pp. 6575-6589, *https://journalppw.com/index.php/jpsp/article/view/8183/5332*, last consulted on 24.06.2023.

[6] See Adobe Communication Team, *Agile Marketing,* Adobe Experience Cloud Blog, 18.03.2022, *https://business.adobe.com/blog/basics/agile-marketing*, last consulted on 11.07.2023.

[7] See *Agile Marketing Manifesto*, *https://agilemarketingmanifesto.org/*, last consulted on 03.07.2023.

[8] See A. Fryrear, *What is Agile Marketing: From Buzzword to Best-in-Class Way of Working*, Atlassian, *https://www.atlassian.com/agile/agile-marketing/what-is-agile-marketing*, last consulted on 04.07.2023.

[9] See D. Edelman, J. Heller, S. Spittaels, *Agile marketing: A step-by-step guide*, McKinsey and Company, 2016, *https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/agile-marketing-a-step-by-step-guide#/*, last consulted on 25.07.2023.

[10] See D. Teece, Margaret, Peteraf, Sohvi, Leih, *Dynamic Capabilities and Organisational Agility: Risk, Uncertainty, and Strategy in the Innovation Economy*, California Management Review, vol. 58, issue 4, 2016, pp. 13-35.

changing market situation and to satisfy the consumers' needs in a more efficient way than the competition[11].

Agile marketing is a strategic tool designed to implement the marketing strategy in a fluid and changing environment[12] where a quick reaction to the changes that occur is desired, and the media in which the strategy is implemented is malleable and has fast feedback loops providing the opportunity to iteratively optimise execution, quickly and inexpensively.

Adaptation to the particularly changing environment must be achieved and agile marketing allows a faster adaptation with less chance of failure by dividing the experiences into smaller, easy to implement, segments that are provided to consumers in order to obtain exceptional experiences that can be tested on smaller markets, dedicated only to a certain segment of the existing need (for example, on a city or only on a type of product user) and, subsequently, based on collected data, the experiences should be improved, then extrapolated to the entire market[13]. Agile principles can support companies of any size by allowing large projects to be broken down into distinct units, enabling continuous improvement of results, and rapid adaptation in response to internal or external environment changes.

Agile marketing involves the long-term application of an agile methodology to manage and improve the way a marketing team operates[14]. The marketing activity carried out in the spirit of this methodology is carried out cross-departmentally bringing together members from different departments to capitalise marketing opportunities and to modify marketing plans based on the changes in the dynamic environment[15].

Compared to the traditional marketing approach that treats each stage of the marketing activity management as separate and sequential, agile methods use iterative work cycles (see Figure 1). In addition, from the traditional perspective the marketing activity must be done right from the first attempt, instead agile methods aim to provide a response as quickly as possible. The difference in the pursued objectives determines different characteristics between the two approaches in terms of adaptability, documentation, testing and collaboration.

The interest in agile marketing stems from the significant contribution to the organisation and implementation of an effective marketing activity, adapted to the current period characterised by rapid changes and complex needs, placing emphasis on frequent releases, intentional experimentation and a permanent commitment to consumer satisfaction[16].

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[11] See L. Moi, F. Cabiddu, *An agile marketing capability maturity framework,* Tourism Management, vol. 86, 2021, *https://fardapaper.ir/mohavaha/uploads/2021/05/Fardapaper-An-agile-marketing-capability-maturity-framework.pdf*, last consulted on 16.06.2023.

[12] See S. Brinker, *Choosing between being strategic or being agile is a false dichotomy*, Chief Marketing Technologist, July 11, 2018, *https://chiefmartec.com/2018/07/choosing-strategic-agile-false-dichotomy/*, last consulted on 29.06.2023.

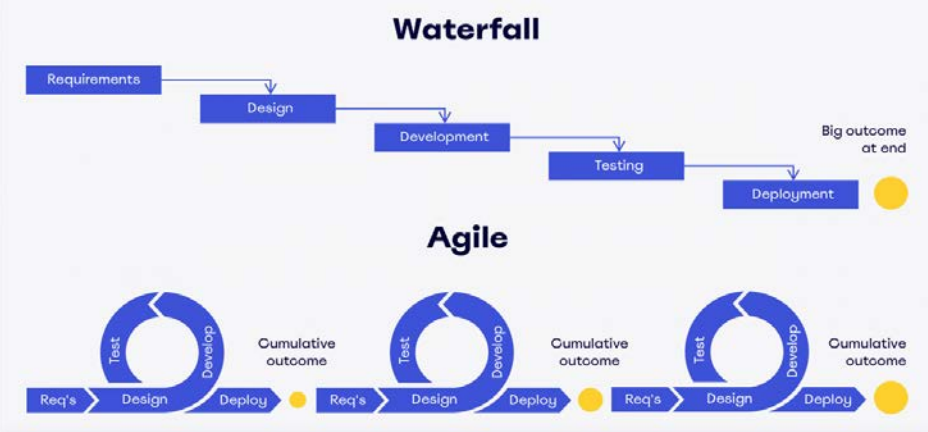
[13] See Y. Yeret, *Defining Agile Marketing,* Agile Sparks blog, 2017, *https://www.agilesparks.com/defining-agile-marketing/*, last consulted on 23.08.2023.

[14] See A. Fryrear, *What is Agile Marketing: Everything You Need to Know,* Agile Sherpas, *https://www.agilesherpas.com/blog/what-is-agile-marketing*, last consulted on 28.07.2023.

[15] See P. Sachdeva, D. Kumar, *Strategic Marketing: Agile Marketing Developments,* Journal of Positive School Psychology, vol. 6, no. 5, 2022, pp. 6575-6589, *https://journalppw.com/index.php/jpsp/article/view/8183/5332*, last consulted on 24.06.2023.

[16] See A. Fryrear, *What is Agile Marketing: From Buzzword to Best-in-Class Way of Working*, Atlassian, *https://www.atlassian.com/agile/agile-marketing/what-is-agile-marketing*, last consulted on 04.07.2023.

Figure 1. Traditional approach (Waterfall) versus agile approach in activities management



Source: Visual guide to Agile methodologies for modern product management, Miro Blog, https://miro.com/blog/choose-between-agile-lean-scrum-kanban/ last time consulted on 10.08.2023

Among the major contributions that the agile perspective can bring in the company's marketing activity are[17]:

- *Increasing productivity* by focusing the activity on what is important for the consumer, on what better aligns with the company's objectives, as well as on the elimination of unproductive work. Teams involved in agile marketing are much better organised, they focus on quick response and iterations based on the feedback received in order to make changes;
- *Increased awareness regarding the marketing activity contribution* due to better measurement and monitoring of results.
- *Adaptability to change*. Agile marketing provides built-in adaptation mechanisms such as emphasis on iteration, focus on consumers, and the spontaneous emergence of requirements from experience. Companies that previously needed weeks or even months to get a good idea implemented into an offer for the customers have progressed to less than two weeks in which they can accomplish the same thing by applying agile techniques[18].
- *Increased job satisfaction as well as talent attraction and retention*.

Agile marketing makes significant contributions to product development, marketing mix development and brand marketing through the permanent feedback it provides, through the constant market testing and retesting of ideas and communications as well as accelerating the process of delivering impact by the branding activity.

3. Agile marketing coordinates

Agile marketing involves approaching the marketing activity starting from the following coordinates[19]:

- *Constant response to change rather than following a plan*. Recent events have taught us that changes can occur at surprising speed, and over time we have remained with the certainty that change is constant. Companies that can quickly adapt to these changes gain a competitive advantage in the market.
- Strategic marketing planning has a special role in the marketing activity. However, in the previously mentioned conditions, an important role currently belongs to the constant monitoring of the market and, in particular, of the changes that occur in consumer behavior in favor of stubbornly implementing a marketing plan. In the current context, we are becoming aware that no marketing plan survives in its entirety the contact with consumers and their purchasing behavior. Every action needs to be filtered from the following perspective: if it

[17] See J. Ewel, *The Six Disciplines of Agile Marketing: Proven Practices for More Effective Marketing and Better Business Results*, John Wiley&Sons Publishing, New Jersey, 2020, p. xx-xxi.

[18] See D. Edelman, J. Heller, S. Spittaels, *Agile marketing: A step-by-step guide*, McKinsey and Company, 2016, *https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/agile-marketing-a-step-by-step-guide#/*, last consulted on 25.07.2023.

[19] See J. Ewel, *The Six Disciplines of Agile Marketing: Proven Practices for More Effective Marketing and Better Business Results*, John Wiley&Sons Publishing, New Jersey, 2020, p. 13; P. Sachdeva, D. Kumar, *Strategic Marketing: Agile Marketing Developments,* Journal of Positive School Psychology, vol. 6, no. 5, 2022, pp. 6575-6589, *https://journalppw.com/index.php/jpsp/article/view/8183/5332*, last consulted on 24.06.2023.

does not benefit the end consumer, it is not a priority. Agile marketing recognizes this truth by emphasising the need to react, first and foremost, to the current reality rather than following a plan that does not work[20]. This does not mean that those implementing agile marketing do not plan, but planning is flexible, plans are formulated in the short term and oriented towards delivering value, being constantly subject to revision.

- *Rapid iterations and continuous improvement in exchange for large-scale campaigns*, an idea implemented through continuous task cycles and improvements made at each cycle;
- *Testing and data rather than opinions and conventions*;
- *Many small experiments in return for a few big bets.* Agile marketing reduces experiences and experiments to a smaller, much more manageable size. The tests are carried out at a small level and if a failure is recorded, it is very easy to move on to another experience. Agile marketing teaches us to fail quickly, learn from failure and constantly adapt, an adaptation with small steps, avoiding the risk of major failures.
- *Individuals and interaction instead of hierarchy*. Agile marketing requires continuous collaboration instead of hierarchy, based on constant interactions with stakeholders and customers in order to provide a clear answer to their requirements.

Under these conditions, the implementation of agile marketing in a company meets a series of characteristics without which the marketing activity cannot bear this name[21]:

- *Adaptability* to the constantly changing conditions materialised in the rapid adaptation of marketing plans in order to react to the changes in consumer needs and desires;
- *Change of mentality*. Marketers on an agile team demonstrate respect, a penchant for collaboration, continuous improvement and learning, a focus on delivering value, and the ability to quickly adapt to change.
- *Experimentation, iteration and small releases*. Agile marketing involves carrying out experiments and small launches, the team subsequently using the obtained results in the next work round.
- *Leadership that serves the team*. Agile managers support the team on the path to success, instead of being set on achieving numbers at any cost
- *Teamwork and collaboration*. The application of agile marketing requires the existence of a cross-functional team that organises itself and that performs frequent iterations with continuous feedback[22]. A collaborative and integrated work environment allows the development of close relationships based on trust between individuals, between departments and with customers.
- *Data-driven marketing*. The agile team will ensure that work is measurable and that they will rely on empirical evidence to make decisions.
- *Monitoring and forecasting market needs* through projections of future characteristics and trends allowing companies to respond proactively or reactively in order to increase customer satisfaction;
- *Continuous and rapid innovation pace.*

Another element that is characteristic to this type of marketing is the agile marketing team that works with all of the organisation's top-level managers, focusing their efforts towards achieving the set objectives, each of its members having the responsibility of achieving them, placing the consumer at the center of any adopted decision and constantly measuring the level of achievement of said objectives. Instead of grouping individuals by function, agile organisations prefer small, cross-functional teams able to autonomously complete projects without too much handoff between teams[23]. For example, an agile marketing team working on a digital marketing campaign can include a copywriter, a graphic designer, a SEO specialist, and an analytics lead.

On the other hand, the agile marketing activity cannot be carried out without the collaboration between various individuals with various functions (research, project management, art and creation, web design, strategy, etc.), facilitated by agile software systems. Otherwise, marketing activity cannot be agile without proper software tools. Thus, there are management platforms that allow a good structuring and visibility of priorities, projects

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[20] See J. Ewel, *The Six Disciplines of Agile Marketing: Proven Practices for More Effective Marketing and Better Business Results*, John Wiley&Sons Publishing, New Jersey, 2020, p. 15-16.

[21] See L. Moi, F. Cabiddu, *Leading digital transformation through an Agile Marketing Capability: the case of Spotahome*, Journal of Management and Governance, vol. 25, 2021, pp. 1145–1177, *https://www.researchgate.net/publication/345312111_Leading_digital_transformation_through_an_Agile_Marketing_Capability_the_case_of_Spotahome*, last consulted on 23.06.2023; A. Fryrear, *What is Agile Marketing: Everything You Need to Know*, Agile Sherpas, *https://www.agilesherpas.com/blog/what-is-agile-marketing*, last consulted on 31.07.2023.

[22] See A. Fryrear, *What is Agile Marketing: From Buzzword to Best-in-Class Way of Working*, Atlassian, *https://www.atlassian.com/agile/agile-marketing/what-is-agile-marketing*, last consulted on 4.07.2023.

[23] *Ibidem*.

and the rapid flow of complex tasks[24] - Asana[25], ClickUp[26], Monday.com[27], Workfront[28], Kanbanize[29], etc.

The agile marketing activity involves going through the following stages:

- *Data analysis*. The team formed for the agile marketing activity analyses the data collected, first of all, from the actual or potential consumer segments with the aim of identifying anomalies, weaknesses, problems or opportunities. Also, there are daily stand-ups at the beginning of the working day in which each team member gives a report on the objectives achieved the previous day and those to be achieved for the day ahead.
- *Testing ideas*. For each identified opportunity and problem, the team will formulate ideas for improving the consumer experience. The ideas will then be evaluated in terms of business impact and ease of implementation, and methods of efficient testing will be developed by formulating hypotheses related to them along with the values of the pursued performance indicators.
- *Conducting tests*. The agile marketing team carries out the tests during 1-2 weeks to verify the effectiveness of the proposed approach for which it has developed efficient and reliable tracking mechanisms to quickly report the performance of each test. Afterwards, review sessions will be held to review test results and decide whether to implement promising results, adapt to feedback, and eliminate solutions that don't work—all done in a very short time frame.

4. Methods used in the agile marketing activity

The main methods used in the agile marketing activity are represented by[30]:

Scrum represents a methodology that involves implementing a project through a Sprint held over a period of 2-6 weeks with a team that usually includes 5-9 people. In order to implement complex projects, it is necessary to perform several Sprints dividing a large project into smaller projects. Each aspect of the project will be broken down into measurable objectives, thus ensuring a solid foundation for effective implementation. The involved teams will have the feeling that they are achieving their goals from the very first phases, thus being motivated for the further development of the project.

During the Scrum implementation, the involved team will be led by a „scrum master" with experience in agile techniques together with an assistant who will set priorities, define assumptions, manage backlogs, identify the necessary resources and manage „sprints"[31]. On the other hand, a „product owner" will focus on the final product of the sprint (this could be represented, for example, by a promotion campaign) and on the interests of the end consumer, the rest of the members being considered „developers".

To achieve effective and timely communication in order to adopt effective decisions, the Scrum methodology involves holding four key events representing the components of a Sprint:

Sprint planning involves an initial meeting in which the team discusses the project components and the sprint objective formulated in measurable terms. Typically, this meeting runs for 4-8 hours (generally one hour will be allocated for each week of the sprint[32]), during which the team members must be able to establish the tasks within the sprint, the estimated time for each task and the people tasked with carrying them out. Practically at the end of this meeting each member must know clearly what is the task they will be working on. In this case, it is useful for planning to be carried out on a centralised platform dedicated to project management, such as Adobe Workfront.

[24] See S. Brinker, *Have we entered a post-agile marketing age?*, Chief Marketing Technologist, May 31, 2022, *https://chiefmartec.com/2022/05/have-we-entered-a-post-agile-marketing-age/*, last consulted on 27.06.2023.

[25] See Asana official website, *https://asana.com/*, last consulted on 27.06.2023.

[26] See ClickUp official website, *https://clickup.com*, last consulted on 27.06.2023.

[27] See Monday.com official website, *https://monday.com/*, last consulted on 27.06.2023.

[28] See Adobe Workfront official website, *https://business.adobe.com/ro/products/workfront/main.html*, last consulted on 27.06.2023.

[29] See Kanbanize official website, *https://kanbanize.com/*, last consulted on 27.06.2023.

[30] See S. Katare, *Agile Marketing as a Key Driver to Increasing Operational Efficiencies and Speed to Market*, International Journal of Business Administration, vol. 13, no. 2,2022, *https://www.sciedu.ca/journal/index.php/ijba/article/view/21730/13450*, last consulted on 30.06.2023; Adobe Communication Team, *Agile Marketing,* Adobe Experience Cloud Blog, 18.03.2022, *https://business.adobe.com/blog/basics/agile-marketing*, last consulted on 11.07.2023.

[31] See D. Edelman, J. Heller, S. Spittaels, *Agile marketing: A step-by-step guide*, McKinsey and Company official website, 2016, *https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/agile-marketing-a-step-by-step-guide#/*, last consulted on 25.07.2023.

[32] See A. Fryrear, *What is Agile Marketing: Everything You Need to Know*, Agile Sherpas, *https://www.agilesherpas.com/blog/what-is-agile-marketing*, last consulted on 2.08.2023.

Daily scrum (or daily standup) represents meetings held daily in a maximum interval of 15 minutes in order to evaluate the progress towards reaching the sprint goal, plan the activities for the next 24 hours and discuss possible obstacles that have occurred since the last standup. Practically every team member has to answer three questions during the meeting[33]: I. What have you accomplished since the last meeting?, II. What are you working on until your next meeting? and III. What exactly prevents you from carrying out your assigned task? The daily meetings are meant to allow the team to focus their efforts on getting the job done better in the next 24 hours.

Sprint review takes place at the end of the sprint and consists in reviewing and discussing the sprint results in the presence of all stakeholders. Incomplete tasks are set aside and taken into account in the next sprint planning.

Sprint retrospective takes place in the last sprint meeting in which the team reviews the process that took place during the sprint and discusses future improvements.

Considering that environmental changes occur with a much higher frequency than in the past, this method has evolved over time in hybrid forms.

Scrum methodology has the following benefits[34]:

- Teams are encouraged to meet regularly and discuss progress towards achieving short-term marketing objectives, which contributes to the achievement of long-term objectives.
- Teams can test, iterate and correct which contributes to increased productivity, flexibility and adaptability to change;
- Enables marketers to understand customer needs and deliver content that satisfies them, creating a long-term test-and-learn perspective.

Kanban is a methodology that supports the correct visualisation of data and leads to continuous improvement (kaizen). The Kanban methodology was created within the Toyota company in the 1940s, its name meaning „panel" in Japanese. The engineer Taiichi Ohno was the one who initiated the first Kanban board in his effort to streamline the inventory management process of the Toyota company. Thus, similar to the practice of grocery stores that stock only as much merchandise as is requested, Toyota's production teams began using kanbans (tickets) to signal to the production line when production of a larger number of parts was required.

Based on the Kanban board, the Kanban methodology allows the visualisation of stages and tasks in order to maximise the efficiency in implementing tasks. This method is based on three basic principles:

- *Workflow view* using the Kanban board where the tasks within a project are represented by tickets and columns according to the degree of completion. The simplest Kanban has three columns: „To do", „In progress" and „Completed". A task is represented on a note that circulates through the columns (maximum 7-10 columns) on the Kanban board. In order to structure the Kanban board it is recommended to take into account the elements that cause delays in the workflow such as approvals, reviews, transfers from one person to another or broadcasting to certain target audiences, and use them to create columns. The Kanban board must be a representation as accurate and as simple as possible of how the team work is done.
- *Work-in-progress limitation* - a maximum number of elements within a column is fixed to impose a manageable workload but also to improve efficiency. Thus, once a column reaches the maximum number of tasks no new task can be added until another task is moved from that column. Wip limitation is a particularly useful tool considering the fact that when team members aim to accomplish too many tasks, they often become inefficient.
- *Explicit policies*. Another key element in the Kanban implementation process is the formulation of explicit policies on how the team's work will be carried out. Formulating and communicating clearly how the team will work will eliminate misunderstandings and create consistency in the way of working[35].
- *Process analysis and improvement*.

Workflow visualisation enables better collaboration between individuals and teams in the marketing activity. Also, by setting a limit on the tasks to be performed simultaneously, the marketing team becomes much

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[33] See Adobe Communication Team, *Daily Stand-Up Meetings,* Adobe Experience Cloud Blog, 18.03.2022, *https://business.adobe.com/blog/basics/daily-stand-up*, last consulted on 17.07.2023.

[34] See S. Katare, *Agile Marketing as a Key Driver to Increasing Operational Efficiencies and Speed to Market*, International Journal of Business Administration, vol. 13, no. 2, 2022, *https://www.sciedu.ca/journal/index.php/ijba/article/view/21730/13450*, last consulted on 30.06.2023.

[35] See A. Fryrear, *What is Agile Marketing: Everything You Need to Know*, Agile Sherpas, *https://www.agilesherpas.com/blog/what-is-agile-marketing*, last consulted on 03.08.2023.

more efficient.

For this methodology also, daily meetings are held (daily stand-up) with the difference that in this case the team members will not communicate the individual report, as is done in the Scrum method, instead the meeting will be focused on the Kanban board and the work to be done with an emphasis on tasks experiencing a deadlock. Retrospective meetings are also held every two weeks in which the activity carried out is analysed and elements for improving the way of working in the future are identified.

Scrumban, also known as modified Scrum, is one of the most accepted hybrid agile marketing methods representing a flexible methodology that combines practices from both Scrum and Kanban. This approach combines the flexibility and adaptability of Kanban with the structure and formality of Scrum by incorporating Scrum's sprints and Kanban's visual boards. According to this methodology, the teams will work in two-week sprints, similar to the Scrum methodology, and will visualise the entire project on a board with a maximum of wips set from the beginning, just like in Kanban. Although it is a method that can be easily adapted to the needs of different teams, some essential aspects must be preserved: daily standup meetings, workflow visualization and regular retrospectives.

Based on team structure, specific workflow and business context, marketers can select and combine Kanban, Scrum and Lean practices as desired to identify effective solutions for implementing agile marketing. Beyond the methodology that is used, it is necessary to keep in mind the fact that the success or failure of the implementation depends on the team that implements the project. Under these circumstances, the methodology must be selected and adapted according to the marketing team characteristics and its desire and ability to undergo transformations.

5. Conclusions

Conducting the marketing activity from an agile perspective provides companies with a competitive advantage in today's highly changing environment characterised by volatile markets with informed consumers and fast-reacting competition, creating an appropriate climate for cross-functional team members to work together to achieve goals centered on consumer needs and to constantly identify weaknesses and unnecessary steps in order to quickly adjust and optimise the company's operations. It is important to consider that for agile marketing implementation, businesses must have a clear idea of what they want to accomplish through this initiative as well as of the data and the technological infrastructure available to them for carrying out their marketing activity.

Of all the elements that are necessary in adopting agile marketing, people are the most important component. Creating a team of talented people who are able to work well and quickly together is crucial[36]. The implementation of agile marketing can start with such a team and, depending on the obtained results, create more teams whose activity is focused on achieving certain objectives, focused on certain products or services starting from the objectives set by the company. Teams focused on certain products from the company's portfolio, customer segments or moments in the consumer experience can be created.

