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THE REPRESENTATION OF THE RELATIONSHIPS BETWEEN PROFESSIONALS’ TRADERS

Professor Smaranda ANGHENI, PhD.

Summary

Professional trader use the services (work), in ongoing business, individual or company, certain categories of persons who according to the Commercial Code, art. 392-404 (now repealed) legal doctrine named them being representatives of trade aids traders. In this framework the legal institution of representation has existed both in traditional civil law relations and in relations between professionals’ traders.

Trade aids were divided into two categories: dependent and independent auxiliary aids. Aids addicts represent a category of people who are in a relationship of subordination to the person (owner) who hired. These aids cannot addict traders never acquire quality although, in fact, carries on trade. Category dependent auxiliaries are: servant; clerk; salesman; Trade Commission.

Categories which were considered auxiliary trade were: servants, salesmen, trade mediators (intermediaries). These people act in the name and behalf of the trader from receiving authorization or acting in its name but for his account.

Keywords: representative, represented, servant, representative, agent, auxiliary trade, empowerment, trader, professional

Introduction

Professional trader use the services (work), in ongoing business, individual or company, certain categories of persons who according to the Commercial Code, art. 392-404 (now repealed) legal doctrine named them being representatives of trade aids traders. In this framework the legal institution of representation has existed both in traditional civil law relations and in relations between professionals’ traders.

Trade aids were divided into two categories: dependent and independent auxiliary aids. Aids addicts represent a category of people who are in a relationship of subordination to the person (owner) who hired. These aids cannot addict traders never acquire quality although, in fact, carries on trade. Category dependent auxiliaries are: servant; clerk; salesman; Trade Commission.

Categories which were considered auxiliary trade were: servants, salesmen, trade mediators (intermediaries).

These people act in the name and behalf of the trader from receiving authorization or acting in its name but for his account.

Servant (art. 392 400 C.com.) was an adjunct of commerce to conduct business representation permanently stable or to all trade, either for a specific area in the country or abroad. In all cases, replace servant trader who hired him, concluding or negotiating on goodwill entrusted and on behalf of the merchant. In relation to third parties servant behave as such trader himself, while the internal relations, he operated on the understanding of representation depicted as a general or special power of clerk. Servant have the work done by professional, legal foundation is the employment contract, without him to acquire a merchant. Trader servant differed from any other appointed by action sphere and where it was going. The Servant was substituted by the trader, being his alter ego (See I.N. Finţescu Course on Commercial Law, vol. III, Bucharest, 1930, p. 141).

In all acts concluded in the exercise of trade which was tasked the servant was obliged to inform third parties of its quality of represented (contemplatio dominate). Servant exists as a legal entity under the current regulations and the framework of the Civil Code on tort deed servants (art.1373).

Clerk was an agent whose certificates are devoid of character stability. He was a trustee with simple representation, who in internal rapports was subordinate to the specific contract provision of services (location services) or contract. Because the clerk acts similar conduct, it had stood all the provisions governing the rights, obligations and responsibilities of the servant. Clerk signs legal documents concluded with third parties mentioning "by proxy".

The Commission for trade. Under art. 404 C.com. (Now repealed), "Commission for trade are servants of goods for retail sale; they have the right to exercise trade and where they are handed to request and collect the price of goods sold, may give good receipt for it on behalf of their employer. "Committee merchant trade was employees who helped him in internal premises (i.e. shop sellers. It should be stressed that not all employees had the status of trader committee on trade, but only those employees who entered into legal relations with clients. The Quality Committee of trade resulting from the express or implied empowering the trader. This representation powers were limited, the Commission for trade requiring a special authorization from the trader to the premises where operational exercised their activities [art. 404 par. (2) C.com. (Now repealed)].
The Salesmen for trade. Commission travelers for trade (also called commercial salesmen or pigeons) were employees of the trader, being remunerated with a fixed salary or a commission for each completed deal. Unlike the commission for trade, who were working in the office where the employer's trade, business travelers acted Commission outside this place, in other places, usually set up by traders. According to art. 402 C.com. (now repealed), trader makes travel to instruct the Commission to treat or make trade operations of its trade. This mandate related to searching and finding customers, collecting offers, orders and their implementation into contractual relations. Commercial operations involved and powers of representation, in which case the Commission for trade salesmen legal acts in the name and on behalf traders (art. 403 C.com., now repealed). Empowerment may result from circular, notices, letters trader, regardless of its form. Law regulating representation in professional traders is of special practical utility. Representation is and must be regarded as a legal institution itself, according to which the carried out in the names of a legal act (in the sense of negotium), so although this act shall be deemed made by the representative effects of the act did not affect this is causing them directly on representative.

Representation is legal, conventional and legal. In the case of legal representation, the power of a person to represent another person is required by law [art. 42 par. (2), the legal representation of the minor lacking legal capacity], [art. 1436 par. (1) Civil Code, the legal representation of creditors mutual solidarity].

In the case of conventional representation of a person (representative) empowers another person (representative) to enter into legal acts on behalf and in the name of the representative. The legal institution of representation is conventional contract of mandate with representation [art. 2013 - 2038 Civil Code] or the legal act unilaterally called proxy [art. 2012 par. (2) Civil Code].

The legal representation [art. 182 par. (3) Civil Code] existing, for example in the appointment of the curator of the court. Therefore, legal representation is one of the institutions particularly useful in the work of professional traders, especially when concluding contracts. Moreover, the contract executed in the name and on behalf of another person is based on the contract of mandate, legal institution that based idea of representation.

In terms of the Civil Code of 1864 representing the institution had no legislative consecration but its applications, namely the contract of mandate (Art. 1532 to 1559) and the Commercial Code (art. 374-391).

As I said, there were applications of the institution regarding representation auxiliaries’ trade regulations being art. 392-404 Commercial Code. Currently, the Civil Code establishes the legal institution of representation in art. 1295-1314, provisions governing the legislature, mainly foundation (under representation); effects representation; ability of the parties; vices of consent; good faith; proxy form; conflict of interest; termination of empowerment, accountability representative etc.

1. Conceptual framework of the institution of representation

Although the Civil Code does not define the representation, concluded effects occurring directly representative in person, according to the provisions of art. 1296 that legal representation is a transaction by which a person appointed representative can make legal documents, legal agreements with third parties on behalf and on behalf of another person, as represented. The contract concluded representative, within the limits of empowerment, on behalf representative directly affect only represented to within empowered to represent (Art. 1296 Civil Code).

However, the Civil Code contains details on the effects of representation in the case of the concealment quality of representative. According to art. 1297 Civil Code, whether the third party contractor knew nor should have known that the act in that capacity, contract with third parties to effect only representative and third party, unless otherwise provided by law.

However, an important provision for professional traders is that of the art. 1297 par. (2) that “if the representative, when contracting with the third party within the powers conferred on account of an undertaking claims to be the holder, the third party which subsequently discovering the identity of the true holder may exercise also against the latter the rights it has against representative ”.

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3 With regard to legal representation, in theory there is the view that this is all legal representation, see A. Pop, Gh. Beleiu, Civil Law. General theory of civil law, Bucharest, 1980, p. 338.
2. Conditions representation and its effects

2.1. Conditions representation

Representation requires three conditions must be cumulatively met: the existence of empowerment; intention to represent; Prior representative will.

The existence of empowerment mentions that it is absolutely necessary because the legal makes agreements for another person, respectively represented and not for himself (nomine alieno).

Empowerment is a unilateral act, which takes the form of a document called proxy [art. 2012 par. (2) Civil Code].

The power of clerk must be written in the form that will end the act by representative (art. 1301 Civil Code).

Thus, the principle of symmetry conclusion of legal documents if the legal act to be concluded by representative must be produced in authentic form "validitatem ad" obviously procure need to "dress" the same form, unless otherwise provided by law.

The authorization may be graft and other legal relations between the parties: office, bank deposit, contract services, employment contract, works contract etc. Although the empowerment of represented envisages achieving a particular legal act which is grafted, the power of clerk is itself an individual act, abstract, meaning that if, for any reason, the legal act that is grafted is null, this situation legal empowerment not itself affect the act of representation by continuing to produce effects between the parties.

We must also mention that, as a rule, naturally, the power must exist before the closing date of legal acts for which was granted power of clerk representative. However, the power can be time and "post factum" or so after the conclusion of the legal acts for which the representative was authorized, if ratified representative concluded documents without authorization.

Empowerment must be disclosed to third parties (contemplatio dominate), otherwise the documents concluded representative not be opposed to them, unless they knew or had the opportunity to know the date of completion of documents by representative (art. 1302 Code civil). Similarly, modification and revocation of authorization (power of clerk) must be disclosed to third parties in order to be opposable.

Representation may be: general (total) when the name of the representative, the representative may conclude any legal act, except those considered intuitus personae; special (partial), where the representative is empowered to enter only a certain act on behalf representative.

As long as the legal agreements for each other and not for himself, he must act within the limits of empowerment received representative.

Another condition that must meet the representation is to represent the intention is that the representative must act with the intent to represent one in which he received empowerment. Only if this intention exists between the legal effects of the act and third party representative shall take effect.

The intention of representing you may be express declaration resulting from such representative or tacit, when arising from certain facts or circumstances manifested at the conclusion of the legal act (i. e. factis et rebus).

As we said representation is valid if the will is expressed in terms of legal representative. Even if the representatives working on behalf of, at the time the deed is concluded with the third party, clerk manifest their own intention, in these circumstances, it must be free and uncorrupted. Otherwise, the legal act is annulled thus concluded (art. 1299 Civil Code).

According to art. 1300 Civil Code, the parties must act in good faith. Thus, knowledge or ignorance of certain circumstances it is considered representative in person. Representative of bad faith cannot rely on the good faith of the representative.

Given traits, peculiarities representation legislature regulates "conflict of interest" considering that if the representative is in conflict of interest with representative, contract representative can be canceled represented when conflict was known or should be known contractor when the contract (art. 1303 civil Code).

2.2. Effects representation

Representation - as a legal operation - both take effect in relations between the represented and the third person who contracted representative, within the limits of empowerment represented and received from internal relations between representatives and represented.

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3 See art. 71 of Law 31/1990, republished and amended
(1) Managers who are entitled to represent the company I can not send them unless this faculty has been expressly granted.
(2) In case of violation par. (1) The company may claim the benefits of the substituted operation.
(3) The administrator who, without right, substitute its responsibilities with this other person for any damages society.
The effects in relations between represented and third party

Representative legal act concluded with the third party to produce direct effects represented by becoming a party in their relations with third party is obliged to fulfill the obligations that representative within the limits of empowerment has assumed on behalf and account representative.

The legal basis is art. 1296 Civil Code article that "contract agent, empowerment within direct effect between the represented and the third person."

So, if a person ends legal acts in the name and on behalf of another person without having had power of clerk to that effect, or if exceeded empowerment, legal documents concluded with third parties have no effect against the represented (art. 1309 Civil Code).

Obviously, in this case, under art. 1310 Civil Code, will respond personally to third parties for damage caused if these being in good faith (not lack of empowerment experienced representative or exceeding its limits) when the deed is concluded.

As mentioned, there is a possibility for later represented ratify the act representative concluded without having had power of clerk or if limits were exceeded (art. 1311 Civil Code). Ratification takes effect retroactively from the time of conclusion of the legal act by the third party representative (art. 1312 Civil Code).

Right (opportunity) ratification document signed by a representative, according to art. 1310 Civil Code is transmitted to the heirs’ representative (art. 1313 Civil Code). It still, is according to art. 1314 Civil Code, and the third person (who concluded the contract in that capacity) may agree terminating the contract as long as it was not ratified.

Representation can always be revoked or restricted by represented. This rule is established by a rule of common law (revocation ad nutum applied to all legal acts intuitu personae) and is based on trust accounted representative. Representation is irrevocable but if it is given the benefit of both parties.

From the point of view of advertising and act to revoke or restrict the representation must meet the same conditions as granted power of clerk by which, with perfect symmetry and formally. Representing terminated by:

- Death or disability or disappearance of either the representative or a representative;
- Revoke the empowerment or waiver of the representative (art. 1306 Civil Code);
- Insolvency of one of the two parties (art. 1307 par. 3 Civil Code).

If the ending acts exceed empowerment received it personally liable towards third parties, unless those provisions have been ratified by represented.

However, according to art. 1309 par. (2) if the representative has led the third person to believe that the third party has power on his part cannot rely on the lack of empowerment or exceeded its limits. Upon termination of empowerment, the document must repay representative (clerk) finds the powers granted.

The representative does not have a lien (a guarantee) on claims which has to represented, but may retain a copy of such a document [art. 1308 par. (2) Civil Code].

In bills, the agent who issued a bill beyond the powers conferred or without the right personnel remains liable.

Contract with himself

Representative working on behalf of another has the right to work and own. But usually conflicting interests, which is why, in legal doctrine, it has been opined as meaning invalidity contract⁶. Notwithstanding, such a contract is possible if there is an authorization given by explicitly represented. As far as we are concerned we believe that this legal transaction is valid, leaving it to annul the legal representative to ask ended conclusion to be drawn from the content of art. 1304 Civil Code. The representative may request cancellation of the contract if he proves that the damage was caused due to conflict of interest that exists between representatives and represented.

Likewise, according to art. 1304 par. (2) Civil Code, for the same reasons and double representation is permitted where it is both the representative and the represented third party.

Also contract with himself allowed on commission, provided that the goods have a share of stock because pricing criterion is objective and does not depend on the will of one party.

4. The contract of mandate - conceptual framework

The most important institution of representation contract term is common in relationships between professionals’ traders.

Pending the adoption of the new Civil Code, the mandate was governed, on the one hand by the Civil Code of 1864 (art. 1532 et seq.), On the other hand, the Commercial Code (art. 374 et seq.). By Unification of

⁶ See F.A. Motiu, controversial issues regarding the contract to itself if the mandate and commission R.D.C. no. 3/2005, p. 35 ff.
Private Law, currently, the warrant shall be governed by the Civil Code art. 2009-2042 and as its applications so there are provisions in the Civil Code and special laws.

According to art. 2009 Civil Code mandate is a contract whereby a person appointed principal undertakes to conclude one or more legal acts and on behalf of the other party, called mandate.

The mandate of the following characteristics:
- The mandate is free of charge or for consideration. The mandate of the two individuals presumed to be free.
- The mandate is presumed to be an act of consideration is given to whether legal acts pursue a professional. Remuneration due to the representative is established in the contract or as a fixed amount or as a percentage value calculated at the agent acts concluded. In the absence of a contractual stipulation trustee remuneration shall be established by law, usage, or lack thereof on the amount of services they provide to mandate [art. 2010 par. (2) Civil Code]. Expression legislature "to the value of services rendered" is very general, which is why we believe that the legal provision was more appropriate to refer to the value of the documents which they conclude the mandate. Remuneration may be fixed by the court, that conclusion can be drawn from the content of art. 2010 par. (3) Civil Code "right action to establish the amount of remuneration is prescribed with the right action to pay it."
- Mandate may be represented, but without representation, this is not the essence of the mandate, but only by nature;
- Mandate may be general for all the affairs of the principal, or especially for a business.

If the mandate is the representative has greater freedom and independence, according to the dynamics of business activity.

**Delimitation of mandate contract by other contracts**

Delimitation mandate contract of the employment contract. The main difference concerns the nature acts concluded. If the mandate agreement, the trustee legal agreements and on behalf of the principal, and if the employment contract, the employee meets the material acts which exclude representation, being subordinated to the employer.

Mandate contract delimited from agent contract, it is concluded between the principal (represented) and agent (representative), and which in turn is a professional independent intermediary acting professionally. Principal empowers the agent to negotiate or to negotiate and conclude cons and on behalf of the principal in a given territory (region) for consideration. The warrant shall be delimited and legal administration of property of another institution regulated by the legislature in art. 792-857 Civil Code.

**The administration of the property of others**

The legal institution of administration of property of another, which is an absolute novelty "scene" Romanian law, the legal basis is 792-857 Civil Code has strong links with the mandate (as a legal option) which is distinguished primarily by different legal regime.

Thus, administration of property of others is a complex institution that contains elements of the mandate but equally other legal institutions such as agency contract, management of business establishments that defines and justifies its autonomy.

As for the delimitation to warrant must remember that if in both cases a person gives power of clerk to another person to "do something" in the name and on his behalf, so that both the trustee and administrator of legal agreements and must give an account on operations, the possibility of withdrawing an authorization, administering the property of others, empowering content is much more extensive and complex than the empowerment representative.

In these circumstances administering the property of others is the legal institution that involves both the conclusion of legal acts and offenses committed in the interest of the beneficiary materials remuneration due administrator.

Administration of property of others’ object can represent one or more assets of the beneficiary of a patrimony or heritage in its entirety.

However, administration of property of others differ mandate and scope of the powers conferred by the beneficiary administrator, powers which differ depending on whether the administration: simple administration or full administration.

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7 D. Cărpenaru, Treaty... op. cit., p. 492 f.
8 See also C. George, property management regulation other in the Civil Code, "Judicial Courier", no. 8/2013, p. 440: The author opines that taking the property of others is derived from the mandate effects so that "legal documents concluded within the limits of the powers conferred administrator can not engage his personal liability to third parties contractors". However, the author shows "derived from the same legal institution, overcome powers administrator or instruction from the administrator attract personal liability unless there has been known to exceed the limits of the mandate" unless the recipient expressly or tacitly ratifies the act ended.
When it is given simple, according to art. 795 Civil Code, the administrator is empowered to enter only acts of conservation and management of the assets of the beneficiary while when given full administrator may enter and acts of disposition of property taken whether the acts are subordinate to the need for as many to exploit patrimony managed, profitable purposes i.e. if the value of heritage acts lead to enhanced benefit (art. 800 civil Code).

Also a commercial mandate contract is essentially and management contract concluded under Law no. 31/1990 amended and supplemented, between the company and administrator. However, administrator credentials are different from those of the trustee; it has the opportunity, in addition to signing legal documents, to fulfill other specific tasks.

Conclusion

The legal institution of representation is expressly provided for in the current Civil Code presenting a particular theoretical and practical utility. Although the provisions of the Commercial Code concerning trade auxiliaries were repealed by the enactment of the Civil Code, however, in practice, they exist in the legal institution of representation meaning a reality that endures business life.

Bibliography


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DIGITAL SIGNATURE.
DIGITAL PROTECTION METHOD

Prof. Univ. PhD. VALENTIN PAU, PhD. LUMINIȚA COPACI

Abstract

A key element, in the current context, when hard copy tends to become a secondary means of presentation for documents, when transportation and archives are mainly electronic, consists of replacing the electronic document authentication methods with new services, adjusted to the latest information technologies. In this context, a critical role is played by digital signatures, as the means for authenticating the content of an electronic document and its issuer.

This paper contains an overview of technologies existing at present, identifying design and implementation criteria in respect of inter-operable protection and security solutions to allow the users to trust the electronic documents and to operate efficiently in the context of the current computer networks.

1. STANDARDS AND REGULATIONS RELATING TO DIGITAL SIGNATURE

1.1. Legal regulations governing digital signature

The enforcement of laws governing digital signatures started in 1995, when the American Bar Association (ABA) published the Digital Signature Guidelines [ABA95]. The above-mentioned document sets forth the conditions to be fulfilled by digital signatures in order to be legally accepted, the technical method for their implementation and the requirements imposed by Certification Authorities.


At the European level, in the 1997 communication “European Initiative in Electronic Commerce”, the European Union Commission acknowledged the fact that digital signatures are the main instrument of ensuring the security of electronic commerce.


Romania has enacted, in July 2001, Law No 455 on Digital Signature [ROES01]. The law lays down the legal status of digital signatures and soft-copy documents, and also the conditions for providing certification services in relation to digital signatures.

1.2. Standards on digital signatures

The first recommendations of the European Electronic Signature Standardization Initiative (EESSI) refer to the main fields identified as follows:
- Operational and quality standards for certification services providers;
- Operational and quality standards for signature creation and verification systems;
- Requirements to ensure inter-operability of digital signatures.

The standards referring to digital signatures are prepared by the European standardization bodies CEN and ETSI (European Telecommunications Standards Institute) in cooperation with companies, organizations and experts in this field.

The responsibilities of ETSI EESSI and CEN/ISSS in terms of standardization, in connection with the entities and systems used within the creation and verification of digital signatures are illustrated in summary in Figure 1.
2. SECURITY SERVICES FOR ELECTRONIC DOCUMENTS

The basis of security services for electronic documents consists of public key encrypting. Public Key Infrastructure (PKI) allows the entities to obtain authentic public keys in the form of digital certificates. A digital certificate consists of a connection impossible to forge between a public key and a certain attribute of its holder. A public Key Infrastructure consists of all the hardware, software, personnel, policies and procedures necessary to generate, store, distribute and revoke digital certificates associated to public keys. Certification Authorities are basic elements of Public Key Infrastructures, playing the role of issuing and revoking digital certificates. A Public Key Infrastructure is made up of one or several Certification Authorities connected between them through trustworthy communication channels.

The main components of a Public Key Infrastructure shall be:
- Certification Authority (CA) consists of the basic components of a Public Key Infrastructure and have the role of issuing and revoking digital certificates;
- Registration Authority (RA) has the role of validating certificate issuance requests and the identify of end entities;
- Repository for storing and distributing certificates and Certificate Revocation Lists (CRL);
- End Entity is a generic term used in order to refer to users, devices, or software employing the digital certificates for the implementation of security services.

PKI components and the relationships among them are illustrated in Figure 2, in accordance with the architectural model proposed by IETF PKIX Working Group [AT02].
3. CREATION OF DIGITAL SIGNATURES

3.1. Format of digital signatures

In general, a document bearing a digital signature consists of four different parts [Sche01]: signed content; signature; signed attributes; unsigned attributes.

Figure 3 illustrates the general structure of a document bearing a digital signature.

![Figure 3. Structure of a document bearing a digital signature](image)

The Signed Content consists of the data to be signed.

The Signature contains the signature proper.

The Signed Attributes consist of the algorithm identifiers, the signature policies and the digital certificates used.

The Unsigned Attributes consist of a series of data not covered by signature, but which is nevertheless associated to the signature, such as: CRLs, time stamps, etc.

3.2. Creation of digital signatures

In order for the digital signatures to have legal value, the systems used in their creation or verification need to ensure the security of information.

As per CEN/ISSS WS/E-Sign, the main components in a Signature Creation System (SCS) are as follows [CWA14170]:
- The Signature Creation Application software (SCA) and
- The Secure Signature Creation Device (SSCD).

Figure 4 illustrates the functional model of a signature creation system [BICA05]. This model is independent from the technology used and only emphasizes the modules and interfaces relevant in terms of security.

![Figure 4. Functional model of a SCS](image)

3.3. Signing an electronic document

In signing a document, the signatory attests to the fact that he acknowledged the content of the document and agrees with it. Signing a document shall be, first and foremost, an act of will. Therefore, it is very important for the individual signing a document to have the assurance that he fully saw and understood what he signed.

The display and signing of an electronic document are completely separate processes (Figure 5) [BICA05]. An electronic document may exist in various formats: text, Word, PDF, HTML, XML, etc., and the manner in which it is presented to the user depends on the features of the application and display system used.
3.4. Document signature policies

A signature policy is a set of rules/procedures which have to be observed during the creation and validation of a digital signature, so that it may be accepted as valid [ETSIESF]. The signature policy may be determined, for instance, at organization level and needs to be complied with both by the individuals creating signatures – electronic documents, and by the individuals verifying such signatures. The signature policy may be explicitly specified or may be inferred from the semantics of the signed data, if they refer directly to a signature policy.

In accordance with ETSI, a signature policy needs to contain the following:
- general information on the policy, such as: the single policy identifier; the name of the individual having issued the policy; the date on which the policy was issued; the scope of the policy.
- signature verification rules: the period during which the signature may be deemed valid (lifetime of the signature); consent expressed by the signatory on the content of that document; the conditions in which digital certificates are trustworthy, time stamps, or other attributes associated to the signature; rules for using information concerning the status of certificates or time stamps; other restrictions referring to signature algorithms or key length.
- other rules necessary for fulfilling the goals of the signature.

In order to allow automatic processing, ETSI has defined two formats that may be used in preparing signature policies. The former employs ASN.1 (ETSI TR 102 272 - ASN.1 format for signature policies), while the latter XML (ETSI TR 102 038 - XML format for signature policies).

The signature policy has to be procured from an authentic source. This may be achieved when it is signed by the issuer or by authentication of the server on which it is posted, using, for instance, the SSL/TLS protocol.

4. CASE STUDY

4.1. Identrus PKI

Computer security and the financial guarantees is one of the main obstacles in using electronic commerce at general level.

Although there are currently in place a series of standardized security mechanisms which may be used with a view to protecting electronic transactions, consensus was not yet reached in tackling certain concerns.

With a view to tackling computer security concerns and benefiting from the opportunities afforded by electronic commerce, eight international banks - ABN AMRO, Bank of America, Barclays, Chase Manhattan, Citigroup, Deutsche Bank, Bankers Trust (purchased, in the meanwhile, by Deutsche Bank) and HypoVereinsbank - joined forces in April 1999 ad created Identrus LLC, an organization whose mission is to build a worldwide trustworthy infrastructure for the protection of B-2-B type electronic transactions.

Unlike other existing PKIs, Identrus allows, in addition to securing the identity of entities, the possibility to provide additional services, such as financial securities, risk management, etc., for B-2-B-type transactions, by setting forth an appropriate legal frame among Identrus. The participating financial institutions and business clients (companies or organizations) thereof.

In accordance with Identrus, financial institutions shall be divided into two categories:
1st Level Financial Institutions. These institutions are at the first level of Identrus hierarchy and need to fulfill strict requirements, in terms of rating;
2nd Level Financial Institutions. 2nd level financial institutions are the institutions that fulfill the basic criteria on rating and which, by means of a 1st Level sponsor, may supply the same services for clients.
From the technical standpoint, Identrus is a PKI with hierarchical architecture, in which Identrus LLC plays the role of Root Certifying Authority, and the participating financial institutions are 1st Level or 2nd Level Certifying Authorities issuing certificates for business clients. In their turn, the companies issue certificates to the employees authorized to perform business over the Internet. Figure 5 illustrates a summary of Identrus PKI architecture [BICA05].

The management of private keys and of digital certificates shall be performed by means of hardware security modules (HSM) and smart cards. In order to ensure inter-operability within the infrastructure, it is exclusively allowed to use widely known standards such as X.509, OCSP, PKCS #7 or PKCS #10.

The functional architecture of Identrus is illustrated in Figure 6. Such infrastructure relies on procurement management modules and on sale modules. Each of these modules is equipped with a pair of keys and a digital certificate for the performance of digital signatures or for encrypting transactions.

This model corresponds to a typical business scenario between a company and its suppliers/partners. The procurement management module is used by an authorized employee of the company, who holds a smart card on which the private key and corresponding digital certificate are stored, in order to place orders with the suppliers. The sale module consists of the application server of the supplying company. The private key and digital certificate of the application server are stored on a hardware security module (HSM).
The status of digital certificates during a transaction is determined on-line by means of OCSP (OCSP – Online Certificate Status Protocol) or CSC (CSC – Certificate Status Check) protocols which, in principle, is identical to OCSP but uses XML instead of ASN.1 for the format of its messages. The sequence of steps necessary for the performance of a transaction, but also its communication with the other modules, such as the risk management module, is controlled by the transaction coordination module.

Identrus also provides a legal frame for the performance of B-2-B type electronic transactions. This involves the conclusion of specific agreements both between Identrus LLC and the participating financial institutions, and between the banks and their business clients. The agreements set forth the rights and obligations of the parties, but also the manner in which disputes shall be settled. The existence of this legal frame, in conjunction with the technical infrastructure for the management of digital certificates allows Identrus to provide the necessary trust for the performance of global electronic transactions to ensure the identity of participating entities and the provision of financial guarantees for such transactions.

CONCLUSIONS

Information security, in general, and digital signatures, in particular, are, at present, two of the most dynamic fields of research.

Digital signatures play the same role as handwritten signatures, allowing to identify and for agreements to be concluded between the individuals in Cyberspace. The presence of a digital signature on a document guarantees the authenticity and integrity of data.

Another, equally important, feature of digital signatures is that of non-repudiation, preventing any possibility for the signatory to assert later on that he was not the one who signed that document.

The role of electronic archiving services is also to keep and guarantee the validity over time of documents bearing digital signatures.

The systems used in the creation of digital signatures that hold legal value need to provide to the user the security that what is shown on screen is indeed what was actually signed and that no one else may create signatures in his name.

The applicable laws and regulations in place at international, European and national level in this field lay down the conditions which need to be fulfilled by a digital signature in order to be equivalent, in legal terms, to a handwritten signature and to be admitted as evidence in court.

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ROMANIAN LAW ON THE RIGHT TO REMAIN SILENT AND TO AVOID SELF INCRIMINATION

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Abstract: The institution of the right to remain silent originates in the Medieval England when there were two completely different criminal procedure systems: on one hand, the inquisitorial one, applied mostly by ecclesiastic courts, practicing the canonic right, and on the other hand, the Common Law employed in laic Courts.

Later, Miranda Warning, called also the defendant’s right to avoid self incrimination, a rule originating in a famous trial in the U.S.A., stipulated that: “You have the right to remain silent. Anything you say may be used against you in a court of law”.

In terms of the right of a suspect not to incriminate himself, it is important to take into account the content of art 6 paragraph 1 of the European Convention of Human Fundamental Rights and Freedoms, according to which everyone is entitled to a fair hearing of his case by an independent and impartial Court. Constantly there have been efforts to consolidate the right not to testify and the right to avoid self incrimination as worldwide recognized standards and basis for equitable trials.

I. GENERAL ASPECTS ON THE RIGHT TO SILENCE

Generally, the right to be silent is known as an obstacle for every violation of the defendant’s private life, but, from a stricter point of view, it is seen as a right that protects only the defendant’s testimony.