Having an agile mindset in marketing means always thinking that something could be done better. The agile process can be modified to best suit the marketing team. On the other hand, we can consider forming an agile team only when each team member can fully commit to the sprint without falling behind on other responsibilities, alternatively a different team structure can be considered, new tools can be tested or WIP limits can be adjusted - all sorts of adjustments can be made that can help the team better implement agile marketing.

Under these conditions, the documentary research carried out is intended to provide an in-depth understanding especially of the benefits that can be obtained using the agile marketing perspective to obtain competitive advantage in a constantly changing environment and to serve as a guide in incorporating agile practice into the marketing planning process to more effectively achieve ever-changing marketing objectives.

[36] See D. Edelman, J. Heller, S. Spittaels, *Agile marketing: A step-by-step guide*, McKinsey and Company official website, 2016, *https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/agile-marketing-a-step-by-step-guide#/*, last time consulted on 25.07.2023.

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ASPECTS OF THE CIVIL SERVANT'S CAREER AND MANAGEMENT IN ROMANIA IN THE SARS-COV2 PERIOD

Narcis Dumitru BADEA[*]

Abstract

The institution of the civil servant emerged on its own in the 20th century and its importance is growing in all democratic countries.

And in Romania, even if it is subordinated to the political factor, the civil servant institution should be decentralised, politically neutral, with precise career management rules.

In democracies, civil servants need to be encouraged to take initiatives that reward their work and to have clear career development prospects that stimulate their creativity and make them not want to leave the job.

Civil servants are trained and specialised according to the areas of activity within the institutions, their specialisation requiring participation in courses appropriate to the stages of development of society and in correlation with the rules established by local, regional or European Union political factors.

This „public servants' joint-stock company", as a legal entity, has to cope with the economic and social environment, normal or exceptional conditions in a given period without disintegrating or going bankrupt with the help of a qualified career management, depending mainly on the local political factor, but also on the obligations assumed as an EU member.

The methodology of understanding the role of the civil servant in society could be more easily applied if the whole society were compared to a commercial company and its structure which would involve specialised departments through which the objectives of its existence and purposes are achieved efficiently and on time for the benefit of the shareholders and the population of a country.

It can be said that there are situations of normality in social existence, but also situations of exception (pandemics, major economic and social crises, wars, etc.), according to which both management and individual careers must adapt, especially in cases of force majeure.

Force majeure events can occur at local (country), regional (EU), or global level, with relatively similar implications.

Keywords: *management, development, activity, professionalism, costs, efficiency, reproduction, control.*

1. Introduction

Historically, professional careers developed subjectively within guilds, then within academic institutions and later under the control of state and political institutions.

Effective career development as a civil servant requires not only investment but also time, which implies the involvement of qualified management, depending on the state of normality or exception (pandemics, economic or financial crises, wars, etc.).

It is understood that each field of activity, productive, scientific, political, administrative, educational, etc., must have a specific career development management, determined by the present and future development of a society.

The economic and social development of an entity has required careers but also their management, so that they correspond to the needs of the moment, either of normal conditions, or of crisis, considering the possible consequences and consequences.

It can be said that each type of career has created another type of career management. The more a society evolves, the more it develops areas of activity, productive or political-administrative, which cannot be assigned without the appropriate qualifications, with the aim of maximising efficiency, also driven by the inevitable competition within the various activities.

2. Paper content

While for a long-time professional career depended on the efforts of each individual, with the development of society careers have become of major interest for all types of activities, which has led to the need for the

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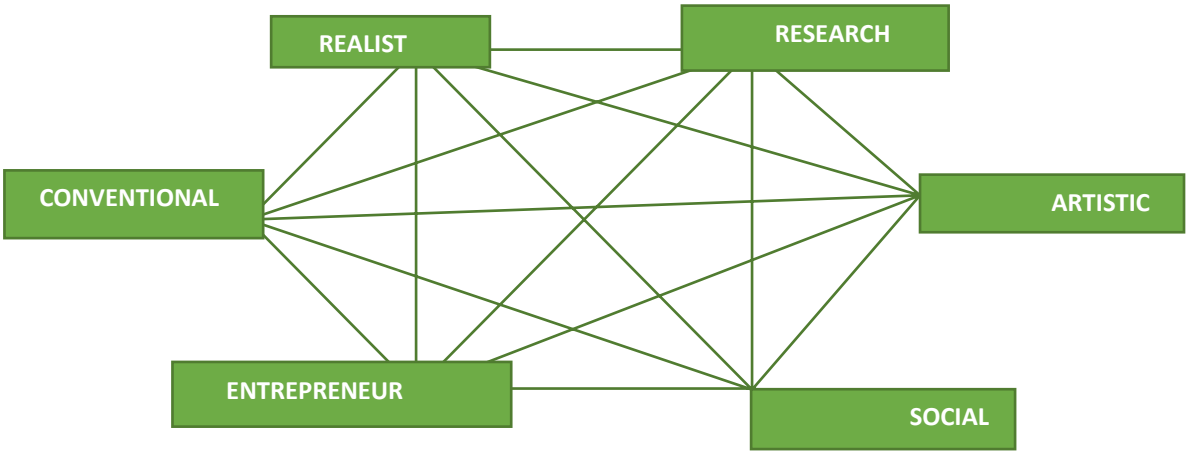
emergence of career management.

Schooling at various levels was a first way to establish a start in various fields, the costs were mainly up to the possibilities of each person, and then with the support of the authorities.

It can be represented graphically, by theorising career types according to the theory of „Holland".

Figure 1. Types of quarries



Holland

It can be said that career management is concretely evident in fields such as sport, fine arts, music, in many cases with the assumption of failures, more or less costly, caused by various exogenous factors, but the least risky are the careers that involve an accumulation of information from a particular field, without assuming innate talents, especially in non-creative fields, in production, either in industry or agriculture, as opposed to sectors where innate talents or special physical conditions are required. In all cases, career planning must also be considered, which offers both individual satisfaction and social recognition.

Career decisions are influenced by a few factors:

- or psychosocial (family, school, group of friends, labor market demand, „fashion of professions", prejudices related to certain professions;
- or individual (intellectual level, aptitudes, motivation, dominant personality traits).

In Romania, the National Authority of Civil Servants (ANFP), consequently under the influence of the government, as a political deciding factor would have the role of selecting and promoting in public positions, based on data submitted by human resources managers, under local or national factors. The ANFP's remit includes:

- management of public functions and civil servants;
- drafting legislation, policies and strategies for the management of public functions and civil servants;
- monitoring and controlling the application of legislation on the civil service, civil servants and the enforcement of rules of conduct in public authorities and institutions;
- providing expert assistance, on request, to the human resources departments of public institutions on the application of civil service legislation;
- developing competence frameworks;
- drawing up the annual report on the management of civil services and civil servants and submitting it to the relevant ministry;
- administration of the National Electronic Public Sector Employment System and the keeping of records of staff paid from public funds.

Once a civil servant, the person must comply with the statutes drawn up and approved by the government. The work of public officials is controlled and evaluated by each employing institution, as well as by specialised institutions (DNA, DIICOT, National Integrity Agency), and has an effect during election periods.[1]

Since 2020, the SARS-COV-2 virus pandemic, without knowing its origin, effects and treatments, has forced Romania to interact with EU Member States, either by applying regulations established by the European Union (vaccinations, green certificate, wearing of masks, special circuits in hospitals, etc.), with the involvement of authorities and family doctors and teachers.

[1] C.L. Butoi, C. Platon, *Career decision and factors influencing career choice*, in Journal of Educational Assistance no. 1/2012.

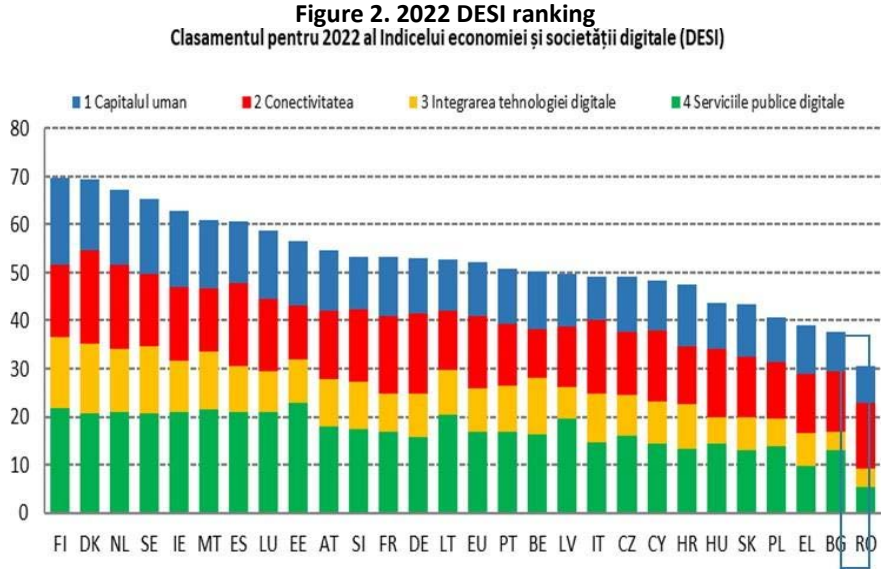
This pandemic has directly affected the national economy, the education system and human relations. The exceptional situation with the emergence of Covid-19 has required an increase in the responsibility of public institutions and public officials to ensure the limitation, spread and effects of the pandemic, taking regulatory and even legislative measures to achieve these goals.

The situation of force majeure established by the Covid-19 pandemic in Europe and Romania has imposed a decrease in direct inter-human relations, so that the need for digitization has arisen in some institutions with civil servants, supported by the fund from the Recovery and Resilience Plan for Romania (NRRP) with the appropriate equipping and training of civil servants.

While digitization is progress, the European Commission monitors Member States and publishes annual reports on the Digital Economy and Society Index (DESI), ranking countries according to their level of digitization and progress, taking into account their starting point. However, the European Commission's report shows that Romania will rank last in the EU in 2022, with the biggest gap.

At the same time, from the analysis of the data posted by the National Institute of Statistics on the platform dedicated to statistical databases in Romania, we find that in 2021 the share of people who interacted via the internet with public authorities was only 15%.

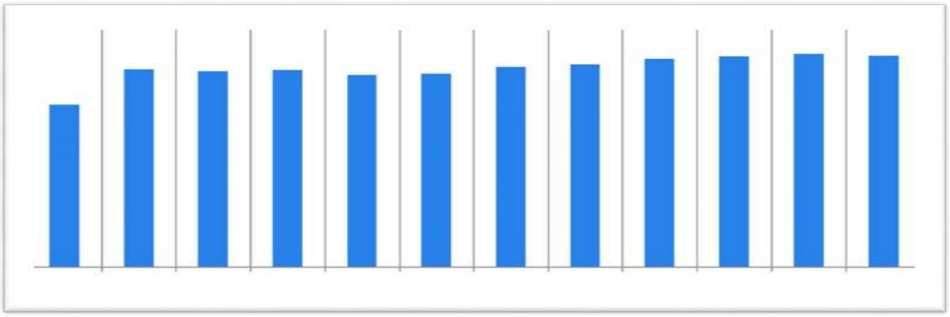
Figure 2. 2022 DESI ranking



ANFP https://www.anfp.gov.ro

The current problems in Romania's economic and social life have also required an increase in the number of civil servants as follows:

Figure 3. Evolution of the total number of civil servants (2009-2020)



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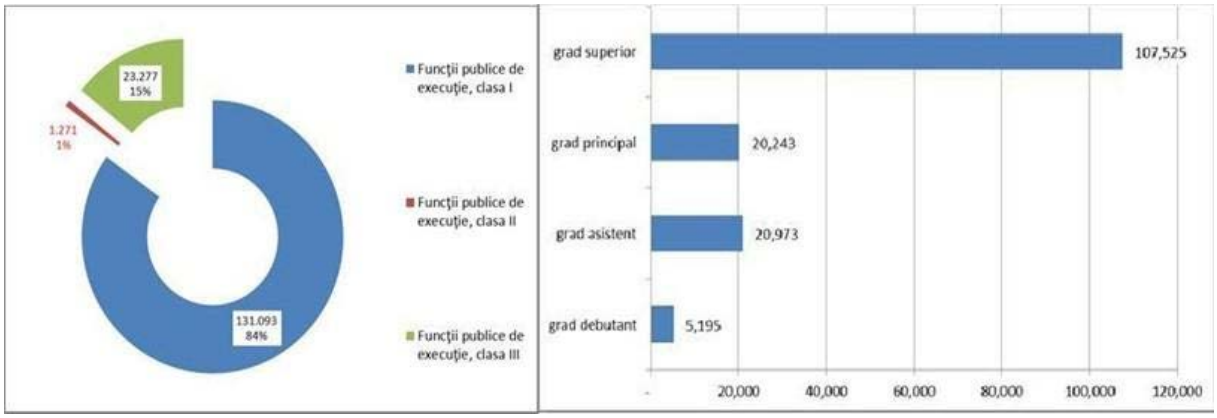
There is a substantial increase in the number of public employees by more than 40 thousand, either as a necessity to carry out service tasks, and between 2019-2020 1628 people were hired because of the Covid-19 pandemic, or staff shortages. Civil servants may be classified into the following categories of functions:

Figure 4. Distribution by grade of executive civil servants and professional grades



https://www.anfp.gov.ro

It is obvious that there is a program for the evolution of functions in public institutions through the recruitment of young professionals, with adequate training for the positions, for qualification on the job and through appropriate courses, as future professionals with increased responsibilities, in situations of possible crises (pandemics, state of war, regional financial crisis, global crisis, etc.).

The lack of principled cooperation and collaboration between the Ministry of Health and the Ministry of Interior in setting up actions and rules during the pandemic did not bode well for the economy, social life, and most citizens in Romania, due to restrictions imposed. As a result, very high costs were found for questionable sanitary protective materials. And in the case of the pandemic, the EU Council has imposed for all members that at least 40% of civil servants should be female, where possible.[2]

In Romania, the percentage showing the female dominance of the number of civil servants can be justified by the fact that civil servants are mainly involved in social actions and less in economic and production actions, but also by the limitations of the extra professional activities of male civil servants, who in most cases, being the head of the family, are more interested in obtaining a higher income.

The Covid-19 anti-pandemic programmes developed at the request of the European Union and the Romanian Government must be understood and implemented mainly by civil servants in all types of administrative institutions, at the level of municipalities, towns, communes and villages, which obliges civil servants to adapt to the political factor in charge of the country, as well as to each new requirement developed and approved by the EU Council, taking into account also the applications through digitization.

[2] D. Dincă, *Public Services*, Economică Publishing House, Bucharest, 2018, p. 26.

There are categories of civil servants between public services of an administrative nature and public services of an industrial and commercial nature, which are differentiated by the way they are financed, so that significant additional sums were allocated from the budget during the Covid-19 pandemic, in the interest and for the protection of citizens. According to the literature[3], the public interest means „the totality of interests expressed by a human collectivity with regard to the requirements of organisation, coexistence, social welfare, health, etc.".

For the career development of the civil servant of basket must be trained regularly, through various means, to take cognizance of the programs instituted by the government and implement them properly, this variability is not optional for the civil servant, also valid in the case of the Covid-19 pandemic.

The career and management of the civil servant is decisively influenced by the political factor, currently in charge of the country, which he/she must serve in the implementation of various socio-economic development programmes, approved by ordinances or laws issued by the parliament.

3. Conclusions

It follows from the above that the management and the career of the civil servant are determined by the political factor and, secondarily, by intellectual training and work experience.

The specificity of the activities assigned to civil servants in Romania has highlighted the promotion of women in public office.

EU legislation influences and obliges the Romanian state to adopt rules and laws that determine functions and obligations for new activities of civil servants, as a result of new public institutions, also taking into account cases of force majeure.

Consequently, civil servants must continuously adapt their professional training, for which their management is of particular importance through the selection of staff and the organisation of appropriate and timely regular information courses, retraining and promotion of civil servants on objective criteria.

For this, the national and local budgets must quantify the amounts needed to update their professional training, but also with the funds made available by the Recovery and Resilience Plan (NRRP).

I believe that the Ministry of National Education should also include in its programmes the importance of the activities of civil servants and how to interact with individuals.

Civil servants' services should, where possible, be digitised, which would require appropriate investment, maximising benefits and appropriate training for civil servants.

In many cases, the work of civil servants is not carried out in compliant locations/seats and optimal solutions should be found.

Democratic countries establish specific legislation for civil servants who can play a special role in the social and economic development of society, as long as the political factor is progressive enough to cope with force majeure situations.

Civil servant career management must create conditions so that civil servants do not want to become workers in private companies.

Proposals. The management of civil servants' work should also consider a friendly and decent collegial atmosphere in the workplace for each team, in order to prevent conflicts between civil servants, which is the responsibility of the leaders of the respective institution.

The promotion of civil servants should be based on principles of respect for professional competitiveness that do not provoke dissension in the collective, without taking into account the involvement of the conjunctural political factor.

Civil servants who do not fit into the collective, or who do not demonstrate collective performance and workload should be excluded, subject to the legislation in force.

The extent to which personal professional training has increased through personal efforts (master's, doctorate, specialisation courses) should be recognized by management and encouraged/rewarded.

The services as a public servant must be performed with professionalism, dedication, and helpfulness, so that the public servant enjoys respectability in society.

The activities of civil servants should not be competitive within the same institution/service, but in positive competition with other territorial institutions.

Development of education and qualification plans for future specialised civil servants. Regular review of pay and reward systems and criteria for civil servants.

[3] E. Prahoveanu, A. Matei, *Economics and Economic Policies*, 3rd ed., revised and added, Economică Publishing House, Bucharest, 2005, p. 172.

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COMMON SELF-EVALUATION FRAMEWORK (CAF) FOR THE EDUCATION SYSTEM

Alexandra IANCU[*]

Abstract

Public administrations are faced with a variety of challenges, contexts and circumstances, including social problems and social exclusion caused by financial and economic crises, low levels of trust in politicians and public institutions, demographic changes, the rapid development of information and communication technologies and the development of a differentiated civil society with new information and communication needs, which require inclusion in active policy formulation and decision-making.

All Member States have established cooperation between different levels of government and institutions dealing with the quality of universities, public administration institutes and private organisations. Despite all the common features of an established organisational structure for promoting quality, there are significant differences between the actual organisational units of the counties and the way they cooperate with other actors in the field of quality management.

Keywords: *CAF education, public sector, performance.*

1. Introduction

In almost all Member States, quality management training is considered not only very important but also essential for the successful implementation of quality. In some countries, total quality management experts and experts from specific sectors have started to develop CAF versions for their sectors such as local government (Belgium), justice (Italy) and others. In most cases this has been done at the national level.

At some point, the CAF Resource Centre was informed that some countries had developed a CAF version specific to the education sector. First the Belgian French-speaking Community informed about their CAF version on education and training institutions, training. They created a working group of 5 education and training experts who reflected during several meetings on the adaptation of the CAF for their sector. The group was chaired by the national CAF correspondent in Belgium, Jan Marc Dochot. Their work contributed greatly to the development of the CAF in education.

In Norway, Even Fossum Svendsen developed examples and documentation adapted to the education sector at county level. In Portugal the work on developing CAF for the education sector has been done at university level. In Italy there have been experiences of this kind carried out by regional offices in schools in Lombardy and Veneto.

The coordinating group for the development of the CAF model for education consists of the Ministry of Public Administration, the Ministry of Education, FORMEZ, INVALSI (Centre for the Evaluation of Educational Achievement), TQM experts, school managers from the north, centre and south of Italy who were selected on the basis of their experience in using CAF.

The CAF version for the education and training sector is designed for all education and training institutions, at all levels, from pre-school to higher education and lifelong learning in Europe. This document was discussed in Maastricht on 18 February and endorsed by the Innovative Public Services Group (IPSG) - the EUPAN working group responsible for all CAF activities at its meeting in Madrid on 19 and 20 April 2010.

The International Commission on Education for the 21st century characterises education, in its Report to UNESCO, as the essential pillar in the formation of a strong, innovative and democratic society, reaffirming the importance and the role of quality education, and the idea that through education the beneficiaries of education build their own value system through the knowledge they assimilate on a daily basis, that education contributes to reducing discrimination, promotes equality of opportunity and emphasises the development of the necessary skills of the beneficiaries of education so that they can develop their full potential and face the demands of a changing future.

This conceptualisation of education has provided a comprehensive integration and perspective on the importance of the education sector at European and global level, and therefore also on the importance of quality of education. It was concluded that at the level of the learning system, there is a need for a supportive guiding

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structure, a model, to ensure and standardise the quality of the European education sector, to standardise policies and related legislation in the field of quality in education, in order to achieve results and performance in this sector of utmost importance for the present and future society.

2. Adapting the CAF for VET institutions: why?

The CAF was originally designed for use in all areas of the public sector. So it is a tool that may be interesting to apply to the education sector. The year 2010 was the deadline imposed by European education ministers to complete the Bologna process, a process based on the Declaration that triggered the harmonisation of European education in 1999.

The Bologna Declaration committed to promote European cooperation in quality assurance with the aim of developing comparable criteria and methodologies.

Bergen Declaration (2005) - establishing a European Higher Education Area (EHEA) based on the principles of transparency and quality.

In 2008, a number of CAF national correspondents and/or education experts in different countries - based on the extensive use of the model in the education sector in a number of Member States, as well as subsequent adaptation at national level by Belgium, Italy and Norway - decided to join forces with a twofold objective. On the one hand, CAF experts wanted to increase the number of CAF users, and on the other hand educational institutions wanted to implement harmonised European quality management such as learner-centredness (see London Declaration 2007).

We are in favour of a common European approach in the public sector that is easily accessible and free of charge.

At European level the Innovative Public Services Group (IPSG) - EUPAN has mandated, empowered a working group to develop a CAF version for the education sector based on the experience of the Member States. CAF and education are intended for all education and training institutions, regardless of their level. It ranges from pre-school level to higher education and lifelong learning.

3. What's new?

1. Adaptation of the language - we will use „students" instead of „citizen-customer" and „education and training institutions" instead of „public organisations".

2. Adapting the terminology: creating a glossary of revised terms.

3. Integration of 2 additional documents: an introduction on the use of CAF and TQM and European education policy.

4. The initiative to start a quality approach using CAF must be based on a clear decision from leadership to consultation of all people in the institution. Self-assessment according to the CAF model gives the education and training institution the opportunity to get to know itself better in terms of quality management.

4. Analysis of the CAF Education Model

Criterion 1. Leadership. The behaviour of an institution's leaders can help create a clear and unified purpose. Leaders provide direction to the institution. They develop the mission, vision and values necessary for the long-term success of the institution. They motivate and support people in the institution and act as role models by adopting appropriate behaviour in line with the institution's values.

Leaders develop, implement and monitor the institution's performance management system and review results. They are responsible for improving performance and preparing for the future by making the changes necessary for the institution to achieve its mission. In education and training, leaders are the main interface between the institution and the political sphere, but they also have the role of sharing responsibilities while maintaining unity in the institution. They are responsible for managing relationships with other stakeholders.

In addition to their own values, specific to education, training institutions share a number of common values such as: social and human development through knowledge, training the skills and capacities needed to take up the challenges of the new millennium.

A distinction must be made in the education and training sector between the role of political leadership and those who run the educational institution. The CAF focuses on the evaluation of the management system of the education and training institution rather than on the 'quality' of education policies.

The leaders of an educational institution create the optimal conditions for the institution to adapt to the ongoing changes taking place in society. They do this by looking for opportunities for innovation and modernisation and by actively integrating electronic solutions in administration (e-gov).

Criterion 2. Strategy and planning. Through the effective combination of its interdependent activities, an education and training institution contributes to its overall performance. The institution implements its mission and vision through a clear stakeholder strategy, aligning public education and teaching policies and objectives on the one hand, and stakeholder needs on the other. This strategy is underpinned by continuous improvement in the management of resources and processes and translated into measurable plans, objectives and targets.

The planning and strategy reflect the institution's approach to how to implement modernisation and innovation.

Strategy and planning are part of the PDCA (Plan, Do, Check, Act), starting with the collection of information on the present and future needs of stakeholders, and by analysing past results and their impact. This includes the use of reliable information, including the perception of all stakeholders.

Feedback from the internal review process is also fundamental to producing the planned improvements in institutional performance.

Identifying critical success factors - the conditions that must be met to achieve strategic objectives - target setting plays a crucial role in ensuring an effective system for tracking and measuring results.

Objectives should be formulated in such a way as to distinguish between outputs and outcomes.

Institutions should consistently and critically monitor the implementation of their strategy and planning and update and adapt them whenever necessary.

Criterion 3. Employees. How people interact with each other and manage resources and availability ultimately determines institutional success. Respect, dialogue, empowerment and a safe and healthy environment are fundamental in getting people engaged and participating in the institution's efforts to achieve excellence.

The education and training institution manages, develops and communicates its competences and potential through the people it has both individually and institutionally to support the strategy and action plan for the effective operation of its processes.

Criterion 3 looks at how the institution links its strategic objectives to its human resources so that these resources can be identified, developed, allocated and managed to achieve their optimal use and intended success.

It follows that particular attention must be paid to the implementation of human resource management so that there are benefits on both sides: for the institution and for the employees.

Employee well-being is an important aspect of management. When education and training institutions create the framework for employees to continuously develop their skills, take more responsibility and initiative, they contribute to the development of the institution. This can be achieved when there is a link between their own performance goals and the institution's strategic objectives and when they are involved in setting the institution's policies on recruitment, training, recognition and rewarding the merits of employees.

Criterion 3 focuses on the ability of managers and employees to actively cooperate for the development of the institution, to break down hierarchical barriers through dialogue, to create an environment conducive to creativity, innovation and suggestions for performance improvement. All these elements contribute to increased employee satisfaction.

The proper implementation of HR policies depends on all leaders and department heads across the institution demonstrating that they care about people and their issues and actively promoting a culture of open and transparent communication.

Institutions may, in assessing their performance, take into account the restrictions on their freedom of action arising from education and training and employment policies.

Criterion 4. Partnerships and resources. The way in which the educational institution through its learning plans as well as the management of key partnerships (especially with learners) supports its strategy, action plans and the effective functioning of its processes. In this way, partnerships are important resources for the proper functioning of the education and training institution.

Alongside partnerships, institutions need more traditional resources - such as financial, technological and material - to ensure their effective functioning. These are used and developed to support the institution's strategy and its most important processes to achieve the institution's objectives in the most effective way. Presented in a transparent way, the Institution can ensure accountability to stakeholders on the legitimate use of available resources.

In an ever-changing society of increasing complexity, institutions are obliged to manage relationships with other organisations, both public and private, in order to achieve their strategic objectives.

Another consequence of this complex society is the need to increase the active role of citizens/customers as key partners. In the world of education and training, citizens/customers are students, or their legal representatives; parents, guardians, etc. The term „citizens/customers" refers to the role of citizens „ranging

between stakeholders and the service user". In this criterion, the CAF focuses on involving citizens in public affairs and in the development of public policies by being open about their needs and expectations.

Public organisations are often subject to constraints and pressures that are far greater than those normally found in the private sector. The ability of public organisations to generate additional financial resources is limited as is their freedom to allocate, or reallocate, their funds to the services they wish to provide. It is therefore essential that they measure the efficiency and effectiveness of the services they provide.

In this respect, sound financial management and the existence of internal control and accounting systems are the basis for proper costing. Even though public institutions often have little influence in allocating resources by demonstrating their ability to deliver more and better services at lower cost, they create the opportunity for innovative services to be implemented more quickly.

An important resource is the amount and quality of information the institution has available. It is therefore important that information and knowledge needs are identified and used to support the strategy and planning review/evaluation process. The institution must provide employees with the knowledge and information they need to work effectively in a timely and accessible manner. The institution must ensure that it provides essential knowledge and information with key partners and stakeholders in line with their needs.

Evaluation:

4.1. Development and implementation of key partnership relationships

4.2. Development and implementation of partnerships with learners

4.3. Financial management

4.4. Information and knowledge management

4.5. Managing technological resources

4.6. Managing facilities

Criterion 5. Processes. How the institution identifies, manages, improves and develops its key processes to support strategy and planning. Innovation and the need to generate increasing value for learners and other stakeholders are two of the main factors in the development process.

Key implications

Every institution's performance is driven by several processes, each process being a set of consecutive activities that transform resources or inputs into outputs or outcomes thereby increasing value.

These processes can be of a different nature:

- Core processes are those related to the mission and purpose of the institution and are essential to the delivery of goods and services;
- Management processes relating to the leadership of the institution;
- Supporting processes for the delivery of required resources.

Only the most important, key processes are subject to evaluation in the CAF.

Identifying, evaluating and improving key processes is effective to the extent that they contribute to the achievement of the mission of the educational and training institution. Involving students and other stakeholders at different stages of the management process taking into account their expectations contributes to the overall quality and reliability of its processes.

In the field of education and training, examples of goods and services include: qualifications such as certificates and diplomas, national and international conferences, lifelong learning programmes, libraries open to the general public. The main outcome for an education and training institution is that an individual has acquired competences and skills - possibly certified ones - and is able to find employment and integrate into society - as well as training through lifelong learning and self-development. In order to achieve this mission (strategic plan), education and training institutions must implement a number of key processes, including:

a) Essential processes:

- the education and training process (structures, programmes, methods, on-the-job, training and apprenticeship, assessments, individual projects, etc.);
- civic process (attitudes, values, citizenship, participation, etc.);
- research and development and applied research processes (extension of study activity, use of institutional quality assessments, basic research, etc).

b) „Support" processes:

- external communication processes (publicity, shows and exhibitions, open days, websites, media, etc);
- staff recruitment process (selection, retention and development of skills, etc);
- administrative management process (registration, enrolment, filing and records management, organisation of courses, etc);
- career guidance and support process;

- budgeting process.

c) Managerial processes:

- measurement or evaluation processes for the various stages of the core and support processes;
- decision-making processes.

Monitoring how these different processes work is important to maintain an overall and integrated view of the functioning of the institution.

Some management and support processes are not always key processes, except in times of crisis or emergency (*e.g.*, violence control and prevention measures, budget preparation, restructuring, etc.).

In the case of support services (resource management), the identification of key processes will depend on how they contribute to the achievement of the institution's core processes and strategy. In all cases, an institution must be able to identify the key processes, which it carries out in order to deliver the expected results taking into account the expectations of students and other stakeholders.

Results

Criterion 6. Beneficiary/client-oriented results. The institution's outcomes are the satisfaction of its citizens/customers - students and other stakeholders with the products/services it provides.

Key Implications

Education and training institutions can have a complex relationship with the public. In some cases, this can be characterised as a customer relationship whereby learners are beneficiaries of education and training services. In other cases, it is characterised as a relationship with the citizen, as the education and training institution defines a framework in which learning is transmitted to members of society (compulsory schooling until the age of 18, leads to socio-professional integration, transmission of values, etc.). As the two cases are not always clearly separable, this complex relationship will be described as a citizen/customer relationship. In the field of vocational education and training, we use the term „learn" in view of the duality of this relationship.

In the case of education and training institutions, the concept of „citizen/customer" includes learners as well as other stakeholders (parents, employers). Education and training institutions provide services in accordance with local and/or central government policy (sometimes within different networks and under different organising authorities), and are accountable for their performance as policy actors. Measurement of learner and other stakeholder satisfaction is usually based on areas that have been identified as important by learner groups and is based on what the institution is able to improve in its specific area. It is important for all education and training institutions to directly measure the satisfaction of learners and other stakeholders in terms of, for example:

- overall image of the institution;
- level of academic qualifications and achievements;
- matching of qualification profiles to the requirements of the educational and socio-economic environment;
- quality of education and training processes;
- transparency of the institution;
- involvement of students and other stakeholders.

Institutions usually use questionnaires or satisfaction surveys, but they may also use other complementary tools such as focus groups.

6.1. Results of measuring citizen/customer satisfaction

6.2. Indicators measuring citizen/customer orientation

Indicators related to the overall image of the institution.

- Number and processing time of complaints;
- Degree of public confidence in the institution (*e.g.*, student loyalty, population growth, number of students taken on by employers, etc.);
- Waiting times in the secretary's office and other departments;
- Document management and processing time (certificates, files and records, student cards, etc.);
- Importance placed on staff training to improve professional skills and communication with students and other stakeholders (number of days, budget, scheduling, etc.);
- Indicators of respect for diversity as well as cultural and social diversity of staff/teacher and learner training;
- Number of ombudsman interventions - where this service exists;
- Opportunities to move to higher levels, to achieve social promotion

Indicators relating to involvement

- Degree of involvement of learners and other stakeholders in the design and content of training and/or design of decision-making processes;
- Number of suggestions received and adopted;
- Implementation and degree of use of new and innovative modalities in dealing with students and other stakeholders.

Indicators related to accessibility within the institution

- Openness and waiting times in different departments, cost of services, quantity and quality of accessible information, website, and importance given to access and facilities, etc.

Indicators relating to transparency of processes :

- Number of complaints and appeals;
- Number and effectiveness of information channels.

Indicators relating to skill levels and achievements:

- Number of students reaching higher education level;
- On-the-job training/placement success rate;
- Employment rate after training;
- Number of learners continuing with lifelong learning.

Indicators of teaching in relation to / training activities and other services:

- Compliance with published service standards (*e.g.*, social and cultural projects, educational projects, quality charter, etc.).

Criterion 7. Employee outcomes. The outcomes of the education and training institution are the achievements in relation to the competence, motivation, satisfaction and performance of its people. The terms 'people', 'staff' or 'employees', indicate all administrative staff, teaching/training staff and psycho-socio-medical, scientific and technical workers.

This criterion refers to the satisfaction of all people in the institution. Institutions usually use surveys to record satisfaction, but they may also use other complementary tools such as focus groups, interviews or exit evaluations. They may also examine people's performance and level of skills development.

Sometimes external constraints can limit the institution's freedom in this area. Constraints and how the institution overcomes or influences constraints should be clearly stated. It is important for all types of education and training institutions to record directly the results relating to the image of the institution's employees and its mission, the working environment, the institution's leadership and management systems, career development, personal skills development and the institution's products and services. Education and training institutions should have a set of internal performance indicators linked to people that measure their performance against people's goals and expectations, their overall satisfaction, their performance, their skills development, their motivation and their level of engagement with the institution.

Consider the results the institution has achieved in meeting the needs and expectations of learners and other stakeholders, by

7.1. Overall people satisfaction outcomes:

Results on satisfaction with leadership and management systems:

- The institution's governance capacity (*e.g.*, goal setting, resource allocation) and communication;
- Rewarding individual efforts and teamwork;
- The institution's approach to innovation.

Results on satisfaction with working conditions:

- Working atmosphere (*e.g.*, how to deal with conflicts, grievances or personal problems) and general culture of the institution (*e.g.*, how to deal with and encourage exchange between different departments, categories, faculties, etc.);
- Addressing social issues (*e.g.*, working time flexibility, work/life balance, health, workplace comfort);
- Equality of opportunity and equity of treatment and behaviour in the institution.

Outcomes related to motivation and job satisfaction and skills development:

- Ability to lead and promote a human resource management strategy, encourage systematic development of capacity and skills and understanding of the institution's goals and objectives;
- Results in people's willingness to accept change;
- Measure of employee involvement in the institution's extra-curricular activities

7.2. Indicators relating to people's outcomes

Criterion 8. Outcomes related to society. Education and training outcomes are the achievement of meeting the needs and expectations of the local, national and international community. This may include the perceived approach of the institution and the contribution to improving the quality of life, the environment and the

conservation of global resources.

Vocational education and training institutions have an impact on society by the very nature of the services they provide and the outcomes of these core activities have an impact on direct and indirect beneficiaries. The analysis of immediate impacts on beneficiaries should be presented in line with criterion 6 (satisfaction of learners and other stakeholders) and criterion 9 (key performance-related outcomes).

Criterion 8 will measure the intended or unintended impact on society, i.e. the overall effects of the institution's policies beyond its primary missions or core activities. In doing so, the analysis will take into account impacts derived from planned objectives as well as unintended consequences, e.g. adverse effects that may have positive and/or negative impacts on society.

Measures cover both qualitative measurement of perceptions and quantitative indicators.

They can be related to:

- Economic impact;
- Social dimension, e.g. people with disabilities;
- Quality of life;
- Environmental impact;
- Quality of democracy.

Evaluation:

Consider what the institution has achieved in terms of impact on society, with reference to:

8.1. Results of social measurements perceived by stakeholders/stakeholders

8.2. Social performance indicators set by the organisation.

Criterion 9. Key performance results. The outcomes of the educational institution consist of the achievement of strategy and planning related to the needs and demands of different stakeholders/stakeholders (external outcomes); and its management outcomes and improvements (internal outcomes).

Key performance outcomes refer to the institution's key measurable achievements related to the institution's short and long-term success. They represent the capacity of policies and processes to achieve the goals and objectives as defined in the institution's strategic plan.

Key performance outcomes can be divided into:

1. External outcomes: measures of the effectiveness of policies and services/outputs in terms of their ability to improve the condition of direct beneficiaries: the achievement of the objectives of key activities' (see criterion 5) in terms of outputs (services and products) and outcomes (results). The 'product/output' of the education and training institution may be the graduation of the student and the 'outcome' is socio-vocational integration (effectiveness),

2. Internal results: measures related to the internal functioning of the institution: its management and improvement of financial performance (efficiency and economy). These measures are likely to be closely linked to policy and strategy (criterion 2), partnerships and resources (criterion 4) and processes (criterion 5).

Assessment:

Consider evidence (e.g. through indicators) to define the objectives achieved by the education and training institution in relation to:

9.1. External outcomes: achievements and outcomes related to objectives

9.2. Internal results

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CHALLENGES OF ECOLOGICAL MODERNIZATION IN EU'S EASTERN PERIPHERY. THE CASE OF ROMANIA

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Abstract

The need for urgent actions regarding the worsening climate crisis has been stressed over and over again through campaigns, reports, international conferences and treaties regarding climate, there are various discussions regarding the best ways to mitigate the crisis and strategic actions are taken at various levels, from local to national and international. But unfortunately, there is still not a clear and cohesive effort to address the climate crisis at a global level, and therefore the many local and national initiatives have little impact in terms of decreasing or reversing the effects of climate change. Thus, one can note that the different approaches to the climate issue by various states are shaped by their particular economic and infrastructural development. In this respect, we can understand the climate action not as a sort of a reductionist policy in relation to the classic coal and petroleum-based economy, but as a strategy of ecological modernization. From this perspective we are asking what are the challenges of ecological modernization for a particular category of states - the post-communist periphery of the European Union, such is the case of Romania, which is, alongside Bulgaria, one of the least developed countries amongst the post-communist camp. We will try to explore the way in which Romania is trying to shape its 21st century strategy for eco-modernization and how, at the same time, it's trying to fall in line with the European requirements that the EU assumed as a part of the Paris Agreement and through the European Green Deal. Therefore, in our paper we are trying to answer the following questions: how is Romania dealing with its post-communist industrial past in terms of eliminating sources of pollution, switching to sustainable energy and designing public policies aimed to engender a greener economy? What is the role the Eu should play in relation to its less developed members? We are planning to address the above mentioned questions by using Joseph Huber's theoretical framing of the concept of ecological modernization, and also Martin Jänicke's approach to the concept to provide a better understanding of the challenges faced by Romania in its struggle to tackle the climate crisis, and of the ways in which these can be successfully mitigated by the Romanian authorities.

Keywords: *ecological modernization, Romania, Paris Agreement, EU periphery, climate crisis.*

1. Introduction

For the last several decades the scientific community along with a plethora of environmentally conscious civic actors throughout the world have tried to raise global awareness regarding a worsening climate crisis that could put into question the very survival of our species. And the sense of urgency cannot be more pregnant than after the UN's Intergovernmental Panel on Climate Change sixth assessment report released in August 2021. The data is showing that the situation is more dire than previously thought - now we cannot act to reverse the global climate warming, we can only try to limit its effects and to find adequate mitigation strategies that would hopefully enable us to adapt and survive through the crisis. According to the IPCC report, in spite of all our future efforts, the 1.5° Celsius global warming threshold will be reached within the next two decades. Nevertheless, if we continue to fail to act swiftly and on a global scale, then the warming process would continue to as much as 4°C. What can still be achieved through collective global action is to stop the process under 2°C by halting all carbon emission until 2050[1].

The Paris Agreement signed by 194 states and organisations represented an important step in the right direction in terms of reducing the carbon output and try to keep the global warming process under 2°C. The member states have so far taken only timid steps in implementing the accord, perhaps the best example being

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[1] IPCC: *Climate Change 2021: The Physical Science Basis*. *Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. 2021, Cambridge University Press.

the fact that, until 31st of December 2020 only 74 states submitted their Nationally Determined Contributions (NDC)[2]. The NDC's are meant to reflect the strategic actions taken by every country part of the Paris Agreement in order to achieve the goals on emissions and to adapt to the impacts of climate change[3]. But, in all fairness, we have to admit that the implementation process of the Paris Accords was first and foremost hindered by two other important factors that have to be acknowledged here - firstly, the 2017 United States withdrawal from the treaty and secondly, the emergence of the Covid-19 pandemic that significantly delayed the national processes required by the agreement's implementation. The US withdrawal under then president Trump clearly was a demagogical and irrational decision that was made under domestic political reasons fuelled by Trump's populist rhetoric[4] and it had been seen at the time as a „historic mistake"[5]) and a major setback in the fight against climate change, since the US is one of the most significant emitters of greenhouse gases in the world. After the November 2020 elections the new US president Joseph Biden rejoined the Paris Accord as soon as he was sworn into office, in February 2021, thus reestablishing the US as a leader in climate change action.

Similarly, the Covid-19 global pandemic had a major impact on both world economies and the implementation of the Paris climate agreements. The global economy already shows to be in a deep recession caused by the pandemic, global economic growth in 2020 was reduced to a rate of -3.2%, global trade fell by 5.3% [6]) and, as the pandemic continues, nowadays the world market is plagued by the crisis of the global supply chains which affects not only consumption, but also the manufacturing processes across the world. Ironically, the economic contraction had some beneficial effects on climate, a number of studies showing that global greenhouse emissions in 2020 dropped significantly[7]. Not the same can be said in regard to the Paris Agreement implementation process though. The Covid-19 pandemic seriously hindered the national efforts of the signing parties to meet the Paris criteria and to fulfil the obligations required by the agreement. Thus, as stated above, many countries failed to advance their NDC's and ultimately, the 26th Glasgow Conference of the Parties (COP26), central for advancing the climate agenda, was postponed for one year, to 31 October-11 November 2021. At the same time, the economic impact of the pandemic sparked another very important discussion, regarding the need to correlate the fiscal and relief policies such as bailouts with the Paris Agreement criteria. In this respect, the stimulus packages should be target solely towards companies and businesses that are compatible with the Paris Accords - these government policies can therefore support and encourage already existing desirable good business practices and also stimulate the adoption of new ones, such as clean investments, green restructuring and so forth, and using green energy and technologies[8]. Unfortunately, this still remains a theoretical debate that up to now has failed to have any concrete outcomes in terms of real-world policies that would condition the access to relief funds to a commitment to the Paris Agreement criteria.

Nevertheless, in spite of its shortcomings, the Paris Agreement represents in our opinion a minimal and useful framework that could guide or inspire further action on climate change at a state level. But limiting the anthropogenic emissions and increasing the ability to adapt to climate change poses a different set of challenges depending on the case and, more specifically, on the degree of development. Some states need to take ample measures in order to limit their emissions, due to their manufacturing industries and transport infrastructures (as is for example the case of the US and China), while others need to focus more on their specific ways of dealing with the effects of the climate change (such is the case of many of the Pacific island-states). Similarly, the developing states have different capabilities and needs in regard to the abovementioned criteria, therefore are facing very different challenges than the developed nations (fact recognized in the art. 3 of the Paris Agreement)[9].

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[2] United Nations, Framework Convention on Climate Change, *Nationally determined contributions under the Paris Agreement*, p. 4, available at Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat (unfccc.int), accessed May 2, 2024.

[3] United Nations Framework Convention on Climate Change, *Paris Agreement*, art. 4 para. 2, document available at Paris Agreement English (unfccc.int); accessed May 2, 2024.

[4] L. Hermwille, L. Sanderink, *Make fossil fuels great again? The Paris Agreement, Trump and the US fossil fuel industry*, Global Environmental Politics, 2019, 19:4, p. 46.

[5] J. Bordoff, *Withdrawing from the Paris climate agreement hurts the US*, in Nature Energy 2017, 2(9). 17145, p. 1.

[6] *World Economic Outlook Update*, International Monetary Fund, 2021, p. 6.

[7] See Z. Liu *et al.*, *Near-real-time monitoring of global CO2 emissions reveals the effects of the covid-19 pandemic*, in Nature communications, 2020, 11(1), p. 1-12; *Global Energy Review 2020. The impact of the Covid-19 crisis on global energy demand and CO2 emissions*, IEA Publications, 2020, pp. 3-52.