Judicial protection of the natural rights, generally, and of the human rights in particular, employs a series of mechanisms and procedures which make the States accept the International Community supervision for the manner this protection is applied.

The right to freedom and safety focuses mainly on the person’s physical freedom.

A person’s freedom protection means also having some guarantees concerning her rights.

The right to avoid self incrimination is not clearly expressed in the European Convention, being known rather as the right to be silent.

This right is a basic condition for an equitable trial, though the right not to incriminate himself is not clearly guaranteed.

The judicial nature and the content of the right to be silent involve the analysis of the legal provisions of the matter as elements of the international context. Thus, its constitutive elements are as follows:

a) The right to make no statement on the criminal action or on the accusation brought against, without being charged for previous insincerity as aggravating circumstance;
b) The freedom to, knowingly, answer or not to all or part of the questions;
c) The right to avoid self incrimination;

The first two elements represent imperative rules of the evidence procedure, while the third one makes reference to the right to an equitable trial.

According to the 5th Amendment of the American Constitution: “No person shall be compelled to become a witness at his own trial. The testimonies and evidence produced by breaching this right shall result in eliminating the case evidence. We are talking about removing the illegally produced evidence from being used during the criminal trial”10.

Article 10 point 1 of the European Convention on Human Rights provides the right to freedom of expression, and implicitly the right to hold opinions and therefore the right to be silent, which represents the object of this work.

Thus, communication is a form of freedom, meaning that the person is free to be silent and not to communicate, representing her right to be silent.

Nowadays everyone knows about the right to be silent, not only in the European Court for Human Rights but also in the national legal frames, which consider this right originated from the Common Law system, more exactly from the USA Supreme Court of Justice.

The vast jurisprudence of this Court clarified, by several decisions, very complicate aspects come up in criminal law on this procedure guarantee.

The Canadian Charter of Rights and Freedoms confirms the right of a person, accused of having committed a crime, to not be compelled to testify in the action started against him regarding the criminal action. For this, art 13 of this Chart establishes the right to not self incrimination in favor of the witness: “A witness who testifies in any proceedings has the right not to have any incriminating evidence used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence”.

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Also, according to art 10.1 of the same Charter: “When there are reasons to suspect a person for having committed a criminal act, that person must be informed promptly on every question about the crime or others related to it, in case the answers could be the ground for suspicion, so that either his answers or his silence (refusal or incapacity to answer or provide with a satisfying answer) could be considered evidence. The person shouldn’t be warned if the questions focus on other purposes.

The same text, article 10.5, contains the warning with the following form: “you have to remain silent… Anything you say could be against you”.

In Europe, the Court of Justice of the European Communities was the first Court which admitted, for the legal persons benefit, the right not to testify against its own person in crimes related to the competiveness law.

II. THE RIGHT TO SILENCE IN THE NATIONAL LEGAL FRAME

According to the Romanian Constitution, the right to silence is settled by:

a) art. 20, p. 1, after confirmation by Decree n. 212 of 31.12.1974, at the International Treaty civil and political rights, stipulating the right to silence of the accused person;

b) art. 24, regulating the right to defense even by remaining silent both in the presence and in the absence of a lawyer;

c) art. 28, controlling the secrecy of letters and, therefore, the right to silence and not to violate the secrecy of letters for those who legally or by chance acknowledged it. Such right is at the same time, also a work obligation for the public employee.

d) art. 29 and art. 30, settling the freedom of consciousness and the freedom of expression, representing the right to keep silent and withhold thoughts, opinions, believes, creation, in other words the right to communicate only when you want to do so or consider it is necessary and right:

The right to silence and to avoid self incrimination was settled by Law n 281/2003\(^\text{11}\).

Based on art 72 paragraph 2 of the Criminal Procedure Code, modified by this law, it was established that: “The accused person or the defendant is informed about the deed that represents the object of the case, its legal qualification, his right to have an attorney together with the right to remain silent, being warned about the possibility his statements be used against him”.

Art 143 paragraph 3 Criminal Procedure Code, on arrest terms, also modified by Law no 281/2003, is it set that: “The Prosecutor or the investigating authority shall inform the accused of defendant about his right to hire an attorney. Also, he shall also be informed about his right to remain silent, his statements could used against him”.

The old Criminal Procedure Code contained a regulation resulted from art 322, on the beginning of the judge investigation, stipulating that: “the President explains the defendant the meaning of the accusation brought against him and informs him on his right to remain silent, warning him that his statements could be used against him; at the same time, the defendant was informed about his right to ask questions to co defendants, to the victim to other parties, to witnesses, experts and to offer explanations during the entire judge investigation, whenever he would consider necessary”.

Based on these articles, we can notice that regulations on the right to silence of the defendant or accused were heterogeneous, being comprised in different basic institutions of the Criminal Procedure Code on evidence matter, of preventive measures and of the trial phase. The national law maker didn’t understand to provide this procedure guarantee a unitary law.

Also it is clear that national regulations were not comprised at the same time in the fundamental law of our criminal procedure; it was an approximate 3 year period between. Thus, the old Criminal Procedure Code lacked a text settling the right to avoid self incrimination.

The law project to adopt O.U.G. no 60/2006 to modify and complete the Criminal Procedure Code, and to modify other laws, contained a disposition forbidding the usage, during the criminal trial, of statements made by some persons as witnesses who afterwards became accused for having committed the same deed: “The testimony of the witness on the deed object of the criminal prosecution, cannot be used as evidence in the criminal trial and shall be eliminated from the case file by the criminal prosecuting body”.

This text was declared as unconstitutional as it infringed the principle of the Judge’s independence, the effort for finding the truth, the right to an equitable trial and the principle of justice\(^\text{12}\).

On the other hand, we have to mention that the old Criminal Procedure Code, when settling the defendant’s institution, didn’t provide with any right for persons suspected of having committed crime; the procedure rights started their effects at the beginning of the criminal prosecution “in personam”, when acquiring the quality of defendant. Nevertheless the beginning of the criminal prosecution was not clearly defined and the competent

\(^{11}\) Law no 281/2003 published in the Romanian Official Gazette, part 1, no 468 of July 1\(^\text{st}\) 2003;

authorities had an extended right to assess on starting this phase, which led many time to situations where most evidence produced in the preliminary phase and the criminal prosecuting stage being reduced to minimum, with the impossibility to observe the procedure basic guarantees for the accused or the defendant. Therefore, the persons accused of having committed some crimes were not procedurally protected, and this was against the standards of the European Court of Human Rights.

The New Criminal Procedure Code sets at art 10 paragraph 4, the judicial bodies obligations on warning the accused or defendant about the existence of such procedure guarantees: “Before hearing, the suspect or the defendant must be informed about the right to make no statement”. But this text can be criticized as it is not clearly stipulated if it’s about the first hearing or all hearing of the accused or defendant. Art 6 paragraph 5 of the Old Criminal Procedure Code mentioned that the accused or the defendant was informed about his right to be assisted by an attorney before testifying for the first time. The new text doesn’t provide with this mention; it is allowed this way to have a correct interpretation from the point of view of how this procedure guarantee works, meaning that the suspect or the defendant are to be warned on the existence of this right every time he testifies. This logic judgment is also the result of the expression “suspect or defendant”, meaning that the same person, suspect at the beginning and afterwards defendant, is to be warned twice.

This procedure guarantee is maintained during the entire time of the criminal process, for all its phases, until the final decision is ruled, so a suspect or defendant, who chose at one point, to testify, didn’t give up this right for good, and can, any time, come back to his option, whereas warning him afterwards is necessary to perceive the persistence of the right to silence in other subsequent stages of the criminal process.

Article 83 point a of the Criminal Procedure Code, making reference to art 79 of the Criminal Procedure Code, governs the procedure rights of the suspect and the defendant: “during the criminal trial, the accused enjoys the following rights: a) to right not to testify during the entire criminal process, being informed that such decision will not lead to any negative consequences, while, in case of testifying, his statement could be used as evidence against him”. This way, the Romanian lawmaker established the impossibility of the judicial bodies to extract unfavorable consequences from the silence of the suspect or defendant who understands to exert his legal right.

Although it is clear that the Romanian law maker didn’t make further comments on the protection of such guarantee, choosing to settle the right to silence only in relation with the suspect or defendant, capacities that can be acquired only after the beginning of the criminal prosecution “in personam”, meaning after the beginning of the criminal action, leaving uncovered the cases where information are obtained by interrogating the suspect before this procedure moment. Another important regulation, found in the new Criminal Procedure Code, on this matter, in art 209 paragraph 6: “Before the hearing, the criminal prosecuting body or the prosecutor must inform the suspect or the defendant about his right to have an attorney, chosen or ex officio, and also the right to remain silent, except for the information on personal data like identifying himself, being warned that his testimony could be used against him”.

It is clear that judicial authorities must warn the suspect or the defendant about the existence of the right to remain silent before giving any kind of information, including those related to his identity. The New Criminal Procedure Code settles a new procedure related to the witness right to avoid self incrimination.

According to art 118: “a testimony, made in the same case, cannot be used against its author who turned into suspect or defendant before or after the testimony. Judicial authorities must stipulate, when recording the testimony, the previous procedure capacity”.

But this text is not sufficiently clear about the case where the same person, who, at the end considered a suspect, is not legally warned in due time, because, in the case, he doesn’t have the same role, not even as witness, and gives information to the criminal investigators: here, these information could be recorded as testimony becoming evidence.

Another relevant article on this matter is art 225 of the new Criminal Procedure Code, which, pursuant to its paragraph 8, settles that: “Before hearing the defendant, the Judge of rights and freedoms informs him about the crime object of the accusation, and the right not to make statements, warning him about the possibility that his testimony could be used against him”. We can notice that the lawmaker introduced a new text, on the guarantee of the right to silence, in the matter of the preventive arrest institution, even though the defendant has been heard before and therefore, warned or instructed again on his right. Clearly, the lawmaker took into account the case where a proposition for preventive arrest is made up regarding a defendant who hasn’t been heard again; this way, the judge for rights and freedoms becomes the first judicial body that hears the defendant in that case.

13 Puşcaşu V., “Critical aspects on settling the right to silence and to non self incrimination in the Romanian Criminal Procedure, with references to compared law”, Chronicles of Universităţi de Vest de Timişoara, Law, 2014, Public Law Section, pp.86-87;
During the criminal process, we find another case settled by the Romanian law at art 379 paragraph 2 of the New Criminal Procedure Code: the Judge explains the defendant the accusation brought against him, informs him about the right to remain silent, warning him that anything he says could be used against him, and also about his right to ask questions to co defendants, to the victim, to other parties, witnesses, experts and to offer explanations during the entire process of the judge investigation, whenever considered necessary.

This law sets a new warning concerning the defendant on his right the keep silent and the consequences of his statements in the case.

Also, this text points out the specific character of this procedure guarantee, being valid for the entire criminal process, even though, as we previously mentioned, at one point, the defendant has exerted another option, choosing to make statement.

III. ELIMINATION OF THE ILLEGAL EVIDENCE, PRODUCED BY BREACHING THE RIGHT TO SILENCE OR TO NON SELF INCRIMINATION

The lawfulness principle in producing and using evidence means that only evidence produced and used in legal circumstances can be employed according to the new Criminal Procedure Code and to the jurisprudence of the European Court of Human Rights.

It is governed by art 101 of the new Criminal Procedure Code: “It is forbidden to produce evidence by using force, threats or other constraining means, by making promises or instigating. No listening methods or techniques shall be used so the person could remember and relate consciously and willingly the evidence object”.

Evidence elimination is clearly regulated by art 102 Criminal Procedure Code, where the second paragraph stipulates that: “Evidence obtained illegally cannot be used in the criminal process”. This penalty can also be applied in the matter of producing evidence by breaching the principle of truthfulness, loyalty. It has a special operational scope, meaning it is different from the sanction of annulment applied only to process or procedure acts.

Evidence elimination can be decided when there is a major and important infringement of a legal provision concerning the legality of producing evidence; in certain circumstances, using this evidence can menace the equitable character of the criminal process.

IV. CONCLUSIONS:

Based on the provisions of the old Criminal Procedure Code, elimination of illegal evidence was done mainly before the Court, where the defendant used to be informed about the produced evidence only at the end of this procedure stage, together with the content of the criminal prosecution. Therefore, the defendant only had the possibility to appeal to vices of already produced evidence and to ask for elimination of the illegal pieces from the phase of judge investigation or deliberation.

By settling the Preliminary procedure the law maker wanted to solve all aspects of lawfulness of the arraignment of evidence production. This matter influences the speed of case solution, by excluding the possibility of subsequent sending, during the judging process, of the file to the Prosecutor’s Office, due to evidence validity; the lawfulness of the evidence and of the arraignment is settled now, in this stage.

Thus, the Judge of Preliminary Chamber is the one responsible for the arguments analysis and, by a good usage of the principles of the equitable trial, he has the obligation to admit evidence which allow finding the truth, evidence correctly and legally produced during the criminal prosecution phase.

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THE FORENSIC PSYCHIATRIC EXAMINATION ACCORDING TO THE NEW CRIMINAL PROCEDURE CODE

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Abstract:

The new Criminal Procedure Code contains, besides general rules applicable to all types of expertise (forensic, criminalists, accounting, technical, judicial etc.), a series of new special regulations, applied for forensic psychiatric expertise, for forensic autopsy, for toxicology or forensic expertise examination of the person, which were absent in the old code.

The new frame created not only in the matter of forensic expertise, a legal modern system related to the criminal process, able to comply with the new realities, to make efficient the criminal trial and assure at the same time the observance of the fundamental rights and freedoms of all subjects of the criminal procedure.

The new Criminal Procedure Code clearly stipulates that the expertise can be conducted by official experts or authorized independent experts, Romanian or from another country, the only institutionalized expertise being the forensic one.

For a celerity of evidence production and for a fast trial of the criminal cases, the judicial body has the possibility to replace the expert when he doesn’t finish his report of expertise in due time and offers no reasons.

The new Criminal Procedure Code offers the expert the possibility to testify as witness when the judicial body considers it is necessary to clear his findings or conclusions.

V. GENERAL AND SPECIAL RULES SET BY ROMANIAN LAW FOR EXPERTISE ORDERING AND CONDUCTING

Ordering and conducting forensic examinations have always been regulated by the Criminal Procedure Code in force in our country.

Thus, art 164-168 of the Code of Charles the Second mentioned that the only judicial bodies able to order an expertise were the instruction judge and the Courts and not the criminal prosecuting authorities or the prosecutor. The expert was the person who, by his art, profession or knowledge, was capable to fulfill the task, and if there were forensic doctors or official experts it was not possible to assign other persons except for special circumstances.

The right to defense was guaranteed also by the Criminal Procedure Code of 1936, being considered as a fundamental right in the criminal trial, and the name of the assigned person as expert ex office was communicated to the defendant, to persons with civil liability, to civil parties and to the Public Ministry, who had, within 3 days since the receiving of the notification, to forwards their written conclusions regarding the person, having also the possibility that the defendant and the civil party assign their own technical advisor, specialist in the matter.

According to art 174 of the Criminal Procedure Code of 1936, if there were differences between the opinions of experts assigned by the judge of instruction or the Court, and the technical advisors, their reports were sent to control and review to the forensic committee for their imperative approval.

In terms of forensic psychiatric expert examinations, the same code laid down they were ordered whenever the criminal responsibility seemed doubtful, having the possibility that these experts request the defendant be placed under observation in mental institution for a maximum 6 weeks time.

These legal provisions have made up the basis for the subsequent codes in the expertise matter.

Thus, in the Criminal Procedure Code of 1968 the expertise, generally, no matter its object, used to be a piece of evidence conducted by an expert assigned by the criminal prosecuting body or the Court to examine the facts that needed to be clarified by using advanced knowledge.

The forensic medical expertise was optional meaning that it was left to the judicial bodies’ free option. In certain cases it was compulsory, one of them being the forensic psychiatric medical expertise for aggravated and consumed homicide crime, together with the case where there is only the tentative. Another case was to determine whether the under aged person, aged 14 – 16 years, had mental capacity. For instance, this medical expertise was compulsory when the prosecuting authority or the court had doubts regarding the mental capacity of the accused or defendant when the crime had been committed.

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15 Art. 164 of Criminal Procedure Code of 1936
16 Art. 175 of Criminal Procedure Code of 1936
It was ordered ex office or at the request of parties, by order of the criminal prosecuting bodies or by the conclusions of a court, using the same person for all cases, except for particularly cases.

Compared to the Code of 1936, the one of 1968 expressly stipulated that if the expertise was to be done by a forensic institute, the judicial authorities could not assign a certain person but had to accept the expert sent by the Institute management. Here, the parties had also the right to ask for the presence of expert witness when the forensic psychiatric examination was done.

The code of 1968 introduced the rule set by art 64 paragraph 1 on evidence, according to which, the testimony on the forensic expertise, as evidence, was made by judicial bodies enjoying free right to assess its value.

Nowadays, the forensic psychiatric medical expertise is compulsory in the following cases:

a) For crimes committed by minors of 14-16 years. A presumption regarding the lack of judgment is taken into consideration, given the age and the specific features of a developing mind;

b) For crimes provided by art 200 and 202 of the Criminal Code. In cases where the mother kills or injures her newly born during the birth, the code stipulates that in order to enjoy alleviating circumstances when the legal classification is decided, the active subject of these crimes must be mentally troubled the moment of committing the crime. In other words, this type of forensic examination aims at establishing whether the mother had or not reduced mental capacity as a result of the mental disorder;

c) For cases where the prosecuting bodies have doubts on the mental capacity of a person accused of having committed a crime after meeting him or after analyzing some forensic medical documents.

The forensic psychiatric medical expertise can be ordered during the criminal prosecution or during the trial in order to make clear whether other participants, besides the suspect or defendant, have competency to stand trial while testifying, (witnesses) or the moment of presenting the accusation (victim or civil party).

This type of expertise can also be ordered when the judicial body, in charge with investigation of crimes against sexual freedom and integrity, has to prove certain circumstances on which depends the criminal liability or the judicial classification of deeds. For rape, in simple or aggravated form, it is necessary to prove the circumstance that the author took advantage of the incapacity of the victim, over 18 years old, to defend or express her will, for instance, due to her psychiatric incapacity. Also, the same happens with the crime of aggravated sexual intercourse with a minor of 15 - 18 years old, when it is necessary to prove that the author abused the vulnerability of the victim, give the psychic disability, mental retard for instance.

VI. THE FORENSIC MEDICAL EXPERTISE EXAMINATION

This is a probative procedure and it is carried out by the prosecuting bodies during the criminal prosecution. It’s process can be decided either by these bodies or by the Prosecutor, through reasoned order, or during the trial by the Court, through reasoned conclusions, based on several compulsory criteria: lawfulness, conclusiveness, relevancy, utility and even the possibility to produce such evidence.

Only licensed experts can conduct this forensic examination, from Romania or from another country, having derogatory aspects, in cases where it is carried out in forensic institutions. Art 2 of H.G. no 774/2000 shall be observed where forensic activity is fulfilled forensic doctors, employees of forensic institutes.

The new Criminal Procedure Code settles the principles of equality of arms and contradictoriosity, meaning that the main procedure subjects have the right to ask for an expert who take part to the examination having the same rights and obligations as the expert assigned by the judicial bodies.

In terms of the process of expertise, we see that the procedure and the specific methods, together with the practical elements are all mentioned by the special law, whereas the Code only presents general notions.

The current legal frame regulates the principle where the forensic expertise is a probative procedure carried out only if the judicial body considers it necessary, useful and conclusive for finding the truth, for determining the facts or other circumstances, being optional.

The forensic psychiatric medical expertise is a technical scientific activity typical for forensic institutions, representing the interpretation of the mental state of a person at a specific moment.

During the criminal trial, this examination is conducted by a commission from the forensic institution, determining the mental state of a person. This evidence is not limited to the suspect or defendant’s case; the authorities can order it for other cases as well: when there are doubts about the reality of the victim’s testimony, where the case papers lead to the conclusion of a possible mental condition, affecting credibility. The same thing can happen with the eye witness, when there are doubts about his testimony, if there are doubts regarding abnormal aspects related by him.

For this last case, art 115 Criminal Procedure Code, on witness quality, person with doubtful capacity of being witness can stand the trial only when the judicial body finds the person able to relate consciously facts and circumstances corresponding to reality; and for this, the judicial authority can order any necessary examination within the limits of the legal frame. This helps to verify the health and mental state of the witness, as his testimony represents a very important probative means in finding the truth.

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There have been cases where courts found the witnesses had no competency to stand trial like the case of witnesses who recognized the suspect or defendant from photos or a group of persons or where the subject of a hearing was a person unable to read or write.

In all cases, the objectives of the forensic expertise are decided by judicial bodies depending on the criminal case specific elements: whether the defendant was able to understand what he was doing at the time of the crime; whether the defendant has the competency to stand trial together with his mental capacity during the hearing; whether the crime author is socially dangerous, given his mental disease; whether it is necessary to adopt a medical safety measure.

According to art 28 paragraph 1 of the Regular Order issued by the Ministry of Justice and the Ministry of Health no1134/C/2000 and no 255/2000 on procedure rules for expertise, findings and other forensic activity, the forensic psychiatric medical expertise is to be conducted by a commission made up of a forensic doctor, as head of commission, and two other psychiatrists, assigned by the Head of the Forensic Institute, as the Chief Forensic Doctor of County Forensic Authority.

The forensic psychiatric medical expertise expressly requires the presence of the subject, as it is an examination based on person testing.

For the report of the forensic psychiatric medical expertise it is necessary the commission members know as many things as possible regarding the crime author, data found also in the findings minutes, together with the statements of the person, her family members’ and other information about the way and circumstances of the crime. All these are completed with forensic documents, such as: observation record, examination sheet, document issued by emergency unit of the hospital, medical history of the person issued by family doctor.

The forensic psychiatric medical expertise shall be conducted at specialized forensic institutions except for the following cases, for the first expertise:

a) For severe mental diseases when transportation and examination doesn’t provide full security; here the examining commission shall examine the person in psychiatric hospitals or in the psychiatry sections of the prison hospitals;

b) For preventively arrested persons, the examining commission shall do the examination inside the psychiatric department of the prison hospitals, being allowed to involve the Chief MD of the unit, provided he is specialist;

c) For sick people who cannot be transported, with lethal developing sufferance or hospitalized, the examining commission shall go and examine the person lying on the bed, only if it is used to rule a decision.

The forensic commission is formed as it follows: for the forensic institutes, it is the Director who assigns, by written document, the forensic specialist and two psychiatrists or specialists, for the psychiatric hospitals together with the approval for these sanitary institutions, or other units recognized by the Ministry of Health, by the Superior Forensic Council; whereas for the county forensic service, it is the Chief Doctor who assigns, by written decision, a specialist forensic doctor and other two psychiatrists for the county hospital psychiatry section or other medical units recognized by the ministry of Health.

The forensic psychiatric medical expertise is conducted for a certain crime or circumstances with the following purposes: determination of the mental capacity or of a legal right exercised when the crime was done, determination of the mental capacity during the examination, and assessment of the social danger level, whether it is necessary or not to adopt medical safety measures. In case the subject of the examination is an underage person, the file shall also contain the social investigation together with school performance information.

Sometime it is necessary to hospitalize the subject in a specialized unit, if the examination uses mainly oral or non verbal communication.

In cases with severe condition, it is compulsory to place the subject in specialized units, according to art 184 paragraphs 1 – 28 of the Criminal Procedure Code. Here the examination begins only after the subject consents in the presence of an attorney, chosen or ex office, before the judicial body, and the legal tutor if the subject is underage.

Thus we can notice the imperative presence of the judicial assistance, provided with by the judicial authority the moment of the consent expression.

The reason for this is that the examined person is different from other parties of the criminal trial, given the special specific psychic features, leading to the conclusion that this person is not able to defend her procedure rights and interests.

The law also provides with a special case where the suspect or defendant, during the criminal prosecution, refuses the examination or changes his mind after he previously expressed his consent.

The way to force a person to be examined is represented by the bench warrant usually ordered by the prosecutor.

According to art 265 paragraph 3 of the Criminal Procedure Code, during the criminal prosecution, the bench warrant is issued by the criminal prosecution, meaning the prosecutor or the competent bodies in the matter. The exception regarding the functional competency is presented in the matter on the forensic psychiatric medical expertise.
According to art 184 paragraph 4 of the new Criminal Procedure Code, if it is necessary to enter a residence or office without previously expressed consent the criminal prosecution body shall inform the prosecutor or the judge for rights and freedoms in order to issue the warrant. We can see that if the general rule of art 265 Criminal Procedure Code, states that the prosecutor is the only authority to inform, during the criminal procedure, the Judge for rights and freedoms, for the issue of the bench warrant with residence violation, in the matter of forensic psychiatric medical expertise there are references both to the prosecutor and to the criminal prosecuting body.

Talking about the opportunity to adopt this measure for assuring the psychiatric evaluation, a complex activity, the examining commission is the only one able to assess the necessity of temporary arrest of the suspect or defendant.

We might have the case where the suspect or defendant consents being hospitalized, before the commission, with volunteer temporary freedom deprivation or the case of a refusal for the hospitalization, and the commission is forced to inform the criminal prosecuting body or the court to decide accordingly. Here, during the prosecution, the judge for rights and freedoms is requested for forced hospitalization for maximum 30 days necessary to conduct the forensic psychiatric medical expertise. Evaluation of this proposal issued by the prosecutor during the prosecution is made in close session, in the presence of the prosecutor and the judicial assistance for the suspect or defendant.

The judge for rights and freedom expresses his decision through reasoned conclusions. This is appealable both by the suspect or defendant and by the prosecutor within 24 hours after the ruling.

The same procedure is used during the criminal case, meaning that the court decides the forensic psychiatric medical expertise and the commission requests the adoption of forced hospitalization.

The law provides a maximum 60 day term for the freedom deprivation in a medical specialized unit. If the term was initially of 30 days, it can be extended only once, for maximum 30 days.

A new rule is this matter is that fact that hospitalization is not considered a measure for prevention of restriction of freedom or other rights; although it is a freedom deprivation; so pursuant to art 184 paragraph 28 of the new Criminal Procedure Code, this measure shall be reduced from the punishment length. The same rule is applied in case the defendant consented to hospitalization, as the law only states about the length of punishment and not about being consented or not.

In terms of underage people, there are special rules for situations where emergency forensic psychiatric medical expertise is needed.

By order no 1976/C/1909 of July 11th 2003 on measures for conducting the expertise with celerity to determine the mental capacity underage of 14 – 16 years who committed a crime punished by criminal law, such expertise is done with celerity, permanently, by a commission made up two psychiatrists and a forensic doctor, in charge with this commission, while the permanency is assured by guards kept by forensic and psychiatrists. The commission members shall meet within maximum 3 hours since the moment of calling and they shall do the examination within 48 hours, unless the hospitalization is ordered, having 10 days to do it.

VII. CONCLUSIONS:

At the end of our analysis of this law provisions, we can conclude that the decision and the carrying out of the expertise was brought under regulations in details, providing also with clear rules for the forensic psychiatric medical expertise.

The Romanian legal frame has always took into account the practice of the European Court of Human Rights, especially for cases of forced hospitalization to determine the mental capacity.

The European Court of Human Rights makes provisions for three conditions when a person cannot be considered to be alienated or deprived from liberty: alienation should be well grounded and justify the hospitalization, for as long as the disorder persist\(^\text{17}\).

The Court decided that no deprivation of freedom is according to art. 5 paragraph 1, lit. e, unless it has been ruled without the previous approval of an expert, otherwise we talk about arbitrary decisions, accepted only in emergency cases when a person is arrested for violent behavior and planning to obtain it immediately after arrest. All other cases request previous consultation.

At the end of our analysis we can say that the New Criminal Procedure Code applies the standards imposed by the European Court of Human Rights for all aspects concerning forensic expertise in general and the forensic psychiatric medical expertise in particular.

\(^{17}\) Art. 5, paragraph 1 letter e of the European Convention for Human Rights
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17. Romanian Criminal Procedure Code of 2014;
18. Order no 1134/C/255 of 25th May 2000 approving the procedure rules on expertise, findings and other forensic works, issued by Ministry of Justice and Ministry of Health;
19. Governmental Order no 1/2000 on organizing the forensic institutions activity and functioning;
20. Order no 1976/C/909 of 11th July 2003 on setting the measures for carrying out in celerity of expertise to determine the mental capacity of the underage of 14 and 16 who committed a crime punished by criminal law, issued by Ministry of Justice and Ministry of Health.
Abstract

Awareness of heritage civilizational common transforms the judge into a promoter of a new world order, testimony European Union law expresses the quintessential legal values subsisting in the deeper layers of national systems of law. Legal norms union pass directly into national law because, first, it is open to them, accept status to which Member States have subscribed. In effect axiologically, law originates and also the theme of the genesis of European law. Only thus the foundation of the legal values of civilization peoples of the right may acquire prevalence functional - not superiority, as commonly stated - to law.

Keywords: national sovereignty, European Union law, administrative law, codification of administrative procedure.

1. Argumentum

This paper is the development of concerns in this area that the author has had previously claimed; matters addressed are subsumed principle of sovereignty from the perspective of EU law, with special focus on the Europeanisation of administrative law and administrative procedure coding. If in the codification of administrative law both material and procedural Romanian I completely agree, up to "militarization" its good grounds as the administrative law of the European Union we have strong reservations, particularly that in the absence of a theory of federalism across the state, European thought has invented a new word - supranationalism - and the idea of European unification is as old as the European idea of a sovereign state. However, spectacular scale that has taken the latter pushed into obscurity for centuries, the idea of European union. In the twentieth century, two world wars and disastrous social forces of globalization have put into question the idea of a sovereign state. The decline monadically status and found expression in the spread of interstate cooperation, while the extent of international cooperation has generated a radical transformation of the substance and structure of international law. Altered reality of international relations required a change in the theory of international law. The various efforts made to European cooperation after the Second World War did really part of this transition to a general international law of coexistence to a cooperative international law "began to organize Europe".