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From this perspective we are asking what are the challenges of ecological modernization for a particular category of states - the post-communist periphery of the European Union, such is the case of Romania, which is, alongside Bulgaria, one of the least developed countries amongst the post-communist camp. We will try to explore the way in which Romania is trying to shape its 21st century strategy for eco-modernization and how, at the same time, it's trying to fall in line with the European requirements that the EU assumed as a part of the Paris Agreement and through the European Green Deal. Therefore, in our paper we are trying to answer the following questions: how is Romania dealing with its post-communist industrial past in terms of eliminating sources of pollution, switching to sustainable energy and designing public policies aimed to engender a greener economy? What is the role the Eu should play in relation to its less developed members? We are planning to address the above mentioned questions by using Joseph Huber's theoretical framing of the concept of ecological modernization, and also Martin Jänicke's approach to the concept[10] to provide a better understanding of the challenges faced by Romania in its struggle to tackle the climate crisis, and of the ways in which these can be successfully mitigated by the Romanian authorities. Thus, we are going to look, in a contextualised manner, at Romania's institutional response stated in the *Integrated National Energy and Climate Plan 2021-2030* released on April 2020, and also at the European Commission's evaluation of it, in order to get a clear image of the Romanian approach to the climate crisis and of the way in which the Romanian authorities are assessing the specific challenges that they are facing in this respect.

2. Ecological modernization and the fight against climate change - a theoretical perspective

Ecological modernization theory originates in the work of Joseph Huber[11], who understands it as a transformative step of industrialization. In the tradition of classical modernization theory initiated by W.W. Rostow in 1960[12], Huber denounces what many saw as the antagonism between industrialization and environmental protectionism, considering that technological innovation is the vector for a successful transition to a sustainable economy - „industry and business are looking for a strategy that would allow for further economic growth *and* ecological adaptation of industrial production at the same time"[13]. Thus, he argues that, from an ecological modernization theory standpoint, the old strategies of efficiency and sufficiency employed in industry should now be complemented by a strategy of consistency meaning „the transformation of traditional industrial structures, which are often environmentally unadapted, to an ecologically modernised, consistent industrial metabolism implies major or basic technological innovations, not just incremental efficiency-increasing change and minor modifications of existing product chains"[14]. As a result, the theory and policies of ecological modernization are synthesised in six core theses: 1. The pivotal component of ecological modernization is advanced technology[15] - these technological environmental innovations cover vast areas such as: regenerative energy (wind, solar, hydro, tidal and so forth), substituting clean electrochemical fuel cells for pollutant furnaces and combustion engines, zero-emission power-plants on the basis of integrated gasifier combined cycle technology and carbon capture and storage in order to produce hydrogen and electricity simultaneously, making use of advances in biochemistry in order to make use of genetically modified enzymes and micro-organisms to replace the conventional high-temperature high-pressure chemistry that is affecting the environment, replacing hazardous chemicals with more benign low-impact substances, bio feedstocks partially replacing fossils as a raw material, new materials with enhanced properties (such as ultra-light or ultra-durable etc) which reduce volumes of conventional materials and energy, nanotechnology and micromachines with a smaller environmental impact replacing large conventional machines and chemical production, sonar, photonic and microfluidic analyses substituting for conventional methods involving hazardous ingredients, and improving quality and performance of production, introducing sound ecological practices in agriculture, in combination with high-tech precision farming and green transgenics[16]; 2. The most important pre-condition of eco-innovation is stringent regulation - the stringency of environmental standards and regulations, doubled by a strictness of regulatory enforcement are seen as playing a crucial role in determining environmental performance[17]; 3. Environmental innovation takes

[10] *Ibidem*.

[11] See: J. Huber, *Die Regenbogengesellschaft: Ökologie und Sozialpolitik* (The Rainbow Society: Ecology and Social Politics), Fisher Verlag, Frankfurt am Main, 1985; J. Huber, *Towards Industrial Ecology: Sustainable Development as a Concept of Ecological Modernisation*, in Journal of Environmental Policy & Planning, 2, 2000, pp. 269-285.

[12] W.W. Rostow, *The Stages of Economic Growth. A Non-Communist Manifesto*, 1960, Cambridge: Cambridge University Press; W.W. Rostow, *Politics and the Stages of Growth*, 1971, Cambridge: Cambridge University Press.

[13] W.W. Rostow, *Politics and the Stages of Growth*, *op. cit.*, p. 269.

[14] *Idem*, p. 270.

[15] J. Huber, *Pioneer countries and the global diffusion of environmental innovations: Theses from the viewpoint of ecological modernisation theory*, in Global Environmental Change 18, 2008, p. 360.

[16] *Idem*, p. 361.

[17] *Ibidem*.

place in lead markets of pioneer countries - Huber underlines the importance of emerging lead markets in eco-innovation, in what he calls pioneer countries that benefit from the presence of a progressive government, pioneering science and technology and pioneer companies[18]; 4. Despite globalisation, environmental policy and technological innovation remain dependent on individual pioneer countries, while global environmental regimes have proven to rarely be suitable points of departure for developing technological environmental innovation[19]; 5. Internationally active companies are central to the creation and global diffusion of eco-innovations, through foreign sales, international co-production, joint ventures, cross-border R&D, outsourcing, subcontracting and licensing[20]; 6. Environmental innovations do not easily trickle down the hierarchy of the world-system, while leapfrogging and tunnelling-through is possible, but limited - uneven development is seen as being the root cause that prevents the transfer of eco-technology from the developed to the less developed nations[21]. Huber's theoretical framework regarding ecological modernization offers, in our opinion, a very useful tool in analysing Romania's approach to the climate crisis and its strategy to reach the European set standards in this respect. Can Romania be seen as a „pioneer" country? Obviously not - It does not fulfil any of the conditions mentioned by Huber - progressive government, pioneering science and technology and pioneer companies. Romania is, from this perspective, a recipient of eco-innovation. But the gateway to eco-innovation rests in Romania's ability to adopt strict standards and regulations that would not only enable, but facilitate the transfer of green technology. Therefore, we need a more comprehensive theoretical approach, one that would offer a more in-depth view on the institutional and political mechanisms at play. Because adopting institutional constraints in order to facilitate ecological modernization is undeniably a multi-level political process that can offer a clearer perspective on the way in which non-developed countries such as Romania can mitigate their climate action.

Martin Jänicke considers that «the strategy of „ecological modernization" nonetheless faces a number of inherent limitations. These include the unavailability of marketable technological solutions for relevant environmental problems like the loss of species, the rebound effect neutralising the incremental environmental improvements through economic growth (the dilemma of the „N-curve") as well as resistance by „modernization losers". Against this background, structural solutions seem indispensable. Here, eco-innovations should be supported by transition management or ecological structural policy»[22]. Jänicke's approach is to discuss two forces of ecological modernization as a political concept - the role of 'smart' government regulation and the growing risks for polluters in the context of multi-level governance. These two elements have, in Jänicke's opinion, the capacity to shape the way in which a specific country is able to construct and implement its strategy of eco-modernization in terms of both innovation and diffusion of environmental technologies[23]. Jänicke proposes the concept of „smart regulation" as the main force driving environmental innovation, presenting a number of clear advantages for the various stakeholders involved in the productive process:

- „Regulation can create or support markets for domestic industries. Here, the most interesting cases are the Japanese „Top-Runner" approach for 21 energy-consuming product and the rapidly diffusing German feed-in tariffs for renewable energy;
- Regulation, often initiated by regulatory trendsetters and leading to global harmonisation, increases the predictability of markets. Anticipation of regulatory trends is therefore a typical behavior of innovative companies under global conditions of growing complexity and insecurity;
- Regulation (real or threatened) can make things easier for business: in contrast to voluntary approaches, affected companies do not have to worry whether their competitors will enact the same measures.

Regulation also reduces internal impediments in companies to implement technological change (even energy saving potentials are often being ignored for organisational reasons). Moreover, companies do not have to look for support within the value chain, as their customers simply have to accept the change."[24]

This *regulatory capitalism* as Jänicke calls it provides an institutionalist solution to the climate action for peripheral countries like Romania, where low-skilled, labor-intensive and low wage jobs are still dominant in the economic sector. He goes further by identifying the defining elements of a smart framework of environmental regulation:

Instruments are innovation-friendly if they.

- provide economic incentives;
- act in combination;

[18] *Idem*, p. 362.
[19] *Idem*, p. 363.
[20] *Idem*, p. 364.
[21] *Idem*, p. 365.
[22] M. Jänicke, *Ecological modernisation: new perspectives*, in Journal of Cleaner Production, 16, 2008, p. 557.
[23] *Ibidem*.
[24] *Idem*, p. 559.

- are based on strategic planning and goal formulation;
- support innovation as a process and take account of the different phases of innovation/diffusion.

A policy style is innovation-friendly if it is.

- based on dialog and consensus;
- calculable, reliable, and has continuity;
- decisive, proactive, and demanding;
- open and flexible;
- management-oriented.

A configuration of actors is innovation-friendly, if.

- it favors horizontal and vertical policy integration;
- the various objectives of regulation are networked;
- the network between regulator and regulated is a tight one;
- the relevant stakeholders are included in the network[25].

3. Romania and the challenges of ecological modernisation

During the communist era Romania was programmatically industrialised following the Stalinist line, especially in heavy and petrochemical industries[26]and its transport infrastructure (roads, railways and shipping) was also upgraded, all in an attempt to achieve autarky in both food, manufacturing and energy production[27]. After 1989, through the 90's transitional period and economic crisis, Romania suffered a throwback in its energy producing, manufacturing and transport capabilities, at the same time having to deal with its remaining industries which were polluting and energy intensive. The transition from communism meant rampant corruption, bad management of the remnant manufacturing industry and transport infrastructure, a lack of re-technologization of the polluting factories and shady privatisations of those industries. On the other hand, this period saw the disappearance of formerly communist-endorsed sustainable policies regarding recycling, repurposing and reusing due to the institutional upheaval and anti-communist rhetoric in the wake of the 1989 revolution. All sustainable policies and programs adopted under the former regime were abandoned, being perceived as emblems of the widespread scarcity that characterised the last decade of the communist regime. During the late 90's, as the Romanian government tried to access both NATO and the Eu, it had to accept as part of the European acquis to overhaul its environmental legislation and to try to adopt new regulations, designed to deal with the climate crisis[28]. After joining the European Union, Romania became part of the EU's treaties (such as the Paris Agreement) and obligations as a member, by assuming the Union's environmental policies as its own. Apart from its communist and post-communist heritage, Romania is also haunted by a number of systemic issues that are further hindering its climate mitigation efforts. Perhaps the most relevant in this respect are the rampant corruption and clientelism, and institutional inefficiency. The main result of the endemic political corruption and clientelism in Romania consists in an overall poor governance and governmental inability to perform its tasks properly, including the absorption of European funds. The state is often unable to design proper policies to address or to solve the challenges and/or the needs in various sectors of society (including the environment), and also frequently proves its inability to hold the necessary skills and knowledge required to implement various plans and to enforce rules and regulations[29]. Similarly, poor institutional design resulting in institutional overlapping, doubled by generalised informality in regard to actual institutional practices reflects in Romania's inability to engender real eco-conscious behaviors and to stimulate the stakeholders to adopt them[30].

EU's climate action plan is constructed on for distinct directions: *The European Green Deal*, the *European Climate Law*, the *Climate Pact* and the *EU strategy on climate change adaptation*[31], under the leadership of the Directorate-General for Climate Action (DG CLIMA). The EU's ambition is to manage to transform the European

[25] M. Jänicke, J. Blazejczak, D. Edler, J. Hemmelskamp, *Environmental policy and innovation: an international comparison of policy frameworks and innovation effects*, in: J. Hemmelskamp, K. Rennings, F. Leone (eds.), *Innovation-oriented environmental regulation. Theoretical Approaches and Empirical Analysis*, 2000, Berlin&Heidelberg: Springer-Verlag, p. 135.

[26] See: A. Tsantis, R. Pepper, *Romania: The Industrialization of an Agrarian Economy under Socialist Planning*, 1979, MD: John Hopkins University Press; D. Turnock, *The Pattern of industrialization in Romania*, Annals of the Association of American Geographers, 60(3), 1970, pp. 540-559.

[27] C.E. Banister, *Transport in Romania – A British perspective*, Transport Reviews, 1(3), 1981, p. 252.

[28] C. Thomas, *Waste management and recycling in Romania: a case study of technology transfer in an economy in transition*, Technovation, 19 (6-7), 1999, pp. 365-371.

[29] A. Buzogány, *Building governance on fragile grounds: lessons from Romania*, 2015, Environment and Planning, 33(5), p. 906.

[30] G. Ibrahim, V. Galt, *Bye-bye central planning, hello market hiccups: institutional transition in Romania*, Cambridge Journal of Economics, 2002, 26(1), pp. 105-118; O.D. Jora, A. Pătruți, M. Iacob, D.R. Șancariuc, *'Squaring the Circle' – The Disregarded Institutional Theory and the Distorted Practice of Packaging Waste Recycling in Romania*, Sustainability, 2020, 12 (22), pp. 9-10.

[31] Directorate-General for Climate Action, *Strategic Plan 2020-2024. Climate action*, 2020, European Commission, p. 3.

peninsula into the „first climate-neutral and climate resilient continent by 2050"[32]. Also, by signing the Paris Agreement, the EU has set a number of tight climate and energy targets for 2030 which were also made an integral part of the European Green Deal - reducing greenhouse emissions by at least 55% compared to 1990, increasing energy efficiency by at least 32.5%, increasing the share of renewable energy by at least 32% of EU energy use and guaranteeing at least 15% electricity inter-connection between neighboring member states[33].

The European Green Deal actually formulates a project of ecological modernization structured on 8 main directions designed as a set of transformative policies aimed at creating clean energy supply for the economy, industry, production and consumption; rethinking policies for large scale-infrastructure, transport, food and agriculture, construction, taxation and social benefits, protecting and restoring natural ecosystems, the sustainable use of resources and improving human health[34]. In order to achieve these goals, the Commission has framed a series of milestones that will be reached by using „all policy levers: regulation and standardisation, investment and innovation, national reforms, dialogue with social partners and international cooperation"[35] - 1. *Increasing the EU's climate ambition for 2030 and 2050 to achieve climate neutrality*, by reducing the Union's greenhouse emissions by 2030 as shown above, by 50 to 55% of the 1990 level. This milestone is seen as being the basis on which the EU constructed its Nationally Determined Contribution to the United Nations Framework Convention on Climate Change (according to the Paris Agreement); 2. *Supplying clean, affordable and secure energy* - aiming to decarbonize the energy system in order to achieve energy efficiency. Therefore, the member states had to submit to the Commission their energy and climate plans by the end of 2019, specifying the ways in which they are going to manage the transition towards clean energy production[36]; 3. *Mobilising industry for a clean and circular economy*, that would include an action plan encompassing a sustainable products policy supporting the circular design of all products, and that will prioritise reducing and reusing materials before recycling them, focusing particularly resource-intensive sectors like textiles, construction, electronics and plastics[37]; 4. *Building and renovating in an energy and resource efficient way*, meaning that all member states will have to engage in a 'renovation wave' of public and private buildings according to the Union's legislation related to the energy performance of buildings[38]; 5. *Accelerating the shift to sustainable and smart mobility* - implying a 90% reduction in transport emissions by 2050. The main directions of action are multimodal transportation (meaning amongst other thing shifting the freight carried by road to railways and inland waterways), digital smart traffic management, ending fossil fuel subsidies and production and deployment of alternative transport fuels[39]; 6. *Designing a fair, healthy and environmentally-friendly food system (the 'farm and fork strategy')* - aiming to transform the European food production system into the global standard for sustainability by employing new technologies and scientific innovations, combined with public awareness campaigns for sustainable foods[40]; 7. *Preserving and restoring ecosystems and biodiversity* - identifying specific quantifiable objectives that would stimulate member states to improve and restore damaged ecosystems and increase reforestation to increase the CO_2 absorption and increase the biodiversity[41]; 8. *A zero pollution ambition for a toxic-free environment* - focusing on monitorization, reporting, prevention and remedy pollution in EU's air, water, soil and consumer products[42].

After reading all of the above, we can safely say that the European Green Deal is clearly constructed as an ecological modernization project structured within a multilevel governance framework that would incentivize the stakeholders to act primarily via the use of standardisation, regulation and financial investments. The main dimensions of EU's action plan against climate change adopted after the Paris Agreement confirm the eco-modernization approach, clearly falling under Huber's main strategies - efficiency, sufficiency and consistency: energy safety, decarbonization, energy efficiency, the energy internal market, and research, innovation and competitiveness. Also, one can discern the political dimension discussed by Jänicke that encompasses a modern environmental governance designed to involve a large array of actors in a multi-level and multi-stakeholder approach[43].

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[32] *Idem*, p. 4.

[33] European Commission, *2030 climate and energy framework, 2030 climate & energy framework (europa.eu)*, accessed May 2, 2024; European Commission, *The European Green Deal*, 2019, Brussels: European Commission, p. 4.

[34] *Ibidem*.

[35] *Ibidem*.

[36] *Idem*, p.6.

[37] *Idem*, p. 7.

[38] *Idem*, p. 9.

[39] *Idem*, p. 11.

[40] *Ibidem*.

[41] *Idem*, p. 13.

[42] *Idem*, p. 14.

[43] M. Jänicke, *Ecological modernisation: new perspectives*, in Journal of Cleaner Production, 16, 2008, p. 561.

Nevertheless, the enforcement dimension remains, pragmatically, at the state-level, therefore the failure or the success of the Green Deal stays firmly in the hands of the member states and the specific measures that they are willing or able to take in order to address the climate crisis.

That is also the case of Romania. In April of 2020 Romania submitted its 2021-2030 final Integrated National Energy and Climate Plan (INECP), as required by the Commission, in line with the Regulation on the Governance of the Energy Union and the Climate Action[44]. The plan is structured in five parts - an overview of the current situation and developments discussing already existing policies and the multilevel governance dimension relating to the various consultations with stakeholders at national, regional and EU level[45]; a discussion regarding Romania's national targets structured around the five dimensions of EU's eco-modernization plan mentioned above (decarbonization, energy efficiency, energy security, energy internal market and research, innovation and competitiveness)[46]; a presentation of the policies and measures needed in order to achieve the proposed targets, also structured around the same five dimensions[47]; an analysis of the current situation and projections in regard to the already existing policies and measures[48]; an impact analysis of the planned measures and policies[49]. The first three parts constitute the actual national plan, while the last to are the analytical basis of the plan.

What are the main features of the Romanian approach to environmental policy? First, Romania followed the Commission's recommendations regarding the 2030 objectives and adjusted its targets accordingly (see Figure 1).

Figure 1. Main objectives of the 2021-2030 INECP

Overview of the main objectives of the 2021-2030 INECP by 2030	
ETS emissions (% compared to 2005)	**-43.9 %***
Non-ETS emissions (% compared to 2005)	**-2 %**
Overall share of renewable energy in gross final energy consumption	**30.7 %**
⬇	
RES-E share	49.4 %
RES-T share	14.2 %
RES-H&C share	33.0 %
Energy efficiency (% compared to the PRIMES 2007 projection for 2030)	
Primary energy consumption	-45.1 %
Final Energy Consumption	-40.4 %
Primary energy consumption (Mtoe)	32.3
Final energy consumption (Mtoe)	25.7

Source: The 2021-2030 Integrated National Energy and Climate Plan (INECP), p. 12.

But achieving these goals means major infrastructural investments that the Romanian side cannot afford. For example, meeting the European requirements in terms of renewable energy means that „appropriate funding from the EU is needed in the sense of providing for the appropriate adequacy of electricity grids and flexibility in the production of RES-E by deploying backup gas capacities and storage capacities and by using smart electricity grid management techniques. Romania has chosen to adopt a prudent approach to the level of ambition, taking into account the national particularities and the RES investment demand for both replacement of capacities that have reached the maximum operation period and new ones in order to achieve the targets committed to in the INECP"[50]. Also, to this respect, the authors of the plan acknowledge a rather unusual fact - that in the process of implementation of the recommendations there had been no data required to prepare a detailed plan regarding the measures, actions and financial resources envisaged by the Romanian authorities in order to achieve the renewable energy targets, therefore... „a new review/adjustment of the 2030 target will be possible on revision of the INECP, which will enable to estimate much better the effects of the implementation of Directive (EU) 2018/410 and of the Green Deal support programmes"[51]. In other words, the authors admit to the government's

[44] *„The 2021-2030 Integrated National Energy and Climate Plan"*, 2020, available at *ro_final_necp_main_en.pdf (europa.eu)*, accessed May 2, 2024.
[45] *Idem*, pp. 11-47.
[46] *Idem*, pp. 48-80.
[47] *Idem*, pp. 80-140.
[48] *Idem*, pp. 141-206.
[49] *Idem*, pp. 207-228.
[50] *Idem*, p. 13.
[51] *Ibidem*.

inability to collect the necessary data to be able to put together a coherent plan. This speaks volumes regarding the quality of governance in the Romanian case, but also on the way in which the Romanian side understands its relationship with the European institutions - in order to meet the deadline anything would do. Similarly, when discussing the internal energy market, Romania's way of adopting measures to „develop liquid and competitive wholesale and retail markets" was to „take significant steps" by liberalisation of the energy market[52]. This measure, firstly, had put the household consumers in a vulnerable position by the rising prices and by the oligopolistic 'new' market that can dictate prices and policies to the consumers (to which the Romanian government, in spite the Commission's explicit requirement to adopt protective measures regarding the vulnerable consumers, has noted in the plan that „the operationalization of the support measures for vulnerable consumers and the alleviation of energy poverty will be considered in strict correlation with the deadlines"[53]. Secondly, it appears that the authors are confused about the meaning of „internal energy market". For the European Union, that means „the removal of numerous obstacles and trade barriers; the approximation of tax and pricing policies and measures in respect of norms and standards; and environmental and safety regulations. The objective is to ensure a functioning market with fair market access and a high level of consumer protection, as well as adequate levels of interconnection and generation capacity the removal of numerous obstacles and trade barriers; the approximation of tax and pricing policies and measures in respect of norms and standards; and environmental and safety regulations. The objective is to ensure a functioning market with fair market access and a high level of consumer protection, as well as adequate levels of interconnection and generation capacity"[54]. Thus, one can identify here an ideological tension - for the EU the internal energy market is conceived as a consumer-oriented, climate friendly and fair economic environment that should enable eco-innovation in a manner that would produce gains for most of the stakeholders, while for the Romanian authorities it's a neo-liberal vision centered on deregulation as the principal mean of dealing and solving all potential issues, which is obviously an opposing approach to climate and energy in relation to the EU vision. Our assertion is further supported by looking at the policy responses envisioned by Romania with regard to energy and climate, specifically regarding energy security, where the Romanian response consists simply on the liberalisation of energy markets, the argument being that „market liberalisation and development of a legislative framework that is favorable for investments are likely to contribute to energy security because they will enable to develop new capacities, also enhancing the flexibility of the national energy system"[55]. Unless more environmental regulatory action is added by the Romanian authorities, liberalisation and the legislative framework oriented towards investments will only mean that the industry will adopt the easiest solutions, with a complete disregard for the objectives assumed within the INCEP, therefore making the plan useless. Moreover, from this standpoint, it appears that the plan itself is a waste of intellectual and work power, as long as there are fundamental misunderstandings in its construction which are undermining and/or even contradicting its very purpose.

And the list of such examples can go on. After receiving Romania's National Draft Plan, the European Commission released an evaluation document in which it critically discussed the Romanian strategy. The Commission's feedback targets several key issues, of which some we already mentioned above. The Commission asked for clarifications regarding the Land Use, Land Use Change and Forestry (LULUCF) no-debt commitment; considered that the renewable energy contribution target is significantly below the renewable share of at least 34% in 2030, therefore asking for further elaboration on measures and policies that would ensure that the target will be met; a similar position was stated in regard to Romania's energy efficiency targets, which were considered to be too low; regarding the security of supply dimension, the Commission noted that Romania needs to include adaptation policies and measures in the energy security dimension, with a particular accent on the foreseen role of nuclear generation capacity[56]. Regarding the internal market dimension, the Commission rightfully asked for more concrete measures and timeframes on the reduction of energy poverty, considering that the information given in the Plan is not sufficient. Also, on the research and innovation dimension it was noted that the Romanian side had not managed to include any specific objectives, a necessary requirement that was seen as being an overall issue of the plan, which was lacking „substantiating policies and measures with concrete information - such as prioritisation, timeframes, expected impacts and investment needs - to underpin their consistency with

[52] *Idem*, p. 14.

[53] *Ibidem*.

[54] European Parliament, „Factsheets of the European Union", Internal energy market | Fact Sheets on the European Union | European Parliament (europa.eu);] EU Commission, Annex to the *2020 Report on the state of Energy Union pursuant to Regulation (EU) 2018/199 on Governance of the Energy Union and Climate Action*, 2020, Brussels: European Commission, pp. 1-34.

[55] „The 2021-2030 Integrated National Energy and Climate Plan", 2020, available at *ro_final_necp_main_en.pdf (europa.eu)*, accessed May 2, 2024, p. 26.

[56] European Commission, *Summary of the Commission assessment of the draft National Energy and Climate plan 2021-2030(Romania)*, 2020, Brussels: European Commission, pp. 1-4, *necp_factsheet_ro_final.pdf (europa.eu)*, p. 2.

the stated objectives and targets" [57]. Last but not least, the Commission asked, when discussing the socially just energy transition, that the authors of the Plan should include the estimation of the social and employment impacts - shifts in sectors/industries and skills impacts, distributional effects and revenue recycling - and the need to also discuss the needs and measures addressing the structural changes entailed by the clean energy transition for mono-industrial regions such as those depending on the coal industry[58].

In the final Plan, Romania did not managed to address all the Commission's recommendations and, moreover, again failed to understand the logic behind the EU's climate strategy, which is embedded throughout its documents, therefore proposing measures and policies constructed in a neo-liberal manner that are literally either masking a superficial approach to the environmental issues and a clear-cut support for maintaining a status quo that is in reality blind to them, or a lack of knowledge and expertise that is preventing the writers of the Plan from getting a real understanding of the fundamental ideas behind the European environmental strategies. Or perhaps both. This is, in our opinion, a dissimulation strategy used by the Romanian authorities that would continue to produce lengthy bureaucratic documents with little or no impact in order to preserve and protect a particular internal economic arrangement.

4. Conclusions

What are the challenges to Romania's attempt to deal with the climate crisis from an eco-modernization theory standpoint and what are the possible solutions? The most obvious one is the fact that Romania is unable to understand the advantageous economic aspects of the European environmental strategy, due to its own path-dependent approach to modernization, a consequence of the communist era and of the transitional period. From this, a plethora of subsequent challenges emerge - regarding knowledge and expertise, public communication, governance and development. Thus, from an ecological modernization theory perspective, given the unevenness of development between countries in the European Union, the Romanian government tends to perceive the environmental policies and reforms proposed by the Union as a threat to its own path of development, which is constructed, as shown by Ibrahim and Galt [25] on a neo-institutionalist (neo-liberal) framework. Consequently, the government's aim is to preserve a business-as-usual model while at the same time trying to marginally align with the European environmental standards and regulations. Unfortunately, the Romanian government seems to be the prisoner of a particular ideological model that equates growth with a deregulated market, polluting and energy consuming industry, and a low-wage labor market. Also, it must be noted that the Romanian government, in spite of apparently adopting the multi-level approach to the climate crisis recommended by the EU, appears to have been operating with a top-to-bottom logic that sees as the main actors of the environmental policy only the state and the industry, while neglecting or treating superficially all other potential stakeholders such as the civil society. This ideological path-dependency needs to be addressed if the European green agenda is to have a real chance to meet its targets across all member states. And this can be achieved if the Commission would pressure the Romanian authorities to adopt a real multi-level governance model, where the discussion involves multiple stakeholders (including the NGO's), and not just the state and the industries impacted by the EU's environmental policies. The EU institutions appear to be, in their turn, seemingly blind to this present disparity within the ranks of the EU member states, which is generating outputs such as the INECP. Perhaps the Commission should take into consideration a secondary set of measures, regulations and perhaps even funding, specifically targeting this type of situation. Supporting the emergence of a progressive Romanian government in relation to the environmental agenda would prove crucial to reaching the goals set for 2030 and 2050. Therefore, the EU should first try to pressure less developed countries like Romania to move towards adopting a real multi-level governance model, coupled with negotiating and/or lobbying for a change in relation to the business-as-usual ideological vision undermining the adoption of environmental measures by arguing for the advantageous aspects of the environmental policy agenda, and thirdly, it should allocate funding towards the non-state, civic actors, enabling their voices to be heard in the national public sphere and thus strengthening the civic sector as a powerful stakeholder in the multi-level governance equation. Also, funding the NGOs would provide a secondary beneficial effect at a communicational level, enabling citizens to be more aware and better informed in relation to the environmental agenda, therefore exerting a supplementary pressure on the decisional levels to adopt a more inclusive approach to the regulatory process.

[57] *Idem*, p. 3.
[58] *Ibidem*.

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INITIAL TEACHER EDUCATION IN ROMANIA - OVERCOMING OR SUCCUMBING TO PAST WEAKNESSES AND THREATS?

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Abstract

In the light of the new Education Act dedicated to preuniversity education that came into force in Romania in 2023, prospective teachers are to be offered two alternative pathways to enter their profession: a twelve-month or eighteen-month master's degree. Timewise, those determined to embrace the teaching career will have to comply with these provisions starting with the 2027-2028 school year. Considering these specific regulations belonging to the recent legal framework governing education in Romania, our paper aims at investigating the advantages and disadvantages of the options given to future teachers, so as to tentatively predict whether past obstacles might be overcome. By briefly outlining both the tendencies and realities of initial teacher education at international and European levels and by presenting the evolution of initial teacher education in Romania in the post-communist era, we lay the basis for our small-scale investigation. The responses of our interviewees (school inspectors, school principals, experienced teachers, academics) point not only to the imminent threats and inherent weaknesses, but also to the long-term prospects of this educational reform, as professionalising the teaching industry advances the profession as a whole and goes a long way to create better opportunities for student success.

Keywords: *Education Act, initial teacher education, educational reform, teaching profession, professionalisation.*

1. Introduction

Teacher education is important because of its impact upon teacher quality. To teach is a complex and demanding intellectual work, one that cannot be accomplished without adequate preparation. Teacher education not only ensures that teachers are and remain competent, but it also allows to assure that they stay motivated through time[1]. Research shows that most effective way to raise educational quality is to modify initial teacher education and recruitment, and to develop the means to train teachers that are already in-service[2].

A „complete" teacher education combines strong subject-matter and pedagogical knowledge, the ability to collaborate with diverse actors (students/colleagues/administrators), and the capacity to continue developing these skills and to understand the in-depth context of the schools in which they teach. Teacher education programmes should be designed as an incentive to bring the right people into teaching and to make it adequate to a country's specific needs.

Starting with the 1990s, Romanian initial teacher education has undergone successive reforms, each new Education Act struggling to redefine teaching as a high-level profession. This paper delves into the provisions of the latest Romanian Preuniversity Education Act, asking education specialists' opinions on the success of its enforcement. In point of structure, the first part of our paper provides current trends on initial teacher training as they are depicted in reports drafted under the auspices of OECD and EU Commission. In part two, we give a diachronic perspective on the initial teacher training regulations in Romania between 1990 and present time. Part three covers the methodology employed in our study and in part four we discuss the findings of our small-scale research. The final part deals with the conclusions of our investigation.

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[1] See European Education and Culture Executive Agency, Eurydice, *The teaching profession in Europe: practices, perceptions, and policies. Publications Office of the European Union*; 2015, *http://doi/10.2797/031792*.

[2] See P. Musset, *Initial Teacher Education and Continuing Training Policies in a Comparative Perspective: Current Practices in OECD Countries and a Literature Review on Potential Effects;* 2009, *https://www.oecd-ilibrary.org/education/initial-teacher-education-and-continuing-training-policies-in-a-comparative-perspective_5kmbphh7s47h-en*, last consulted on 23.03.2024.

2. Setting Current Trends in Initial Teacher Education: OECD and EU

2.1. OECD Perspective on Initial Teacher Education

Teacher quality is undoubtedly an essential trait of any sound educational system and developed countries around the world have constantly attempted to enhance the quality of the educators within their systems. Relying on data and analyses generated by seven countries, the 2019 OECD study[3] dedicated to improving initial teacher preparation (ITP) aims at identifying the challenges that characterise ITP at present and to suggest possible strategies that might be used to address them.

Initial teacher education (ITE) structure differs across and within countries. The two most widespread models are concurrent programmes, which provide pedagogical training and practicum at the same time as courses in subject matter, and consecutive models in which pedagogical and practical training follow courses in subject matter. The ITE reviews in the OECD study suggest that independently of the model, countries seem to struggle with finding the balance between subject and pedagogical knowledge. Establishing strong links between theoretical and practical training has long been on the teacher education agenda and one way to achieve this is through aligning teacher education to professional standards. Nevertheless, such alignment is not straightforward due, in part, to the different conceptualizations of professional knowledge. For example, teacher education institutions with strong academic traditions often reflect a knowledge and research-based conceptualization, while standards would often have stronger emphasis on practice and a more restricted understanding of what professional knowledge is[4].

There are three traditions in teacher education: (1) an academic knowledge tradition (the content is structured in classical disciplines: educational psychology, sociology, history and philosophy); (2) a practical knowledge tradition (based on teachers' tasks such as lesson planning, classroom management, evaluation); and (3) an integrated tradition (clinical practice model). The 2019 OECD study adopts *the Teacher Education Pathway Model* developed by Roberts-Hull, Jensen and Cooper[5], thus doing away with the traditional view of the teacher as a 'product' endowed with a degree and a certification, and embracing the 'process'-oriented perspective in which ITE comprises selection into ITE, acquisition of knowledge and skills across ITE, entrance into teaching, as well as the first years of teaching. Hence, initial teacher preparation is no longer seen as an isolated component of the teaching profession, it is a complex system resulting from the continuous interactions between different agents (human actors, organisations, material artefacts).

The study pinpoints to the 4 main challenges that ITP is currently experiencing: (1) ensuring an evidence-informed, self-improving initial teacher preparation system; (2) ensuring a balanced teacher workforce; (3) ensuring updated and high-quality teacher preparation; (4) ensuring and integrated early professional development. The strategies proposed to deal with the first challenge are to support rigorous and relevant research on ITP and to introduce accreditation that incentivizes ITP institutions to build their own evidence and implement a continuous improvement approach. As for the second challenge, three ITP-related strategies are suggested: using ITP data in forecasting workforce needs; raising the status of teacher education through building a solid knowledge base for teachers and ensuring quality teacher education, and attracting, selecting and hiring candidates who are likely to be committed to improving their professional competences through their career. Addressing the third challenge involves ongoing reflection on teachers' knowledge, strong ITE-school partnerships and supporting teacher educators. The strategies proposed to respond to the fourth challenge include strengthening practical experience in engaging in critical reflection and evaluation of teaching, ensuring effective mentoring schemes with competent mentors, and securing continuity in professional support throughout the early career years.

One should underline the importance of the ideas put forward by this OECD study since it might have a positive impact on its readership. Thus, it might prove its actual value if taken into consideration by policy makers specialised in educational matters, employed by national governments to develop educational strategies meant to improve initial teacher training; by university staff who would like to either design or update their bachelor or master programmes dedicated to initial teacher training, so as to attune them to the latest research findings; or by researchers who are interested in exploring issues, solving problems, and predicting trends related to initial teacher training.

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[3] See OECD, *A Flying Start: Improving Initial Teacher Preparation Systems,* OECD Publishing, Paris, 2019, *http://doi.org/10.1787/cf74e549-en*.

[4] *Idem*, pp. 78-79.

[5] *Idem*, p. 18.

2.2. EU Perspective on Initial Teacher Education

The goal of the Eurydice report on EU teachers' careers, development and wellbeing[6] is to provide a detailed insight into the current national policies, regulations and practices that are intended to enhance and support the teaching profession in EU member countries, as well as in several other European countries accepting to be part of this research. Data describing the legislative provisions in each country is combined with data on teachers' practices and perceptions from the *OECD Teaching and Learning International Survey* (TALIS) in order to allow various stakeholders to understand the impact of national policies on teachers' behaviours and, possibly, to evince the necessity of reforms.

When it comes to ITP, the EU report indicates that more than half of the European education systems offer both concurrent and consecutive training routes for lower secondary teachers, whereas in nine education systems mainstream ITE is provided exclusively and in eight systems the consecutive route is the only one available. In the majority of the European education systems, ITE programmes for lower secondary teachers lead to master's degree, while in others, the minimum qualification is the bachelor (as a rule, ITE programmes leading to the bachelor's degree last four years). According to TALIS 2018, in the EU, 54.9 % of teachers report holding a master's degree, while 38.0 % of teachers stated a bachelor's degree as their highest qualification. Nevertheless, TALIS 2018 data suggests that the highest educational qualification achieved by in-service teachers tends to correspond to the minimum requirement in top-level regulations to ITE.

In nine education systems, where the duration is regulated, the workload of professional training is 60 ECTS corresponding to around a year of full-time training. In Ireland, France, Malta (consecutive programme) and Portugal professional training is twice as long. In Bulgaria, Romania, Bosnia and Herzegovina, North Macedonia and Serbia, the minimum duration of professional training does not exceed 40 ECTS, while the shortest durations are in Italy (24 ECTS), Montenegro (23 ECTS) and Turkey (25 ECTS). Moreover, when looking at the share of professional training as a part of ITE programmes, big cross-country variations can be observed. The share of professional training ranges from 50 % of the total duration of ITE in Belgium (French Community), Ireland (concurrent programme) and Malta (concurrent programme) to 8 % in Italy and Montenegro. The share of professional training is 15 % or less in Bulgaria, Italy, Romania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia and Turkey where the duration of professional training is also the shortest. While the duration of in-school placements as part of professional training is regulated in about half of the European education systems, in others it is a matter left to the discretion of the ITE institutions or it is not regulated. Where regulated, the minimum length of in-school placement shows considerable cross-country variations. It ranges from 60 ECTS in Ireland (concurrent model) to five ECTS in Romania. In eight education systems, practical training takes up around half of the time dedicated to professional training.

The content of ITE is one of the key factors impacting its quality. Subject knowledge, pedagogical theory and sufficient classroom practice are the core elements of effective ITE. Although almost all education systems require professional training to be included in ITE programmes alongside academic subjects, its duration varies considerably across countries. In-school placement is regulated in around half of the European education systems.

According to the TALIS 2018 results, in the EU, nearly 70 % of all teachers report that they were trained in all three core elements (subject content, general and subject related pedagogy, and classroom practice). The new generation of teachers (less than 35 years old) seems to benefit more from a comprehensive teacher education compared with the overall teacher population. In the EU, 75 % of young teachers completed formal education or training including all three core elements.

Supporting teachers during the early stages of their career is crucial not only to enhance the quality of teaching but also to reduce exit from the profession. In most European education systems, teachers new to the profession have access to a structured induction that usually lasts one year. In almost all of them, induction is compulsory. Mentoring and professional development activities are the two most widespread compulsory elements of structured induction. Evaluating novice teachers at the end of the induction period is a widespread approach across Europe. It aims at confirming employment when induction occurs during a probationary period or contributes to certifying the teaching qualification when induction is part of the qualification route.

The Eurydice report contains valuable data which offer a comprehensive view on the current realities depicting ITE in Europe, so that future prospects might be envisaged by various stakeholders. As teacher education matters for quality teaching and for students' learning outcomes, having a wider perspective when deciding national policies and regulations might prove more than useful. The report places great importance on the fact that quality ITE and effective support to new teachers not only help to prevent teacher attrition, but also

[6] European Commission/EACEA/Eurydice, *Teachers in Europe: Careers, Development and Well-being. Eurydice report*, Luxembourg: Publications Office of the European Union, 2021.

have a positive impact on the attractiveness of the teaching profession in general.

3. Past and Present in Initial Teacher Education in Romania

Over time, compulsory education in Romania first comprised the primary and lower secondary school cycles, and, subsequently, also included upper secondary education. As a result, our diachronic overview will focus on teacher preparation for primary, lower and upper secondary education, considering the legal provisions regulating this domain and their impact on the initial training of teachers. In post-communist Romania, at least at the declarative level, ITE has always been an important concern for education reform.

During the communist period, the initial training of teachers was carried out either by means of compulsory psycho-pedagogical training courses, within the framework of various (short and long term) university programmes for those teaching in secondary education, or by means pedagogical high schools (also known at that time as *Normal Schools*) for primary school teachers. The first education act of the post-communist period, the *Education Act no. 84/1995*, together with *Act no. 128/1997 on the Status of the Teaching Staff*, introduced psycho-pedagogical training, as a standalone programme, which was to be offered by special Teacher Training Departments (set up in 1996) operating in universities, as a condition for filling teaching positions for lower and upper secondary teachers. Primary school teachers were given an alternative: apart from graduating from pedagogical high schools, they could also enrol in teacher training colleges (three-year programme, i.e. short-term higher education).

In 2004, Romania adhered to the Bologna process, and *Act no. 288 on the Organisation of University Studies* provided the legislative framework for the changes. Accordingly, the certification for the teaching profession could be obtained through two levels of psycho-pedagogical training: Level I, whereby graduates with a bachelor's degree who earned the 30 ECTS allotted to the psycho-pedagogical training programme and passed the graduation examination, corresponding to Level I certification for the teaching profession, obtained the certificate of completion of the psycho-pedagogical training programme Level I, which entitled them to hold teaching positions in compulsory secondary education; Level II, whereby graduates of a master's programme in the field of the bachelor's degree who completed the 60 ECTS psycho-pedagogical training programme and passed the graduation examination corresponding to Level II certification for the teaching profession obtained the certificate of completion of the psycho-pedagogical training programme Level II, which entitled them to occupy teaching positions in post-compulsory education. The training of primary school teachers was also reformed by introducing a new bachelor programme: Pedagogy of Primary and Preschool Education (undergraduate studies, Bologna I cycle). The new context generated by the Bologna Process has marked a substantial reform at organisational and curricular level, and the new measures have been applied since the 2005-2006 academic year.

The *National Education Act 2011* did not change the initial training in the case of primary school teachers, but it introduced the obligation of the master's degree in teaching for the lower and upper secondary school level, which was meant to replace the former provisions (*i.e.*, the training for the teaching profession through the two levels of psycho-pedagogical training) starting with the 2015-2016 school/academic year. Thus, in the light of the 2011 regulations, initial training for teaching positions included:

- initial, theoretical, specialist training carried out by universities in programmes accredited by law;
- 2-year master's degree in teaching;
- practical training for one school year in an educational establishment under the supervision of a teacher (practicum supervisor).

The master's degree in teaching seemed to give shape to the much-desired (since 2001[7]) professionalisation of the teaching career, which could have been achieved through a 'school' especially designed to produce teachers, very much like a law or medical school. Hence, if, at primary level (through vocational high school, university college, bachelor's degree in primary and preschool pedagogy), initial training had come substantially closer to professionalisation, the master's degree in teaching could have finally legitimised the teaching profession at all levels of education discussed here, to define its identity, to make 'the transition from the artisan teacher to the expert teacher'[8].

The 2011 moment, with the introduction of the compulsory teaching master's degree, represents an even

[7] The strategy for the development of the initial and in-service training system for teaching staff and managers in pre-university education (2001) promoted and implemented specific lines of action aimed at professionalising the teaching career, *http://arhiva.gov.ro/upload/articles/100024/stratform.pdf*, last accessed on 23.04.2024.

[8] See E. Păun, *Profesionalizarea activității didactice*, in L. Gliga (coord.), *Standarde profesionale pentru profesia didactică*, Consiliul Național pentru Pregătirea Profesorilor, proiectul de reformă a învățământului preuniversitar, Ministerul educației și cercetării, Bucharest, 2002, p. 21.

stronger change than the Bologna reform. However, it has generated many uncertainties and has led to positions for and against: 'It is a turning point that can orientate the field of initial teacher training either towards correlation with the objectives of the European Union in terms of investing in human resources and skilfully exploiting these resources so as to increase quality, or towards the breakdown of a functional system, obviously without any pretence to its being perfect, which, for more than fifteen years, has strived to make the teacher training departments develop continuously'[9]. Surprisingly or not, the following year, a new provision came into force, setting forth that 'until the graduation of the teaching master's degree provided for in art. 154 para. (1) letter (c) of Act no. 1/2011, as subsequently amended and supplemented, by the first class of bachelor students admitted under the terms of this act, training for a teaching career is provided by the specialist departments in the higher education institutions'[10].

Debates continued, and the lack of consensus among those in a position to implement the change led to an amendment to the *National Education Act* in 2014, through GEO no. 49, making the teaching master's degree optional. The new legislative text looks like this:

'Initial training for occupying teaching positions in preuniversity education shall comprise:

a) initial, theoretical, specialist training, carried out by universities, within the framework of programmes accredited in accordance with the law;

b) completion of either a two-year master's degree in teaching or psycho-pedagogical training programmes Levels I and II carried out by specialist departments in higher education institutions;

c) a practical traineeship of one school year, carried out in educational establishments, usually with a practicum supervisor.'

The wave of changes and their postponements generated further waves of questions: *What is the best route for initial teacher training? Which one provides the most solid preparation for future teachers? What kind of preparation provides the best teachers in a system?* etc. As a matter of fact, these are timelessly relevant questions to be asked in any society that wants a high-performance education system. In 2016 Romania, they seemed all the more legitimate because the results of the national and international assessments of Romanian students were not at all encouraging. In the PISA tests, in which Romania has participated since 2000, 15-year-old students have consistently obtained some of the lowest scores in Europe[11].