2. Sovereignty in international law

In the spectrum of fundamental principles of public international law principle of national sovereignty plays a primordial because it implies the state's right to decide for itself in terms of economic, social, political and cultural rights and the right to establish and domestic policy external. The study public international law principle of sovereignty has been set for the first time in art. 2, paragraph 1 and article. 78 of the UN Charter, being developed by subsequent UN Declaration of October 24, 1970 on the principles of international law concerning Friendly Relations and Cooperation among States, which states that "All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community.

The approach from the point of view of international law sought and identification of sovereignty independence. A case of the Permanent Court of Arbitration sanctioned even this similarity: "Sovereignty in the relations between states means independence. Independence in relation to a territory is entitled to exercise the state functions upon to the exclusion of (rights) of other state ". Independence and sovereignty of the Member States is a concern to their relations established between them and the European Union EU even in administrative law.

3. Short considerations about administrative powers of the European Union

Without going into details of administrative law theory, as can be appreciated in legal doctrine, "administrative powers allow a public authority to apply a general rule a particular situation. To what extent the EU is empowered to apply their own rules of law in particular situations? Union had to rely on state administrations to execute European law? Or that the Union would be willing or implied general powers to enforce its rights in individual cases?
Two skills could give the Union general administrative powers. Union internal market competence of art. 114 TFEU allows the Union to adopt measures for the approximation of the laws, regulations and administrative provisions of the Member States. The power to adopt measures "seems to include the power to adopt individual decisions. How could still decide to "harmonize" national laws or administrative actions? Art. 114 TFEU would enable such Union to adopt administrative decisions. However, since the original decision concerned a decision addressed to the state, its impact Constitutional could be limited to that category. Art. 114 TFEU could be used to adopt decisions addressed to individuals, or even setting up their own administrative infrastructure of the Union? Subsequent case law has clarified that art. 114 TFEU could indeed be used for both purposes.

The European Union may resort to an even broader legal basis for taking administrative measures: art. 352 TFEU. Article enables the Union to take appropriate action "when this is necessary to achieve one of the objectives set out in the Treaties. This power includes the power to adopt administrative decisions. The power to adopt the administrative decision may be derived as follows: for almost any subject policy within the domain treaty when it was considered "necessary". Art. 352 specify such a reservoir of executive powers, which coincides with the scope of legislative powers of the Union, this interpretation was reinforced by the Lisbon Treaty. Indeed, art. 291 TFEU gives the foundations constitutional stronger parallelism of the legislative and executive bodies of the European Union. While Member States are responsible primarily for enforcement of European law, the union is considered empowered to implement their own law, "where conditions are needed uniform implementation of the acts legally binding ".

The question left open. The Treaty of Lisbon is that: should we consider art. 291 par. (2) as the legal basis for administrative action independent of the Union? Text of providing an argument against this view, as far as his text refers to horizontal relations between EU institutions. Teleological and systematic considerations may however lead to a different interpretation. Unlike his predecessor său128, art. 291 TFEU is not limited to regulating horizontal ratio between the Union institutions, but in par. (1) refers to the vertical relations between the Union and the Member States.

A systematic interpretation of art. 291 TFEU might suggest that, although Member States are primarily responsible under (1), Union jurisdiction under par. (2). The Union's competence may derive from such art. 291 par. (2) as such, while the particular act only regulates Union delegation to the Commission (Council) power executare129 release. This interpretation is reinforced by systematic teleological considerations. An interpretation of the powers of art. 291 TFEU would give the Union to adopt any act of implementation - including implementing decisions-without resorting to art. 352 TFEU. This interpretation would give the EU a solid legal basis for administrative action. This is however as always - an issue on which the European Court must rule.

4. On the concept of sovereignty in the context of EU

The problems and challenges of deeper integration have a distinctive character. One of the key questions raised by commentators European Union is how it will look and how it will operate in an increasingly integrated Europe administratively?

One thing is certain: the approach of fifty years ago, adjusted for only six members, to be changed. The European Union is currently facing other challenges which press towards a reform of the way it operates. Most important are ensuring good representativeness of the grouping in a world in the process of globalization and finding ways to meet the requirements of its own citizens as well for better management/governance. Until now, European integration, which is a transfer of powers from the Member States on an entity - the Union was perceived by citizens as a bureaucratic mechanism, technical and complicated, and that since the entry into force of Treaty of Rome-1957 core Union continued to be represented primarily by the Single Market, which has a dual dimension: the interior, rules drawn up in accordance with Community procedures, and external relations, mainly economic bodies international based on negotiations conducted by the European Commission. Also, after successive expansion and deepening of common policies and institutional scheme treaties architecture, simple in origin, have become increasingly difficult to decipher.

Sovereignty has gained in recent years, new meanings and dimensions, representing the instrument through which national interests and European interests are connected with the world. The doctrine of the opinion that the integration process does not, therefore, substantial concessions of sovereignty, which are lost by state definitively and irrevocably; limitations of sovereignty in the context of European integration implies limitations on the exercise of state sovereignty, meaning that those powers previously purely national, transferred Community institutions will not be exercised in a singular state, but along with other EU countries. State participation in the Community bodies allows it "to recoup" these skills transferred through their joint exercise. This joint exercise is believed to make "affordable inevitable limitation of sovereignty" by the implementation of the Community scheme. Skills issue has aroused attention of Member States, insisting on the principle of sovereignty and even on a greater role for national parliaments.
For European countries, the theory is based on the binomial sovereignty rights/obligations. By virtue of the theoretical content accepted by the Europeans and the international community, states have the right to an international personality, the right to receive respect the territorial integrity and right to self-defense, the right to establish their own social regime - political, right to use their resources, to establish economic and social system and legislation, the right to freely manage the relations with other states, and the correlative obligations to respect international personality of other states and their sovereignty and to meet international obligations in good faith.

From the beginning we have to mention that there are differences of nuance on acceptation concept of "sovereignty" in the European Union Member States. In the context of the European integration process, the concept of sovereignty (at least in terms of its traditional meaning) is transforming its essence, but not disappears. Contrary to the thesis of authors such as G. ScelI, which denies its existence, sovereignty can not be considered an outdated political dogma or a legal fiction.

In the context of establishing a new form of political organization of Europe, Member States agreed to entrust some of their sovereignty to supranational bodies, giving up or transferring a number of attributes specific national, which can not be regained only in certain situations, conditions exceptional. This is why it is considered that the transfer of power to EU institutions is irreversible. Originality community construction is that, although intended to be a superior system of national legal systems, the European Union does not replace the sovereignty and the right of Member States decision.

A habitual association of European unification uncertainties in the context of a new phase of globalization with the idea of a crisis of sovereignty. But most often, this formulation is taken in a restrictive sense as the notion of sovereignty is identified a priori as its national and at the same time, it is suggested equivalence between crises of sovereignty and spatial development policy supranational, transnational or post-national. However, this restriction has three shortcomings. The first is that, taking the form of binary oppositions, there are alternatives to sovereignty in Europe can not be reduced to a single type. Thus, we can conjure up at least three alternatives: subsidiarity and Federalism Empire.

Secondly, the idea that sovereignty is the essential cause regression disintegration of nations, eliminating boundaries or putting into question their political operation leaves unclear the issue of the relationship between the notion of state sovereignty and the popular sovereignty. It seems that, although conceptually distinct, their reality is either confirmed or denied simultaneously. This is the cause that determines the difficulty of introducing the idea of democratic sovereignty to supranational institutions without mixing them with a defense of the centralized state and nationalist. The warning contained in Friedrich Wilhelm Nietzsche's allegory - "I state, are people" - seems more relevant than ever. Whenever people is invoked most often speaks interests of the state. But conversely, the idea of popular sovereignty can be dissociated from its state forms remains enigmatic, if not unthinkable.

Thirdly, the question of defining the content of the concept of "the people of Europe." Sovereignty continues to play a fundamental role in contemporary international law. In this respect, that the Union recognizes the sovereignty of Member States. Proof legitimacy of 'modern' sovereignty can be demonstrated by the existence of internal regulations which examines the limits of state sovereignty. Legality limitations of state sovereignty depend on compliance with certain rules laid down by national laws. Most constitutions require three conditions "a priori" for the transfer of state powers:

A) National rules of procedure to be met to begin the transfer process. If a consensus is parliamentary accession of international organizations. This condition is common to most constitutional regulations on limiting state sovereignty which normally provides that international treaties state that the powers conferred an international organization to be enacted by a majority of national parliaments.

B) Conditions to be fulfilled by international organizations to which the transfer, for example, that the goals we pursue (strengthening international cooperation in specific areas or maintaining peace and security in the world) requires having some of the sovereign powers of the state.

C) Conditions to be met by all states that are - or will become - members of international organizations such as reciprocity in their relations, equal treatment under the international organization and the proportional distribution of responsibilities assumed by each member to achieve goals common. These conditions, in terms of "reciprocity" and "equality" are found in many constitutional regulations concerning the transfer of sovereignty, such as article 11 of the Italian Constitution, art. Or Article 28 of the Greek Constitution. 55 of the French Constitution. However, such transfer requirement is not mentioned in the Constitution of Germany, Spain, Portugal, the Netherlands or Luxembourg's. Besides these conditions, the observance of which will be confirmed before the transfer of state powers to take place, the desire to preserve the principle of state sovereignty and has prompted lawmakers to impose constitutional limits the transfer process. Although these limits are not expressly sanctioned by the various Constitutions, their existence has monopolized the parliamentary debates that took place to enact constitutional provisions authorizing the limitations of sovereignty in the interest of international cooperation. Thus, they may be requirements implied, which form the very basis of consent of the state to participate in international organizations.
First, the object of exchange is "exercised" certain sovereign powers, but not "owning" them, which remain in state hands. Powers or competences transferred from the state international organizations are not "lost" in the sense that once international organization objectives have been met, or if the international organization receiving the transfer disappeared powers will automatically return to the state. The first limit was widely discussed by European doctrine on differing interpretations of constitutional meaning of the phrase, such as "delegation of power", "transfer", "limits of sovereignty," "constitutional delegation of power" etc., phrases that are used in without discrimination various constitutional texts. Although according to the doctrine all expressions have a common goal (to emphasize the limited nature of the transfer) divergence terminology was used by the French Constitutional Council to make a distinction questionable between "limitations" sovereignty (permissible constitutional) and "transfer of sovereignty" (which, vision, are banned constitutionally).

Secondly, there are material limits of this transfer. Powers may be transferred only to a certain limit. Constitutions prohibit the transfer totality of state power that emanates directly from the people. The new international entity that arose from the transfer of sovereignty can therefore exercise in a very well defined executive, legislative and legal, but they can never take the place of state.

Thirdly, there are time limits on the transfer. The delegation should not be construed as a definitive abandonment or disposal of sovereignty. Powers can be transferred to related international organizations either provisionally or permanently, but in any case the transfer is not irreversible, states always having the possibility to recover the powers conferred by way of a unilateral withdrawal from the international organization. Despite the above, there is an international organization, be it traditional or supranational, to prevent separation of one of its members. Moreover, international law enshrines very clearly sovereignty, independence and territorial integrity of any state, and a resolution of the UN General Assembly for Ukraine approved by an overwhelming majority of votes after the annexation of the Crimea, which enshrines respect for the principle of sovereignty, territorial integrity and independence a state on the right of self-determination of peoples, as is not qualified and explained to the minorities but to the multinational empires and decolonization processes.

In this context, to protect the essence of state sovereignty, national laws establish provisions governing the entire process of transfer and impose conditions and limitations on the granting of state powers. However, state efforts to determine the purpose of the transfer in advance failed partly because the "limitation of sovereignty involved in an international organization should be determined primarily by reference to the constituent instrument of the international organization concerned". The state is separated can create international responsibilities if it does not comply with the rules governing withdrawal but despite the principle "pacta sunt servanda", an international agreement solemnly can always be violated and there is no way to compel a state to remain part an international organization against its will. Such a possibility, however, has been questioned in the case of the European Union. Treaties establishing the international organization provide the actual conditions in which the transfer occurs state powers. Under the provisions of its instrument of incorporation, each international organization acts through institutions and their substantial duties in certain areas. Each of these elements (institutions, functions, jurisdiction) corresponds to "a priori" a set of "limitations", regulating the life of the organization, defining the balance of power between the various internal organs ( "limitations institutional"): the purpose of the powers conferred and functions assigned to the organization ( "functional limitations") and its specific field of action that can not be exceeded ( "limitations of autonomy"). Thus, in theory, the conditions envisaged in domestic law and, on the other hand, the "limitations" derived constituent instruments of international organizations provides sufficient safeguards to protect the essence of "sovereignty" state.

The transfer of state sovereignty is a long process that, though begins with the conclusion of an international treaty will be largely developed in the new institutions created. Only then, during what is called "phase transfer" occurs actual transfer of state powers by means of interpretation and effective implementation of the rules provided daily by the founding treaty of the organization. The dimensions of this argument can not be made in the abstract. A practical analysis of the purpose of the transfer of state powers in an international organization specific is indispensable, but for reasons tehno-reductio-limit us to specify that the jurisprudence of the Constitutional Court of Romania has made, especially in recent years, many new elements, such as to ensure building the legal framework for the integration into the European Union and especially of clarifying relations between "sovereignty" and "integration".

The Constitutional Court found that the acts of transfer of certain powers to the European Union structures, they do not acquire by gift, a "supracompetență", a personal sovereignty. In reality, the Member States of the European Union have decided to jointly exercise certain powers which, traditionally, the field of national sovereignty. It is obvious that in the current era of globalization issues of humanity, developments interstate and communication inter-planetary scale, the concept of national sovereignty can no longer be conceived as absolute and indivisible, without the risk of isolation unacceptable. "Already known provisions of the Treaty Lisbon, that the Union shall respect "national identity" Member States "in their fundamental structures, political and constitutional” must be interpreted not in the sense of "immobility" - hardly maintained otherwise - the synchronization and correlation prerogatives of Member in the European constitutional context in terms of which we will analyze national administrative autonomy and its limits, specifically, what are harmed by limiting state sovereignty administrative autonomy.
5. Alteration state sovereignty by limiting administrative autonomy

5.1. National administrative autonomy and its limits

In European law enforcement, national authorities are subject to the duty of loyal cooperation. As the Court has interpreted this obligation in the context of the Union's executive federalism? The Court began by recognizing, in principle, the procedural autonomy of Member States in the execution of European law: "Although under Article 4 of the [EU] Treaty, Member States are obliged to take all appropriate measures, general or particular, to ensure fulfillment obligations arising from the Treaty, they shall determine which institutions in the national system are entitled to take those measures. Moreover, when the national authorities responsible for the enforcement of a regulation [union] must be recognized that in principle this execution takes place with due respect to the forms and procedures of national law.

An expression of the principle of national procedural autonomy can be seen in regulation European "nerechiționării." While not yet explicitly confirmed by the European Courts, a decision by the Union can scarce doubt never to "order" officials of the National Executive in directly. The recipient of a decision addressed formally state that atare157 always remain the Member State in the past, the judiciary union has adopted this position by default. The Court held that, for the implementation of decentralized Member States are empowered to interpret autonomous European rules, to the extent that "the Commission has no power to take decisions on the interpretation, can only express an opinion that is not binding national authorities. "Ambiguities text of European legislation thus appears to grant national administrations - and not European administration-the power to decide on the meaning of these provisions.

This negative signal may be evidence of a rule general constitutional prohibiting the Commission issues formal order by the national. If this view is accepted, it follows that national administrative bodies are not part of an "integrated administrations' hierarchical. And when a national administration does not execute European law, the Commission will have to initiate legal proceedings against the Member State of enforcement. But even if the Union can not enter the administrative structures of its Member States, the procedural autonomy of Member States is not absolute. It must be reconciled with the need for uniform application of European law. What then are the constitutional limits imposed by the principle of national procedural autonomy? National regulations are subject to the constitutional principles of equivalence and effectiveness, the Union can harmonize national administrative procedures. What are the legal grounds on which the Union will have to adopt common administrative procedures? The power to harmonize national administrative law has always been part of EU harmonization competence. And the power to structure national administrative procedures was used extensively in the past. The Lisbon Treaty introduced today a new special constitutional ground: art. 197 TFEU. This article is himself the title XXIV which deals with "administrative cooperation" between the EU and Member States. This provision states: "(1) The effective implementation of EU law by Member States, which is essential for the proper functioning of the Union, is a matter of common interest. (2) The Union may support the efforts of Member States to improve their administrative capacity to implement EU law. Such action may, in particular, facilitate the exchange of information and of civil servants as well as supporting programs training. No Member State is obliged to resort to this support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonization of laws, regulations and rules of the Member States. [...]"

Decentralized management of European law-not surprisingly-is of central interest for the Union. In order to guarantee an administration effective, the Union may decide to "support [s] the efforts of Member States to improve their administrative capacity to implement EU law." This support of the Union, however, is completely voluntary and European legislation adopted under that power should not draw any 'harmonization of laws, regulations and administrative provisions of the Member States ". This constitutional limitation should be regretted. Adjusting the legal basis for a "complementary skills" can have side effects paradoxical. By blocking the rationalization of European national administrations (ineffective) provision protects their autonomy organizational formal. The refusal to allow harmonization of national administrative capacity by Union law may favor indirectly intervention centralized Union under art. 291 par. (2) TFEU.

5.2. The effects of national administrative Acts in the context of European law

Decentralised enforcement by Member States of European administrative law Means That Decisions Taken by National Authorities as politica is binding only Within the Member State. This principle of territoriality follows from the, According to which their national Powers of can only produce effects on national Territory. Administrative Decisions of Member States implementing EU law Even When Will BE Adopted therefore, in principle, in complete isolation from the other Member States. The Administrative Decision within a Member State William politica not have special effects in Another Member State. Soon to be aware of potential Difficulties arising from different national administrative practices.

Under competition law, the Union has been to centralize power Granted politica application of European law: Even When There is a danger of administrative incoherence Between Member States. In other policy Areas, the European Union legislature has built Cooperation between National Authorities. Relationships feature horizontal thes mutual recognition of national administrative Acts implementing European law. While
not required to automatically granting administrative validity and Decisions of other Member States, national apr
Authorities BE nevertheless subject to procedural and substantive Obligations laid down by European law. For
example, on medicinal products for human use décidées European Directives of "mutual recognition procedure".

In other Matters, the European Union legislature PROVISIONS national administrative Granted automatic right validity transnational that I found in the Customs Union Code. in this context it is Romania's position on how to the promote the national interest in view to the completion of European integration? We conclude GMT.

6. Instead of conclusions. Romania's position on how to promote the national interest in view to the completion of European integration

In the text of the Constitution of Romania's post-communist democratic, Constituent Assembly chose to
define sovereignty in the sense derived from the works of Montesquieu, who emphasized the representative
mandate and not to enshrine the concept of J.J. Rousseau, who argued the imperative mandate.

So the early '90s, Romania opted for a Constitution to substantiate the classic representative democracy,
people become indivisible and inalienable sovereignty depositary, which elected representatives or delegates
exercised directly by referendum. The mandate of those elected is a representative one, which implies that they
act on behalf of the nation and its interests general, can not be dismissed.

Art. 2 para 1 of the Constitution adopted in 1991 stated that "National sovereignty belongs to the
Romanian people, who exercise it through its representative bodies constituted through free, periodic, and by
referendum." Also, the provisions of par. 2 enshrine that "no group or person may exercise sovereignty in their
own name." Analyzing the provisions of this article from a national perspective, we can say that the Constituent
Assembly has defined state sovereignty Westphalian attributes based on internal and leaving quite a few
interpretations of sovereignty external side. Although adopted a traditionalist formula of acceptance sovereignty,
Constitution of 1991 admitted, however, an exception to human rights enshrined in art. 20 primacy of
international law over domestic law in this area, where treaties to which Romania is a party.

Revision of the Constitution by Law no.429 / 2003, approved by national referendum held on 18-19
October 2003 (confirmed by the Constitutional Court Decision no. 3 of 22 October 2003) maintains the principle
of national sovereignty regulated in article 2, paragraph 1 of the text, while maintaining the possibility of
organizing a referendum as a means of exercising national sovereignty. In the context of integration, Parliament
accepted the settlement a "transfer of sovereignty" in Romania's accession to the European Union by adopting an
interim solution, recognizing the possibility of joint exercise of certain prerogatives of sovereignty, no transfer of
powers sovereign Community bodies. We think it would be appropriate to include in article 2, paragraph 2 of the
provision that "can be brought limitations of national sovereignty only in Romania's accession to the European
Union", thus avoiding the revision of the Constitution once upon accession.

To ensure priority implementation of the Community Treaties and secondary legislation of the whole
community, ruled Romanian Constituent inclusion of Article 148, entitled "Integration into the European
Union". Analyzing the provisions of Article 148 of the Constitution, some authors have found that the solution
adopted in the revision of the Constitution is contradictory, some difficulties may occur, such as when the
Parliament notes that accession is not possible under the Constitution because it requires the limitation of
sovereignty They are not admissible under Article 1. 1 and adopting a law by qualified majority, or a situation
where parliament adopts law violates article 1, paragraph 1 membership and sovereignty. Thus, every society
needs common rules and mechanisms to achieve them. The notion of law is central to all modern societies. The
legislation refers to making laws (legis). But what is "law"? In the modern era there are two competing
conceptions. Conceptia formal or procedural law is about the modern understanding of the actor in charge of the
legislative function. The legislation is formally defined as any legal act adopted under the procedure legislative
(parliamentary). This concept has influenced the procedural law traditionally British constitutional thinking.
Instead, a second concept defines what should be the law, namely: legal rules of general application. This
material or functional conception of constitutional thinking has influenced legislation mainland. A material
definition is the basis of legislation phrases such as "foreign law" and international agreements "delegated
legislation" adopted by the Executive.

Finally, the nature of the European Union? Union can be described as a federal union? I saw that
American tradition easily classify the European Union as a federal union. The European Union has a structure
composed or mixed, and by combining national and international elements it is situated in a "middle ground"
federal. Federal label is denied, paradoxically, of its own intellectual tradition of Europe. Pressing the federal
principle in national format not only reduces the concept of federation to state that early federal.Comentatorii
were aware that the new European construction themselves on the "middle ground" located between the
international and national law. However tradition of European conceptual blocked identify the middle ground
with the federal idea. In times of conflict constitutional, federal old European tradition was returned from the
depth and has imposed two ideals-type polarized: the European Union was to be an international organization or
a federal state. And because it was the latter, she had, by definition - be the first.
What is the thesis explanatory power of international law? Maybe it does explain satisfactorily legal and social reality in the European Union? In the last half century, "little Europe" was emancipated from his humble birth, transforming itself into a force oriented regional, even international. Creation European Union law, including the administrative whose concrete analysis shows that soft law appears at EU level in various forms and in an increasing proportion. In the interest of flexibility in their decision-making processes EU bodies will not give up any soft law in the future. The new rules introduced by the Lisbon Treaty do not exclude the use as before these tools. This does not mean that soft law has evolved Union toward a unified legal category, sufficiently definite criteria for admissibility and legal effects. Legal assessment must proceed further in its various manifestations, the soft law appears today in the gray area, located between law and politics.

In a hierarchy, having regard to the admissibility of their use and the effects they produce can be distinguished from my point of view, the following types of soft law: The fewer objections encounters soft law in the form of recommendations and opinions, whose soft set out expressly in the TFEU (art. 288 fifth paragraph) and through which the EU can communicate their position and intentions. Soft law of nature or concretizatoare Explanatory formal rules can in principle be considered allowable as long as does not exceed the semantic rules of law "authentic". Doubts of legally occur when the recommendations and advice is outdated, soft law having binding legal acts preparatory to. It is worth mentioning intention bodies of the Union, especially the Commission, to inform those to whom the rule will be addressed with regard to its essential elements. Such a soft law is acceptable but only if that does not take any automatism on subsequent regulations, which he prepares, and he is not feature any other form of coercion irreversible. In any case, it must be ensured legislative discretion to issue further legal norms.

As such preparatory her soft law is immanent shaping force some rules regarding subsequent hearing and participation rights of particular importance in this type of "regulation". Consequently, the Member States - such as the example in German - were extended information rights of national parliaments and on this form of expression of the will of Union bodies.

Soft law can not be allowed to replace or substitute for genuine legal norms. The legislature is called and the European Union - to regulate itself essential elements of a legislative act. Outside situations where the delegation is expressly provided he [legislature] can not cede these powers of an executive body that is empowered to legislate, nor can accept the issuance of such rules in some form, as in the case of soft law. It does not have the binding force of a genuine legal norms. Such an approach would be contrary to the provision of primary law flagrant that the essential elements of a legislative act must be determined by the legislature (art. 290 par. (1) TFEU).

To evoke a modern-day example, it should be recalled that Member States may take decisions - even in times of economic and financial crisis - policy financial fundamentals and the stability pact, which is at the treaties, only the norms own -rise nature of primary law, but not by political decisions. For these reasons here, soft law will have in the future at EU level is indispensable. He will have to fall, however, within the limits imposed by treaties and other legislation.

As regards the autonomous nature of the legal system from that internal union member states, the issue is raised in literature legitimacy monistic principle, considered compatible only with the idea of a legal system integration. Indeed, the application of European law, once assumed, is mandatory; it would not be possible through Community will dismantle.

Only that the necessary coherence of the system of union rules and their priority over those of domestic law does not follow from their formal condition than at first glance. Monism of formal order is only the result of external pluralism manifest national wills, become resonant in Community policies and authority given to Community institutions. Monism not sustains itself in its legal formalism normativist, but the size of the content which makes it possible.

EU law expresses the quintessential legal values subsisting in the deeper layers of national systems of law. Legal norms union pass directly into national law because, first, it is open to them, accept status to which Member States have subscribed. In effect axiologically, law originates and also the theme of the genesis of European law. Only thus the foundation of the legal values of civilization peoples of the right may acquire prevalence functional - not "superiority" as they say usually - to law. It can be concluded that internal positive law is the material cause (in the Aristotelian sense) and perhaps final cause (the same terminology) the right union. The latter does not marginalize voluntarist national legal systems; he enriched in turn, created legal community values diversity by joining synthesis. A rethinking in a broader horizon of the relationship with those national union right remains, however, necessary.

The more so since administrative law was considered an area of law in principle unsuitable for harmonization at EU level because of its intrinsically national. However, due to the fact that EU rules are based on a decentralized system of implementing EU law is applied by national courts in accordance with their national procedural law, administrative law has not remained immune to the Europeanisation for long. To ensure a minimum standard of protection in the application of EU rules, the CJEU has intervened indirectly via national procedural law principles of effectiveness and equivalence.
The expertise growing national courts in applying EU law, members of the older and newer EU gradually faced with a notable influence of European law and its principles into their national laws. Thus, national administrative law gets Europeanized, and this development is not felt only in cases of implementing legislation in the Member States but is perceived even in cases involving purely internal matters.

An important step forward for uniform rules of administrative procedure was conducted by drafting the Administrative Procedure Code RENEUAL (2014) and the adoption of European Parliament Resolution 15 January 2013 with recommendations to the Commission on a law of administrative procedure of the European Union, which It has given a new impetus to the discussion on the Europeanisation of administrative law (or public) in the Member States.

One small step for Europeanization, a big step for the loss of sovereignty and national identity. Here, as the right created in a few decades the European Union and is about to destroy 28 secular identity.

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DROPPING CRIMINAL CHARGES FROM THE PERSPECTIVE OF THE
CHANGES BROUGHT BY THE PROVISIONS OF THE GOVERNMENT
EXTRAORDINARY ORDINANCE 18/2016

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Abstract: The provisions governing the dropping of criminal charges contained in the Code of Criminal Proceedings are aimed at responding to some current requirements, such as speeding up the duration of criminal proceedings, their simplification and the creation of unitary jurisprudence in accordance with the jurisprudence of the European Court of Human Rights.

Keywords: crime, the principle of obligatory initiation and exercise of criminal action, to drop criminal charges, public interest

1. Overview

We can see that a new element was introduced in the Law 135/2010 on the Code of Proceedings, besides the classical principles of the Code of Criminal Proceedings, which were taken over by the provisions of the present Code, namely the appearance of some new principles, whereof we mention: the right to a fair trial carried out over a reasonable period of time, the separation of judicial functions in the criminal trial, the obligatory character of criminal action in close connection to the subsidiary one of opportunity, and in the matter of evidence, loyalty in obtaining the evidence. In this way, the solution of dropping criminal charges is brought under regulation.

With the introduction of the principle of opportunity of prosecution there is a passage from an obligatory prosecution system (the lawfulness of prosecution principle) to a system based on the opportunity of prosecution principle18, as a consequence of the need to provide a solution that simplifies and makes possible to avoid excessive workloads in the law courts for less serious acts, given the removal from the provisions of the Criminal Code of the institution of the act that does not present the social danger of a crime, which was contained in Article 181 of the previous Criminal Code, and, consequently, also the solution of dropping criminal charges, according to the provisions of Article 10 paragraph (1) letter b18 of the previous Code of Criminal Proceedings.

For that matter, as resulting from the provisions of Article 17 paragraph (1) of the previous Criminal Code, an act could have been considered a crime if it had three essential traits: it presented a social danger, it was committed with guilt and it was stipulated by the criminal law. For an act to be a crime, it was necessary that it represented a social danger.

The provisions of Article 18 of the previous Criminal Code were completed by Article 181, which referred to “the act that does not present the social danger of a crime” and which represented “a cause that expels the criminal character of the act”, by removing the social danger of the crime, a fact that lead the prosecutor or the law court to apply, according to Article 91 of the previous Criminal Code, one of the administrative sanctions, namely: reprimand, reprimand with warning or a fine from 10 lei up to 1000 lei.