The Coalition for Education[12] drew attention to the fact that the successive postponement of the application of the National Education Act provisions on the teaching master's degree, a condition for the initial training of teachers, was a cause for moving education in Romania away from finding the best solution for 'increasing the quality of human resources', a public priority at the declarative level, but not a long-term decision at the political level. 'Romania needs teachers who are competent, motivated, autonomous, respected and encouraged to learn', argued the Coalition for Education, and this required a clear position from the majority of co-interested actors. As a result, this group initiated a broad public consultation (May-August 2016) to find the answer to the question '*Master's degree in teaching or psycho-pedagogical modules (Levels I + II): which type of initial training will increase the quality in the Romanian education system?*'[13] Of course, the aim of this debate was not to point to the saving solution for initial teacher training based on the respondents' preferences. Surprisingly, though, the answers received from the respondents (representatives of the teacher training departments, heads of university departments, deans, rectors, principals of state and private schools, school inspectors, teachers, researchers from relevant institutions, non-governmental organisations working for education and related sectors, trade union representatives), tipped the balance in favour of the master's degree in teaching: 40.36% (44 answers) of the respondents gave their endorsement to the master's degree in teaching; 21.10% (23 answers) opted for maintaining training through Levels I+II psycho-pedagogical modules; 22.01% (24 answers) proposed a mixed model (Level I module + master's degree in teaching). In addition to these, other proposals were put forward: alternative training and certification routes, bachelor's degree in teaching, unspecified form of organisation with recommendations for content reform, etc. (18 answers, 16.51%)[14]. It is

[9] See L. Șerbănescu, *Formarea profesională a cadrelor didactice – repere pentru managementul carierei*, Printech, Bucharest, 2011, p. 146).

[10] See GEO no. 92/2012.

[11] See *https://www.oecd.org/pisa/data/*, last accessed on 23.03.2024.

[12] *The Coalition for Education* is an organisation created in 2015 by various NGOs active in this field and has had as its mission the coagulation of energies and resources to achieve a bold vision for learning in Romania. The organisation was formed by NGOs having more than 10 years of experience in the field and thousands of beneficiaries, on different levels of education, be they preschoolers, pupils, students, educators or parents.

[13] *Formarea inițială a profesorilor - raport audiere publică – Motivație*, *http://coalitiaedu.ro/formarea-initiala-profesorilor/motivatie/*, last accessed on 23.03.2024.

[14] *Formarea inițială a profesorilor - raport audiere publică – Raport*, *http://coalitiaedu.ro/formarea-initiala-profesorilor/bibliografie/*, pp. 9-10, last accessed on 23.03.2024.

interesting that the option for a master's degree in teaching was the most preferred one by those involved in preuniversity education, whereas the preference for training through the psycho-pedagogical modules was equally embraced by preuniversity and university teachers. The mixed model, consisting of the Level I psycho-pedagogical module followed by a master's degree in teaching, was supported by most university respondents.

Apart from raising new questions, the participants' responses not only highlighted the pluses and minuses of the two training models under discussion and outlined possible solutions[15], but they also formulated proposals and suggestions regarding the central aspects to be considered for the significant improvement of the education system, such as its objectives, its way of functioning, or the way of collaboration between the co-interested parties.[16]

The next stage was marked by the launch of the project called *Educated Romania*[17], carried out along 2016-2021, which started with a public debate, resulting in a strategic vision for Romania, comprising not only specific objectives for national education and research to be achieved by 2030, but also a set of proposals for public policies stemming from areas labelled as priorities[18] according to the project, and ended with the publication of *Educated Romania Report*. *The Project of the President of Romania (2021)*. Its priority areas included both the teaching and career paths and among its objectives it is highlighted the restructuring of the initial teacher training system through the gradual expansion of the master programme for teachers, based on the evaluation of the pilot phase[19] (with a focus on analysing the impact of this training route on teacher training) and subject to the provision of the necessary resources and conditions at the level of training institutions. The report also put forward the idea that: 'from a legislative point of view, it is important to draw up a new Education Act or to revise *National Education Act 2011*, so that the provisions of the legal framework are correlated with the Project and at the same time provide coherence and predictability to the system. The current form of the Education Act 2011 has undergone an impressive number of changes, taking on different meanings from the original ones.'[20]

At this very moment, even if we have tried, we have not been able to find any report on the impact of the piloted master's degree on the preparation of future teachers in the eight universities which participated in this stage of the project. It must also be added that such a report would be hasty and inconclusive right now, given the short period of time since the pilot project was initiated, especially as this period of time has overlapped with the pandemic. In order to be relevant, it would take a longer to show the effects. Anyway, new education legislation came into force in 2023, in the form of *Preuniversity Education Act 2023* and *Higher Education Act 2023*.

In the light of the latest provisions, teacher training continues to be a priority for Romania's education legislators, as the results of international assessments (PISA) of Romanian students have shown no improvement. The 2022 PISA report points out to the stability of the Romanian educational system between 2018-2022 (considering not only the crisis due to the pandemic, but also the results obtained by other countries, which scored lower than before)[21], only that this stability keeps Romania at the level indicated by previous evaluations: below the OECD and EU averages[22], respectively. Moreover, by analysing the resources invested in education and their positive correlation with school performance, demonstrated in numerous specialist studies, the OECD report states that human resources represent a strength of the Romanian education system[23].

Under *Preuniversity Education Act 2023*, article 176 (e) stipulates the conditions for occupying teaching positions in preuniversity education. Once again, the changes are mainly aimed at post-primary education, reverting to the provisions of *Education Act 2011* and thus imposing the obligation of obtaining a master's degree in teaching, as follows:

(e) for teaching positions in lower secondary, upper secondary and non-university tertiary education, […],

[15] *Idem*, pp. 11-18.

[16] *Idem*, pp. 18-21.

[17] Educated Romania is a national project initiated by the President of Romania, *https://www.romaniaeducata.eu/despre/*.

[18] The teaching career is at the top of the list, envisaging the development of a competence framework, the reform of initial training, increased quality and flexibility.

[19] Through the POCU project *„Start a career through a teaching master's degree"* (the beneficiary was the Romanian Ministry of Education and Research, in partnership with eight Romanian universities), the teaching master's degree programme was to be piloted for the first time in Romania, starting with 2020-2021 academic year, in accordance with *the Order of the Minister of Education and Research No 4524/2020 of 12 June 2020 on the establishment and organisation of the teaching master's degree programme*.

[20] See *Raportul proiectului România educată*, *http://www.romaniaeducata.eu/rezultatele-proiectului/*, p. 124, last accessed on 23.03.2024.

[21] See G.N. Noveanu (coord.), *PISA 2022. România. Raport național PISA 2022*, Centrul Național de Politici și Evaluare în Educație. Unitatea de cercetare în educație, Bucharest, 2023, p. 116.

[22] The average score obtained by Romanian students in 2022 is 428 in any of the areas investigated - mathematics, reading or science. Both the OECD and EU average in mathematics is 472; in reading, the OECD average is 476, whereas the EU average is 469; in science, the OECD average is 485 and the EU average is 481.

[23] See G.N. Noveanu (coord.), *op. cit.*, p. 119.

at least one of the following conditions:

(i) holding a bachelor's degree in the field of the desired position, the psychopedagogical training module totalling 30 ECTS credits, and a one-year master's degree in teaching;

(ii) holding a bachelor's degree in the field of Educational Sciences and a one-year master's degree in teaching;

(iii) holding a bachelor's degree in the field of the desired position and a one-and-a-half-year master's degree in teaching.[24]

Alongside bachelor's and master's degrees in the various subjects, universities are to organise two types of master's degrees in teaching: '(1) The master's degree in teaching totalling 60 ECTS which comprises the teaching practice, carried out by the organising higher education institution in collaboration with the preuniversity educational establishment where the teaching practice takes place, amounting to 48 ECTS, and specific activities carried out within the higher education institution, representing 12 ECTS. (2) The integrated master's degree in teaching, totalling 90 ECTS, organised by higher education institutions for bachelor's degree graduates who have not obtained 30 ECTS by completing the psychopedagogical training programme. The master programme includes, in addition to the teaching practice and specific activities carried out in the higher education institution, 30 ECTS for psychopedagogical training programme.'[25]

Of course, the law will apply progressively[26]. However, if the legislative provisions are maintained, at some point all teachers in Romania will be able to be called education professionals. It is our hope that this path will not be interrupted by other changes, as it happened in the period following the entry into force of *Education Act 2011*, so that the teaching profession will regain its former status and attract highly qualified graduates, and *Educated Romania* project will become an undeniable reality.

4. Research Methodology

Our small-scale investigation stemmed from the assumption that the new provisions regulating the teacher profession in Romanian preuniversity education might entail both opportunities and threats. 20 interviewees (5 academics belonging to Teacher Training Departments in the University of Bucharest, the University of Ploiești, University of Brașov, University of Suceava; 15 teachers from Prahova county: 3 school inspectors, 2 school principals, 3 expert teachers[27], 7 teachers) accepted to answer our questions: *(1) Do you consider that the new training route will be superior to the previous one (through the level I and II psycho-pedagogical training modules offered by the Teacher Training Departments), in the sense that it will increase the quality of teaching? (2) Do you consider that this formula for initial teacher training will materialise or there are risks that threaten its implementation? If so, which are they?* Our respondents' teaching experience ranges between 7 and 25 years for the academics, and between 12 and 37 for the rest of our group. The interviews were conducted in February 2024.

5. Findings and Discussion

As our group of subjects is a homogeneous one, made up of *school people*, with consistent teaching and/or

[24] Important changes also occur in the case of other categories of teachers: those that are to hold a bachelor degree in special and special-integrated education. They are required to complete a master's degree in the field of their specialisation. Although this aspect is not covered by our paper, we believe that this measure is beneficial for the professionalisation of all teachers.

[25] See *Higher Education Act 2023*, art. 102.

[26] Art. 176 (*Preuniversitary Education Act 2023*) provides that: (6) In situations justified by the lack of qualified personnel at the level of the preuniversity education institutions, higher education graduates who have not completed their initial training in accordance with the provisions of the Higher Education Act or master students enrolled in the teaching master's programme may be hired as associate teachers for a fixed period of not more than one school year, on an hourly basis, with the approval of the institutions governing preuniversity educations in Romania, in accordance with the provisions of a methodology approved by order of the Minister of Education. (7) In situations justified by the lack of regular staff at the level of the preuniversity education institutions, graduates holding a bachelor's degree in the field of the position and having accomplished the psycho-pedagogical training programme, may be hired as substitute teachers for a fixed period, with the approval the institutions governing preuniversity educations in Romania, in accordance with the provisions of a methodology approved by order of the Minister of Education. (8) In situations justified by the lack of qualified personnel at the level of the preuniversity educational institution, graduates holding a bachelor's degree in a field other than that corresponding to the position and having accomplished the psycho-pedagogical training programme, may be employed as substitute teachers without the required qualifications for a fixed period, with the approval of the institutions governing preuniversity educations in Romania, in accordance with the provisions of a methodology approved by order of the Minister of Education.

[27] According to the Romanian regulations in force, an expert teacher is a teacher who cumulatively meets general criteria (regarding the level of studies, the professional status - tenured position, career development - certified teacher Level 2, the quality of teaching activity - very good annual evaluation, experience in carrying out mentoring or methodology-related activities) and specific criteria (*e.g.*, scientific activity, participation in in-service training, etc.), appointed after successfully passing the competition organised by the school inspectorates to temporarily or periodically carry out guidance, control and evaluation activity through teaching inspection.

managerial experience, we are not surprised by their unity of vision on the problem in question. Thus, the answers of our interviewees converge on several points, highlighting both ideas specific to the topic under discussion, the initial training of teachers, and as well as other points, more general, which might be considered old and still unresolved when it comes to education-related issues in Romania. These ideas outline a radiography of the present, on the basis of which a picture of the future of initial teacher training in Romania is tentatively sketched.

On the whole, the vast majority of our interviewees are in favour of the initial training of teachers through a master's degree in teaching, but their realistic, objective and well-reasoned responses identify many variables and risks that, if ignored or treated superficially, will constitute obstacles, even roadblocks to the implementation of the latest legal provisions in this domain. Cumulated with their previous experience (post 2011), our research subjects, although optimistic, are cautious about the future.

The answers of our interviewees evinced similar thoughts and we grouped them accordingly.

5.1. Motivation for a teaching career

The strongest idea that emerges from our interviewees' answers is that of motivation/lack of motivation for the teaching profession, a profession that is totally unattractive at the moment because of the difficulties related to this profession and the reduced rewards available. According to 19 of the 20 persons we interviewed, before debating initial training routes, it is necessary to reconsider the status of the teaching profession in society, because, regardless of the training route, it is absolutely mandatory to increase the attractiveness of the teaching career in Romania, so that this particular feature could lay the basis for choosing this profession. Directly stating or just suggesting, our respondents' opinion is that, in order to really increase the quality of the teaching act, our educational system badly needs candidates who are truly motivated for embracing the teaching career. Thus, motivation should be an absolutely necessary condition for becoming a teacher, as, at present, more often than not, this choice is rather a plan B for the majority of those who are at the beginning of this professional path:

- Over the years, we have noticed that students participating in the psychopedagogical module (and we cannot see why it should be any different in the case of the master's degree in teaching, we add) choose this type of training as a backup plan, an interviewee with 25 years of experience in higher education tells us. The quality of teaching is an independent variable in my view. It is not the form that determines the substance!
- [...] a bachelor programme graduate opting for a master's degree dedicated to preparing him/ her for a teaching career implies a clear decision to follow this professional path, which could lead to increased retention of teaching staff in the education system. Therefore, the quality of teaching would increase not only due to potential teachers being exposed to a higher number of training hours, but also due to the implicit selection of people for whom being a teacher is an ideal (pre-university teacher, 20 years' experience);
- It can bring along a good selection of those who want a teaching career (university teacher, 25 years' experience;
- Perhaps one of the reasons for which we can estimate an increase in the quality of teaching for those graduating with a master's degree in teaching could be their motivation to follow the courses of this particular master's degree, adds another interviewee (university teacher, 20 years' experience). If future candidates for a teaching position choose to follow a master's degree in teaching (only this degree or simultaneously with a master's degree in the field of their specialisation), this could indicate a higher motivation for choosing a career in teaching. The new form of training might prove valuable for master students who are really aiming for a teaching position, believes another university teacher with 19 years' experience;
- I think that - at a time when fewer and fewer students are enrolling in the psychopedagogical module, even though it is tuition free for those who get a subsidised place in the university undergraduate programme of their choice, and, at a time when many of those who enrol want to quit after they deliver their first teaching practice performance, saying that "it's hard" (or as one student put it: "For the 50 minutes' teaching time, I studied as if I had had to pass a midterm exam, I prepared for 2-3 days and spent almost 100 RON of my own money on teaching material for students!"), as they are rather interested in the "generous holidays" they know teachers have - the biggest risk is that students will not enrol for this master's degree in teaching to the extent we might expect (university teacher, 7 years' experience).

In very concrete terms, it is the level of teacher salaries in Romania (a notorious problem), which appears in 13 of our interviews as a major risk to the implementation of a teacher training route that would increase the quality of teaching: *the level of salaries is the first threat*, says a teacher who agreed to participate in our interview-based research, a school principal with 36 years of teaching experience. *As long as this variable is not controlled, master's degrees in teaching will continue to attract weaker candidates than master's degrees in*

science, and teachers will continue to be considered inferior to those in other professions.

5.2. Insufficient data

The majority of our interviewees (17) believe that more data is necessary to establish the superiority of one training route or another. Indeed, we do not currently know enough about how the master programmes in teaching, piloted in the eight Romanian universities, have been run, or about how their potential graduates' skills might reflect in the quality of teaching. When asked whether the new training route is superior to the previous one (*i.e.*, the psychopedagogical training modules Levels I and II, carried out by the Teacher Training Departments), more precisely whether it is likely to have a positive impact on the quality of teaching, the teachers interviewed expressed reservations:

- I don't know if the quality of teaching will increase or not, research is needed in this respect (university teacher, 20 years' experience);
- From my point of view, at this very moment, we cannot say for certain whether the new training route is superior or inferior to the previous one. A comparative evaluation of the two training routes will be relevant at least 4 years after the entry into the preuniversity education system of the graduates who are to study under the new provisions (pre-university teacher, 35 years' experience, school principal);
- For comparison purposes, it would be desirable to know the conclusions of the experiment with the master's degree in teaching in the eight pilot universities (pre-university expert teacher, 36 years' experience).

5.3. Important advantages

A main advantage, which can be deduced from what has been presented so far, is that the master's degree in teaching could benefit from a better selection of those who might enrol in this programme, in the sense that those who really want to take up a teaching position will opt for training through the master's degree in teaching. This idea is stated more or less explicitly by the overwhelming majority of those interviewed (18 teachers). It is especially the university teachers participating in our research who see the new form of initial training as a way of combating the hitherto negative selection of those who apply for the psycho-pedagogical training modules Levels I and II: *Yes, I believe that the new training route is likely to be superior to the previous one, as there are students who do not intend to pursue a career in teaching and, nevertheless, enrol in the psychopedagogical module so as to take advantage of this training opportunity (for some, it is tuition-free), and who do not turn out to be motivated students, not giving due importance to training through the psychopedagogical module, a shortcoming that could be overcome by the new regulations (we assume that only those who really want to pursue a teaching career will enter the master's degree!)* (university teacher, 7 years' experience).

Another important advantage, which is directly or indirectly mentioned by 16 of our respondents, would be that the master's degree in teaching, a concept discussed and analysed since 2011, when it was first included in the legal provisions regulating the teaching profession, then piloted in 8 of the largest universities in Romania, *has many chances to increase the quality of the teaching act because it is the result of a needs analysis of the educational reality* (pre-university teacher, 29 years' experience, school inspector); in the same vein, our interviewees have also pointed out to the fact that the master's degree in teaching can take up and subsequently either maximise the positive aspects characterising the old training route, or minimise its negative facets: *one could propose courses and/or content to develop teaching competences that might take into account the shortcomings/problems encountered in the previous psychopedagogical modules and the challenges of new learning contexts. Those forms of teacher training which have proved their effectiveness and ability to adapt to change should also be maintained* (pre-university teacher, 35 years' experience).

The curriculum of the master's programme for teachers could also represent an advantage. If completed in a consistent, coherent and undivided period of time, this postgraduate degree could provide thorough training, according to 16 of the teachers in our research group. Particularly, the new master's degree in teaching (12 or 18 month programme) is to dedicate more hours to both the methodology of the specialisation subject (so far more weight was placed on acquiring knowledge in the students' specialisation area) and the teaching practice, considered essential by all the teachers who accepted to be interviewed: *the new training route, through the substantial number of hours and credits allocated to practical work, can foster a range of interactive approaches (project-based learning, experiential learning, collaborative learning) and link these activities to a coherent mentoring programme* (university teacher, 19 years' experience).

The emphasis on the importance of the teaching practice, as one of the strengths of the new route of initial teacher training, is a constant in our respondents' answers*: a balance is achieved between the teaching of a subject or subjects in a certain curricular area and the teaching of other curricular areas, correlated with the teaching practice* (pre-university teacher, 28 years' experience). Moreover, according to another interviewee

(pre-university teacher, 12 years' experience), *allotting one year / one and a half years to teacher training could ensure the acquisition of sound theoretical notions of pedagogy and educational psychology and, above all, the participation in more hours of teaching practice*, because, as another respondent points out, emphasising the same idea, *being a teacher is not only about sharing your knowledge, but knowing how to do it* (pre-university teacher, 35 years' experience, school principal). Another teacher strongly supports the idea of thorough practical training by mentioning some weaknesses characterising the activity of those trained through the former route: *There are many teachers in preuniversity education who are very well trained in terms of the subject they teach, but who do not have the necessary teaching skills to transmit the desired knowledge to the younger generation. There are people who know a lot but only for themselves, who do not make themselves understood by students and who do not manage to overcome the obstacle of successfully using those teaching strategies that might facilitate the transmission/reception of knowledge. Many are unable to get emotionally close to the direct beneficiaries of the teaching process because they are unaware of the psychopedagogical aspects that characterise various groups of students. Thus, their teaching discourse is not in line with their students' age and individual characteristics, being either too sophisticated and therefore incomprehensible to them, or too childish and therefore uninteresting. At the same time, without proper psychopedagogical training there is no way of knowing the students' interests, aspirations and abilities. It is therefore impossible to provide quality teaching that is differentiated and adapted to the group and/or the individual* (pre-university expert teacher, 37 years' experience).

The strengths of curriculum of the master's programme in teaching also emerge from the responses of the teachers we interviewed: *this curriculum includes pedagogical disciplines, educational research concepts derived from practical examples, recommendations and suggestions for making teaching, learning and assessment activities more effective, as well as teaching practice modules with social and ethical impact, from a mono- and transdisciplinary perspective*. In this way, according to our interviewee*, the student-teacher learns how to use teaching methods reflectively and creatively, and the teaching practice activities, organised in accordance with the structure of the school year, give the student-teacher the opportunity to gain an in-depth perspective of the school environment and to design more complex teaching projects, which may take more time to implement. The longer time dedicated to the teaching practice entails a variety of learning contexts/school environments, with positive effects on the student teacher's ability to evaluate and adapt their methods* (pre-university teacher, 36 years' experience, school principal).

Therefore, such a curriculum *can be a very good link between the competences acquired during the bachelor's degree and the future teaching activity in a school,* says a pre-university teacher, 30 years' experience, school inspector. Last but not least, according to a university teacher with 7 years of experience, another important advantage might be that, *from the perspective of training for the teaching profession, the master's degree in teaching is an opportunity to harmonise what is happening in our country with what is happening in other educational systems around the world*.

5.4. Many variables, many risks

Assuming that the main purpose of any initial training route that prospective teachers might embark on is to ensure quality education, our research subjects have identified many unknown variables, which might translate into risks, threats, dangers or possible blockages. The teachers we interviewed have drawn attention to some categories of variables:

(1) methodological variables:

- *the accreditation standards laid down for the master's degree in teaching and the structure of the curriculum; the similar manner of providing practical training in all institutions involved; the institutional capacity to organise, monitor and evaluate psychopedagogical practice activities; the manner in which these programmes will actually be organised at university level depends on the capacity of the universities to provide qualified teaching staff, material resources* (university teacher, 19 years' experience);

- *the organisation and conduct of teaching practice with particular reference to the type of school, number of students assigned to a practicum supervisor, number of hours, etc.* (pre-university teacher, 35 years' experience, school principal);

- *there might exist a lack of collaboration between trainers at university and pre-university levels* (pre-university teacher, 36 years' experience, school principal, underlining the need for a common vision);

- *Does the time factor for initial and continuing training have equal, standardised units of measurement? For example, if I follow a master's degree in teaching, after how long am I invited to participate in continuing training for the teaching profession?* (university teacher, 25 years' experience, in an attempt to signal it is crucial for the initial and continuing training to closely attune);

- *the risks are also linked to the concentration of teacher training only in certain universities* (university teacher with 25 years' experience).

(2) material variables, formulated by both university and preuniversity teachers:

- *How do I receive funding to participate in training for a professional master's degree and how do I receive it for participation in a master's degree in teaching? Do I have the freedom and certainty that participating in this type of training will have a direct connection to my future employment/tenure in teaching?* (university teacher, 25 years' experience);

- *How will young university graduates be incentivised to do two more years of schooling with the aim of becoming teachers? Will they be given incentives (e.g. scholarships)?* (pre-university teacher, 35 years' experience, school principal).

(3) political variables (inconsistency, instability):

- *I don't know if it will materialise. I think the main risk is the lack of coherence of the legal provisions* (pre-university teacher, 12 years' experience);

- *one of the risks is that people in key positions do not carry out their projects* (pre-university expert teacher, 36 years' experience).

(4) legislative variables, in the sense of clarifications, which both university and pre-university teachers consider absolutely necessary:

- *clear, objective criteria are needed, linked both to the economic factors and the social context* (school principal, 35 years' experience, referring to being admitted to the master's programme in teaching);

- *another necessary condition for increasing the quality of teaching could be clear regulation of the conditions for teaching practice (as well as an increase in the number of hours of teaching practice) and mentoring during practice and the start of a career, which could underpin the development of the preprofessional identity of candidates/starters; if there are clear regulations and full support from the authorities for the implementation of these regulations, there is a chance that these measures will materialise* (university teacher, 20 years' experience).

(5) psychological variables: *the resistance to change* characterising both teachers and universities (mentioned twice, by two university teachers, 17/20 years' experience*), the reluctant attitude of some bachelor's degree graduates, their lack of seriousness or commitment* (mentioned four times, by preuniversity teachers with 36, 35, 12, 37 years' experience, including two preuniversity expert teachers).

Alongside these variables, those who participated in this research have also expressed their concerns as to the possibility that the new regulations for the two master's degrees in teaching may not bring any change at all, that they might *comprise the same activities/ content under different names/ different courses* (pre-university teacher, 35 years' experience, school principal), or, to put it bluntly, as one of our interviewees did, *same meat, different gravy*, i.e. it is only a change of form, the substance remaining untouched (pre-university teacher, 17 years' experience).

We agree with our interviewees that not only the prestige of the teaching profession, but also the awareness of its social importance have to be raised. In our opinion, any of the two master's degrees in teaching can be a step forward from this perspective, as it is a path towards professionalisation, which could transform the teaching profession into a highly qualified profession, a profession that can regain its former status.

6. Conclusions

Acknowledging the limits of our paper (small number of respondents - 20; four universities in Romania; preuniversity teachers from only one county - Prahova) and hoping to widen the scope of our research (by asking novice teachers what they could have benefited from/ what they may have lacked during their ITE stage), our findings suggest that there are both opportunities and threats when it comes to assessing the impact of the recently adopted legal provisions on ITE in Romania. Internationally, the trend is to view ITE as a process at the end of which the prospective teacher is fully equipped with knowledge, experience through extensive practice hours, as well as provided with support during the so-called induction period, by means of well-qualified teacher-mentors. So, not only more studying time is necessary for someone who would like to embrace this profession, but also more exposure and the ability to benefit from thorough practical training. Thus, the improved quality in teachers' initial training may be directly proportional with the competences acquired by their students.

To some extent, the findings of our qualitative research has shown that the new provisions regulating ITE in Romania follow the international trend, at least for the theoretical (related both to the teaching subject and pedagogy) and practical aspects, as any of the master programmes in teaching that might be chosen by future teachers will probably include disciplines meant to endow them with the appropriate teaching skills and competences in a way that may be superior to the prevailing concurrent model used so far, in terms of the

teaching quality to be subsequently delivered. Nevertheless, according to our interviewees, more data is necessary to prove the superiority of the new model. In addition to that, there are many obstacles to be overcome, the biggest of them being the lack of motivation, as for many of those who take this career path at present, this is, more often than not, their second choice. Moreover, considering that recent regulations represent the second attempt to professionalise teaching by means of a dedicated master's degree, our respondents expressed their concern, pointing to the need of consistency, objectivity and transparency in the legislative process, as well as to the appropriation of the necessary funds that might pave the way for success.

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2024 - THE UNRAVELLING OF ILLUSIONS?

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Abstract

The evolution and reform of public policies face new challenges amidst the economic, social, and political conditions of the electoral year 2024. Indeed, the electoral year of 2024 appears to have a significant global impact, given the elections in countries with significant geopolitical influence such as the USA, India, Indonesia, Mexico, and the European Union. The choice between Trump and Biden in the USA, in particular, captures the attention not only of Americans but also of the entire world. Certainly, electoral years are crucial moments for democracies worldwide, and the fact that over 75 states have scheduled elections in a single year is impressive. It is a sign of people's engagement and desire to exercise their right to vote and influence the political direction of their countries. However, it is important to underline that elections are not always a guarantee of a healthy democracy, as there can be various issues such as electoral fraud, voter intimidation, and other undemocratic practices that can distort the electoral process. The year 2024 is a unique electoral year in Romania - with European, local, legislative, and presidential elections.

Keywords: *electoral cycle, economic crisis, public policies, economic sustainability, conflict in Ukraine, hybrid warfare.*

1. Introduction

The year 2024 is a year full of challenges and also a turning point in many aspects, and some of these aspects may remind us of the period leading up to the Second World War. The war in Ukraine and the geopolitical tensions between Russia and other states, as well as the possible expansion of populist groups, often supported by Russia, raise serious concerns regarding regional and global stability and security. Uncertain economic developments, as well as the potential for conflicts to escalate at the European or global level, heighten these concerns and amplify the sense of instability.

The analogy with the period preceding the Second World War can indeed be relevant in some respects, especially concerning geopolitical tensions and the risk of conflict escalation. It is crucial for leaders and the international community to be mindful of the lessons of history and to make efforts to avoid repeating past mistakes, promoting dialogue and cooperation in resolving disputes, and promoting peace and stability.

However, it is important to underline that each historical period has its own particularities and unique contexts, and addressing current challenges requires specific approaches and solutions tailored to the conditions and dynamics of our world today. Through collaboration, diplomacy, and commitment to democratic values and human rights, we can hope to overcome these challenges and build a safer and more prosperous future for all. Otherwise, the year 2024 will represent the unravelling of illusions for a period of prosperity and peace.

2. The period leading up to the Second World War (1938-1939) v. the Geopolitical Turning Point of 2024

The period of 1938-1939 is known as a particularly tense moment in European history, marked by events of geopolitical significance that culminated in the outbreak of the Second World War. This paper explores that specific period from multiple perspectives, focusing on the economic, political, and geostrategic aspects that contributed to the climate of instability and conflict in Europe at the end of the 1930s.

From an economic perspective, the 1938-1939 period was characterised by a deep global recession fuelled by the effects of the Great Depression of 1929. European states suffered from economic decline and rising unemployment, which exacerbated social and political unrest. Additionally, the protectionist policies adopted by some countries in an attempt to safeguard their domestic industries contributed to increased economic tensions and reduced international trade[1].

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[1] B. Antoniu, M.-R. Dinu, *Istoria relaţiilor internaţionale în secolele XIX-XX*, Program postuniversitar de conversie profesională pentru cadrele didactice din mediul rural, 2005, p. 103-121, *https://hiphi.ubbcluj.ro/Public/File/sup_curs/istorie25.pdf*.

From a political perspective, the 1938-1939 period was marked by a series of events and decisions that heightened tensions and rivalries among European powers. The year 1938 saw the Anschluss of Austria and the Munich Agreement, which allowed Nazi Germany to annex territories and consolidate its position in Central Europe. Additionally, the Czechoslovak crisis occurred, during which Czechoslovakia was dismembered, with the agreement of Britain and France, under pressure from Germany. These events underscored the weakness and hesitations of Western powers in the face of Nazi aggression and fuelled feelings of insecurity and distrust in Europe.

From a geostrategic perspective, the 1938-1939 period was characterised by the consolidation of Nazi Germany's position in Europe and the expansion of its influence in the region. Through the annexation of Austria and the dismemberment of Czechoslovakia, Germany gained control over strategic territories and strengthened its position in Central Europe. Additionally, the signing of the Molotov-Ribbentrop Pact between Nazi Germany and the Soviet Union in August 1939 changed the geopolitical dynamics in the region and paved the way for the outbreak of the Second World War.

The 1938-1939 period was exceptionally tense and provocative in European history, marking the beginning of a new era of conflict and suffering. Economic, political, and geostrategic factors significantly contributed to the atmosphere of instability and tension in Europe at the end of the 1930s, laying the groundwork for the outbreak of the Second World War. It is important to understand and reflect upon the lessons learned from this dark period of European history in order to avoid repeating past mistakes and to promote peace and stability in our contemporary world.

The period around 1938 is indeed considered crucial in the evolution of events leading to the outbreak of the Second World War, and the policy of appeasement practised by France and the British Empire towards Nazi Germany has been criticised for exacerbating Nazi aggression and jeopardising peace and stability in Europe.

The conciliatory attitude of the Allies, represented by the policy of „appeasement", was clearly evident during the Sudeten Crisis of 1938. Despite international treaties guaranteeing the territorial integrity of Czechoslovakia, France and Britain adopted a conciliatory approach to Nazi Germany's territorial claims over the Sudetenland region, which had a German population within Czechoslovakia. The Munich Agreement, signed in September 1938, allowed for the annexation of the western part of Czechoslovakia by Germany without consultation with the Czechoslovak government. This conciliatory approach was interpreted as encouragement for Nazi aggression and territorial expansion and undermined the credibility of international commitment and peace treaties.

Furthermore, the Allies' conciliatory policy towards Nazi Germany's territorial claims was also evident in the case of the Anschluss of Austria in 1938. The lack of a strong response from France and Britain to Germany's annexation of Austria strengthened the aggressive stance of the Nazi regime and heightened the threat to regional and international stability.

In conclusion, the hesitant policy practised by France and Britain in their dealings with Nazi Germany during the interwar period has been later criticised for failing to prevent Nazi aggression and territorial expansion and for contributing to the escalation of the conflict that led to the outbreak of the Second World War. This period serves as a reminder of the importance of solidarity and firmness in the face of threats to peace and international security, and of the danger of appeasement policies towards an aggressive and expansionist state led by a dictator[2].

The strategic error of France and Great Britain in 1938, in the context of the annexation of Austria and the dismemberment of Czechoslovakia by Nazi Germany, had significant consequences on the balance of power in Europe and drastically altered the world order established at the end of the First World War.

The annexation of Austria and the dismemberment of Czechoslovakia brought into Germany a significant population with considerable economic and military potential. Approximately 7 million inhabitants from Austria and 3.5 million from Czechoslovakia, the majority of whom were ethnic Germans, were incorporated into Germany. This territorial expansion brought about a substantial increase in Germany's labor force, recruitment base, and industrial capacity, giving it a significant strategic advantage over France and Great Britain.

In the spring of 1939, the demographic balance among the four major European powers was significantly altered by these territorial changes:

- Germany became the largest power in Europe, with 87.3 million inhabitants, the majority of whom were considered ethnic Germans;
- The United Kingdom, Italy, and France were outnumbered by Germany, with 47.5 million, 43.4 million, and 42 million inhabitants, respectively.

[2] M. Udrea, *Drumul Europei spre Al Doilea Război Mondial (1937-1938)*: München, *„Pacea timpurilor noastre". Înghițirea Austriei și Cehoslovaciei. De ce o dictatură nu poate fi oprită niciodată cu compromisuri și negocieri*, Istoria Lumii, Colecționarul de istorie, 15.01.2022.

This change in the demographic balance of power amplified Germany's dominant position in Europe and undermined confidence in the Allies' ability to confront Nazi aggression. The strategic error of France and Great Britain in 1938 was a fatal one, significantly contributing to laying the groundwork for the outbreak of the Second World War and altering the balance of power in Europe[3].

In conclusion, this period was a crucial moment in world history, marked by escalating political tensions, laying the groundwork for the outbreak of the Second World War. The main economic, political, and social aspects during that period globally were:

- Global economic context: following the economic crisis of 1929, the world was still grappling with the profound effects of the Great Depression. Many people were still living in poverty, and unemployment remained high in many countries;
- Rise of totalitarian regimes: in Europe, the Nazi regime in Germany and the fascist regime in Italy had become dominant. Hitler had consolidated power in Germany and began to extend his influence in Central and Eastern Europe. Mussolini, in Italy, was also strengthening his control;
- Annexation of Austria and the Sudeten Crisis: in March 1938, Hitler annexed Austria, consolidating Germany's power. Subsequently, the Sudeten Crisis followed when Germany demanded the cession of the Sudetenland region from Czechoslovakia, which it obtained following the Munich Agreement in September 1938, signed by Britain, France, Italy, and Germany, without consulting Czechoslovakia;
- Expansionist policies of Japan: Japan intensified its aggression in Asia, occupying several territories in China and embarking on what would become the Pacific War;
- International reaction: the international community was concerned about the increasing aggression and instability. Attempts to maintain peace and stability, such as the appeasement policy adopted by France and Britain, were criticised by some for allowing Nazi aggression to advance;
- Military mobilisation: as tensions rose, many countries intensified their efforts for rearmament and military mobilisation in preparation for a potential conflict;
- Refugees and immigrants: the tense political situation in Europe led to an increase in the number of refugees and immigrants trying to escape persecution and war. Many Jews from Germany and other areas under Nazi influence sought asylum in other countries.

Overall, the period 1938-1939 was characterised by escalating geopolitical tensions and concerns about global peace, laying the groundwork for the outbreak of the Second World War on September 1, 1939.

The elections in 2024 are undoubtedly crucial for the direction each country will take and for the global political climate. In the United States, especially, the competition between Trump and Biden is intense and has repercussions worldwide[4].

Trump represents a polarising figure, with an agenda that has sparked controversies domestically and internationally. His promise to establish a personal dictatorship and to withdraw US support for international organisations such as NATO, as well as the threat to close the American economy and reduce aid to other countries, fuel concerns regarding the respect for democracy and global stability[5].

The year 2024 is indeed a crucial moment for global democracy, considering the large number of countries holding elections and their significance in a variety of political and social contexts[6].

In the United States, India, Indonesia, Mexico, and the European Union, these elections will influence the political and social direction of these countries, significantly impacting their citizens and international relations.

On the other hand, countries like Russia, Pakistan, and Bangladesh face challenges regarding transparency and fairness in the electoral process, and the outcomes of these elections can have significant consequences for the political and social stability of the region and the world at large.

It is essential for elections to be conducted transparently and adhere to democratic standards to ensure the fair representation of the people's will and to promote stability and progress worldwide.

The European Parliament elections in June are indeed particularly important, and the results will have profound consequences for the direction the European Union will take in the coming years.

An increase in eurosceptic and far-right parties could bring significant changes to the political dynamics of the European Parliament. However, it is important to note that the European Parliament is composed of a variety of parties and political orientations, and the legislative and decision-making process requires negotiations and compromises among different political groups.

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[3] *Ibidem*.

[4] *https://newsweek.ro/international/super-2024-anul-care-poate-schimba-lumea*.

[5] *https://pressone.ro/2024-cel-mai-important-an-electoral-din-istorie-76-de-tari-merg-la-urne-ce-putem-sa-facem-pentru-a-ne-asigura-un-viitor-mai-bun-in-romania/*.

[6] *https://www.mediafax.ro/politic/2024-va-fi-un-an-electoral-istoric-cu-alegeri-din-sua-si-uniunea-europeana-pana-in-rusia-ii-va-supravietui-democratia-22224683*.

The possibility of the far-right Identity and Democracy group becoming the third-largest faction in the European Parliament could have implications for how European policies are formulated and implemented, especially concerning aspects related to EU enlargement and relations with partner countries, including Ukraine[7].

The rise of far-right populism in Europe is indeed a concerning trend, and the elections for the European Parliament within this context are of major importance regarding the political direction of the EU and its future.

Far-right populist parties have managed to gain ground in many European countries, relying on platforms that emphasise defending traditional values, combating immigration, and criticising European institutions. The successes of these parties in national elections in the Netherlands (Geert Wilders), Italy (Giorgia Meloni), Slovakia (Robert Fico), Finland (Petteri Orpo), and Hungary (Viktor Orbán) indicate a shift in the European political landscape and an increase in their influence in decision-making processes[8].

In the context of the European elections, it is expected that these parties will focus their campaigns on the same themes that brought them success in national elections. Defending traditional values, promoting national sovereignty, and opposing immigration are likely to be central points in their political platforms.

However, it is important to emphasise that the European elections provide a framework in which a variety of parties and political orientations can make their voices heard. The democratic process and the need to reach compromises and consensus in the European Parliament could limit the ability of far-right parties to unilaterally impose their agenda.

Ultimately, this year's European elections will be an important test for the future of the European Union and its ability to manage political and social changes in the current context of rising far-right populism and the internal and external challenges it entails.

The future EU support for Ukraine and other candidate countries for accession will indeed be influenced by the outcome of the European elections and the political configuration of the new European Commission. The candidacy for a new term of the Commission President, Ursula von der Leyen, and her pro-Ukraine stance could play an important role in the EU's continued support for these countries.

Despite opposition from some member states, such as Hungary, EU support for Ukraine may continue, but the modalities and conditions of this support could be affected by political changes within EU institutions.

Overall, the European elections in June will be a crucial step in the evolution of the European Union and in setting its future direction in a wide range of issues, from internal and economic policies to external relations and community expansion.

Comparing the challenges of 1938 with those of 2024, in the current context of the conflict in Ukraine and elections in many democratic states, we can observe several significant differences and similarities:

- **Conflict and Geopolitical Tensions:**

In 1938-1939, geopolitical tensions were marked by the aggressive expansion of totalitarian regimes, such as Nazi Germany and Fascist Italy.

In 2024, the main focus of geopolitical tensions is the conflict in Ukraine, where Russia is involved in a war against Ukraine and supports separatists in eastern Ukraine. Additionally, geopolitical tensions are present in other parts of the world, such as the Middle East and the South China Sea region.

- **Economy and Poverty:**

During the 1938-1939 period, the global economy was still grappling with the effects of the Great Depression, and poverty and unemployment were still major issues in many countries.

In 2024, the global economy faces various challenges, including uncertainties related to the COVID-19 pandemic and its impact on global markets, as well as issues related to poverty and social inequality.

- **Authoritarian Regimes v. Democratic States:**

In the period leading up to World War II, authoritarian totalitarian regimes, such as those in Germany and Italy, dominated European politics.

In 2024, there is a diversity of political regimes in the world, ranging from consolidated democratic states to authoritarian regimes and dictatorships.

- **Refugees and Migration:**

In 1938-1939, geopolitical tensions and persecution led to an increase in the number of refugees, especially Jews, seeking asylum in other countries.

In 2024, migration is a global issue, and the refugee crisis persists in many regions of the world, with millions of people leaving their countries of origin due to conflicts, persecution, poverty, and climate change.

- **Technology and Communication:**

During the years 1938-1939, technology and communication were different from what we know today, but

[7] *https://moldova.europalibera.org/a/anul-electoral-2024-anul-recordurilor/32762649.html*.

[8] *https://www.euractiv.ro/extern/2024-anul-alegerilor-77-de-tari-si-aproape-trei-miliarde-de-oameni-chemati-la-vot-65071*.

there were still some significant innovations and developments during that period.

Although television was still in its early stages of development during that period, the first television broadcasts began to appear in some countries, heralding a new era in communication and entertainment.

Overall, while there are notable differences between the challenges faced in 1938 and those in 2024, there are also some striking similarities, particularly in terms of geopolitical tensions, economic uncertainties, and migration issues. Additionally, advancements in technology and communication have transformed the way information is disseminated and societies interact, shaping the global landscape in both eras.

In conclusion, the technology and communication in the years 1938-1939 reflected a combination of traditional means and innovations in development. Although they did not reach the level of complexity and accessibility of today's technologies, these means of communication had a significant impact on shaping public opinion and transmitting information globally.

In 2024, technological advancements and global communication allow for greater awareness and mobilisation among civil society regarding current challenges such as climate change and human rights.

Overall, while there are some similarities between the challenges of 1938-1939 and those of 2024, such as geopolitical tensions and migration, the current context is quite different, reflecting significant changes in politics, economy, and technology over the past century.

3. The electoral duel between Donald Trump and Joe Biden

The assessment of the harmfulness of Donald Trump's presidency between 2016 and 2020 is subjective and can vary depending on political perspectives and individual values. However, there are some aspects of his presidency that have often been criticised and have generated controversy. Here are some of them:

- Polarisation and division: Trump's presidency was marked by extreme polarisation in American society. His reluctance to criticise or condemn supporters who resorted to violence or hate speech fuelled tensions and political divisions in the country;
- Attacks on democratic institutions: Trump was criticised for his attacks on democratic institutions such as the free press, the judiciary, and the electoral process. His constant rhetoric against the media and his doubts about the fairness of the presidential elections undermined trust in these key institutions;
- Harsh immigration policies: Trump administration's immigration policy was one of the most controversial aspects of his presidency. Policies such as family separation at the southern border of the US and attempts to ban travel from certain predominantly Muslim countries generated widespread criticism, including from the international community;
- Withdrawal from international agreements: Trump adopted a unilateralist approach in international relations, withdrawing the United States from several agreements and international organisations, including the Paris Climate Agreement and the World Health Organization (WHO);
- Handling of the COVID-19 pandemic: Trump administration's response to the COVID-19 pandemic was strongly criticised for initially downplaying the seriousness of the pandemic, inefficient management of testing and distribution of medical equipment, and promotion of unconventional or ineffective treatments;
- Ethical lapses and allegations of corruption: Trump administration was overshadowed by numerous allegations of corruption, nepotism, and conflicts of interest, including related to his family's businesses and his personal conduct as president.

It is important to mention that, alongside the criticisms and controversies associated with his presidency, Trump also had numerous supporters who appreciated his non-conformist approach and his efforts in areas such as fiscal policy and nominations for the Supreme Court. The overall assessment of his presidency is subjective and may vary depending on the perspective of each individual.

4. The presidency of Joe Biden in the United States has its pros and cons

The presidency of Joe Biden in the United States has been subject to subjective analysis, varying depending on individual political perspectives. Here are some pros and cons of his presidency up to this point:

Pros:

- Handling of the COVID-19 pandemic: Biden administration has made the management of the COVID-19 pandemic a top priority, accelerating the vaccination campaign and providing financial support to states and communities to address the health crisis;
- Economic stimulus: adoption of a comprehensive economic stimulus package, known as the American Rescue Plan, to support economic recovery and assist families and businesses affected by the pandemic;
- Addressing climate change: Biden administration has taken measures to combat climate change,

including rejoining the Paris Agreement and promoting climate policy at the national and international levels;

- Return to diplomacy: restoring diplomatic relations with traditional allies and commitment to international cooperation, particularly regarding the World Health Organization and the North Atlantic Treaty Organization (NATO).

Cons:

- Criticism regarding the handling of the migrant crisis at the southern border: Biden administration has faced criticism for its management of the migrant crisis at the southern border of the United States, including conditions in detention centers and its family separation policy;
- Domestic economic and political tensions: political divisions and social tensions remain high in the United States, and Biden administration faces challenges related to passing legislative reforms in a polarised political context;
- Failure in immigration system reform: to date, Biden administration has not succeeded in achieving comprehensive immigration system reform, leading to criticism from organisations and groups advocating for immigrant rights;
- Geopolitical challenges: the United States faces multiple geopolitical challenges, including tensions with China and Russia, as well as threats from authoritarian regimes worldwide.