In order to eliminate subjectivity, abuses and arbitrariness in evaluating the concrete social danger of an act, Article 181 paragraph (2) of the previous Criminal Code stipulated some criteria that the judicial bodies need to take into consideration when they had to settle such cases.

These criteria were: how and by what means the act was committed, the purpose of the person who committed the act, the circumstances of the act, the consequence that was produced or could have been produced, the person and the behaviour of the person who committed the act.

At present, the provisions of the Criminal Code have brought some changes, removing the social danger as an essential trait of a crime from the Article 15 of the previous Criminal Code, and at the same time the provisions regulating the lack of social danger of a crime – which had as a consequence the application of an administrative sanction – have disappeared cumulatively with the disappearance from the content of Article 10 of the previous Criminal Code of cases provided in paragraph (1) letter b18 and letter j), namely the lack of degree of social danger of a crime, and the replacement of criminal liability respectively19.


However, at the same time, the provisions of Article 318 of the Code of Criminal Proceedings brought under regulation the solution of dropping criminal charges, and introduced this way the *principle of opportunity of prosecution* provided for by Article 7 of the Code of Criminal Proceedings.

2. Non-constitutionality of the provisions of Article 318 of the Code of Criminal Proceedings

As a matter of fact, in its Decision no. 23 of 20 January 2016\(^{20}\), the Constitutional Court admitted the non-constitutionality exception of the provisions of Article 318 of the Code of Criminal Proceedings and it stated that they are non-constitutional, considering that they contravene the lawfulness principle stipulated by Article 1 paragraph (5) of the Constitution, as well as to the provisions of Article 124 paragraph (1) corroborated with Article 126 paragraph (1), according to which justice is done in the name of the law and through the courts of law established by law\(^{21}\).

In its motivation, the Court states that the competence of a prosecutor to drop criminal charges, according to Article 318 of the Code of Criminal Proceedings, prior to the beginning of this stage of proceedings or during its course, having as a consequence the non-arraignment of the suspect or the defendant and the *ab initio* renouncement to the application of a punishment, confers to the prosecutor the prerogatives of *jurisdictio* and *imperium* specific to the courts of law.

Moreover, the Court holds that, according to Article 318 paragraph (1) of the Code of Criminal Proceedings, the prosecutor can drop criminal charges in case of crimes for which the law provides the punishment of a fine or the punishment of imprisonment for at most 7 years, stating that a number of 198 crimes of the total of crimes regulated in the Criminal Code correspond to these prerogatives.

As a matter of fact, the Constitutional Court gave its opinion also on the non-constitutionality of the provisions of Article 18\(^{1}\) paragraph (3) of the previous Criminal Code – which provided that “in case of crimes provided for by Article 18 of the previous Criminal Code, the prosecutor or the court applies one of the administrative sanctions” – in its Decision no. 329/2004\(^{22}\), considering them constitutional. Therefore, the Court considered that the law assigned to the prosecutor the competence to determine concretely, in the course of criminal prosecution, the degree of social danger of the investigated act, taking into consideration his role as protector of the rule of law and representative of general interests of society, defined by Article 131 paragraph (1) of the Constitution, republished. In accomplishing this role, the prosecutor could dispose the solutions of dropping the criminal charges against the person investigated for having committed a criminal act, which comes within the scope of Article 18\(^{1}\) of the previous Criminal Code and to give to that person an administrative sanction, as a consequence of the fact that these are not jurisdiction deeds, but deeds that are subject to the censorship of the law court, based on a complaint from the interested person, according to Article 278\(^{1}\) of the Code of Criminal Proceedings.

3. Conditions concerning the solution of dropping criminal charges

Analysing the provisions of Article 318 of the Code of Criminal Proceedings the conclusion is that in order to dispose the solution of dropping criminal charges it is necessary that the following conditions are met cumulatively:

- a punishment with a fine or a punishment of imprisonment for at most 7 years is stipulated for the crime with regard to which the criminal investigation body was informed, without disposing the criminal prosecution, or with regard to which the criminal prosecution has begun;

- to state there is no public interest in the execution of criminal prosecution in a criminal case.

The resemblance between the institutions, that of lack of the degree of danger of a crime in case of Article 18\(^{1}\) of the previous Criminal Code and the conditions for disposal of the measure of dropping criminal charges, according to provisions of Article 318 of the Code of Criminal Proceedings, taking into account their legal nature, which as a matter of fact is different, where in both cases the solution disposed by the prosecutor was and also at present is subject to the censorship of the court with the procedure of complaint against the solutions of

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\(^{20}\) Published in Monitorul Oficial no. 240 of 31 March 2016

\(^{21}\) According to Article 147 paragraphs (1) and (4) of the Constitution, the Decisions of the Constitutional Court are generally obligatory from the date of their publication in Monitorul Oficial al României (The Official Journal of Romania), and the legal provisions that are found non-constitutional are suspended by right for a period of 45 days and their legal effects shall cease in case that in this period the Parliament or the Government, as appropriate, do not bring the non-constitutional provisions in compliance with the Constitution.

\(^{22}\) Published in Monitorul Oficial no. 988 of 27 October 2004.
dropping or dismissal of criminal charges, provided by Article 278¹ of the previous Code of Criminal Proceedings, but also through the provisions of Article 339-340 of the current Code of Criminal Proceedings.

In order to verify if these criteria are met, it is necessary that there are means of evidence administered in a sound way in the case file, which allow for the prosecutor to determine beyond any doubt the existence of the act and its circumstances or, as appropriate, the identity of the person who committed the act and the elements which make possible considerations on the guilt, motive and purpose.

The solution of dropping criminal charges may be disposed only by the prosecutor, by an ordinance. The prosecutor may also dispose the solution of dropping criminal charges also by the indictment by which he disposes, with regard to other acts or with regard to other people, the solution of arraignment.

The solution of dropping criminal charges may be disposed only by the prosecutor, by an ordinance. The prosecutor may also dispose the solution of dropping criminal charges also by the indictment by which he disposes, with regard to other acts or with regard to other people, the solution of arraignment.

The Ordinance of the prosecutor for dropping the criminal charges shall include, according to provisions of Article 318 paragraph (5) of the Code of Criminal Proceedings, the mentions stipulated in Article 286 paragraph (2) of the Code of Criminal Proceedings, as well as dispositions on the measures disposed, according to Article 315 paragraphs (2)-(4) of the Code of Criminal Proceedings and 318 paragraph (3) on the necessity that the defendant fulfils one or several obligations after consultation with the suspect or defendant.

The legislator used the phrase “consultation with the suspect or defendant” as a consequence of the evaluation which the prosecutor, as representative of the Public Ministry, has to make with regard to the need for the suspect or the defendant to fulfil one or several obligations expressly provided by Article 318 paragraph (3) of the Code of Criminal Proceedings, namely:

a. to remove the consequences of the criminal act or to repair the damage caused or to convene with the plaintiff claiming damages a way to repair it;

b. to apologize publicly to the aggrieved party;

c. to perform non-paid work as community service, for a period between 30 and 60 days, except the situation when, because of his health condition, the person cannot carry out that work;

d. to attend a counselling programme.

The period during which the suspect or the defendant must fulfil these obligations is maximum 6 months, except for the obligation in letter a), as far as the defendant or suspect concluded a mediation agreement with regard to the civil side of the case, a case where the period can be extended up to 9 months.

In case of obligation for the suspect or defendant to perform work as community service, the duration that can be disposed for this obligation is between 30 and 60 days; however, it can not be disposed in case that the person cannot perform this work, it can be disposed only for people who are able to work.

In case that, upon the expiry of the terms provided by the ordinance dropping the criminal charges, it is discovered that the defendant or the suspect did not respect them in bad faith, then the case prosecutor shall dispose the reversal of the ordinance, the criminal charges and the settlement of the case shall continue excluding the possibility to dispose the same solution once again (Article 318 paragraph (6) of the Code of Criminal Proceedings).

For that matter, at present, public interest shall be evaluated in relation to:

a) the content of the act and its concrete circumstances;
b) how and by what means the act was committed;
c) the purpose pursued;
d) the consequences that were produced or could have been produced by committing the act;
e) the efforts of the criminal prosecution bodies necessary for carrying out the criminal trial in relation to the seriousness of the act and the time lapsed since it was committed;
f) the procedural attitude of the aggrieved person;
g) the existence of an obvious disproportion between the expenses that could be incurred by carrying out the criminal trial and the seriousness of the consequences that were produced or could have been produced by committing the act.

When the author of the act is known, the evaluation of the public interest shall also considered:
- the person of the suspect or defendant;
- the behaviour prior to committing the act;
- the attitude of the suspect or the defendant after committing the crime;
- the efforts made for removing or diminishing the consequences of the crime.

If the author of the act is not identified, it is possible to dispose dropping criminal charges only in relation to the criteria provided for in Article 318 paragraph (2) letters a), b), e) and g) of the Code of Criminal Proceedings.
The solution of dropping criminal charges for crimes that resulted in the death of the victim cannot be disposed.

The changes brought by the provisions of the Government Extraordinary Ordinance 18/2016 for changing and completing the Law 286/2009 on the Criminal Code, the Law 135/2010 on the Code of Criminal Proceedings, and also completing the Article 31 paragraph (1) of the Law 304/2004 on judicial organisation were especially targeted at two aspects, namely:

- a verification of the ordinance that disposed dropping criminal charges in point of its lawfulness and thoroughness by the prime-prosecutor or, as appropriate, by the general prosecutor of the prosecution office attached to the court of appeal, and when it was made by the latter, the verification shall be made by the prosecutor who is higher in hierarchy, and when it was made by a prosecutor of the prosecution office attached to the High Court of Cassation and Justice, the ordinance shall be verified by the prosecutor-head of unit, and when it was made by the latter, the verification shall be made by the general prosecutor of this prosecution office;

- to subject the ordinance disposing the solution of dropping criminal charges to the confirmation of the judge from the preliminary chamber of the court that, by law, would have the competence to judge the case as a court of first instance.

Therefore, the judge from the preliminary chamber verifies the lawfulness and thoroughness of the solution of dropping criminal charges based on the works and the material in the criminal prosecution file and any new deeds presented, and in his conclusion the judge admits or rejects the confirmation request formulated by the prosecutor, and when rejecting the confirmation request, the judge from the preliminary chamber:

a) abolishes the solution of dropping criminal charges and sends the case to the prosecutor to begin or complete the prosecution or, as appropriate, to initiate the criminal action and complete the prosecution;

b) abolishes the solution of dropping criminal charges and disposes to dismiss the case.

The conclusion pronouncing one of these solutions is definitive. In case that the judge rejected the request for the confirmation of dropping criminal charges, it is not possible to dispose dropping the charges again, no matter the reason that is invoked.

4. Conclusions

We can see that, although considered non-constitutional, the provisions of Article 318 of the Code of Criminal Proceedings were changed by the Government Extraordinary Ordinance 18/2016, and at present their application is possible only after the ordinance for dropping criminal charges is subjected to the confirmation of the judge from the preliminary chamber from the court that has the competence to judge the case as a court of first instance.

Therefore, we can state that in the past – with regard to the lack of degree of social danger of a crime, the prosecutor could apply an administrative sanction, and these provisions that regulated the institution concerned were not considered non-constitutional – and at present we admit that the solutions to be found by the legislator shall envisage the fact that if the prosecutor finds that the conditions provided by Article 318 of the Code of Criminal Proceedings are met, he shall subject to the confirmation of the judge from the preliminary chamber the solution of dropping criminal charges, and being in this way in line with the provisions of Article 3 paragraph (6) of the Code of Criminal Proceedings, although we consider that they contravene the provisions of Article 3 paragraph (3) of the Code of Criminal Proceedings, according to which the function of verifying the lawfulness of arraignment or non-arraignment is compatible only with the judgement function and not with the prosecution function.

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THE APPLICATION OF THE PRINCIPLE OF NON BIS IN DEM IN THE CASE OF IDEAL PLURALITY OF OFFENCES

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Abstract: The assurance of the legality of the criminal procedural framework is achieved by a series of guarantees, such as that provided in Art. 4 of the European Convention, rendered by the apothegm—non bis in idem—meaning no legal action can be instituted twice for the same cause of action.

The European jurisprudence contains cases where the above mentioned apothegm has raised controversial opinions, which we consider interesting also for the internal criminal law.

Key words: non bis in idem, ideal plurality of offences, the European Court of Human Rights

1. The legal application of the non bis in dem principle

The state recognition of the non bis in idem apothegm as a criminal law principle, as a procedural rule-guarantee or human right, as well as the juridical consequences produced by its application, have determined the application of the principle in the national legislation of states, in the European legislation but also in the international legislation, being at the basis of modern criminal law.

In the internal legislation, the non bis in idem apothegm is mainly applied as a principle and procedural rule that guarantees the right to an equitable trial in Art. 6 of the Criminal Proc. Code; in Art. 8 of the Law no. 302/2004 on international judicial co-operation in criminal matters.

The internal legal framework includes, through Art. 20 of the Constitution both European regulations and international regulations referring to the right of not being judged or punished twice for the same cause of action, contained in the deeds ratified by our country.

In the category of European and international deeds, we mention: The Charter of Fundamental Rights of the European Union – Art. 50; the European Convention of Human Rights – Art. 4 of the Protocol 7; the Convention for the Application of the Schengen Agreement (CASS) – Art. 4; the international pact regarding civil and political rights – Art. 14 pct. 7; the Statute of the International Criminal Court – Art. 20.

24 Art. 6. Ne bis in idem. „No person can be pursued or judged for committing an offence when such person has a prior criminal decision pronounced with regards to the same deed, even if under another legal classification of the offence”.

25 Art. 8 Non bis in idem (1) The internacional judicial co-operation is not admitted if a criminal trial took place in Romanian or in any other state, for the same deed and if: a) the trial was discharged or terminated by a final judgment; b) the punishment applied in the case, by a final condemnation decision, was executed or made the object of a reprieve or amnesty, in its entirety or in its non-executed part.

(2) The dispositions of part. (1) do not apply if any assistance is requested for the revision of the final decision, for one of the reasons justifying the promotion of one of the extraordinary ways of attack provided by the Criminal Procedure Code of Romania.

The internal legal framework includes, through Art. 20 of the Constitution both European regulations and international regulations referring to the right of not being judged or punished twice for the same cause of action, contained in the deeds ratified by our country.

26 Art. 50. – The right of not being judged or punished twice for the same cause of action No person can be pursued or criminally punished by the jurisdictions of the same State for committing the offence for which he/she has already been discharged or condemned within the Union, by a final court judgment, in accordance with the law.

27 Art. 4. The right of not being judged or punished twice

1. No person can be pursued or criminally punished by the jurisdictions of the same State for committing the offence for which he/she has already been discharged or condemned by a final judgment according to the law and to the criminal procedure of this State.

2. The dispositions of the precedent paragraph does not prevent the reopening of the trial, according to the law and to the criminal procedure of the respective state, if new or recently discovered deeds or a fundamental vice within the precedent procedure are likely to affect the judgment pronounced.

28 Art. 54. „A person against whom a final decision was given in a trial on the territory of a contracting party cannot make the object of a prosecution by another contracting party for the same deeds, provided that, if a punishment was pronounced, it must be executed, under execution or can no longer be executed according to the laws of the contracting party pronouncing the sentence.”

29 Art. 14. pct. 7. No person can be pursued or punished for committing the offence for which he/she has already been discharged or condemned by a final judgment according to the law and to the criminal procedure of each state.

30 Art. 20. Non bis in idem

1. Unless otherwise disposed by this statute, no person can be judged by the Court for criminal actions for which he/she has already been condemned or investigated by it.

39
The signatory states of these international deeds give the *non bis in idem* apothegm three distinct meanings, namely, that of fundamental principle of the community right, that of human fundamental right and that of procedural rule, so as, in the absence of a common and singular definition enclosing all these three meanings, the legislative application is materialized in different contents, from one legal deed to another, the states wishing to give a nuance to the meaning granted according to the object and purpose of the adopted deed.

This fact is not likely to create juridical problems to the signatory states of some of the above mentioned deeds, as the texts complete harmoniously towards the protection of human rights through material guarantees having the value of fundamental principles.

In this sense, we exemplify with the interpretation given to the principle of *non bis in idem* provided by Art. 54 of the CASS, by the Court of Justice of the European Union (CJEU) in three cases, namely Gözütok and Brügge, Van Esbroeck and Miraglia.

In these cases, „The Court seems to have chosen a wide interpretation of Art. 54 of the CASS, giving priority to the objectives regarding the free circulation of persons, in the detriment of those referring to offence repression and the protection of public safety. Nevertheless, in the Miraglia case, the Court applied a narrower interpretation and gave priority to the prevention and control of criminality in the detriment of free circulation of persons. Moreover, in the case Gözütok and Brügge and in the Van Esbroeck case, the Court underlined the principle of „mutual trust”, which represents the basis of Art. 54 of the CASS and highlighted the fact that the non-harmonization of the national criminal codes and procedures does not represent an obstacle in the application of the principle of *ne bis in idem*.”

The jurisprudence formed in relation with the *non bis in idem* apothegm reveals differences in the way the rule is perceived also from the perspective of the objective aimed at, by the deed providing it as follows: „there is an inconsistence between the jurisprudence regarding Art. 54 of the CASS, which does not need (apparently) a „unity of juridical interests protected” but it makes do with applying the principle of *ne bis in idem* provided there is an „identity of material facts” and the defendants are the same in front of both courts and the jurisprudence regarding *ne bis in idem* as „a fundamental principle of the EC legislation” that needs a „triple condition” of „identity of facts, the unity regarding the offender and the unity of the interests protected” before the application of this principle”.

2. Conditions for the application of the *non bis in idem* principle

The efficient invocation in an actual case of Art. 4 regarding the right of not being judged or punished twice for the same cause of action supposes that the requirements of retaining this article in a given situation are achieved cumulatively, from a numeric and terminological point of view.

The following requirements can be detached from the literal text of Art. 4:

1. The principle applies only to the criminal field, which means that the deed committed is provided as an infraction in the criminal law prior to its commitment also in variants containing the deed committed;
2. The criminal jurisdictional bodies gave a judgment over the offence committed;
3. The person appealing to Art. 4 must be the holder of the right of not being pursued, judged, condemned and sanctioned twice for the same cause of action;

2. No person can be judged by another court for a crime provided at Art. 5 for which he/ she has already been condemned or discharged by the Court.
3. Any person who has been judged by another court for a behavior falling also under the provisions of Art. 6, 7 or 8 cannot be judged by the Court unless the procedure before other courts;
   a) it had the purpose of exonerating the persons concerned from any criminal liability for crimes which are not under the Court’s competence; or
   b) it was not led independently or impartially, with the observance of the guarantees provided by the international law, but in a way which, given the circumstances, was incompatible with the intention of bringing the person to courte.

32 Ioana-Cristina Morar, Mariana Zainea, opin.cit., p. 618.
33 Art. 4 - *The right of not being judged or punished twice*

1. No person can be pursued or criminally punished by the jurisdictions of the same State for committing the offence for which he/ she has already been discharged or condemned by a final judgment according to the law and to the criminal procedure of this State.
2. The dispositions of the precedent paragraph does not prevent the reopening of the trial, according to the law and to the criminal procedure of the respective state, if new or recently discovered deeds or a fundamental vice within the precedent procedure are likely to affect the judgment pronounced.
3. No derogation from this article is allowed in the basis of Article 15 of the Convention.
4. A condemnation or release decision was pronounced or decided or an instruction to cease the criminal prosecution was given;
5. A criminal sanction was applied by the condemnation judgment;
6. The condemnation or release judgment remained final and irrevocable and exists under the power of the deed judged;
7. Art. 4 shall apply on the territory of the state where the offence was committed fully or partially;
8. The application of Art. 4 is incident within the performance of a single state jurisdiction and does not exclude the possibility of pursuing, judging, condemning and sanctioning the person by another foreign state, for the same criminal offence committed on the territory of another state;
9. The principle does not exclude the application of both the main penalty and the accessory and/or complementary penalty;
10. The principle applies when the new criminal procedure is initiated after the entry into force of Protocol 7.

3. Applications of the principle of non bis in idem in the case of ideal plurality of offences

Over the requests submitted to the European Court of Human Rights, hereinafter referred to as the Court, to find the violation of the right of not being condemned or judged twice for the same offence, the Court has often had the opportunity to give a judgment, either in the sense of violating the principle of non bis in idem, or in the sense of not violating the dispositions of Art. 4 with regards to this principle.

The Court carried out a thorough analysis of Art. 4 each time, both in its letter and in its spirit, appealing also to „innovations“, where applicable 35, as the Convention allows no derogations from this principle, even in emergency cases 36.

Thus, it resulted a jurisprudence revealing the fact that the European Court has constantly decided that the principle of non bis in idem does not apply in certain matters, such as the revision of the court judgments, the confrontation of the jurisdictions of several states or the ideal plurality of offences.

In most cases, for the settlement of the cases invoking the incidence of Art. 4 of the Convention, the plaintiffs requested the Court to clarify the meaning of notions such as „the same deeds“, „the same acts“ or „finally judged“.

Among these cases, we present hereinafter that referring to the application of the principle of non bis in idem in the matter of ideal plurality of offences, as the Court has given different decisions starting from the explanation of the notion of „same deeds“.

Thus, in the case Gradinger vs. Austria 36, the Court acknowledged the following de facto situation: „On 01.01.1987, the plaintiff, Mr Josef Gradinger was driving his car, he caused an accident, which led to the death of a cyclist.

The specimen taken from his blood showed that Mr Gradinger had an alcohol level of 0,8g/l.

For his deed, he is convicted by the criminal jurisdiction of the Regional Court of causing death by negligence, as provided by Art. 80 of the Austrian Criminal Code. Also, it was held that he consumed alcohol before the accident, but without exceeding the prescribed limit justifying the heavier penalty in Art. 81 par. 2 of the same Criminal Code.

On 16 July 1987, the administrative jurisdiction imposed on Mr Gradinger a fine for driving under the influence of alcohol, deed provided in Art. 5 par. 1 and Art. 99 par. 1 a of the Road Traffic Act of 1960.

In his request addressed to the Court, Mr Gradinger invoked Art. 6 and 4, from the Protocol 7 of the Convention, showing that he was convicted twice against of the principle of non bis in idem, by a criminal authority and by an administrative authority.

Analyzing the request, the Court showed the following: Art. 4 has the purpose of forbidding the repetition of criminal pursuits finally concluded. This article cannot be applied before opening a new procedure. As, in this case, it ends by a decision subsequent to the entry into force of Protocol 7, the ratione temporis applicability conditions of Art. 4 are fulfilled.

With regards to the regional Court, it need not hold the aggravating circumstance against the applicant; in exchange, the administrative authority admitted the existence of the blood alcohol level of 0,8 g/l, in order to apply Art. 5 of the Road Traffic Act.

The dispositions in this case are distinct not only in the denomination of the offences, but also in their nature and purpose. Moreover, the offence in the Road Traffic Act only represents an aspect of the crime sanctioned by Art. 81 par. 2 of the Criminal Code. Nevertheless, the two litigious decisions are based on the same behavior. Starting from this point, there was a violation of Art. 4 of Protocol 7“.

35 Art. 4 – No derogation from this article is allowed in the basis of Art. 15 of the convention.
In another case, in which the plaintiff invoked the fact that she was convicted twice for the same deed, following a car accident which led to the injury of a person, first with a fine for „the lack of control over the vehicle” and with another fine for injuring another person, the two penalties being merged, the Court drew the conclusion that Art. 4 was not violated.

In this sense, the Court showed that this was „a typical case of ideal plurality of offences”, characterized by that a single criminal deed is „decomposed” into two distinct offences. Art. 4 forbids a court to judge twice the same deed, whereas, in the case of the ideal plurality of offences, the same criminal action is to be analyzed as two distinct offences.

Also, the Court insisted in specifying that this last cause is different from the Gradinger case, where the same level of blood alcohol was appreciated contradictorily by two different courts”. In other two cases, Ponsetti et Chesnel c/France and Oliviera c/Suisse, where the plaintiffs were sanctioned twice by the national criminal and fiscal jurisdictions for the deed of “willingly” omitting to submit the return statement within the terms provided by law and, respectively, for traffic of drugs imported by smuggling, the Court decided that the dispositions of Art. 4 had not been violated, holding that it was still an ideal plurality of „criminal deeds”.

The cases presented are also interesting for the Romanian criminal law, in the case of manslaughter by a car driver having a level of over 0.80 g/l pure alcohol in blood, this deed constituting a manslaughter offence (Art. 192 par. 2 of the Criminal Code) in ideal plurality with the offence of driving a vehicle under the influence of alcohol or other substances (Art. 336 of the Criminal Code).

4. Considerations over the causes presented herein

In the case of the ideal plurality of offences, following the Court’s judgment, we must take into consideration each offence committed and not the unique deed divided into two or more offences. This is one of the conditions of Art. 4 par. 1 of Protocol 7, extracted from the expression „for the commitment of the offence”, which imposes the separation of the unique action into at least two offences rising from it. Not being in the presence of a single criminal deed but of at least two offences, which are not merged into the unique action, we cannot hold the violation of Art. 4 and, therefore, the incidence of the principle of non bis in idem.

The expression „the same offence”, in the presence of the ideal plurality of offences, should not be referenced to the same deed, as the same deed does not represent only one offence but several offences and this reality cannot be ignored.

The Court itself39 in its clarification given to the phrase „the same deeds” in the case of committing the offence of illegal substance importation to Norway and illegal substance exportation to Belgium, as a response to the prior question whether the expression „the same deeds” claims or not a single action or two separate actions, showed that a smuggling action does not necessarily and automatically involve the selling of those substances, which can be used for one’s own consumption and, therefore, it is not an integral part of the importation action, but two distinct actions, with separate liabilities, and, therefore, Art. 4 is not violated.

On the side of the European Court’s solutions in the sense of perceiving the ideal plurality as a criminal plurality and not as a unity, is, at present, the entire national doctrine and jurisprudence even if, in the classical doctrine, this issue is very ancient and, even if it has not reached a unanimity of opinions40, the wide, complex approach, real and not fictive, from multiple and different angles of the unity-plurality concepts, amply argued, is concentrated in one valuable material that can otherwise influence the principle of non bis in idem.

Conclusions

The influence of the international regulations regarding human rights protection over the internal laws reduces the risk of such cases as those presented herein, but it does not convince yet over the justness of the adopted solution.

37 Corneliu Bîrsan, op. cit., pp. 1158-1159.
38 Corneliu Bîrsan, op. cit., pp. 1159-1160.
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PROVOCATION INTO COMMITTING THE ACT - VIOLATION OF THE EVIDENCE ADMINISTRATION LOYALTY PRINCIPLE IN THE PROSECUTION PHASE

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Abstract: This article deals with the term "provocation into committing the act" by the judicial bodies in the evidence collection activity during the criminal trial, an activity which is contrary to the evidence administration loyalty principle, in terms of the relevant practice of the European Court of Human Rights. The European litigation court in the field of human rights has dealt with the provocation issue from the perspective of observing the right to an equitable trial provided by article 6 of the European Convention of Human Rights, crystalizing certain criteria according to which a certain activity of determination to committing an offence invoked by claimers can be considered or not provocation.

Thus defined, provocation appears as a form of instigation which consists in determining, encouraging a person to commit or continue to commit an offence in order to collect the accusatory evidence against them.

1. Short considerations on the national regulations regarding the evidence administration loyalty principle.

The criminal trial in its whole, both during the prosecution, the preliminary chamber, trial or during the enforcement of the court decisions is taking place according to the criminal trial legality principle, legislatively consecrated by art. 2 of the Code of the Romanian criminal procedure (Law no. 135/2010 regarding the Code of criminal procedure), and represents the transposition of the adage "nullum iudicium sine lege".

The criminal trial legality principle imposes that all activities take place according to the dispositions of the criminal procedural law. As an effect of the criminal trial legality principle, the criminal procedural law is immediately enforced.

From the perspective of the judicial bodies, the criminal trial legality principle imposes them the obligation to only administer that evidence provided by the law, and under the conditions provided by the criminal procedural law.

According to art. 99 of the Code of criminal procedure, in the criminal action, the evidence task mainly lies with the prosecutor, and according to art. 100 align. 1 of the Code of criminal procedure, during the prosecution, the criminal prosecution body collects and administers evidence both in favour and in disfavour of the suspect or defendant, ex officio or at request.

The evidence administration loyalty principle is legislatively consecrated by art. 101 of the Code of criminal procedure. The legislative text is prepared under the form of interdictions addressed to the judicial bodies.

In alignment 3, the legislator has provided the interdiction against the judicial bodies or other persons acting for them to provoke another person to commit or continue to commit a criminal act in order to obtain evidence.

The evidence administration loyalty principle implies that, in the activity of assessing the utility and conclusiveness of the evidence, the judicial bodies must use, in good faith, only that evidence and probatory procedures provided by the law, in the spirit of the norms and principles governing the criminal trial, and while complying with the rights of the participants in the criminal trial.

One of the legality aspects of the criminal trial is represented by the evidence administration loyalty principle.

2. Elements of judicial practice of the European Court of Human Rights regarding provocation

In its constant practice, the European Court of Human Rights (hereinafter called The Court) has crystalized criteria depending on which the activity of the judicial bodies can be considered provocation, contrary to the evidence loyalty principle, i.e. activity being detrimental to the right to an equitable trial provided by art. 6 of the European Convention of Human Rights.
In the Decision Ramanauskas versus Lithuania of 05 February 2008, The Court has shown that "...the use of special investigation techniques and especially of those under cover cannot itself violate the right to an equitable trial. (...) their use must be within certain well-defined limits." (para.51)

The instigation by the police only takes place when the involved police officers - either members of the security forces, or persons acting based on the instructions received from them - do not limit themselves to investigating the criminal activities in a passive manner but exert an influence on the person, so that they incite to committing an offence which otherwise would not have been committed, with the purpose of obtaining evidence also for the prosecution. (para. 55)

In question, the provokative activities coming from police officers have taken place before the authorization, being determinant for the criminal decision-making.

The Court has found that the police bodies have acted as an agent provocateur.

In the case Teixeira de Castro vs. Portugal, no. 44/1997/828/1034 of 9 June 1998, under-cover police officers have asked the plaintiff to supply heroin, without available evidence indicating that he may have committed the act without the intervention of the under-cover investigator. The police did not have preliminary information suggesting his previous involvement in drug dealing but they accidentally got in contact with him.

The Court found the existence of provocation from the police bodies.

The case Constantin and Stoian vs. Romania of 29 September 2009, the Court showed that "in order to find whether the under-cover police officer had limited himself to "investigating the criminal activity in a mainly passive manner"; it takes into account the following considerations: nothing from the plaintiffs’ past had suggested a predisposition to drug dealing. Only the fact that one of them was a convicted drug user cannot change the conclusion of the Court. The Court notes that the prosecutor did not provide details, nor did he refer to any objective evidence regarding the alleged criminal behaviour of the plaintiffs, in his decision to commence criminal prosecution. Moreover, no heroin was found in the possession of the first plaintiff or in the house of the second plaintiff.” (para.55)

In the case Bannikova versus Russia of 04.10.2010, the Court has analysed the compliance with the right to an equitable trial, namely: if the offence had been committed without the intervention of the state bodies; if the investigation was “essentially passive”; if, prior to the intervention of the authorities, there were objective suspicions that the plaintiff was involved in criminal activities, or that she was prone to commit an offence.

Any preliminary information regarding the pre-existence of a criminal intent must be checked, and the authorities must be capable of proving, in any phase, that they have had solid grounds for authorizing a under-cover operation.

Moreover, in assessing the soundness of the intervention, it is showed that, even though the plaintiff had an criminal conviction in the past, this does not itself represent an indication of a criminal activity currently taking place.

The Court also offers indications of a possible current criminal intent, such as: the plaintiff proves to be familiar with the market prices of drugs, and ability in procuring drugs in a short time, or the nature of the plaintiff's earnings.

One must analyse whether the under-cover investigator "has joined" the criminal act, or has instigated to the criminal act.

In order to set the border between the legitimate infiltration of an under-cover investigator and the instigation to an offence, the Court has analysed the issue whether the plaintiff has been subject to the pressure of committing an offence. Thus, abandoning the passive attitude by the judicial bodies so that they have taken the initiative of contacting the plaintiff, renewing the offer, in spite of his initial refusal, insistently suggested, raising the price beyond the average (Decision Malininas vs. Lithuania, no. 10071/04, 01 July 2008), or resorting to the plaintiff’s compassion by invoking the recurrence of the symptoms (case Vanyan vs. Russia, no.53203/99) can be considered acts of provocation.

The situation is different in case no. 67537/01. Shannon vs. The United Kingdom, Decision on admissibility of 06 April 2004.

In fact, John James Shannon, British citizen, has been contacted by a journalist, employed by a British tabloid, who had information according to which he could provide drugs. The journalist had not revealed his real identity.

Following the meetings of the two, the journalist has brought up drug consumption in certain select clubs which he was going to, and the fact that he has allegedly been asked for cocaine. Shannon has unsolicitedly expressed his will to provide cocaine, renewing his offer several times. Finally, he has procured samples of cocaine and canabis for the false journalist in exchange of certain amounts of money.

The relevant discussions have been audio and video recorded in the respective environment, and the summary of the journalistic investigation has been published in the British tabloid.

The recordings made using concealed means by the journalist have been made available for the police bodies that opened an investigation against Mr. J.J. Shannon, as he was arrested and brought to trial for three accusations of drug supply.
Shannon admitted the accusations before the national court but invoked the fact that he was provoked to commit the acts. His defence was overruled, as he was convicted, especially based on the audio and video recordings made available by the British journalist.

Subsequently, he filed a complaint with the European Court of Human Rights, invoking the violation of article 6 of the European Convention of Human Rights.

Following the assessment on admissibility, the Court has found that the role of the state has limited to the indictment of Mr. Shannon based on the information provided by a third party, a journalist, acting individually, without being an agent of the state; he has not acted for the police, according to their instructions and control. Moreover, police was not previously aware of the under-cover journalist's operation, as the audio and video recordings have been presented to them after the event.

The Court has considered the conclusions of the national resorts which have found the fact that Mr. Shannon has not been determined to commit the offence but has offered voluntarily, and has agreed to supply drugs, without being subject to pressure. His familiarity with the market price of the cocaine and supplied drugs has been found, an aspect which proves that he was capable of perfecting such a business in fifteen minutes, and although he had the possibility to denounce such an opportunity, he did not do it, profiting by the financial advantages of the business.

The Court has found the fact that the journalist has not acted as an agent provocateur, so that no intromission into the right to an equitable trial has been caused, and consequently he declared the request as inadmissible.

3. Conclusions
Further to the analysis of the relevant practice of the European litigation court in the field of human rights, one can conclude that there is provocation when:
• there has been an activity determing a person to commit an offence; it is assessed that the person did not have the intent to act when no evidence proved this. It can however be considered a predisposition to committing the offence when the defendant proves familiarity with the committing manner, proposes variants of action, has contacts able to facilitate the committing of the offence;
• the determination activity comes from the state authorities or from persons acting under the guidance and control of the state bodies; the activity of third parties acting as private persons cannot generally lead to considering this as provocation;
• the activity of the state bodies is the one instigating to committing or continuing to commit the offence, and without this determination, the person would not have acted; it is not considered provocation when the under-cover activity of collecting evidence "joins" the already progressing criminal act, when the state bodies show a purely passive attitude, only offering an opportunity, an "usual temptation", which does not have a special nature, within a role play, with the purpose of passively observing the offender's criminal behaviour;
• the activity of provoking to committing an offence has been performed by the judicial bodies in order to collect accusatory evidence against that person, indict them, and initiate a criminal trial against them in order to hold them criminally liable;

The purpose of the criminal trial is finding the truth, and the truth results from evidence. However, the truth must not be revealed anyhow but only with the help of that evidence regulated by the juridical order, and in the spirit of the principles of the criminal trial, without being detrimental to the person's dignity, to their right to an equitable trial or to their private life.

The entire activity of the judicial bodies in the evidence collection process must be subject to the credibility idea of the judicial process.

The administration in good faith of the evidence provides credibility, guarantees and also imposes the judicial process. This honours the state by means of its bodies, and is imposed with authority to the recipients of the criminal law, and also to the subjects who have suffered damages by the violation of the rule of criminal law.

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RISK PARTICULARITIES FOR CONSTRUCTION CONTRACTOR AGREEMENT

By attorney at law Chifor Daniel-Cătălin

1. Definition of the Contract Agreement for construction works

Arising from the corroboration of article 1874 with the provisions of article 1851, paragraph 1 related to article 1166 of the Civil Code, the contract for construction works is the agreement of wills between two or more parties, the party called entrepreneur or contractor assumes the obligation, at its own risk, to perform a particular construction work for the other party named beneficiary, that by law requires a building permit, in exchange for a price 41.

2. The notion of risk in a Construction Contract Agreement. Risk taking, premise liability?

From the definition provided by the Contract legislator we can observe a feature of this type of contract, assuming the obligation by the contractor as its own risk to achieve a specific work.

To customize on the notion of risk under the contract, we will first define the notion of risk in a broad sense. The risk means the possibility of producing a random damage causing event characterized by its probability of producing but also by damage proportion and thus its consequences.

As regards the notion of risk under the Construction Contract Agreement, in terms of the definition set out, we consider that it is aimed at limiting the possibility of producing an event of damage both in relation to the enforcement of labor but also, where appropriate, in relation to the choice of the materials used, the time that this task is the responsibility of the contractor.

What does the notion of obligation assumption imply when the entrepreneur has to execute a job, on its own risk? We believe that at the time of publishing legal norm, the legislator took into account a wide spectrum, including the accountability by the contractor on the method of implementation adopted, the type and quality of materials used and, not least, the dynamics that may arise regarding the purchase cost on labor and materials used in the execution of construction work if the contractor carries out the work using his own materials. Moreover, at first sight, although it seems imperceptible, the contractor assumes the risk of not obtaining any profit from carrying out the execution of the construction work.

It seems to me that when he introduced the particle "at his own risk" in the structure of legal norm, the legislator felt the need to draw special attention to entrepreneurs that the repair of any damage caused by the way it has worked to coordinate, implement and also diligence in choosing materials will fall in its task, the contract beneficiary entitled to the standards indicated at the time of conclusion of the construction contract.

However, even though there are many similarities between the concept of risk-taking and the assumption of liability, some features distinguish them.

Thus, if the contractor runs intentionally a work using an improper activity or poor quality materials, the contractor is responsible for his own choices, a prejudice is imminent, so it can not be said that it supports incurring a risk since it is known that its action at a time will cause damages.

In the opposite situation, when the contractor makes all the necessary efforts to the proper conduct of the work but also in terms of the choice of the materials, it is the intention to execute a consistent and sustainable work. Thus, the entrepreneur takes a risk on his own choices but convinced that they are correct and necessary for the intended purpose.

Although in both cases the contractor is held liable and obliged to repair the damage, the difference is made by guilt. Therefore, in a situation where a contractor has used intentionally improper materials and work methods, guilt is one way of intention. If the contractor makes all reasonable efforts regarding the proper work

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41 Art. 1166 c. civ. : "The contract is the agreement of wills between two or more persons with intent to establish, modify or extinguish a legal report."

Art. 1851 paragraph 1 URC.civ. : "In the contract, the contractor agrees that its risk, to undertake a particular intellectual work, material, or times to provide a particular service for the beneficiary, for a price."

1874. URC.civ Art. : "In the security contract for construction works, the contractor is obliged to perform a work which require, by law, the authorization of the construction"
methods and quality of materials used, it will be analyzed through the modality of guilt, in ways considered by the court to customize the extent of the damage.

We believe that at the time of the proclamation of the legal norm represented by Article 1851, paragraph 1 of the Civil Code, the legislator took into account the situation of the contractor in good faith, introducing particle “at his own risk” to draw its attention that in the event of a damage, shall be liable even if the lightest fault.

Therefore, the entrepreneur volitional side will be considered by the Court at the time of pronouncement of a judgment in terms of remedy the damage from the execution of a Construction Contract Agreement.

Regarding the motion „risk taking, premise liability?”, in the light of those presented, we by introducin
g the particle his own risk ” in normative text was eliminated any doubt about the liability of the contractor if the damage is a result of the most lightweight, fault culpa being present even where it has assumed the possibility of a random damage causing event.

3. The significance of risk in relation to the type of price set in the contract for Construction Contract Agreements

According to paragraph 1 and 2 of Article 1854 of the Civil Code, the price of the Contract may consist of money or any other goods or benefits and must be serious and determined or at least determinable.42

Thus, if in the framework of the contract of sale price must be imperatively a sum of money, in settlement of the construction contract agreement legislature relaxed the legal requirement an
d left the possibility of expressing the price in "any other benefits or services".

Moreover, it is noted that the legislature has considered the progressive dynamics of the social and contractual relations but mainly the instability in economic activity caused by permanent dynamics of the materials costs, therefor in order to avoid creating financial and economic imbalances, offered the possibility that the parties agree to either a determined price or a determinable price depending on certain factors.

To remove any doubt about the meaning of the phrases „specified price” and „determinable price”, the legislature established in the provisions of Article 1865, Article 1866 and Article 1867 of the Civil Code, the application of the phrases indicated that interpreted the concept of "estimated price", "price set according to the value of works or services" and "fixed price".

3.1. Fixed price

The concept of fixed price falls within the typology laid down in Article 1868 of the Civil Code. According to the legal norm, the fixed price is set when the contract is concluded for an overall price and cannot behave.

Thus, if the contractor assumes the obligation to perform a construction work with materials purchased by it, it will bear the full risk of the materials price fluctuation and also any additional costs caused by increases relating to the remuneration of workers, for example, increasing the minimum wage.

Therefore, if the construction contract agreement is concluded for a fixed price, the entrepreneur alone assumes the entire risk of economic fluctuations and may be deprived of profits.

There are several indicators analyzed by the contractor when concluding the construction contract with the beneficiary: the value of the materials that they will use in the execution of construction work and the amount of labor which may include the cost of remuneration of the employees and profit.

Therefore, if the value of the materials at the time of purchase will be higher than the one presumed when the contract was signed, the risk assumed by setting a global price belongs to the contractor, who is not able to request an increase in the price of the contract and should bear the costs related to the purchase of materials.

Moreover, the beneficiary is not entitled to demand reimbursement of the amount of money paid as fixed price if the cost of materials and remuneration paid to employees decreases. However, the beneficiary does not bear any risk since he is aware of the full value of the construction contract agreement. However, the beneficiary

42 Art. 1854. URC.civ. The price. “(1) the price of the project may consist in a sum of money or any other property or benefits. (2) the price must be serious and determined, or at least determinable.”
cannot ask for a price reduction, thanks to paragraph 1 of Article 1867 of the Civil Code and cannot start a possible action for unjust enrichment."\(^{43}\)

In conclusion, the risk for setting a fixed price belongs exclusively to the contractor, "the beneficiary must pay the agreed price and may not demand a discount, arguing that the work or service required less labor or cost less than was anticipated. In the same way, the contractor cannot claim a price increase."\(^{44}\) The fixed price is "payable regardless of variations in costs incurred by the contractor."\(^{45}\)

As I explained, the legislator wanted to emphasize the notion of determinable price, so the Article 1865 and Article 1866 of the Civil Code estimated sets the typology of "estimated price" and "price set according to the value of works or services".

Appealing to the systematic interpretation of the Articles, namely by applying an interpretation which considers "the place it occupies in the technical-legislative in the normative act"\(^{46}\) it appears that both price types are part of the determinable price and the price typology depending on the value of the works or services constitutes a variation of estimated price typology.

### 3.2. Estimated price

Under Article 1865 of the Civil Code the estimated price represents an approximation of the indicative total amount of the contract at the time of its conclusion, when the parties may consider the cost of labor and materials, the costs highlighted in the economic market and but also relying on their experience in the field.

Unlike the fixed price, besides the fact that it belongs to the determinable price category, the estimated price may entail changes according to the above mentioned cost variation. The legislature does not require the fulfillment of certain requirements when the price change is a reduction but clearly regulates cases where the recipient is required to pay a higher price.

Thus, in the article 1865 of the Civil Code, paragraph 1, the legislature requires the contractor to justify any price increase; in paragraph 2 of the said rule, the legislature requires that price change, meaning its rise, resulting from works or services which could not be foreseen by the contractor at the time of conclusion of the contract.

Therefore, not any increase in costs for the purchase of materials or labor costs causes a change in the estimated price, but only the increase in costs which could not be foreseen by the contractor.

So, in terms of typology of the estimated price the legislator puts into words the phrase "his own risk" given in Article 1851 of the Civil Code, emphasizing that the major risk in terms of changing costs of labor or materials required for completion of the work is for the contractor.

It can be seen that the price change for the purposes of its rise will be made and the price will be paid only if the contractor could not foresee such an increase.

The entrepreneur or contractor is the person qualified to perform the work, hence it should exercise increased diligence in choosing the methods of work and the materials needed for the execution. So, if it turns out that it could foresee that the costs of materials and methods may undergo some changes, changes in the sense of an increase in production costs of the work covered by the contract, the beneficiary will not be required to pay the difference in price, assuming the entrepreneur undertakes the ope legis risk these fluctuations.

It follows that if it appears that the contractor could foresee changing costs, on the bases of the risk assumes, it will bear the price difference between the estimated value and the final cost.

Regarding the situation when the final cost is lower than the estimated price, the legislature did not distinguished it, from which is follows that, by the time of work completion, the price is determinable and only at the time of finalizing the work it becomes determined.

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\(^{46}\) IOSIF ROBI URS, CARMEN TODICĂ “Civil law. The General theory”, edit. Hamangiu, Bucharest, 2015, p. 76.
Thus, if there is a negative difference in price, the beneficiary will be required only to pay the price for the completed work and not to the amount of the estimated price; the contractor is obliged by "ope legis" to take the risk which rests fluctuations in the mitigation costs.

So, if the final price is lower than the estimated price, and the beneficiary has paid the price of equivalent value in advance, it shall be entitled to a refund equal to the difference between the two prices. Also, the formulation of an action concerning the refund of the difference in price is a possibility of the beneficiary; it may or may not take this action.

In conclusion, the risk in the contract of construction agreement for construction work belongs to the contractor seen as a specialist in the field who should exercise enhanced diligence and only if the price increase is caused by events that could not be foreseen by the contractor, the beneficiary will be be required to pay the difference in price, the risk being transferred in these conditions.

3.3. The price set according to the value of works or services

Price set according to the value of works or services, provided by Article 1866 of the Civil Code falls into the category of determinable price. Regarding the relationship between the price determined according to the value of the works or services and the estimated price by applying a systematic interpretation, we consider the fact that this is a species that falls within the estimated price typology. Compared to the fixed price typology, price set depending on the value of the works or services presents the particularity of a determinable character, based on an approximation of final costs.

The particularity of this price consists of a criterion of objectivity in regards to fixing the amount of the price, the contractor issues an estimate that includes a summary of the expenditure concerning the realization of the works and a list of quantities with the nominal value of each item, the sum of the costs represents an objective value of the contract.

By the conclusion of the contract for construction agreement, the recipient accepts the financial plan drawn up by the contractor, which "includes the value of materials and labor, and other expenses necessary and useful for the task".

So when the contract is signed the estimate price is "is determined only provisionally (estimate). Its determination is based on an estimate, i.e. a provisional price of items, the total amount (final price) being known only after completion of the work." 48

Please note that this criterion of pricing is most often used in public works contracts, regulated by Law no. 98/2016. 49

Within this legal norm, the legislature regulates the public works contracts as those contracts which have as their object the following: either only the execution, or both the design and execution of work in relation to one of the activities referred to in annex No. 1 of the law; either only the execution, or both the design and execution of a building; or the realization, by whatever means, of a building that meets the requirements laid down by the contracting authority which exercises a strong influence on the type of design or construction, virtually all activities that can take the form of construction contract agreement in the private Law.

Although it is not expressly provided that the contracting authority should use this kind of price in the public contracts, the legislature has intervened through the governmental decision nr. 28/2008, which has established detailed rules for drawing up the general investments budget and intervention works. Also in support of our assertion is the provision contained in Article 9 of the Public Procurement Act, which states in paragraph 1 that the contracting authority will calculate the estimated contract value.

We must point out that the awarding of contracts for public works by the contracting authority is made after a laborious procedure. Thus, the contracting authority (the beneficiary) shall initiate the procedure for the

49 Law No. 98/2016 public procurement was published in the Official Gazette, part I, no. 390, from 23.05.2016.
50 Article 3, paragraph 1, letter m) the law No. 98/2016 regarding public procurement contract was published in the Official Gazette, part I, no. 390 from 23.05.2016
51 Judgement No. 28/2008 approving the content of technical and economic documentation related to public investment, as well as the structure and methodology for the elaboration of a general estimate for the investment objectives and interventions was publicatâ în the Official Gazette, part I, no. 48 from 22.01.2008.
award, entrepreneurs submit an offer which includes an estimate of the work, on the basis of the offers submitted
the beneficiary declares a winner by following the application of any of the criteria set out in article 187
paragraph 3 of Law, later concluding the contract.

Corroborating the provisions mentioned above, namely H. G. no. 28/2008, Article 9, paragraph 1 and
Article 187 of Law no. 98/2016 on public procurement, it is clear that a major factor in determining the price of a
public contract is the estimate of works as part of the price determined according to the value of the work or
services.

Although, in contracts for public works, the contracting authority as beneficiary and the contractor, as a
performer, establish a sum of money as price of the contract, it is an estimate that may involve changes
"estimated price can be changed depending on the price of materials and labor (and by performing additional
works)\(^52\) (12).

Often, in practice, the contractor requests an offer from the supplier regarding the cost of materials, this
offer is taken into account when drafting the estimate price for the public works contracts. Frequently, the
supplier of materials, due to the prevailing trade relations with the contractor, at the time the contractor is
declared the winner of the award procedure and must purchase products and begin the execution, it offers a
discount for the entrepreneur, influenced by both the steadfastness of the relationship between the supplier and
the contractor and the amount required to be purchased. Being a domino effect, automatically the estimated price
will be non-compliant with the actual value of purchase.

In the following we highlight which of the party gets the difference between amounts: contractor or
contracting authority and who bears the risk in such a situation?

Considering the fact that the price in such a contract is determinable, it will be determined only at the
completion of the works. Therefore, bearing in mind that in this case we are talking about a procurement contract
which follows the rules of the construction contract agreement, it appears that the risk is the responsibility of
contractor.

Thus, the estimate works represents only an objective instrument considered for determining the estimated
price and does not create an obligation on parties to the payment if the final price is higher or lower, depending
on the circumstances.

We believe that in order to determine who bears the risk in connection with the conclusion of such an
agreement, we must take into account the provisions relating to the Construction Contract Agreement from the
Civil Code, considering The principle of public interest supremacy, because the source of funding is public
money.

Therefore, the price recorded in the estimate and accepted by the principal contracting authority through
the conclusion of the contract is determinable and the final price can be determined only at the time when the
works were completed.

This analysis ensure that in terms of a negative fluctuation, i.e. a reduction of the necessary costs for
carrying out the work, indicated in the estimate the risk falls exclusively on the contractor and it may be forced
to refund the difference if the price has been paid in advance.

Due to the determinable character of the price, if the final one is higher than the estimated one, the
beneficiary will be required to pay only if it turns out that the price variation of works or services could not be
foreseen by the contractor and only if the contractor informed beneficiary about price fluctuations and the costs.

Thus, we consider that if the contractor does not immediately highlights the fact that the price has
behaved in a positive sense, i.e. a price increase, there is a legal presumption of acceptance of this risk on the
part of the contractor, established by paragraph 1 of article 1851 by the Civil code, and the beneficiary will not
be required to play the cost difference between the final price and the estimated price.

In conclusion, we consider that in order to determine which part is responsible to take the risk under the
contract agreement for construction works and the Public procurement contract, first of all, it is necessary to
analyze the type of the price stipulated in the contract, depending if the price is determinable or fixed, it will
identify the part that took the risk of the contract.

\(^52\) LIVIU STĂNCIULESCU, Urop.cit., p. 346.
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b) Treaties, manuals, monographs:
COMPARISON BETWEEN FIDUCIAS AND TRUSTS

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Abstract
The following paper proposes an analysis between the fiduciary institution as it is defined by the continental European law and the trust institution as it is defined in the common law system. It is not to be neglected that trusts have been widely regulated since the 1900s and have gained a number of different employments throughout the common law system (as we shall see in the present study the United Kingdom, the United States of America and the British Virgin Islands), whereas the fiduciary institution is still young as it was introduced for the first time in 1985 by the Hague Convention in an effort to standardize the and recognize trusts in Europe. Thus it does not come as a shock that trusts are used worldwide to optimize taxation, hide fortunes, avoid long and costly debates on inheritance, whereas fiducias have yet to find a concrete place in the legal systems.

WHAT ARE FIDUCIAS AND TRUSTS?
In this first section we shall try and find a definition of both concepts and we will point out who can constitute, who can administrate and who can benefit from a fiduciary establishment or a trust.

Definition of the fiduciary institution in the Continental Law System
We shall be interested in the definition of fiducias in both the French and Romanian legal system; the French legal system defines fiducia as the operation by which one or more grantors transfer assets, rights, or security rights, or a set of assets, rights, or security rights, present or future, to one or more fiduciaries who, keeping them separate from their own patrimonies, act to achieve a specified goal for the benefit of one or more beneficiaries. [1] It costs about 125 euros to establish and can be created by a natural or a legal person.

It must be stressed out that regulations in fiducias were adopted a few years before France signed the Hague Convention regarding the law applicable to trusts and on their recognition, in an effort to harmonize the regulations regarding trusts but also to resolve the law conflicts created in the choosing of the lex causae.

The Convention establishes for the signing states the recognition of written trusts, the main characteristics of trusts but without limitation to the ones named in the Convention and the law applicable to trusts who can be submitted to more than one legislation. [2]

Although Romania is not part of the said Convention, it regulates fiducia as the operation by which one or more grantors transfer real property, security rights, warranties or other patrimonial rights or a set of such rights, present or future, to one or more fiduciaries who exercise them with a specified goal, for the benefit of one or more beneficiaries [3]. The Romanian regulation rarely varies from the French one, but as notable differences we may state that the Romanian regulation asks that the fiduciary contract shall be enforced by either law or a contract drafted and acknowledged by a notary, that the fiduciary may also be a public notary, it reduces the time limit in which the fiducia can be constituted to 33 years, as opposed to 99 years, and it also avoids to regulate that the fiducia should be terminated with the death of the natural person who instituted it.

Definitions of trusts in the Common Law system
In the UK, trusts were firstly a jurisprudential creation and were regulated for the first time in 1925 through the English Trustee Act, and after were strengthen by the Recognition of Trusts Act in 1987, which allowed the recognition of trusts created in other countries on UK territory. In the UK the trust defines the legal relations created inter vivos or mortis causa, by a natural or legal person, a settlor (grantor) when goods were placed under the control of a trustee (fiduciary), for the benefit of a beneficiary or to a determined goal. A trust has the following prime characteristics: the goods constitute a different patrimony than the one of the settlor and are placed in the name of the trustee or in the name of another natural or legal person but on behalf of the trustee, and it gives in accordance to the terms of the trust full powers to the trustee.

For the purpose of this study we have chosen the BVI's legislation as it is similar to other tax havens legislation and it shows how trusts are regulated. For a trust to be governed by the BVI legislation it must state so in its constitutive act, regardless the fact that the trust has no real connection to the BVI, and regardless the domicile of the settlor, the trustee or the beneficiary. [4]

The USA generally define trusts as an arrangement whereby property is legally owned and managed by an individual or corporate fiduciary as trustee for the benefit of another, called a beneficiary, who is the equitable owner of the property. As regards to the properties that can be placed in trusts, it knows no limitation as far as the goods are in the civil circuit and are not against law or public order. [5]
Who can create and administrate fiducias and trusts?

In the continental European law system, as in the Common Law system both natural and legal persons can constitute a fiducia or a trust - this being said the natural person must have full capacity and the legal person must be legally and fully constituted at the date of the creation of the trust.

Regarding the identity of the fiduciary or the trustee this differs in the Continental Law from the Common Law system: thus, the French legislation clearly states that fiduciaries can be only the persons stated in article 2015 of the Civil Code - credit institutions as defined in article L. 511-1 of the Monetary and Financial Code, the Public Treasury, French National Bank, French Post, Institute of Emissions for Over Seas Departments, House of Deposits and Consignments, Investment Enterprises mentioned in article L. 531-4 of the Monetary and Financial Code, as well as the Insurance Enterprises governed by article L. 310-1 of the Insurance Code, or lawyers. The Romanian law clearly states that fiduciaries can only be Credit Institutions, Investment Enterprises and those who Administrates Investments, Enterprises that offer Services of Investments, Insurance and Reinsurance Enterprises, lawyers and public notaries.

On the other hand, any natural or moral person can be a trustee in the Common Law system - it is nevertheless true that companies that specialize in the administration of financial goods are to be preferred in the administration of trusts, but the UK or the USA law never states a restrictive manner in which one can become a trustee. Thus, in the UK, any person who is not a minor and can own property can become a trustee, the USA only ask that the person have full capacity.

The BVI created the possibility for a trust to be established by the sole unilateral Declaration of Trust, made by the trustee, or by Deed of Settlement in between the trustee and the grantor/settlor - this allows the grantor/settlor to remain anonymous and portrays the trustee as the real beneficiary of the trust.

As far as beneficiaries of the trust go, they can be both natural or moral persons, in both legal systems - this means that the grantor/settlor can also be the beneficiary, or the trustee can also be a beneficiary. The only thing that is forbidden by the Continental law is gratuitous intent for the benefit of the beneficiary.

DIFFERENCES BETWEEN TRUSTS AND FIDUCIAS

In this following section we shall take interest into how fiducias or trusts can take place, in what form they are established, what happens to the patrimony of the grantor/settlor, who is representing the structure and the possibility to modify the goods in the structure. We shall refer to the legislations of the UK, BVI and USA as the Common Law and to the legislation of France and Romania as Continental Law; if ever a distinction is to be made, it will be made punctually.

How are fiducias and trusts established?

In the Continental Law, fiducias can only be established by law or a written act inter vivos; for example in the Romanian legislation the grantor needs an authentic (notarial) contract to establish a fiducia, whereas in the French legislation the authentic form is only requested when the assets, rights, or security rights transferred into the fiduciary patrimony belong to the community existing between spouses or belong to owners in joint possession.

The Common Law trusts can also be established by a testament (or mortis causa) or the trust can also be formed by a simple oral deal between the settlor and the trustee. [6] Naturally, institutions that manage trusts regularly, or lawyers usually advise settlors to have a written form (but not necessarily notarized), in order to have proof of the trusts clauses.

For how long can such structures functions?

The French state that a trust cannot be established for more than 99 years, whereas in Romania the maximum period for which a trust can be established is 33 years. This raises issues if the grantor wants to create for instance a charitable fiducia, because the fiduciary patrimony shall end after 33 or 99 years, or at the death of the grantor.

In the Common Law system, trusts can be established for different periods of time, depending mostly on the purpose of the trust (charitable or non charitable), thus we can have trusts that last forever or trusts that end by the will of the settlor, an accomplishment of a condition (as for instance the majority of the beneficiary), or after a certain period of time. The BVI used to have trusts that could be founded for an unlimited period of time, but since the modification in 1993, the longest a trust can be created for is 100 years, or a period of 21 years after the death of the last survivor from a branch of individuals that were alive at the date of the creation of the trust; this being said, the person doesn't have to have any connection to the trust.