The evaluation of Joe Biden's presidency is subjective and may depend on individual political perspectives. It is important to consider the full range of actions and decisions of his administration in assessing his presidency.

5. The global economic outlook for the year 2024

In terms of the global economic outlook for the year 2024, these may vary depending on several factors, including the current political and economic situation, global trends, and recent events. However, we can provide some general perspectives:

- Global economic growth: depending on economic recovery efforts, a resurgence of economic growth can be anticipated in many countries, although the pace and magnitude may vary by region and the government policies adopted;
- Long-term impact of the COVID-19 pandemic: the COVID-19 pandemic continues to have a significant impact on the global economy, with varying effects depending on the economic sector and geographic region;
- Inflation and monetary policy: in the context of economic recovery, some countries may experience inflationary pressures. Central banks will continue to monitor inflation developments and adjust monetary policies accordingly;
- International trade and geopolitics: trade and geopolitical tensions can affect the global economic outlook for 2024. Developments in areas such as trade relations between the US and China, Brexit, and other trade conflicts may influence economic growth and global stability;
- Technological changes: technological advancements, such as artificial intelligence, blockchain technology, and digital technologies, will continue to influence the global economy, creating new opportunities and challenges for businesses and society.

In conclusion, the global economic outlook for 2024 is influenced by a variety of factors, and their evolution may be difficult to predict accurately. It is important to monitor economic trends and react to emerging changes to ensure sustainable and inclusive economic growth.

6. The war in Ukraine that began in February 2022

The war in Ukraine, which began in February 2022, was an escalation of the prolonged conflict between Ukraine and Russia-backed separatists in the eastern regions of Donetsk and Luhansk. Here is a brief overview of the main events that led to this escalation:

- Russian aggression and annexation of Crimea: in 2014, Russia annexed the Crimean Peninsula from Ukraine following a controversial referendum condemned by the international community as illegal. This action sparked a conflict between Ukraine and Russia-backed separatist forces in eastern Ukraine;
- Conflict in eastern Ukraine: since 2014, the eastern regions of Donetsk and Luhansk have witnessed ongoing fighting between Ukrainian forces and pro-Russian separatists. This conflict has resulted in loss of lives, destruction of infrastructure, and human suffering, severely affecting the stability and security of Ukraine and the region as a whole;
- Escalation in 2022: in February 2022, the escalation of the conflict reached a critical point, particularly in the Donbas region of eastern Ukraine. Intense clashes occurred between Ukrainian forces and separatists, prompting Ukraine to declare martial law in some regions of the country;

- International support for Ukraine: the international community, including the United States, the European Union, and other countries, condemned Russian aggression and provided political and military support to Ukraine in its fight against separatism and Russian influence;
- Negotiations and ceasefire efforts: despite the escalation of the conflict, diplomatic efforts were made to achieve a peaceful resolution. Negotiations between Ukraine, Russia, and other intermediaries were conducted in an attempt to secure a ceasefire and a political solution to the conflict.

Overall, the conflict in eastern Ukraine, which escalated in February 2022, continues to be a major security concern in the region and a source of tensions between Ukraine and Russia, with significant implications for the geopolitical stability of Eastern Europe.

However, at the beginning of 2023, prospects for a strong counteroffensive from Ukraine seemed unlikely. Military experts and defense analysts predicted that intense fighting would continue into the following year, but that Ukrainian forces were not yet prepared to launch massive counteroffensives. Instead, they were expected to focus on consolidating territory they had already reclaimed, particularly in eastern Ukraine.

At the beginning of 2023, hopes were high that a much-anticipated Ukrainian counteroffensive would change the course of the war against Russia. However, in reality, the evolution of the conflict in 2024 could become even more challenging, and two critical factors could influence the potential defeat of Putin, according to Western military experts[9].

The military alliances of Ukraine with the United States and Europe have the potential to destabilise the Russian army. However, everything depends on the political direction of the United States after the 2024 presidential elections and the delivery of two important weapons to Kiev from the West (aircraft and long-range missiles).

The amount of support and military equipment Ukraine receives may decide whether it will succeed in a counteroffensive or it will need to adjust its war strategy. Meanwhile, Russia has intensified military spending and weapon production, indicating its readiness for a prolonged conflict.

On the other hand, the direction of the Russia-Ukraine war in 2024 will largely be decided thousands of miles away, in the United States. The US is Ukraine's biggest military supporter, and if US assistance decreases in the lead-up to and after the presidential elections, this could have a significant impact on the balance of power in the conflict.

7. The economic, political, and ideological issues between East and West

The economic, political, and ideological issues between East and West have been a prominent feature of modern history, especially in the context of Europe but also in other regions. Here are some of these issues:

- **Historical divisions**: the divisions between East and West have been deeply rooted in Europe's history, with events such as the Cold War solidifying these political and ideological divisions. The West, represented by Western countries, particularly those within NATO and the EU, adopted a capitalist and democratic approach, while the East, especially the countries in the communist bloc, was characterised by totalitarian regimes and centralised economies;
- **Economic differences**: Eastern and Western Europe have exhibited significant economic differences, even after the fall of the Iron Curtain and the end of the Cold War. Western European states have typically experienced faster economic development, with higher living standards and more developed infrastructure, while Eastern countries have often faced challenges related to transitioning to market economies and adapting to the democratic system;
- **Political and ideological divergences**: political and ideological divisions between East and West remained relevant even after the fall of communism in Eastern Europe. Some Eastern European countries rapidly adopted democratic and economic reforms, seeking integration into Euro-Atlantic structures such as NATO and the EU, while others remained tied to their communist past or experienced difficulties in consolidating democracy and market economies;
- **Migration and brain drain**: economic and opportunity differences between East and West have led to significant migration from East to West, with a migration of labor force and talent from Eastern European countries to Western ones. This phenomenon has had an impact on the economies and societies of both regions, sometimes creating social and political tensions;
- **Resilience and cooperation**: despite these differences and challenges, East and West have made significant progress towards reconciliation and cooperation. The process of NATO and EU enlargement in Eastern

[9] *https://ziare.com/razboi-ucraina/razboi-ucraina-experti-evolutie-razboi-ucraina-2024-doua-mutari-decisive-infrangere-putin-1843718*.

Europe has been an important step in consolidating peace and stability in the region, and economic and political cooperation between Eastern and Western states continues to develop.

Overall, the relationship between East and West remains complex and fraught with challenges, but there are also opportunities for collaboration and reconciliation in the common interest of all Europe and the international community.

8. Conclusions

Years like 2024 are indeed crucial for humanity, as they bring with them a series of social, political, economic, and geostrategic challenges. It is during these moments when decisions made can have significant long-term consequences on the direction the world takes. Here are some aspects of the importance of the year 2024:

- **Social Challenges**: rapid social changes and various social movements, such as the civil rights movement, gender equality, or the environmental movement, can redefine society and power relations;
- **Political Challenges**: major political elections and events, such as changes of governments or referendums, can influence the political direction of a country and can have repercussions on international relations;
- **Economic Challenges**: economic crises, technological changes, and transformations in business models can affect global economies and can influence how people work and live;
- **Geostrategic Challenges**: international relations, conflicts, geopolitical tensions, and changes in the balance of power can reconfigure the global geopolitical map and can affect international stability and security.

It is essential for leaders to be prepared to address these challenges and to promote sustainable and equitable solutions. Additionally, citizen engagement and international collaboration are vital to successfully confront these challenges and to create a better future for all.

Comparisons between Russian President Vladimir Putin and Nazi Fuhrer Adolf Hitler have become increasingly frequent in the context of Russia's invasion of Ukraine beginning on February 24, 2022. As highlighted by Atlantic Council President Frederick Kempe, there are significant differences between the 1930s era and the present, but there are also notable similarities[10].

While it is important not to exaggerate or trivialise the significance of the Nazi tragedy, it is imperative to carefully analyse Putin's behavior and policies and assess whether they exhibit common characteristics with those of Hitler's regime. Putin himself has used the term „Nazism” to label the Ukrainian government, sparking intense debate about the legitimacy of the comparison.

Political science professor Alexander D. Motyl from Rutgers University in Newark has emphasised that while Putin's absurd standards regarding Nazism should not be accepted, his opening of this subject justifies a careful examination of his policies and actions compared to those of Hitler. Such analyses should focus on isolating the defining features of Hitler's regime and assessing the extent to which Putin's system is similar[11].

In light of these comparisons, the international community is called upon to evaluate Russia's policies and actions under Putin's leadership and to take appropriate measures based on the conclusions drawn. It is essential to avoid both exaggerating and underestimating the risks and significance of these comparisons, while also paying attention to the gravity of the situation and taking appropriate action accordingly.

While there is hope that Putin's regime could follow the fate of the collapse of Nazism, it is important to approach this perspective with caution and not underestimate the gravity of the current situation. Indeed, both the Nazi regime and Putin's aggressive policies have caused widespread suffering and instability.

The observation that both Hitler and Putin were driven by grandiose illusions and committed grave errors through their attacks is relevant. Hitler's attack on the USSR had devastating consequences and significantly contributed to the downfall of his regime. Similarly, Putin's aggression against Ukraine and involvement in regional conflicts have garnered international condemnation and sanctions, which could weaken his position.

However, it is essential not to underestimate the resources and strategies of Putin's regime, as well as the support it may have both domestically and internationally. Combating this regime will require a balanced and strategic approach from the international community.

While there is hope that the West will remain united and confront Russian aggression, it is clear that the risks and consequences of a major conflict are significant. Therefore, it is crucial to continue diplomatic and deterrence efforts, as well as to prepare for any possible scenario, including escalation of tensions or open conflict. The West will be compelled to abandon its illusions of peace and prosperity and to fight for its peace

[10] *https://adevarul.ro/stiri-externe/rusia/vestul-va-fi-fortat-sa-renunte-la-iluziile-sale-si-2346587.html*.
[11] *https://thehill.com/opinion/international/4521958-is-putins-russia-a-nazi-state/*.

against Russia[12]. The priority should be to maintain global peace and security, which may require sacrifices and compromises from all parties involved.

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[12] *https://adevarul.ro/stiri-externe/rusia/vestul-va-fi-fortat-sa-renunte-la-iluziile-sale-si-2346587.html*.

THE MORALITY OF LAW IN AUDITING

Marta TACHE[*]

Abstract

The aim of the present research is to emphasise the boundaries of law in the absence of morality especially in the field of auditing. In ordinary speech, the word law is contrasted with even so close a cousin as the word justice. We are used to thinking of justice as something that can be hard to define; we do not delight in the open admission that its boundaries may be shadowy and uncertain. The word law, on the other hand, contains a built-in bias toward black and white.

By using a hand-collected data on the framework of the increased number of financial crimes in auditing and by questioning an amount of 80 professionals from the Chamber of Financial Auditors from Romania (CAFR), I provide evidence about the limited effects of the legislation and that the laws should have the basis in morality, in the consciousness of the human beings. Overall, this research documents that the legislative framework is not enough to fade the number of financial crimes in auditing.

Keywords: *justice, law, auditing, morality, financial crimes.*

1. Introduction

Over the last decade, the quality of audit services has been debated due to the high number of economic frauds. The discrepancy behind the unsmoothed legislation related to the national oversight systems depresses the appearance of an increased number of ethical dilemmas. The lack of supra-national efforts of achieving harmonisation obliges the Committee of European Auditing Oversight Bodies (CEAOB) to sustain the minimum requirements through the European Directive 2014/56/EU and the Regulation 537/2014. The national laws mandate specific EU settings but also allow a considerable litheness in their implementation. No more minimum requirements through national laws which should augment the transparent vision about the auditing mission.

If we could come to accept what might broadly be called an interactional view of law, many things would become clear that are now obscured by the prevailing conception of law as a one-way projection of authority. It would become clear, for example, that a failure to observe the principles of legality may harm the institution of law itself, even if no immediate harm is done to any individual. This point, along with others, is ignored in a rhetorical question posed by Dworkin in rejecting my suggestion that legal morality embraces a principle against contradictory laws: "A legislature adopts a statute with an overlooked inconsistency so fundamental that it makes status a goal. form. Where is the immorality or decay of the moral ideal"[1].

In the following section, I provide a consistent overview of the legal institutional setting in auditing and the relevant literature. In Section 3, I analyse the effect of the limited requirements of POB national laws at the EU level and I emphasise the empirical findings. Section 4 presents the conclusions and the personal interpretations.

2. Literature review

The implementation of the inspections program by POBs represents the key reform which has improved the relationship between financial audit under ISA and financial reporting under IFRS. There are also critics who are questioned the expertise and the adequacy of inspections by POBs[2]. Despite all the discussions, the introduction of POB is one of the main reforms aimed at improving audit quality. Concerning the impact of PCAOB, the emerging literature[3] argues that its effect on audit quality remains a consistent empirical question. Most specialised studies that analyse the effects of POB inspections focus on the US PCAOB authority. Lamoreux

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[1] I. K. Khurana, N.G. Lundstrom, K.K. Raman, *PCAOB inspections and the differential audit quality effect for Big 4 and non–Big 4 US auditors*, Contemporary accounting research, 38(1), 2021, p. 376-411.

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[3] D. Aobdia, N. Shroff, *Regulatory oversight and auditor market share*, Journal of Accounting and Economics, 63(2), 2017, p. 262-287; T.L. Johnson, E.C. So, *A simple multimarket measure of information asymmetry*, Management Science, 64(3), 2018, p. 1055-1080.

shows the direct effects of PCAOB inspectors of the US companies on audit quality as measured by less earning management and more reported material weaknesses with higher predilection to issue going concern overview. There is little evidence on the impact of POBs on audit quality, regarding the European countries. As an example, Carson[4] find a positive effect of POBs' inspections on the quality of auditing. However, there is no systematic documentation concerning the effect of inspections commence, inspection characteristics and disclosing the results of national inspections.

Despite the real benefits of POBs, the public oversight of the auditing profession is still the subject of scepticism[5] for the limited expertise and insufficient transparency of procedures[6]. More, the inspection program is claimed being largely ineffective[7] and non-representative for the entire client portfolio[8]. Certainly, the uncontested advantages of public oversight argue the further academic research on this subject. Early studies ensure descriptive evidence on the effects of PCAOB inspections and audit quality. Lamoreaux argues the positive association between PCAOB inspections and audit quality, measured by less earnings management and more reported material weaknesses. Specialised literature[9] attest the previous findings related to the association between PCAOB inspections and audit quality.

Concerning the public oversight of the European countries, there is very little written about the effect of POBs on audit quality. Some exceptions[10] documents the public oversight of the audit regulation in the context of audit quality and auditor independence. In the same context, they document about the number and frequency of inspections by POBs influence the inspection feedback of the analysed auditors. Florou and Shuai[11] find that the audit costs grow for clients of inspected auditors if the national inspections are independent, rigorous and complex.

A written constitution may provide that no law shall become law until it has been given some form of publication. It might be supposed that the principle of condemning retroactive laws could also very easily be formalised into a simple rule that no such law should ever be enacted, or should be valid if enacted. Such a rule would, however, be frustrated by legality. Curiosity, one of the most obvious requirements of legality - that a rule passed today should govern what happens tomorrow, not what happened yesterday - turns out to present some of the most difficult problems of all the internal morality of law. As for the requirements of legality other than promulgation, then the most we can expect from constitutions and courts is that they will rescue us from the abyss; they cannot be expected to lay down very many binding steps to a truly meaningful achievement. Most theories of law either explicitly state or tacitly assume that a distinction of law consists in the use of coercive force. A social norm is legal if its neglect or violation is regularly carried out, in threat or in fact, by the application of physical force by an individual or group who has the socially recognized privilege to act in this way.

In a society of angels there would be no need for law. But it depends on the angels. If angels can live together and perform their good deeds without any rule, then of course they need no law. Nor would they need law if the rules by which they acted were tacit, informal, and intuitively perceived. But if, in order to perform their heavenly functions effectively, angels need "made" rules, rules brought into being by some explicit decision, then they need law, as law is viewed in these essays[12].

The 1933 Congressional testimony of Colonel Carter on the proposed legislation (the Securities Act) may give us some incentives about the human subjectivity in the legislative interpretation. The transcript of the

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[4] E. Carson, R. Simnett, U. Thuerheimer, A. Vanstraelen, *The effect of national inspection regimes on audit quality*, 2017, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049828*.

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dialogue between Colonel Carter and the Senator Barkley was reread in the AAA (American Accounting Association) on the Annual Meeting on the 14th August, 1996:

Senator Barkley: Is there any relationship between your [..] and the organisation of the controllers here yesterday […] ?

Colonel Carter: Not at all. We audit the controllers.

Senator Barkley: You audit the controllers?

Colonel Carter: Yes; the public accountant audits the accounts.

Senator Barkley: Who audits you?

Colonel Carter: Our conscience.

Senator Barkley: I am wondering whether after all a controller is not for all practical purposes the same as an auditor, and must he not know something about auditing?

Colonel Carter: He is in the employ of the company. He is to the orders of his superiors.

Senator Barkley: I understand. But he has got to know about auditing?

Colonel Carter: Yes.

Senator Barkley: Has he got to know something about bookkeeping?

Colonel Carter: But he is not independent.

3. Research analysis and findings

With the help of CAFR, this questionnaire was completed by 80 auditors, starting from September 2023 and managing to collect the answers at the end of the previous year. Therefore, even if the total number of auditors questioned is not surprisingly high, we consider that the answers received, which we will nuance at the level of the next subchapter, are feasible and confirm the qualitative research developed at the level of the first chapter related to this research paper. In this case, we affirm that this study is an exploratory research at this moment.

Even though this questionnaire was designed in such a way that the respondents feel comfortable when they have to share with us some sensitive data about ethics and morals in the field of auditing, the low number of responses received even when maximum anonymity was ensured can be observed. From the results collected, with the help of Google Forms, we noticed that, for the first seven general questions, the information that is the majority is:

- the average age of the respondents is between 30 and 60 years (66.3%);
- most respondents are female (55%);
- the profession targeted by the majority is that of auditor (93.8%);
- the position of the majority of the respondents is management (81.3%);
- the average monthly net income is between 5,000 and 10,000 lei (48.8%) respectively >10,000 lei (41.3%);
- the last form of education completed in the majority is the master's degree (48.8%).

The question *Would an ethicist/moralist profession be useful as a guarantor in compliance with the Code of Ethics, within audit services?,* had the role of observing the auditors' awareness of the existence of a guarantor in compliance with the Code of ethics. Figure 1 shows that although the majority of respondents (53.8%) consider it necessary to implement a new ethicist/moralist profession regarding compliance with the Code of Ethics, the opponents' responses seem to persist vehemently (46.3%).

Figure 1. Q.1

Source: Tache, 2024

Figure 2 shows that the majority (67.5%) believe that the provisions related to the Code of Ethics are

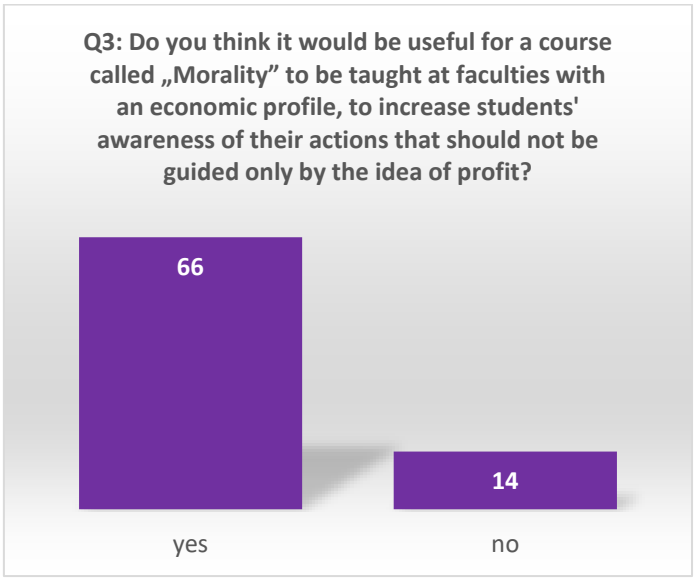
respected out of obligation and at the formal level. Thus, a number of 54 auditors out of the total number of 80 agree with the implementation by law of a globally accepted Code of Morals, similar to the Code of Ethics.

Figure 2. Q.2

Source: Tache, 2024

Figure 3 points out that a majority of 82.5% of the total auditors surveyed believe that, in addition to the central idea of profit, including knowledge of morality, students should be taught.

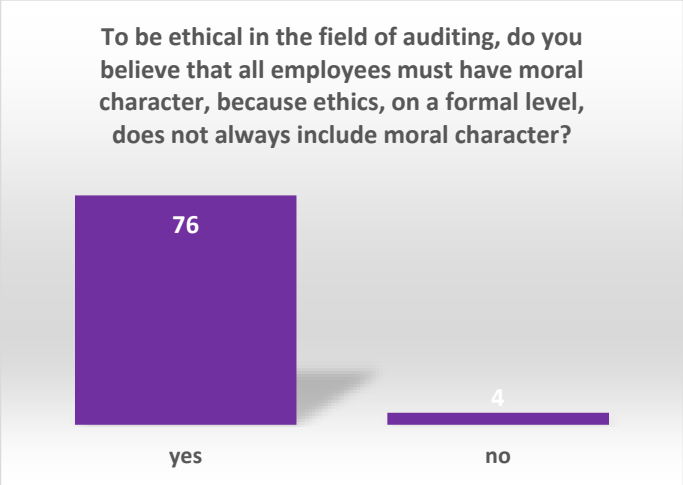
Figure 3. Q.3



Source: Tache, 2024

Figure 4 shows us that 76 of the 80 auditors who responded to our questions agree that, at a formal level, ethics does not always include a moral character of the auditor. Therefore, the second research hypothesis is validated through the four questions detailed above.

Figure 4. Q.4



Source: Tache, 2024

We can see that the professionals questioned are aware of the fact that the issues encountered in the field of auditing cannot be resolved only at the form-ethics level, which is found at the level of the Code of ethics and various other documents, but the moral background is also necessary, which is found in the conscience of each individual.

4. Conclusions

The lack of standardised reports by POBs leads to a deficiency of information across countries. Moreover, the harmonisation of the annual reports by POBs represents the main clue in comparing the results of national inspections across different oversight bodies. Overall, the scope of national inspections appears to be unaccomplished in some countries due to the unstandardized annual reports by POBs.

The bounded legal part of auditing should be diminished due to *(i)* the harmonisation of the minimum requirements of national laws through the disclosure of the POBs' annual activity and their inspections' results and, and *(ii)* augmenting the mission of CEOAB through the periodic and mandatory review of POBs annual activities.

Perhaps we should not overlook the conclusion that morality should become a mandatory discipline at universities with an economic profile, in order to be able to edify the ethical dilemmas that seem endless including in scientific research. The saying inscribed on the frontispiece of the temple at Delphi *Know thyself* is perhaps the best solution for solving ethical dilemmas at the individual level.

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