The trust or fiduciary patrimony

As far as the categories of goods that can be placed in a trust go, both Common Law and Continental Law establish that any good, right, asset, security or warranty that can be found in the civil circuit and are not illegal or immoral can be placed in a fiducia or a trust.
What is interesting is what happens to the patrimony of the person constituting it: Continental Law states that whatever is placed in the fiducia does not leave the patrimony of its grantor - meaning that both French and Romanian regulations do not establish a new patrimony, different from the one of the grantor. Thus the fiducia is simply a set of assets or rights that never leaves the patrimony of the grantor, but is simply affected to the use of something else. Moreover, the French legislation states that if the contract of fiducia ends in the absence of a beneficiary, all assets or rights placed in the fiduciary patrimony shall return to the grantor. If the fiducia ends because of the death of the grantor, the fiduciary patrimony return to his succession as a matter of law, and thus the fiducia can never be used in order to leave a legacy.

Common Law instates as a prime condition to the constitution of a trust that the goods placed in such a structure shall constitute a different patrimony and shall not be part of the settlor's patrimony. Thus, from the date of creation of a trust, the assets and rights that are placed within shall constitute a different patrimony than the one of the settlor, and thus avoiding a big set of obstacles created by the duration of the trust.

**Possibility of the grantor/settlor to amend the fiducia/trust**

The French doctrine created the fiducia-warranty, in which even though the assets, rights or warranties are in the fiduciary patrimony, and are administered by a fiduciary, the grantor has the possibility to still make acts of conservation, administration or disposition upon those assets, rights or warranties. [7] In the Continental Law system, unless the contract states otherwise, the grantor is free (or in the French regulation, if the grantor is a natural person, he is obliged) to name a third party in order to ensure the preservation of his interests in the performance of the fiduciary contract, who can have the same powers that regulations give to the grantor.

What is very important to state is that in the Continental Law system, the grantor may revoke the fiduciary contract as long as the beneficiary hasn’t accepted it. After such acceptance, the contract will only be modified or revoked with consent of the beneficiary or by the decision of a judge.

In the Recognition of Trusts Act, UK clearly states that the reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust, meaning that the settlor can most of the times modify or amend the trust or the assets placed within. This varies a lot depending on the type of trust that is established, meaning that usually charitable trusts and irrevocable trusts cannot be amended or modified by the will of the settlor.

The BVI created a type of trust, called the fixed trust where the beneficiary is entitled to revenues generated by the trust, or a part of such revenues, and shall be entitled to the hole capital of the trust, or a part of such capital, at a certain moment of his life (for instance when he marries), but the settlor can amend the assets contained in the trust throughout all its existence. Amendment of other types of trusts may vary, depending on their purpose.

Certain states in the USA can sometimes allow a settlor to also be the trustee of the trust, or to retain control over the trust (such as a grantor trust); thus the issue of amending or administrating the trust can be diminished. Still, it all depends on the type of trust that is constituted - some trusts can never be amended after their constitution.

**Capacity of fiduciaries and trustees**

The French doctrine regulates that if the fiduciary acts on behalf of the fiducia he must state so expressly, and moreover if the fiduciary patrimony contains assets or rights whose transfer is subject to publicity, it must contain a the name of the fiduciary and his capacity.

The Romanian law is somehow more permissive in the sense that the fiduciary may state that he is acting on behalf of the fiduciary contract, except for when the contract forbids him to do so. In any matter, he can, but is not obliged to state the capacity in which he is acting when the fiduciary patrimony contains assets or rights whose transfer is subject to publicity. The fiduciary is only obliged to state the capacity in which he is acting if the fiduciary contract obliges him to do so.

As far as the regulations in the Common Law go, in the UK and BVI, the trustee has the title to the trust assets in his name or in the name of another person but on behalf of the trustee. The trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. Furthermore, in the BVI, as stated before, the trustee can for the trust by a unilateral declaration of trust, in which way the settlor shall remain anonymous.

In the American regulations, trustees hold the legal possession of the trust, which means that the interest of the trustee in the property appears to be of full right of property and possession onto the trust. The right to benefit from the property of the trust named equitable title belongs to the beneficiary.

The fiduciary or the trustee must almost always account for their actions in the administrations of the goods and assets; this being said, the French and Romanian regulations impose that the fiduciary must account for their actions, and can be held accountable for the way they administrate the fiduciary patrimony. The Common Law can ask the trustee to account for their actions but it usually depends upon the type of trust created.
USE OF FIDUCIAS AND TRUSTS

The fiducias can be used when establishing a business as a form to create a distinction in the same patrimony of the persons as to assets affected to exploit a business. It can also be formed in order to allow a beneficiary to use certain goods without them being in his patrimony.

In France, the doctrine states that the fiducia-warranty can be used for needs to finance or refinance, but without having to cede actives, and thus allowing the grantor to maintain the disposition of rights upon which the operation is made, or to warrant with future goods, or avoid a long and troublesome procedure of financing. [8]

The Common Law system has created more uses for the fiduciary institution as it has regulated it some time before the Continental Law - thus, trusts are usually being set up in order to leave a legacy, to create a foundation or to legally avoid taxes. We shall enumerate some types of trusts that can be set up in each regulation of the Common Law that we studied throughout this paper.

What is interesting in the UK is that all trusts are submitted to different taxations depending on their function. [9] Thus, a common type of trust in the UK is the simple trust, in which goods are held in the name of the trustee, but the beneficiary is entitled to the entire capital and benefits of the trust starting with the date he turns 18 (in England and Wales) or 16 (in Scotland). They are of very common use, and have two advantages: first, they are largely exonerated of an important quantity of taxes and second, they will be exempted of inheritance taxes and an inheritance debate, because the beneficiary will already be the owner of the trust. Another type of common trust is the interest in possession trust, which allows the trustee to pay the beneficiary the interest generated by the assets in the trust - this trust is usually used in order to avoid taxation upon revenue. Another type of trust is the discretionary trust, where the trustee can make a variety of choices regarding the trusts revenues and sometimes even its capital. By the powers invested by the deed of trust in the trustee, he can decide to which beneficiary he shall pay, how often the beneficiaries will receive money out of the trust, and how much they will receive, the trustee can impose conditions upon the beneficiary, etc. In this kind of trust the settlor may also become a beneficiary in certain conditions (for instance if he falls ill), and he can also be the trustee of his own trust. [10] A type of trust that is common in the UK is the one accessible to non-residents, for taxation reasons - they have very complicated taxation rules and depend on a variety of things such as what legislation is the trustee submitted to.

The BVI has similar trusts to those constituted in the UK - they vary slightly and usually they are named differently from those in the UK, but they keep their properties. For instance, discretionary trusts are the same as those in the UK, and they can also allow the trustee to name or remove beneficiaries from the trust. The BVI also allows the creation of charitable or non-charitable funds; moreover they also allow a mixture of a charitable and non-charitable trust. Resulting trusts are those that allow the trustee to hold the assets and rights for the real owner, the settler, who is also the ultimate beneficiary owner of the trust. Taxation wise, the BVI offers a large variety of taxation advantages, under the one condition that the nationality of the settlor is not British. [11]

In regards to the USA, each state regulates its own legislation, thus each states has a different legislation that governs trusts; nevertheless, there are common types of trusts to every state and they usually do not vary as much. Common types of trusts throughout the USA are living trusts that allow on one hand the possibility of not having all of the individual's goods in common with their spouse, and on the other it allows to avoid the probate in the devolution of the testament, that can cost up to 4% of the fortune and can delay considerably the inheritance. Other types of trusts include Irrevocable Life Insurance Trusts or Irrevocable children's Trusts, that have the advantage that they cannot be seized by creditors, and they also allow the grantor to avoid a large number of taxes. [12]

As we can see trusts have various uses and are regulated differently throughout Common Law states, but they have similar characteristics: they can be constituted by a simple oral declaration, natural or moral people can act as trustees and they are used by most of the population in order to fiscally optimize income and assets.
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THE DISTANCE AND THE OVERTURNED IMAGE. ON THE APPLICATION AND INTERPRETATION OF THE ROMANIAN ADMINISTRATIVE LAW’ PLEA OF ILLEGALITY THROUGH THE EU LAW’ PLEA OF ILLEGALITY

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Key words: administrative law, plea of illegality, Article 277 TFUE, the Charter of Fundamental Rights of the European Union

Summary:
The study herein analyzes a particular case of practical application of EU law by a Romanian court. In the case discussed, the national court declared inapplicable the provisions of the national law regarding the plea of illegality, following several lines of reasoning based on EU law, that are first identified and then critically assessed, resulting in a defective application of the law.

1. THE PLEA OF ILLEGALITY IN THE ADMINISTRATIVE LAW OF ROMANIA

The plea of illegality is a procedural exception, in the meaning of Article 245 Civil Procedural Code of Romania (hereinafter referred as “CPC”), and is the procedural means by which one of the parties to a trial, manifesting an interest, or the court of law, ex officio, raises against an individual administrative act that it considers illegal and on which the settlement of the main case within which the plea was raised depends.

According to Article 4 par. 1 of Law 554/2004 on the judicial review of administrative acts, the legality of an individual administrative act, regardless of the date of issuance, can be analyzed at any time within a trial, by way of exception, raised ex officio by the court or at the request of the interested party.

The jurisdiction to decide over the plea remains with the court vested with the settlement of the merits and before which the plea was raised, either by means of an interlocutory decision, or by the judgment on the merits of the case. If the court rules over the plea of illegality by interlocutory decision, the decision can be contested by way of recourse together with judgment on the merits.

In order to debate the plea of illegality, the court will subpoena the parties and the authority which issued the contested act and will communicate to them the plea raised and the acts submitted for the support thereof.

If the plea of illegality is found to be well-founded, the act in question is declared inapplicable, for the purpose of that peculiar trial. Therefore, according to Article 4 par. 3 of Law no 554/2004, if it finds the individual administrative act to be illegal, the court before which the plea of illegality was raised will settle the case without taking into consideration the act whose illegality was found.

The general (normative) administrative acts cannot be the object of the plea of illegality. Judicial review on the general administrative acts is exercised by the administrative court during the action for annulment, in the conditions provided by the law herein.

Administrative acts for the amendment or annulment of which an organic law provides a different legal procedure and which are thus exempt from the control of the administrative court, according to the provisions of Article 5 par. 2 of Law 554/2004, cannot be the object of the plea of illegality.

In time, the institution of the plea of legality has suffered several successive regulations, the current form being determined by the amendment operated through the Law no 76/2012 for the enforcement of the Civil Procedure Code. In this form, the plea of illegality only applies to trials that have started after 15 February 2013, when the new Civil Procedure Code entered in force.

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53 The High Court of Cassation and Justice – Section of Administrative and Fiscal Matters (hereinafter referred to as “ICCJ - SCAF”), Decision no. 2610/2014 (www.sci.ro).
55 ICCJ - SCAF, Decision 1675/2015.
2. THE PLEA OF ILLEGALITY IN EUROPEAN UNION LAW

The plea of illegality in EU law is regulated by Article 277 TFUE (ex-Article 241 EC, ex-Article 184 EEC). According to this article, under the reserve of the expiry of the term provided in Article 263, par. 6 (the term of two months, as the case may be, from the publication of the act, from the notification thereof to the plaintiff or, in absence, from the date when the act came to the knowledge of the later) in the case of a litigation concerning a general act adopted by an institution, organism, office or agency of the European Union, either party may use the reasons of right provided in Article 263, par. 2 (lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of power) in order to plead before the EU Court of Justice the inapplicability of that act.

The goal of Article 277 TFUE was defined by doctrine as that of providing a procedural means to the party that, in a main trial on a different topic, has an interest in finding the legality of another measure. For instance, the claimant may contest a decision that concerns them directly and individually, and, within the same procedure, he has the interest to raise the topic of the legality of a regulation based on which the decision was issued.

The plea of illegality based on Article 277 may only be requested in a procedure before the Court of Justice of European Union (hereinafter referred as “ECJ”, “CJEU” or „the Court”), and not before a national court, and only incidental in nature and with limited effects.

The typical example of using Article 277 is an additional contestation on legality, incidental in an action for annulment submitted in accordance to Article 263, such as the Simmenthal Case 92/78. In that case, the claimant contested a Decision of the European Commission concerning the minimum selling prices for frozen beef. In support of its claim, the applicant contested by way of a plea the legality certain regulations and notices which formed the legal basis for the contested decision.

One of the main characteristics of the plea of illegality in EU law is that this procedural instrument allows the interested party to challenge the legality of an act of general applicability after the expiry of the term provided for the submission of the action for annulment of that act, according to Article 263 TFUE.

3. A JUDICIAL APPROACH ON THE APPLICATION AND INTERPRETATION OF THE PLEA OF ILLEGALITY FROM ROMANIAN ADMINISTRATIVE LAW THROUGH THE PLEA OF ILLEGALITY FROM EU LAW

In a case settled by the Iasi Court of Appeal (hereinafter referred as “the court”) by sentence no. 78/2014, the claimants submitted a plea of illegality regarding the provisions of Annex 78 of Government Decision 1345/2001, through which the real estate allegedly in their property and regained by inheritance was included in the public domain of Țibănești Commune.

The reasoning of the court in support of the solution that the plea of illegality was inadmissible reads as follows: “1. In the process of the application of the law, the national judge has the right to rule, on one hand, in the sense of Article 20 par. 2 of the Constitution, over the priority of the treaties on fundamental human rights that Romania adhered to (such as the case of the European Convention on Human Rights) and, on the other hand, over the provisions of Article 148 par. 2 of the Constitution regarding the compatibility and conformity of the national norms with Community regulations and jurisprudence.

2. The national judge, as first judge enforcing the ECHR, must ensure the full effect of its norms, ensuring their preeminence in relation to any other contrary provision of the national law (mutatis mutandis, Vermeire v. Belgium, Judgment of 29 November 1991, Dumitru Popescu v. Romania, Judgment of 26 April 2007).

3. As about the role of the national judge as first Community judge, the Court of Justice in Luxembourg held that “it is the competence of the national court to fully ensure the enforcement of Community law, dismissing or interpreting, to the required extent, a national norm such as the general legislation on administrative law, that...”

56 Treaty on the Functioning of the European Union.
57 Treaty establishing European Community.
58 Treaty establishing European Economic Community.
60 Ibidem, pp. 516-7.
63 It must be mentioned that the terminological relaxed approach, in the sense of using the word “Community” for the period after the effective date of the Lisbon Treaty of 1 December 2009, belongs to the court that delivered the sentence.
could oppose it. The national court may enforce the community principles of legal security and the protection of legitimate trust in the appreciation of the behavior of beneficiaries of lost funds, as well as of administrative authorities, on the condition that the Community interest is fully considered” (Judgment of 13 March 2008, joined cases C-383/06 and C-385/06).

4. That is why, in exercising the role of the national judge as first conventional and Community judge, by relation to the block of conventionality (ECHR convention and jurisprudence), as well as Community regulations and the jurisprudence of the EU Court of Justice, the provisions of the law on judicial review of administrative acts that allow for incidental, timeless censorship of the plea of illegality of the individual unilateral administrative acts issued before the effective date of Law 554/2004 are removed, as these provisions contradict fundamental conventional and Community principles, whose observance ensures the actual exercise of the fundamental human rights (emphasis added).

5. Thus, the Court holds that the provisions of Law 554/2004 mentioned above, if they allow for the censorship of the legality of individual administrative acts issued prior to the effective date of Law 554/2004, infringe the law to a fair trial, provided by Article 6 of the ECHR, as well as by Article 47 of the Charter of Fundamental Rights of the EU, by hurting the principle of legal security, which is implied throughout the convention and which is one of the fundamental elements of the rule of law” (ECHR, Judgment of December 6 2007, Brumărescu v. Romania, emphasis added).

6. The Luxembourg Court of Justice also held, regarding the possibility to raise a plea of illegality of the acts issued by Community institutions (emphasis added) that, when the party entitled to submit an action in annulment against a Community act exceeds the deadline for the submission thereof, they must accept the fact that the definitive nature of that act will be opposable to it and that it will not be able to request in court the investigation of the legality of that act, not even by way of plea of illegality (Judgment of 27 September 1983, Hamburg University, C-216/82; Judgment of 9 March 1994, TWD Textilwerke Deggendorf, C-188/92; Judgment of 12 December 1996, Accrington Beef et al, C-241/95; Judgment of 30 January 1997, Wiljo, C-175/98; Judgment of 11 November 1997, Eurotunnel et al, C-408/95; Judgment of 15 February 2001, Nachi Europe, C-239/99; Judgment of 20 September 2001, Banks, C-390/98; Judgment of 23 February 2006, Atzeni et al, C-346/03 and C-529/03).

7. For the reasons shown above, the court holds that the provisions in question from Law 554/2004, that allow for the repeated and unlimited challenge of the legality of any individual administrative act, regardless of the date of issuance, infringes the above-mentioned principles and fundamental rights, in contradiction with ECHR and CJEU jurisprudence in similar legal situations (emphasis added) especially since, in regards to the individual administrative acts, the admission of the plea of illegality causes identical effects as extent and impact as the annulment of that act.

8. Therefore, in the enforcement of the provisions of Article 20 par. 2 and Article 148 Par. 2 of the Constitution, by reference to the above-mentioned principles, to the European Convention of Human Rights and to the Charter of Fundamental Rights of the European Union, as well as ECHR and CJEU jurisprudence, the court concludes that the plea of inadmissibility is required, as well as the rejection of the plea of illegality as inadmissible.”

We will not discuss, as it is not part of the analysis herein, the incidence and method of enforcement of ECHR provisions raised by the court in the reasons of the sentence. In the following, we will discuss the applicability and enforcement of EU law in the case at hand.

I. Firstly, one can observe that from the point of view of the legal base, with reference to EU law, the court settles its reasoning on Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred as “the Charter”), stating the right to a fair trial.

Therefore, we must verify whether Article 47 of the Charter can be applied in this case."4

According to Article 51 of the Charter, this act applies first to the institutions and bodies of the Union, observing the principle of subsidiarity, as well as, secondly, to the member states, if they apply Union law. Therefore, the institutions and bodies of the Union will ensure the enforcement of the Charter only with the observance of the principle of subsidiarity, while member states, only if they apply Union law.

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In this case, as it is a litigation referred to a court from a member state, the only applicable hypothesis is the second provided for by Article 51.

According to the Explanations to the Charter, regarding member states, the Court jurisprudence shows unambiguously that member states must follow the fundamental rights defined in the Union only if they apply Union law (Case 5/88, Wachauf; Case C-260/89, ERT; Case C-309/96, Annibaldi, Case C-292/97, Karlsson).

The issue in the case at hand is that the plea of illegality raised by claimants concerns a Government Decision through which the land allegedly their property and acquired by inheritance was included in the public domain of a commune. Therefore, this act does not implement Union law, and so Article 47 of the Charter is not applicable in the case, as the court proceeded. The issue of enforcing EU law is also non-existent in the main litigation in which the plea of illegality was incidentally raised, a case regarding the reenactment of the title over a plot of land as per the provisions of national laws adopted before Romania joined the EU. The analyzed case can neither be included in a case of exorbitant application of the Charter, namely that according to which the Charter solely applies to national norms that enforce EU law, nor in the case of national norms that oppose the effective enforcement of EU law. According to a formal definition, these norms would not be covered by the Charter, as they are not adopted for the enforcement of EU law.

Yet, the Court stated, in Case C-279/09 DEB, in consideration of the utility that member states must guarantee EU law, that if there are such national procedural norms that hinders the efficiency of EU law, they must fall within the scope of the Charter and, if it is found that these norms oppose the rights stipulated by the Charter, those norms will be dismissed. In this case, the Court reformulated a preliminary question which, as the referring court drafted it, didn’t mention the Charter, in the sense that it concerns the interpretation of the principle of effective jurisdictional protection, as provided by Article 47 of the Charter, in order to check whether, in the context of an action concerning the liability of the state based on EU law, this provision opposes the possibility that a national regulation might condition the exercise of the court action on the payment of an advance of the trial expenses, and provide that legal assistance cannot be granted to a legal entity, even if the latter cannot cover such advance payment.

But in the main court action within which the preliminary reference was drafted, the claimant DEB required legal assistance in order to file an action concerning the liability of Germany under EU law. Which is not the case in the litigation analyzed herein.

II. Secondly, the court refers to ECJ jurisprudence, which held that “it is the competence of the national court to fully ensure the enforcement of Community law, dismissing or interpreting, to the required extent, a national norm such as the general legislation on administrative law, that could oppose it. The national court may enforce the Community principles of legal security and the protection of legitimate trust in the appreciation of the behavior of beneficiaries of lost funds, as well as of administrative authorities, on the condition that the Community interest is fully considered” (Judgment of 13 March 2008, joined cases C-383/06 and C-385/06).

The preliminary references from the above quoted joined cases C-383/06 and C-385/06 were formulated within three litigations that oppose to the Dutch administration two associations and a commune and refer to decisions through which the ministry or the general directorate repealed payment decisions for subventions granted to the claimants from the main action or requested the reimbursement of those subventions.

The quote appropriated by the court is taken from the ECJ answer to the second question retained by the European court for an answer:

“2) The recovery of amounts lost as a result of an irregularity or negligence must be carried out on the basis of Article 23(1) of Regulation No 4253/88, as amended by Regulation No 2082/93, and in accordance with the detailed rules laid down in national law, on condition that the application of that law does not hinder the application or the effectiveness of Community law and does not make it impossible in practice to recover the sums improperly granted. It is for the national court to ensure the full application of Community law by setting aside or, in so far as necessary, interpreting a national rule such as the General Statute on administrative law (Algemene wet bestuursrecht) which prevents such application. The national court may apply the Community law principles of legal certainty and the protection of legitimate expectations when assessing the conduct of both the recipient of the amounts lost and the administrative authority, on condition that full account is taken of the interests of the European Community. The fact that the recipient of the funds is a public-law person is irrelevant in that regard.”

65 Loc. cit.
The issue subjected to analysis in the ECJ decision has no similarity to the one that is the object of the main litigation before the Romanian court, being perfectly overturned.

The Dutch courts discussed whether, considering that national law does not provide an opportunity for the recovery of the subvention after its payment, as a consequence of the principles of legal security and the protection of legitimate expectations in the national law, these principles can be understood in a wider sense than the corresponding principles from Community law and therefore, finally, whether they can represent grounds for the impossibility to recover the funds (point 27).

And the response of the Court was in the sense that the enforcement of the Community principles of legal security and protection of legitimate trust must be carried out in accordance with Community law (point 53) and that the efficiency of Community law must be taken into consideration (or, in other terms, that the interests of the Community must be fully considered).

The Court left it with the national court to decide whether, considering the behavior of the beneficiaries and that of the administration, the principles of legal security and protection of legitimate trust, in the sense of Community law, can be legitimately opposed to the reimbursement claims (point 57).

Then, the Court established that it also rests with the national court to fully ensure the enforcement of Community law, by dismissing or interpreting, as required, a national rule such as Awb that might oppose it, being able to enforce the community principles of legal security and protection of legitimate expectations in the appreciation of the behavior exhibited by the beneficiaries of lost funds, as well as that of administrative authorities, on the condition that the Community interest is fully considered (point 59).

In short, this decision cannot be considered one that enunciates the dismissal de plano of the national law deriving from the two mentioned general principles of law, when they oppose the recovery of funds based on community legislation, leaving the decision regarding the priority enforcement of one or the other of the norms (principles) that come into conflict on behalf of the national court trying on the merits.

As results clearly, the matter from the ECJ Judgment is overturned:

- in the ECJ case, the beneficiaries of the funds were trying to oppose the principles of judicial security and the protection of legitimate expectations from the national law to the provisions of Community law;
- in the Romanian case, the court uses the principle of judicial security from the Union law in order to declare inapplicable a procedural objection from the national law.

III. Thirdly, the court refers to ECJ jurisprudence that held, regarding the possibility to raise the plea of illegality of the acts issued by Community institutions that, when the party entitled to formulate an action in annulment against a Community act exceeds the deadline for the submission of this action, they must accept the fact that the definitive nature of this act will be opposable to them and they will no longer be able to contest in court the legality of that act, not even via the incidental method of plea of illegality.

We must state from the beginning that the legal institutions in question – the plea of illegality from the Romanian law, and the plea of illegality from the Union law, are differently shaped, as shown by the analysis in sections 1 and 2 of the present study herein.

We would like to restate that one of the main characteristics of the plea of illegality in EU law is that this procedural instrument allows the interested party to challenge the legality of an act of general application after the expiry of the term provided for the submission of the action for annulment of that act, according to Article 263 TFUE.

Therefore, the purpose of the plea of illegality within EU law is the possibility given to the interested party to contest the act specifically after the expiry of the deadline for the action in annulment. Yet the Romanian court reverses the meaning of the EU law plea of illegality and uses it as an argument according to which, after the expiry of the deadline for the action in annulment, the party can no longer claim plea of illegality.

The second difference between the two institutions that makes it impossible to invoke one's jurisprudence in reference to the other is that the plea of illegality in EU law takes into consideration acts of general applicability, in other words normative acts, while the plea of illegality in Romanian law refers exclusively to individual acts (see above, section 1).

In fact, the jurisprudence invoked by the analyzed Romanian decision does not refer to the plea of illegality in the Community law, but the case in which the applicants had an action in annulment of that act available, yet did not make use of it, can no longer claim the illegality of that act within an action submitted before the national

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66 See above, section 2.
court, against the measures of implementation of the act in question, taken at national level (see C-188/92 TWD or C-346/03 and C-529/03 Atzeni).

4. Conclusions

The application of EU law within the domestic legal order proves to be, almost always, a difficult task. The court’s decision discussed here is just one additional example in support of this assertion. What distinguishes the said decision, determining the impulse to draw the present analysis, is the considerable distance to the specific knowledge of EU law.

The issues identified and discussed above – starting from the inapplicability in the concrete case of the starting point in the court’s reasoning, namely the incidence of the Charter of Fundamental Rights of the European Union, passing through the overturning of the principles of legal certainty and protection of legitimate expectations, followed by the reverse of the sense of the EU law’ plea of illegality and culminating with the quotation of a line of jurisprudence which doesn’t refer to the plea of illegality under Community law – outlines a picture of the defective application of the law, with the consequence of causing violations of fundamental rights on which the judgment in question claims to safeguard.

Consequently, the concrete application of EU law in this case is similar to the image created by a convergent lens: as the distance increases, the image of the object appears turned upside down and increasingly smaller.

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SOME CONSIDERATIONS ON THE APPEAL AGAINST THE SOLUTIONS OF THE COURT WHEN A PLEA AGREEMENT IS CONCLUDED

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Abstract: The conclusion of a plea agreement represented an important moment in the evolution of the idea of bargain justice. Some dispositions in this area were adopted at the time when the dispositions of the Law 202/2010 came into effect, and at present, these dispositions are found in Law 135/2010 on the Code of Criminal Proceedings and they do not lack changes and completions that appeared after some of them were declared non-constitutional. In the light of these changes, the simplification of the trial procedure appears to be necessary and useful in settling the cases submitted for judgment with celerity.

Keywords: bargain justice, plea agreement, prosecutor, defendant

1. General considerations on the plea agreement

The provisions of Article 6 paragraph 1 of the Convention for the protection of human rights and fundamental freedoms establish the right of every person to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” in “the determination of his civil rights and obligations or of any criminal charge against him”. We can add to the dispositions mentioned above those of the Recommendation R (86) 12 of 16 September 1986 on measures to prevent and reduce the excessive workloads in the courts, as well as those of Recommendation R (87) 18 of 17 September 1987 of the Council of Europe Committee of Ministers concerning the simplification of criminal justice.

Similar provisions regarding the reduction of punishments following a plea agreement are also found in the legislations of other European states, such as the Code of Criminal Proceedings of Norway, the Italian Code of Proceedings.

Considering these dispositions, the idea of “bargain justice” could be substantiated in our country too, and this required the establishment of some measures which reduce the excessive workloads in the courts and improve justice, by introducing a simplified procedure to be applied only in some particular situations and on strict and limitative conditions provided by the norms of criminal proceedings.

The initial solution chosen by the legislator was to introduce the dispositions of Article 320 in the content of the previous Code of Criminal Proceedings. However, this solution was criticised, and even the application of these dispositions was accompanied by the reveal of some non-constitutionality exceptions in files of criminal cases at different procedural moments (on merits, appeal, recourse, appeal for annulment).

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67 A document available online on www.dri.gov.ro
68 The Recommendation R (86) 12 of 16 September 1986 of the Council of Europe Committee of Ministers on measures to prevent and reduce the excessive workloads in the courts and the Recommendation R (87) 18 of 17 September 1987 of the Council of Europe Committee of Ministers concerning the simplification of criminal justice. The documents are available online on www.europa.eu.
69 Article 233 of the Code of Criminal Proceedings of Norway stipulates that if the suspect accepts having committed the crime, he shall be asked whether he admits that he is liable from a criminal point of view. If he confessed without any reserve and the case can be judged in an accelerated procedure, the suspect shall be asked whether he agrees with such a procedure, and if he agrees, the prosecutor shall ask the competent court to judge the case without indictment, in a single hearing. The document is available online on www.legislationline.org.
70 The Italian Code of Proceedings provides two special procedures based on the plea agreement. In the first special procedure, for a crime for which the punishment provided by law is less than two years, both in the course of prosecution, and in the trial phase, the person who committed the crime or the prosecutor can request that the judge accepts the plea agreement having as object the reduction of punishment. The document is available online on www.leggeonline.info.
72 The deadline for the defendant to request that the trial is based on the simplified procedure was “by the beginning of the court inquiry”. For that matter, exceptions were revealed on the non-constitutionality of the provisions of Article 320 of the previous Code of Criminal Proceedings (Decision no. 1470 of 08 November 2011 and Decision no. 1483 of 08
Unlike the dispositions of Article 3201 of the previous Code of Criminal Proceedings, the special procedure provided by the dispositions of Articles 478 - 488 of the Code of Criminal Proceedings benefits from some generous regulations brought by the legislator.

The plea agreement can be concluded in the course of the prosecution and also at the trial stage.

The parties of the plea agreement are the defendant as a natural person, as well as the defendant as a legal person and the prosecutor.

The law does not provide for the possibility to conclude a plea agreement also for the suspect, because, in our procedural system, it is necessary to adapt the institution to the principle of finding out the truth, and the start of the criminal action against the defendant is such as to provide a guarantee for the existence of minimum evidence for guilt, because, according to Article 309 paragraph (1) of the Code of Criminal Proceedings, the criminal action is started by the prosecutor when he sees there is evidence that a person committed a crime.

In case that the criminal action is against more defendants, a distinct plea agreement can be concluded with each of them. In addition, according to the new regulations brought by the provisions of the Government Extraordinary Ordinance 18/2016 for changing and completing the Law 286/2009 on the Criminal Code, the Law 135/2010 on the Code of Criminal Proceedings, as well as for completing Article 31 paragraph (1) of Law 304/2004 on Judicial Organisation, the defendants who are minors can conclude plea agreements with the consent of their legal representative.

With regard to the type of crime that was committed, we mention that the dispositions of Article 3201 paragraph (1)-(6) of the previous Code of Criminal Proceedings governed the application of judgement in case of accepting guilt only in the case of crimes for which the punishment provided by law was a fine or the punishment of a fine alternatively with the punishment of imprisonment or only the punishment of imprisonment (but did not apply in case that the criminal action was for a crime for which the punishment was life imprisonment, without considering, in reporting the concrete possibility of application of a reduction cause, possible situations to attenuate the punishment, such as the tentative).

At present, the dispositions on the conclusion of a plea agreement are applied as a special procedure at the stage of prosecution, but also as judgement in case of accepting guilt, as a simplified trial procedure, only with regard to crimes for which the law provides the punishment of a fine or imprisonment of 15 years at most, such as the limit of punishment was modified by the provisions of the Government Extraordinary Ordinance 18/2016.

Moreover, according to the provisions of Article 374 of the Code of Criminal Proceedings, before the beginning of the court inquiry, the defendant can request that the trial takes place only based on the evidence administered during the criminal prosecution and of the deeds presented by the parties.

According to the dispositions of Article 480 paragraph (2) of the Code of Criminal Proceedings, the plea agreement is concluded when, from the evidence that was administered, sufficient data result with regard to the existence of the act for which the criminal action was started and with regard to the defendant’s guilt. Upon the conclusion of a plea agreement, legal assistance is obligatory.

In the case of the special procedure provided by the Code of Criminal Proceedings, in a situation when a plea agreement is concluded, the prosecutor does no longer complete the indictment for the defendants with whom the agreement was concluded, according to the provisions of Article 481 paragraph (2) of the Code of Criminal Proceedings, but he notifies the court that would have the competence for judging the merits of the cause and it sends to it the plea agreement together with the prosecution file.

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November 2011, published in Monitorul Oficial no. 853 of 02 December 2011), because by setting this deadline the following principles were affected: the principle of equality of citizens before the law, as well as the principle of the application of the criminal law which is more favourable, depending on the procedural stages in which the defendants are finding themselves.


74 Published in Monitorul Oficial no. 389 of 23 May 2016.

75 See the High Court of Cassation and Justice, the Criminal Section, Decision no. 250 of 27 January 2012, a document available online on www.scj.ro.

According to the provisions of Articles 481 and 482 of the Code of Criminal Proceedings, the agreement must be drawn up in writing, and it can be initiated both by the prosecutor, and the defendant.

When the agreement is concluded with regard to only some of the acts or only some of the defendants, the prosecutor submits to the court only the prosecution documents referring to the acts and the people who were the subject of the plea agreement, while for the other acts or defendants arraignment is disposed, with a separate notification of the court as resulting from the dispositions of Article 483 paragraph (2) of the Code of Criminal Proceedings.

The plea agreement, according to Article 482 of the Code of Criminal Proceedings shall include:

- the date and the place of its conclusion;
- the surname, the first name and the capacity of those who conclude it;
- data regarding the person of the defendant, provided by Article 107 paragraph (1);
- the description of the act which makes the object of the agreement;
- the legal classification of the act and the punishment provided by law;
- the evidence and the means of evidence;
- the express statement of the defendant where he admits to have committed the act and accepts the legal classification for which the criminal action was started;
- the type and the quantum, as well as the form for the execution of the punishment or the solution for renouncing the application of a punishment or postponing the application of a punishment with regard to which an agreement was reached between the prosecutor and the defendant;
- the signatures of the prosecutor, of the defendant and of the lawyer.

The deadline for the defendant to request that the trial is based on the simplified procedure is “before the beginning of the court inquiry”.

Therefore, according to the dispositions of Article 374 paragraph (1) of the Code of Criminal Proceedings, on the first trial date when the summons procedure is legally fulfilled and the case is on trial, the chairman disposes that the court clerk reads the deed disposing the arraignment or, as appropriate, the deed disposing the beginning of trial or to make a succinct presentation of it.

In cases where the criminal action is not related to a crime that is punished with life imprisonment, the chairman lets the defendant know that he can request that the trial takes place only based on the evidence administered in the course of prosecution and of the deeds presented by the parties and the aggrieved person, if he admits all the acts imputed to him, and informs him about the dispositions of Article 396 paragraph (10) of the Code of Criminal Proceedings on the individualisation of the punishment. So, the court can judge the conviction of the defendant, who benefits from a reduction by a twelfth of the punishments limits provided by law, in the case of an imprisonment punishment, and from the reduction by a fourth of the punishments limits provided by law.

For carrying out the court inquiry in case that a plea agreement is concluded, the legislator provided special dispositions in Article 377 of the Code of Criminal Proceedings, and the evidence with the approved deeds is to be administered. If the court finds ex officio or at the request of the prosecutor or of the parties that the legal classification of the act through the notification document must be changed, then it shall put forward the new classification, and in this situation it can dispose the administration of other evidence.

On the trial date, the defendant, the other parties and the aggrieved person are summoned. The court gives its judgement on the plea agreement through a sentence, in public hearing, after hearing the prosecutor, the defendant and his lawyer, as well as the other parties and the aggrieved person, if they are present.

According to the dispositions of Article 485 paragraph (1) of the Code of Criminal Proceedings, the court gives one of the following solutions:

a) it admits the plea agreement and pronounces the solution with regard to which an agreement was reached, if the conditions provided by Articles 480 - 482 are met, regarding all the acts imputed to the defendant, which were the object of the agreement;

b) it rejects the plea agreement and sends the file to the prosecutor for continuing the criminal prosecution, if the conditions provided by Articles 480 - 482 are not met, regarding all the acts imputed to the defendant, which were the object of the agreement, or if it considers that the solution with regard to which an agreement was reached between the prosecutor and the defendant is illegal or unjustifiably mild in relation to the seriousness of the crime or how dangerous the criminal is.
The court pronounces a sentence, which obligatorily includes the mentions stipulated in Article 370 paragraph (4), as well as those referring to the content of the exposition and the dispositions provided in Articles 403 and 404 of the Code of Criminal Proceedings:

- day, month, year and name of the court;
- mention whether the hearing was or was not public;
- the surnames and the first names of the judges, the prosecutor and the court clerk;
- the surnames and the first names of the parties, lawyers and other people who participate in the trial and who were present in the court, as well as of those who were absent, showing their procedural capacity and with a mention referring to the completion of the procedure;
- the act for which the defendant was arraigned and the law texts under which the act was classified;
- the means of evidence that were submitted to cross-examination;
- any requests formulated by the prosecutor, the aggrieved person, the parties or other participants in the trial;
- the conclusions of the prosecutor, the aggrieved person and the parties;
- the measures taken during the hearing;
- the act for which the plea agreement was concluded and its legal classification.

According to Article 488 paragraph (1) of the Code of Criminal Proceedings, against the sentence given in accordance with Articles 485 and 486, the prosecutor, the defendant, the other parties and the aggrieved person can lodge an appeal within 10 days since its communication. Therefore, the following can appeal:

a) the prosecutor, with reference to the criminal side and the civil side;
b) the defendant, with regard to the criminal side and the civil side;
c) the plaintiff claiming damages, with regard to the criminal side and the civil side, and the responsible plaintiff party, with regard to the civil side, and with reference to the criminal side in so far as the solution in this side influenced the solution in the civil side;
d) the aggrieved person, with regard to the criminal side;
e) the witness, the expert, the interpreter and the lawyer, with regard to judicial fines applied through the sentence, as well as the court costs and the indemnities to which they are entitled;
f) any natural or legal person whose legitimate rights were directly damaged through a measure or a deed of the court, with regard to the dispositions that caused such damage.

In the case of the people named in paragraph (1) letters b)-f), the appeal can be made also by the legal representative or the lawyer, and for the defendant, also by his/her spouse.

According to an opinion77, a question was raised as to whether this text can be interpreted with the meaning that the court of appeal may however verify if the conditions for the conclusion of a plea agreement are met, because the dispositions of Article 488 paragraph (4) of the Code of Criminal Proceedings lead to the conclusion of a negative answer, because there was no provision for the possibility to reject the plea agreement in an appeal for failure to meet the legal conditions for its conclusion.

To that effect, with the solution adopted by the Constitutional Court of Romania through its Decision no. 235 of 7 April 201578, the non-constitutionality exception was admitted and it was found that the dispositions of Article 488 (“Means for appeal”) paragraphs (1) - (4) of the Code of Criminal Proceedings, as well as the legislative solution included in Article 484 (“Procedure in court”) paragraph (2) of the same Code are not constitutional.

At present, following the Decision of the Constitutional Court of Romania, we consider that the persons entitled to appeal are no longer limited to the prosecutor and the defendant, and an appeal can also be formulated by the aggrieved party, the plaintiff claiming damages and the responsible plaintiff party.

By settling the appeal, the court of appeal pronounces one of the following solutions:

a) it rejects the appeal, maintaining the judgment that is appealed against, whether the appeal is tardy or inadmissible or unfounded;

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b) it admits the appeal, it abates the sentence through which the plea agreement was admitted and gives a new judgment, proceeding in accordance with Articles 485 and 486 of the Code of Criminal Proceedings, which are appropriately applied;

c) it admits the appeal, it abates the sentence through which the plea agreement was admitted, it admits the plea agreement, and the dispositions of Article 485 paragraph (1) letter a) and Article 486 of the Code of Criminal Proceedings are applied as appropriate.

Conclusion

We consider that the introduction of a simplified procedure for admitting guilt is an alternative way to settle cases submitted for judgment, considered an institution of criminal proceedings law which sustains the respect for the principle of efficiency by a simplification and quick settlement of criminal cases. Although a series of changes intervened following signals from the area of judicial practice, which were substantiated through Decisions of the Constitutional Court, we can see that at present, following the changes of dispositions concerning this special procedure, these are now in line with the constitutional dispositions in the matter.

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FINANCIAL SECURITY INSTRUMENTS COVERING ENVIRONMENTAL LIABILITY IN PURSUANCE OF DIRECTIVE 2004/35/EC

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Abstract:
The need to establish suitable financial guarantees has become a fundamental task that each member state of the EU must undergo in order to adequately implement the polluter pays principle within national legislations and to provide operators with a means of covering the environmental risks incurred by dangerous occupational activities. As a result of ongoing debate among the major shareholders of this endeavour, three guidelines have been proposed in order to ease the transition towards a more coherent financial security system for each member state: the gradual approach, setting ceilings for financial guarantees and excluding low-risk activities. Consequently, the financial sector has managed to adapt to the particularities of environmental liability, offering a wide range of options, ranging from insurance and re-insurance schemes, to bank guarantees and other market-based instruments. The purpose of this article is to offer an overview of the most important types of financial security instruments currently employed in the context of environmental liability and analyse the relevance of these measures from an international point of view.

1. Context

Environmental liability is the mechanism by which the cost of pollution is assigned back to the person who caused that certain damage in the first place. The Environmental Liability Directive (ELD)\(^79\) establishes the legal framework for implementing environmental liability and the polluter pays principle within the national legislations of EU member states. The ELD differentiates between two liability regimes: strict liability (which states that it is sufficient to have a causal link between the dangerous activity and the ecological damage in order to trigger liability, without needing to prove any fault or negligence on the operator’s behalf)\(^80\) and fault-based liability (wherein it must be proven that the environmental damage was caused through a deliberate action, omission or negligence of the operator)\(^81\). Whenever an operator is deemed liable under the provisions of the ELD, there are three categories of costs he must bear, corresponding to the three types of remedial measures described in Annex II:

- primary remediation (necessary to restore the baseline condition of the polluted site);
- complementary remediation (the creation of an alternative site in cases where primary remediation is no longer possible);
- compensatory remediation (financial compensation for any interim losses suffered by the general public).

In order to ensure that the operator is able to pay the required sum at any time the damage or need for reparations might occur, irrespective of the entrepreneur’s solvency at the time, or whether the remedial actions are employed by the operator himself or by a public authority, Art. 14(1) of the ELD states that: “Member States shall take measures to encourage the development of financial security instruments and markets for the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.”\(^82\)

2. Transposition difficulties

Implementing a coherent approach to financial security became a priority during the transposition of the ELD within the legislations of each member state. The member states were given a deadline of 30 April 2007 to adjust their internal regulations to fit the new directive accordingly, then commence an assessment on the effectiveness of said directive in terms of actual remediation of environmental damage, with specific focus towards the availability, at reasonable costs and on conditions of insurance and other types of financial security, for the activities covered by Annex III (Art. 14(2) ELD). Based on these assessments, a report had to be handed in no

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\(^80\) Applicable to environmental damage or imminent threat of such damage caused by the activities listed in Annex III of the ELD (Art. 3(1)a ELD).

\(^81\) Applicable to damage or imminent threat of damage caused to protected species and natural habitats caused by any occupational activities other than those listed in Annex III (Art. 3(1)b ELD).

\(^82\) This idea is reiterated in Art. 27 of the Statement of reasons of the ELD: „Member States should take measures to encourage the use by operators of any appropriate insurance or other forms of financial security and the development of financial security instruments and markets in order to provide effective cover for financial obligations under this Directive.”
later than 30 April 2010, that would help the Commission decide upon the feasibility of a future harmonised system of financial security applicable to all member states. A series of difficulties soon made themselves known during this process of assessment.

The first problem that had to be solved was whether financial security instruments should be mandatory or optional. Art. 14 refrains from making financial guarantees mandatory, leaving the decision up to the member states to either implement such a system or not. However liberal this approach might seem in theory, the harsh liability conditions postulated by the ELD, as well as the financial implications for operators falling under its scope, who could be held liable for large sums of money depending on the gravity of the damage caused, are a more than sufficient incentive for these operators to cover themselves against such risks. The states themselves have reason to support the development of a financial market that would cater to the new liability risks arisen from the ELD, seeing as though whenever an operator proves insolvable or otherwise incapable of bearing the burden of the restoration costs, reparations ultimately fall on the public authorities and their overstrained budgets. Financial security was almost unanimously acknowledged as one of the fundamental pillars of a coherent environmental liability system, although member states have taken fundamentally different approaches to implementing financial assurance requirements for operators. Consequently, some member states introduced provisions on mandatory financial guarantees (the first states to implement this measure being Bulgaria, Czech Republic, Hungary, Slovakia, Spain and Romania). The activities subjected to such a requirement differed from state to state, some limiting this condition to undertakings perceived as the most dangerous, while other legislations expanded the scope of compulsory financial guarantees to a much larger variety of occupational activities, covering a wider array of threats to the environment. The specific types of financial guarantees also differed, some states issuing mandatory insurance policies (sometimes as a preliminary condition the operators needed to fulfill before they could get the necessary permits and authorizations for their undertakings), while other states allowed a choice between insurance and other alternative mechanisms to cover the risks (such as bank guarantees, funds, bonds, captives etc.).

Secondly, the flexible nature of the ELD, which allows member states to decide upon the specifics of the liability regime within their own jurisdictions, is counterproductive to any attempt of creating a unified practice on an international level. For instance, the scope of the ELD can vary where exemptions from liability are concerned. Art. 8 proposes two types of exemptions that member states can implement optionally into their legislations (they can choose to implement either one, both or none of them):

- permit exemption (which exempts an operator from bearing the costs if the pollution is caused by an authorized activity);
- state of the art exemption (where the operator is not liable if the activity was not considered dangerous according to the level of scientific knowledge at the time).

The ELD also allows member states to decide whether to employ joint and several, or proportional liability for environmental damage (Art. 9). Moreover, the directive expressly states that its provisions shall not apply if a stricter liability regime is already in place in relation to the prevention and remedying of environmental damage (Art. 16). As a result, liability under the ELD can take many forms, depending on the member state and the stringency of its national legislation. The financial market needs to adapt to the particularities of each legal system, a feat especially difficult to achieve in the case of multinational insurance companies, which need to tailor their specific products to the demands of different state regulations.

Another difficulty arose from the lack of awareness operators had in the early stages of ELD transposition concerning their new obligations and the necessity to cover themselves against the risk of environmental damage. This lack of awareness often stemmed from the legal uncertainty caused by delayed transposition in certain member states. Interviews conducted with operators in the second half of 2009 revealed that most of them had not adapted their insurance plans to cover the ELD extended liabilities, while others were not even aware of its entry into force. This fact was especially relevant in regard to most Small and Medium Sized Enterprises (SMEs). Suitable types of financial instruments and insurance products can only be developed if there is sufficient demand for them; insufficient awareness of the risks under ELD causes a lack of informed demand and subsequently less initiative from the financial sector towards developing new products adapted to cover a wider variety of risks.

3. Approach

However different the means of transposition might be on a national level, the Commission nevertheless strives towards a harmonisation of the financial security system within the borders of the EU. Therefore, a set of guidelines have been set in order to allow the member states to adapt to the new requirements of the ELD:

a) a gradual approach: which entails the gradual introduction of financial security, whether in terms of time, covered industrial sectors or covered liabilities. For instance, some member states have chosen to

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limit compulsory financial security to those activities listed in Annex III for which a permit, approval or registration is required, while other states have imposed mandatory financial security starting with the activities in Annex III which are considered high-risk, with the possibility to extend this requirement to other less dangerous activities over time.

b) **ceilings for the financial guarantee:** since no financial security scheme will ever provide unlimited liability, a ceiling must be established, taking into account the risk of damage occurrence, as well as the type, location and size of the operation.

c) **exclusion of low risk activities:** low risk activities could be excluded based on the gravity of their potential damage (as revealed through risk assessments conducted on the activities listed in Annex III), the environmental management system in place (EMAS or ISO), or the solvency risk an operator presents. This approach would help lower the price paid by operators for financial security instruments and ensure that the implementation efforts of the member state as well as the operators are commensurate to the scheme’s gain in terms of actual environmental damage covered.\(^{84}\)

4. Types of financial security instruments

- **Insurance**

Insurance is the most common instrument that offers coverage for environmental liability in the EU. Insurance companies have responded favourably to the challenges posed by the ELD, whether in the form of offering extensions of their pre-existing GTPL and EIL schemes to the requirements of this new form of environmental protection, or by developing innovative products better suited to cover the new categories of risks.

- **GTPL** (general third party liability) represents the basic liability coverage, and is designed to compensate third parties for injury, property damage and sometimes financial losses suffered. As a rule, GTPL products are limited to civil law.

- **EIL** (environmental impairment liability) is a specialised insurance policy that covers third party liability and sometimes cleanup costs associated with pollution, including, in principle, events that are gradual in nature. Covering both civil and public liability law, EIL policies are typically one-off deals (accompanying land transactions, mergers or acquisitions).

At the beginning of ELD transposition, these two classic insurance products were deemed insufficient to cover all the risks emerging from the new directive. A series of difficulties were pointed out by the CE commissioned report of 2008:

- the ELD encompasses all types of impacts on the environment, while standard GTPL insurance only limits coverage to pollution events;
- existing policies cover damage to land and water, but fail to offer compensation for damages to protected species or natural habitats;
- insurance usually covers damages caused by a sudden and accidental or fortuitous event, usually excluding damages brought about by normal undisrupted or permitted operations;
- standard insurance does not cover damage caused through intentional acts and the insurer has the right to reduce the compensation in cases of gross negligence on the part of the operator.\(^{85}\)

A few additional issues have been pointed out by the same report, such as: the insurance companies’ reluctance to underwrite environmental liability policies when there is insufficient information on the magnitude of the damage or the likelihood that the damage will occur; the usual lack of coverage for gradual pollution and the focus on primary and complementary remediation with the exclusion of compensatory remediation.

In order to adapt their own policies, European insurance companies have turned to the example provided by the USA environmental insurance market, which up to date has benefitted from the most experience in this field.\(^{86}\)

Insurance companies also encourage clients to opt for alternative risk carriers whenever a certain product cannot cover the full variety of damages foreseen by the ELD, such as:

- **self-insurance:** situations where a person sets aside the money they would usually pay as insurance premiums, to be used at a later date in case of an unexpected loss. Whenever the damage actually occurs, the self-insured person will use these funds for reparations, and retain any excess;

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\(^{86}\) A few examples of experience gained by the USA in regard to environmental liability: the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 1980); the Oil Pollution Act (OPA, 1990); the Small Business Liability Relief and Brownfields Revitalization Act (2002); the Massachusetts Contingency Plan (Abelson, 1999); the Massachusetts Brownfields Legislation (1998); The Georgia Brownfields Legislation (2005) etc.
• captives: a form of corporate self-insurance where a group of companies own an insurance company, whose primary business purpose is to provide risk mitigation for its “parents”;
• risk retention groups: state-chartered insurance companies that have a preferential regime to normal insurance companies and specialize in third party liability stemming from error and omissions, medical malpractice, professional and product liability;
• insurance pools: collective pools of assets between two or more insurance companies, which allow them to take on high risk accounts that they would have been unable to cover on their own (for example: Assurpol in France, Pool Espanol de Riesgos Medioambientales in Spain etc.).

In 2014, a survey of environmental liability insurance developments was presented to the EC by Insurance Europe, highlighting a few key directions in which this sector has evolved during recent years: the continual growth of environmental liability pools, the introduction of non-binding insurance models for ELD cover and an increasing number of stand-alone environmental products. A series of previous difficulties have also been surpassed and a lot more experience has been gained so as to better respond to customer demands in pursuance of the ELD:
- in most markets, cover is now available for all categories of ELD remediation measures (primary, complementary and compensatory);
- product offers have adapted to the specific needs of the different markets, offering a wide range of solutions;
- available capacity for environmental liability has increased up to 50 million Euros, and even higher, on request;
- the available products offer compensation for damages occurring both on the operator’s premises (first party cover) and beyond (third party cover);
- a few ELD insurance claims have been reported, paving the way to a nascent jurisprudence.87

The survey has also presented the European insurance sector as an eclectic amalgamation of different stages of development, different policies and levels of cover, different customers and markets. The results of the study seem to advocate against a harmonised system of mandatory insurance for all EU member states, on the grounds that “mandatory cover would remove the freedom to contract and has the potential to increase cost and decrease consumer choice”.

There are still problems that need to be addressed in the future (for example: the difficulty to collect statistical information due to member states’ late implementation of the ELD, incomplete data due to the lack of reporting ELD cases by national authorities and erroneous categorisation of ELD cases as something else, such as property damage etc.), but only time and experience will provide us with suitable answers.

➢ Alternative financial guarantees

The main goal of large companies is to outsource the administration of the claims in case of environmental damage, which can be achieved best through insurance. However, companies that are aware of the environmental liability risk relevant to their occupational activity tend to employ a mix of solutions in order to mitigate that risk, combining insurance (in the form of GTPL, EIL or stand-alone products) with other financial security instruments, such as:

• mortgages, charges on lands, liens and privileges: they can be problematic when set up to guarantee pollution costs, because it is impossible to predict the identity of the victims and the overall reparation cost in advance. Moreover, the operator needs to have sufficient unencumbered assets available, both in quantity and value, to cover the potential cost of pollution, without affecting their current activity or the possibility to obtain credit facilities;
• cash deposits, trust funds and Escrow agreements: provided the sum has been determined in a realistic manner and that the funds can be easily accessed by claimants in case of environmental damage, this type of guarantee can be considered appropriate under the provisions of Art. 8(2) of the ELD;
• guarantees by parent companies: a mechanism through which a third party (the parent company) promises to discharge the obligation of the debtor (a subsidiary) in the event of default by the latter. In most legal systems these instruments are called suretyship, indemnity, caution, guarantee etc. and are frequently used in member states whose internal regulations allow joint and several liability;
• bank guarantees and surety bonds: instruments by which a third party (bank or other financial institution) irrevocably agrees to pay a certain sum of money on first demand to the creditor, as a consequence of the debtor’s failure to fulfil certain requirements (usually when the debtor is in default in respect to an obligation). For the operator this is a favourable solution because it avoids encumbering

87 Survey of Environmental liability insurance developments – Briefing note, June 2014
his assets. However, banks usually require cash collateral to guarantee reimbursement for this type of financial instrument and are generally reluctant to undertake such a risk for extended periods of time.88

Market Based Instruments (MBIs):

MBIs are used as a means to correct market failure (in our case, internalizing the cost of pollution – i.e. transferring the burden of the reparations for environmental damage back to the operator who caused them)89, by using market-specific methods. MBIs can be employed to alter market prices, set thresholds on resource use, improve the way a market works or even create a new market where one did not exist before. This kind of approach is favoured by the EU because it offers flexible and cost-effective means of implementing new policies. The particularity of these methods stems from the fact that they can only be employed by decree of a public authority. Among the most utilized categories of MBIs we can count the following:

- **tradable permits**: a mechanism that entails first an assessment of a certain pollutant’s impact on the environment and the ecosystem’s capacity to absorb it without negative effects, then establishing a mandatory cap (threshold) for the cumulative allowed emission of that pollutant and issuing individual permits to emit the pollutant in units that sum to the limit, lastly auctioning these permits to any interested operators. After purchasing these permits, operators are allowed to buy or sell to anyone who wants to participate in the market;
- **environmental taxes**: instruments which are highly useful for influencing the behaviour of producers and consumers by modifying the prices of certain products. They can be a source of revenue for governments, who can redirect these sums towards compensation funds for environmental protection;
- **environmental charges**: sums of money the operators have to pay whenever they engage in high risk activities, which have a great probability of causing ecological damage. Usually, these charges need to be paid before the release of a permit for the dangerous activity;
- **environmental subsidies and incentives**: a series of measures (grants, low-interest loans, favourable tax treatment and procurement mandates) implemented by the state to encourage the production, distribution and sale of products believed to have environmental advantages, to stimulate the development of new technologies or change consumer behaviour. They are also called Payment for Ecosystem Services (PES) schemes;
- **habitat banking**: it introduces a system for complementary remediation by allowing operators that have already caused damage to the environment to participate in the creation of an alternative site, mainly to encourage biodiversity and the restoration of affected sites (for instance, wetlands);
- **compensatory funds**: the money that is collected through environmental taxes or fees is used to establish a fund specifically dedicated to the restoration of affected sites. The most relevant examples of compensatory funds are: limitation funds, advancement funds, guarantee funds and environmental funds.90

5. Conclusions:

Creating a cohesive financial security system that will aid in the practical application of the ELD is an ongoing task for every member state of the EU. In this context, it is crucial to encourage an exchange of information between the major shareholders of this endeavour: the EU legislators, the public authorities of each member state as well as representatives of the operators and the financial sector. A series of stakeholder workshops have already been held at the initiative of the EC (in 201191, 201392, 201493 and 201694), where relevant questions and potential solutions have been exchanged to further the implementation of ELD provisions in a well-integrated, interdisciplinary setting.

Projects that are meant to aid stakeholders in applying the ELD (such as REMEDE95), as well as the various studies and surveys commissioned by the EC (for instance, the reports submitted by Insurance Europe and Bio

91 http://ec.europa.eu/environment/legal/liability/workshop81111.htm
95 http://www.envliability.eu/news.htm
Intelligence Service) and the feedback gained from the member states on the particularities of ELD transposition experienced within their own borders provide us with invaluable material for further study and debate. There is still a long way left to go before establishing a healthy jurisprudence based on ELD reparation claims, and also a harmonised financial security scheme that would benefit all member states equally, but the cornerstones have already been laid, and progress will come with every bit of experience gained.

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THE ABUSIVE EXERCISE OF FREEDOM OF SPEECH AND THE HARM CAUSED TO HONOUR AND REPUTATION

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The freedom of speech – fundamental right of each individual- is guaranteed by the European Convention of Human Rights and also by the internal legislation, on the highest level being situated the Romanian Constitution.

Nevertheless, the freedom of speech is not absolute, the boundaries applied to its exercise taking into consideration the need to protect other fundamental values, such as the right to a private life, honour and reputation.

Damaging these rights which are inherently connected to the human being, or the so called personality rights, creates mainly a moral harm but it implies the obligation for the one guilty of the illicit act to repair it by the rules of tort liability. If, by paying a sum of money, one can repair the pecuniary damage, the moral one cannot be repaired. But there are certain means that could lead to stopping or preventing a new wrong doing, and paying a sum of money to the victim could only value a compensation meant to diminish his or her suffering.

1. ABOUT FREEDOM OF EXPRESSION AND THE LIMITS OF ITS EXERCISE IN A DEMOCRATIC SOCIETY:

The freedom of expression is protected by the 10th article of the European Convention of Human Rights as being an essential freedom in any democratic society, acting as a guarantee for other fundamental rights, such as the freedom of association.

Freedom of expression is mainly constituted by two parts: freedom of opinion and freedom to communicate ideas and information.

The freedom of opinion guarantees that any individual has the possibility to form his own ideas and conceptions about the world he lives in, and protecting this opinion, even if it is a minor one, represents an essential part of a tolerant society.

The freedom to communicate ideas and information has two components; on one hand, it guarantees that any individual can share his opinion and ideas freely to other members of the society, and also it allows every person access to the ideas and information shared by anyone else, in a free manner.

As any other freedom guaranteed in a democratic society, the freedom of expression is not an absolute one; it has its limits, which are generated mainly by the need to find a balance between the freedom of one person which must stop where it violates the freedom of another one. The infringement of these limits usually attract various types of sanctions for the one found guilty of this act, such as civil, criminal or disciplinary ones.

The limits of the freedom of expression exercise allow an interference which has three fundamental characteristics: it must be authorised by law, it must have a legitimate purpose and it must be necessary in a democratic society.

The freedom of expression has a particular importance concerning mass media, because of its role as the „democracy watchdog”; nevertheless, the European Court of Human Rights stated in its caselaw that journalists must still respect high standards of conduct and professional ethics which implies offering correct information and acting with good faith. Journalists cannot be spared from respecting national and international legislation, in spite of their fundamental role in a democratic society.

Not respecting the rights of others and forcing an absolute interpretation of the freedom of speech may generate an abuse of rights, defined by the Civil Code in article 15 in a negative manner, the text stating that no right can be exercised with the purpose to harm another or in an excessive or unreasonable manner, against the principle of good faith. The civil subjective rights are protected by the law in order to offer their holders not only the possibility to pretend a certain behaviour form another person, but also they represent and draw the lines for the holder’s own conduct.

96 F. Sudre, Drept internaţional şi European al drepturilor omului, Ed. Polirom, 2006, Bucureşti, p. 351
99 ECHR, case 18624/03 Ivanciuc against Romania, decision dating november 27, 2007
100 I. Deleanu, Drepturile subiective si abuzul de drept, Ed Dacia, Cluj Napoca, 1988, p 51
A normal use of a civil subjective right will not present a risk of attracting civil or criminal liability for the holder, but when the latter acts with the intention to harm the rights or interests of another person it represents an abusive conduct.

The abuse of right occurs when certain conditions are met. These are:
- the existence of a civil subjective right which is exercised by its holder;
- a harm must be caused to another person
- the harm must be caused by exercising the subjective right
- the exercise of the subjective right must have been made with the purpose to cause the harm or in an unreasonable or excessive manner, against the rule of good faith.

If all these four criterias are to be met, the author of the illicit act will be responsible for the harm caused and has to repair it, by the rules of civil liability.

2. CIVIL TORT LIABILITY. THE HARM CAUSED TO HONOUR AND REPUTATION:

Civil tort liability represents in fact a manifestation of a social act, by which the one who is found guilty of harming another persons’ rights or interests is to be held responsible to repair the damage caused. Only a responsible member of the society can be subject of civil tort liability, so the one who assumed the value of his/her own acts and who found them to be desirable for him or herself and also for his or her community, and who decides freely to proceed and commit those acts.

Tort law represents the assembly of rights and correlative obligations which are born by law as a result of a wrong doing and which form the framework of the State coercion, acting through legal sanctions for maintaining the stability of the social relations and guiding individuals to respect the values of law.

Civil tort liability operates if certain demands are met. These are: the existence of an illicit act, the harm caused to another person’s rights or interests, the correlation between the illicit behaviour and the harm caused and the guilt of the author who did the illicit act. The guilt may take several forms, such as culpa lata, culpa levis or culpa levissima but this classification has no practical importance, as the author of the damage caused through the illicit act is held responsible for even the least harm, according to the principle which states that the damage must be entirely repaired.

Freedom of speech must be exercised according to the principle of good faith, and the information and opinions made public to others should not be false or expressed with intention to cause harm to another. The principle of good faith, as a base for preventing the abuse of right, is also applying to journalists, who should offer to the public only verified pieces of information. Each person’s own conscience should establish his moral standard, and act as the only allowed form of inner censorship, raised above their personal interest and put into the service of the society.

The European Court of Human Rights stated that the freedom of speech that mass media manifests offers them larger limits when drawing the line of abusive exercise of this freedom. As mentioned in the case Dalban against Romania journalists enjoy the possibility to exaggerate or even comit acts of provocation, when doing their professional duty and stating value judgementes, without having to prove their reality; nevertheless, a value judgement which is not based on any factual reality may be regared as excessive and infringing the protection guaranteed by the article 10 of the Convention.

Apart from analyzing the truth of any information, one must observe if the person who expressed it can be considered as being of a good faith. In order to do that, there should be taken into consideration the real possibility he had to know the lack of truth of that information, if he took diligent efforts to find the truth and also the purpose he spread the information to the general public with. For instance, someone could use a certain piece of information in order to inform the general public about an actual fact, and another person could use the same information in order to harm the honour or reputation of another. However, journalists will be protected by the guarantees offered by the article 10 of the Convention even if they cannot prove the truthfulness of their statements.

Concerning mass media, the constant caselaw of the European Court of Human Rights underlines the need to protect the press from the slander accusation, stating that journalists do not have to always prove the truth of their statements, as long as they act by good faith and the information comes from verified, certain sources, especially when the statements are made on a topic that is of general interest.

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103 M.N. Costin, Raspunderea juridical in dreptul romanesc, Ed Dacia, Cuj Napoca, 1974, p 17
105 ECHR, case 114/95, Dalban against Romania, decision dating September 28, 1999
106 C. Birsan, op. cit., p 783-785
107 D. Bogdan, M. Selegean, Drepturi şi libertăţi fundamentale în jurisprudenţa Curţii Europene a drepturilor omului, Ed. All Beck, Bucuresti, 2005., p. 511
Not to forget that the European Convention of Human Rights protects not only the freedom of expression but also the right each individual has to a private life (article 8) which includes the protection of honour and reputation everyone has in the society. Thus, the member states must adopt measures to assure the protection of these values, and by doing so they limit the exercise of freedom of speech, but this limitation should not harm in a serious manner the interests of having a free press in a democratic society.

The European Court condemned Romania for breaching the 8th article of the Convention, in case Sipos against Romania, because the Romanian authorities have not managed to fulfill their positive obligations and guarantee the plaintiff the right to a private life and to her reputation.

The plaintiff, journalist at the Romanian National Television, was informed through a written note in December 2001 that she would no longer be allowed to present a television program she used to. Because she didn’t get any explanation for this, the plaintiff made some press statements denouncing what she called “internal censorship” in the State television.

On January 20, 2003, the SRTV issued a press release that made some statements relative to the plaintiff. She sued the SRTV in March 2003 accusing the management of insult and defamation, but the national jurisdictions rejected her complaints. The Court decision, which proclaimed the violation of the fundamental rights guaranteed by the 8th article made it possible for the plaintiff to reopen the case she had lost in front of the national courthouses.

Also, the Court decision stated that the requirements for the civil tort liability have been met, conditions referring to: the illicit action, the harm caused, the guilt and the correlation between the illicit action and the damage. The ECHR appreciated that the content of the press release issued by the SRTV affected the plaintiff’s reputation because it questioned her discerning ability and also mentioned problems she had in her family life, information which had no factual base and which represents the action that triggers the civil tort liability.

The Court’s decision concluded that the Romanian state failed to assure the balance between the need to protect the plaintiff’s right to a private life and her reputation and the freedom of expression, both being fundamental rights guaranteed by the Convention.

Because honour and reputation are to be found among the rights which form the category of rights of personality, they are considered intimately connected to the human being, expressing it’s quintesence.

The new civil Code contains express regulations regarding the protection of this category of rights, and also it includes ways to protect them, which are not solely pecuniary, such as: taking necessary measures meant to prevent the illicit act to be done, if it is imminent; making the wrong doing to stop, if it is still producing effects, or more specific actions, such as the right of the victim to get the favorable sentence condemning the illicit act be published.

However, in what represents an exceptional regulation, the Civil Code states that the preventive measures cannot be applied when the illicit action was produced by using the freedom of expression. It is obvious that this limitation in what concerns the means the victim has at his/her disposal is only meant as a guarantee that powerfull preventive actions which could function as a de facto censorship against press are not to be initiated.

But once harm is caused to these values, it can affect either the material side of one’s patrimony (and this can be repaired by pecunary means) or the moral side of it. In this latter case, paying a sum of money cannot be considered a way to repair the harm caused, as long as moral prejudice cannot be repaired with money. Paying a sum of money as a compensation for the damage caused it is not meant to be a form of repair by equivalent, but rather it represents a form of repair in nature of this harm, the victim of the illicit act having the possibility to get its sufference caused by the wrong doing diminished by enjoying other satisfactions that can be reached by paying a sum of money.

The damage, as a condition for the civil tort liability, represents the negative effect suffered by a certain person whose rights or interests, protected by law, were not respected by another.

Because when it comes to repairing the non pecuniary damage, the principle of restitutio in integrum is not effective, the sum of money which is given to the victim of the illicit action is necessary in order to compensate for the harm inflicted to her.

In order to establish the ammount of money which is to be paid, certain subjective criterias have been identified and analized.

The first criteria to be taken into consideration is the importance of the value that has been harmed. This is to be appreciated in a particular manner, as long as for certain individuals, certain values can be more or less important that to other persons, and this because of factors like their profession, a certain type of talent or various different habits.

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108 ECHR, case 26125/04, Sipoș against Romania decision dating May 3rd 2011
109 C. Jugastru, Prejudiciul – repere romanesti in contextual European-, Ed Hamangiu, Bucuresti, 2013, p 192
111 P. Pricopie, Raspundererea civila delictuală, Ed Hamangiu, Bucuresti, 2013, p 69
112 C. Jugastru, op. cit, p 234-251
The victim’s personality is another criteria, and this is mainly comprised of factors like the victim’s age, profession, educational level, which determine the particular effects the illicit action causes to them. Regarding the damage caused to reputation and honour, it can be said that if slander statements made in a national newspaper are directed to a high rank official, the damage caused to his reputation is more serious than if the victim was not a public person whose career is not be dependent on the public image constructed during a long period of time.

Other specific criterias are the intensity of the physical and mental suffering that affects the victim, or the consequences produced in the victim’s social or family life (for instance, a slander accusation may lead the victim’s spouse to divorce or it may affect his or her relationships with other relatives, friends or neighbours).

As long as the internal legislation has no objective criteria to determine the amount of money which is to be paid as a compensation for the moral damage, the judges are those who have the mission to determine it in every particular situation, by measuring the concrete gravity of the harm caused to the victim. By deciding in equity, the judge must pay attention not to excessively penalize the author of the illicit action and also not to unreasonably enrich the victim.

CONCLUSIONS:

The freedom of expression is protected by the 10th article of the European Convention of Human Rights as being an essential freedom in any democratic society, acting as a guarantee for other fundamental rights.

Because it is not an absolute one, the freedom of expression has its limits, which are generated mainly by the need to find a balance between the freedoms of each individual. The infringement of these limits usually attract various types of sanctions for the one found guilty of this act, such as civil, criminal or disciplinary ones.

Not respecting the rights of others and forcing an absolute interpretation of the freedom of speech may generate an abuse of rights and its author could be subject to civil tort liability.

Because honour and reputation are to be found among the rights which form the rights of personality, they are considered intimately connected to the human being, expressing it’s quintessence.

The new civil Code contains regulations regarding the protection of this category of rights, including ways which can be both pecuniary or non pecuniary.

When it comes to repairing the non pecuniary damage, the sum of money which is given to the victim of the illicit action is necessary in order to compensate for the harm inflicted to her and in order to establish the amount of of money which is to be paid, certain subjective criterias have been elaborated and which are to be applied to every particular situation, taking into consideration its specific conditions.

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Source: http://hudoc.echr.coe.int/eng
CONSIDERATIONS ON JUDGMENTS WHICH SUBSTITUTE THE ACT OF SALE

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Abstract

Through this article we intend to make an analysis of the judgment which substitutes the act of sale through the conditions for transfer of ownership. Besides expressed valid consent, the court will consider the legal nature of the contract between the parties, exceptions relating to territorial jurisdiction, material competence, prescription and some formalities related to real estate advertising.

Key words

pre-contract, judgment in lieu of buying-selling act, consent, exceptions.

Introduction

The action is a legal finding through which the applicant requests the court to declare the existence of a subjective right in contradiction with the defendant or his lack of a law against it. The Code of Civil Procedure governing the institution by Article 35 according to which “who is interested can ask whether there is any legal finding. The request can not be accepted if the law can require the completion of any other remedy provided by law”. For delivery of a judgment which takes place of authentic sale act, there must be fulfilled all the conditions for transfer of ownership, except consent. For the court to substitute the consent of the party who, culpably, does not fulfill obligations, there must be fulfilled all the conditions of Article 1179 of the New Civil Code on the validity of the agreements and the specific contract of sale - purchase by reference to the provisions Article 1669 paragraph (1) of the Civil Code.

Territorial jurisdiction

By decision No. 8 of January 10, 2013, The High Court of Cassation and Justice has determined that “in the interpretation and application of art. 1073 and art. 1077 of the former Civil Code, art. 5 paragraph. (2) of Title X of Law no. 247/2005” and art. 1279, art. 1669 paragraph (1) of the new Civil Code, in relation to art. 5 Article 10 pt. 1, 12 and art. 19 of the former Code of Civil Procedure (now art. 107 paragraph 1 Article 113 pt. 3, Article 116 and Art. 117 paragraph1 of the New Code of Civil Procedure) the action requesting a judicial pronouncement to substitute an authentic sale - purchase of an estate are personal estate actions and the competence belongs, by the applicant’s choice, either to the court of the place of residence of the defendant or to the court of the place established by the Convention for the performance, even in part of the obligation”, thereby.

The legal nature of the preliminary contract of sale

Regarding the parties agreement, it has the nature of a bilateral sale - purchase promise which has not operated transfer of ownership, but created to the parties an obligation to do, namely to sign until agreed the authentic contract ad validitatem required by art. 2 paragraph (1) of Title X “legal circulation of land ” of Law no. 247/2005.

The exception of inadmissible action

The Constitution enshrines the art. 21, according to art. 6 of the European Convention on Human Rights, access to justice. This must be interpreted in light of the Convention which guarantees practical and effective rights, and not theoretical, illusory, so that the plaintiff cannot be imposed disproportionate burdens, making him impossible the access to justice. By the light of these clarifications we believe that the court will appreciate as unfounded the exception with the direct consequence of its rejection.

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113 Court Sinaia, civil sentence no. 1139 from 10.10.2008, Euroavocatura.ro
114 Published in the Official Gazette no. 581 of September 12, 2013
115 Published in the Official Gazette no. 653 of 22 July 2005
The exception of prescription of the right to action

The action seeking a judgment that takes place for authentic sale - purchase is a personal and patrimonial action which has a years prescription period, according to Article 2517 of the Civil Code. By decision no. 3447 of 4 December 2014, Section I Civil HCCJ ruled that “the hypothesis of a bilateral sale - purchase promise or a legal act by which the parties undertake to conclude a future contract of sale - purchase, the action that the promisee asks the court to issue a decision that takes place of authentic sale - purchase is subject to the time limitation even if the good referred to in the parties agreement is a real estate because the object of the preliminary contract is not real estate, but obliged to make the fulfillment of which can only be requested within the time limit”. As for the time at which commences limitation, worthy of note is that if the good promised in the contract was handed in possession of the beneficiary, this amounts to an acknowledgment of its right to request the contract of sale - purchase, reconnaissance interrupting prescription, a new period of extinctive prescription can not begin to run as long as the applicant is in possession of the property. In this situation we face a real postponing of the start of extinguishing prescription course, the good being taught at the conclusion of the Convention.

The exception of the quality sued

Although according to the principle of the relativity of the civil legal act effects, the bilaterally or multilaterally civil legal act gives rise to subjective rights and civil reciprocal obligations for parts, the doctrine and the jurisprudence establishes the category of those entitled under question, represented by people who although not directly participated in concluding the Convention are still entitled to benefit from the effects of the Convention, or to bear the legal consequences due to their connection to one side of this legal act. This category includes universal title successors. Pre-contract for sale - purchase concluded by their author and its effect to them, because, as the author's successor take over the rights and obligations, except those declared by the parties as intransmisible. From the foregoing standing passively in title case, quality check is fully justified.

Afterthought clause (of denial)

The HCCJ jurisprudence and literature showed that if the previous agreement “envisaged afterthought clause (of denial) to one or both sides (including as earnest specifying explicit denial of the right), consent may be unilaterally revoked and the court can not give judgment to take place Contract”. Analyzing those shown, the court seised of such an application, it finds that the conditions to be able to render a judgment that takes place authentic sale - purchase and the consequence will be that much accepted in part the request, forcing defendants to refund the deposit.

Registration in the Land Registry

Judgment to take the place of authentic sale - purchase operates the transfer of ownership is thus justified tabulation of ownership on behalf of the applicant in accordance with Article 20 para. 3 of Law no. 7/1996, republished. In order of injunction of a judgment which takes place of authentic sale - purchase, the court will verify that the same conditions for conclusion before a notary public act. So that if the defendant does not prove registration in the land ownership promised for sale, the Court dismisses the action. If the advertising requirement was not fulfilled (cf. art. 35 par. 5 of Law no. 7/1996 court will send within 3 days, final and irrevocable decision, constitutive or declarative on a real estate law at the land registry) or this form of advertising was not prescribed by law character of association, rights, documents, deeds or other legal relations subject to advertising are not opposable to third parties unless it is proved that they have met otherwise. According to art. 885 of the Civil Code contained real rights on real estate in the land is acquired both between the parties and against third parties only by entry in the land register on the basis of the act or fact which justified the application, subject to contrary legal provisions. On the same importance is the provision of art. 17 para. (1) of Law no. 7/1996, which states that real estate advertising based on evidence of general cadastre system covers entry in the land register of legal acts and facts relating to the buildings from the same administrative - territorial unit, the purpose of transmitting or lodging rights in immovable property or by case of third parties bid enforceability of these registrations. So, the constitutive character of the entry in the land register is an exception to the principle of mutual consent principle governing civil signing legal documents, including those that concern the creation, transmission or termination of rights in rem on real estate. An element of novelty compared to the previous regulation of Law no. 7/1996, where it is enshrined in art. 891 of the New Civil Code which

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states that if two or more persons were entitled to acquire the documents concluded by the same author rights in the same building mutually exclusive, will be declared owner who has scored first right into the card system land, regardless of the date title under which scored its right.

**The legal regime of the substitute judgment**

Regarding the legal status of such a ruling, the question is whether such a decision is also capable of attacking any authentic or it can be challenged only through appeals against judgments of the Code of Civil Procedure. The judgment is a purely judicial act that category differs from civil legal acts which are a manifestation of the will of one or more persons. Thus, if by a judgment the court obliges the defendant at the conclusion of a specific contract with the applicant, in case of refusal judgment will take place authentic, the part of the judgment which has towards this authentication pre-agreement existing between the parties. From this point of view, the legal regime of the judgment to take the place of authentic resembles, in terms of legal effects, with the legal regime authenticated before a notary public.

**CONCLUSIONS**

The issue of judgment in lieu of an official is complex, the court is bound to consider the conditions on the validity of the agreements and the contract of sale - purchase order to give judgment to supplement the lack of consent of the parties. It is obvious that in practice the courts will face different test cases, the role of legal analysis of the conditions to be able to give such an order returning exclusively courts. As I showed the judgment in such a dispute is already existing authentication preliminary contract between the parties.

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GIVING IN PAYMENT, AS REGULATED UNDER LAW NO. 77/2016 AS ONE PARTICULAR AND SPECIFIC METHOD FOR OBLIGATIONS SETTLEMENT

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Abstract:

Both the established and the ongoing relations in the field of bank and non–bank loans, or in connection with this particular area of expertise, are quite complex, involving on the one hand those relations that one has established upon and within the context of concluding the relevant loan agreements, and on the other hand the legal relations established by virtue of one’s concluding the agreement, or as occurred within the process of running the relevant loan. Well, under these circumstances, issuing Law no. 77/2016 regarding the giving in payment of various immovable assets in view of settling the obligations undertaken by virtue of loans, as a specific method for the settlement of any such legal relations is highly relevant, and thus, one analysis of this particular institution is obviously necessary.

Keywords: giving in payment, loans, agreements, social relations, legal relations, unforseeability.

1. Common law giving in payment institution

1.1. Notion and specificity of common law giving in payment institution

Traditionally, in the legal literature, such datio in solution as a means for settling a certain obligation has been developed as a consensual method for reaching one such arrangement, consisting in the lender’s agreeing upon another service than the one owed by the relevant debtor. Taken from this perspective, the lender’s acceptance stands for one sine qua non condition and it shall have to occur at the very moment the said service is provided.

Given the fact that such giving in payment triggers the same effect as the relevant payment, namely it settles the obligation, alongside all the latter’s accessories, it shall stand for one payment alternative, more precisely an alternative method for obligations performance.

Under the former Civil Code, such giving in payment did not benefit of any express legislative regulation, being only a jurisprudence and doctrine – type institution, as a result of the need to settle certain practical legal factual situations and an expression of the principle relating to the freedom of will in the civil field.

However, upon the coming into force of the New Civil Code, as of October the 1st 2011, the datio in solution has become a legal institution of a legislative type, being expressly regulated under art. 1492 of the New Civil Code [1].

Both under the former legislation and within the acceptance of the new Civil Code, such datio in solution, as a legal paradigm, has been conceptualized as a consensual form for replacing the initial method of the debtor’s performing his obligation, as undertaken, by a new method, as agreed upon by the parties, thus the consensual character being one constant.

Thus, both in terms of structure and in terms of its legal character, the giving in payment stands for an agreement of will, a convention, which in itself shall meet the validity conditions in terms of substance and form, as generally required in terms of agreements.
2. Giving in payment, as regulated by virtue of Law no. 77/2016

2.1. Notion and specificity of giving in payment, as regulated under Law no. 77/2016

By virtue of Law no. 77/2016 on the giving in payment of various immovable assets in view of settling the obligations undertaken by virtue of various loans, one has additionally introduced in the internal legal landscape a new, private and derogatory form, namely the giving in payment, as applicable to certain situations, categories of beneficiaries and objects that shall be strictly determined. As the new legal form regulated under the Civil Law, shall be established in the common law in the field, the one regulated under Law no. 77 / 2016 shall become lex specialia.

The special and derogatory character of Law no. 77/2016 shall explicitly derive out of the provisions of art. 3 of this normative deed, as per which: “By derogation from the dispositions of Law no. 287/2009 on the Civil Code, as republished, with the latter’s subsequent amendments, the consumer shall be entitled to have his debts cancelled, as the same shall derive out of loan agreements, alongside all the latter’s accessories, with no further costs whatsoever, by the datio in solution of the said mortgaged immovable in favor of the relevant lender, unless within the term stipulated under art. 5 paragraph (3) the parties to the loan agreement shall fail to reach any other arrangement”.

In terms of the beneficiaries of the new form of giving in payment and the categories of receivables to which the latter may be applied, Law no. 77/2016 defines its scope in the very art. 1 paragraph 1), in a general and comprehensive manner, by stating that “The present law shall apply to the legal relations between consumers and credit institutions, non – bank financial institutions or the assignees of the receivables held over the consumers”.

Since such delimitation is made by using the concept of “consumers”, paragraph (2) of the same article defines and clarifies the term being used as being “the individuals defined under Government Ordinance no. 21/1992 on consumers’ protection, as republished, with the latter’s subsequent amendments and adjustments, as well as under Law no. 193/2000 on the abusive clauses within the agreements concluded between professionals and consumers, as republished, with the latter’s subsequent amendments and adjustments”.

Also, in order to avoid any eventual restrictive interpretations, paragraph (2) of the aforementioned article provides express stipulations as to the fact that “the dispositions of the present law shall also apply in the event the lender’s receivable deriving out of a loan agreement shall be secured by means of the suretyship and / or the solidarity of one or several co – debtors or co - payers”.

Thus, in terms of the legal beneficiary subjects of Law no. 77/2016, under the latter’s incidence there shall also fall other relevant categories, in addition to the borrowers, such as the co – borrowers, co – debtors, personal guarantors (fidejussor), mortgage guarantors of the main debtor.

In fact, in terms of the categories of loans to which one shall apply the new form of giving in payment, the provisions of art. 11 of the Law set up the general scope of applicability in terms of the law, including “both the loan agreements that were ongoing upon its coming into force, and the agreements concluded subsequent to any such date”, and the introductory part of the article does nothing but to provide explanations and to justify one such scope of applicability, so that there shall be no erroneous perceptions of the text. In the event of the existence of several assets securing the loan, all mortgaged assets are to be placed under giving in payment.

Moreover, within paragraph (4) of art. 1, the law expressly and restrictively stipulates the sole case of exclusion from its general scope of applicability, stating that “The provisions of the present law shall not apply to the loans granted by virtue of the “First Dwelling” program, as approved by virtue of Government Emergency Ordinance no. 60 / 2009, regarding certain measures for the implementation of the “First Dwelling” program, as approved with amendments and adjustments by virtue of Law no. 368 / 2009, with the latter’s subsequent amendments and adjustments”.

In addition to the conditions required “in personam” under the law, namely that the lender, as well as the consumer, shall be part of the categories stipulated under art. 1, paragraph (1), the enforcement of such giving in payment in the case of any material situation and the settlement of the receivable deriving out of any given loan agreement, shall be subject to the cumulative accomplishment of several objective conditions:

- The quantum of the amount, as borrowed, shall not have exceeded, upon granting the same, the equivalent of the amount of 250.000 Euros, an amount calculated as per the currency exchange rate published by the National Bank of Romania upon concluding the loan agreement;
- The loan shall have been contracted by the consumer in view of purchasing, extending, modernizing, arranging, rehabilitating a certain immovable asset with the destination of a dwelling or, regardless of the purpose for which it has been contracted, the said loan shall be secured at least by means of an immovable asset holding the destination of a dwelling;
- The consumer shall not have been convicted by any final judgment of any court of law, for any crimes in connection with the relevant loan to which the present law shall apply.
2.2. Procedure relating to the enforcement of giving in payment, as regulated by Law no. 77/2016

Far from being a simple procedure, or one “ino ictu” execution procedure, the giving in payment procedure, as regulated under Law no. 77/2016 means an in – time development and sequencing in distinct stages, each having specific contents and significance.

Thus, when any debtor of any such bank loan shall find that he meets the conditions stipulated by Law no. 77 / 2016, and believes that he should use the giving in payment procedure, the latter shall draw up a notification and shall forward the same to the lender, by means of a legal executor, attorney at law or public notary, by which he shall notify the latter on his decision to turn to the benefit granted by the provisions of this law and as a consequence, to transfer to the lender, his property right over the immovable asset acquired by means of the mortgage loan, so as to settle the relevant debt.

One special case is represented by the event when, subsequent to the loan having been granted, the same has been assigned by the bank to a receivables recovery company, and in this latter case, in addition to the initial lender there may also be the new assignee lender, as a third party subject.

In such case, the debtor of the said bank loan is to file and forward the notification stipulated under art. 5 of Law no. 77/2016 both to the initial lender, and to the relevant receivable assignee.

In terms of both contents and character, the notification regarding such giving in payment shall comply with a series of formal conditions, namely it shall include, in addition to the express statement regarding the willingness to give in payment, a detailed description of the admissibility conditions stipulated under art. 4 of the Law and it shall be submitted by means of a legal executor, an attorney at law or a public notary.

In addition to the simply formal requirements, the notification regarding such giving in payment shall also include the establishment of one time interval, on two distinct days, when the legal representative or the conventional representative of the relevant credit institution shall show up at the public notary’s office proposed by the debtor in view of concluding the deed of transfer in terms of the property, by which one shall settle any of the debtor’s liabilities deriving out of the mortgage loan agreement, including the main debit, the interests and any and all penalties.

In order not to subject the lender to any adverse consequences owed to the intempestive action on the debtor’s part, within art. 5 paragraph 3, the Law requires for a dilatory term of minimum 30 free days in between the time of the relevant notification communication and the first day of convocation at the public notary, which period of time shall suspend any payment to the lender, as well as any legal or extralegal procedure initiated by either the lender, or by the individuals subrogating in rights to the latter, as initiated against the consumer or against the latter’s assets.

The first impact of such notification shall consist in the ceasing of the normal running of the loan agreement, the “freezing” of the latter’s effects, within the meaning that installments and loan – related penalties shall no longer elapse, and the lender shall no longer be able to take action against the co – debtors, personal or mortgage guarantors and it may not initiate any forced execution of the agreement anymore.

The receipt of such notification by the lender shall provide the latter with the right to file a challenge against the notification submitted by the debtor, within 10 days as of the same being communicated. According to art. 7 of Law no. 77/2016, the subject – matter of this challenge is represented by the “contesting of the fulfillment of the admissibility conditions stipulated by the giving in payment procedure and of course, although the law does not expressly state it, the cancellation of the debtor’s relevant notification.

From a procedural perspective, the trial on the said challenge shall fall under the competence of the court of law from the debtor’s residence, under the form of one general contentious expressed as an emergency procedure that shall be conducted in a public session, with the subpoena of the relevant parties to the trial case. On precise consideration of the emergency character of the procedure, the term of appeal against the judgment by which the court of first instance shall rule on the challenge is a much shorter term, derogatory from the common law term of appeal, and the party that shall not be satisfied with the solution may use this means of appeal, within 15 working days as of communication.

The final admission of the lender’s challenge shall lead to the invalidation of the entire procedure of notification as used by the debtor and to the return of the parties to the latter’s previous standing, and thus the legal relation deriving from the loan agreement shall be resumed and the lender’s right to take action against co – debtors, personal or mortgage guarantors or to initiate any forced execution of the agreement shall arise once again.

If, however, the lender’s challenge shall be finally denied by the court, once this stage of the procedure having been completed, the lender shall benefit of 10 days as of the final denial of its challenge, during which
term the latter shall show up at the public notary’s office indicated by the debtor in order to sign the transfer of the property right.

In the event when, subsequent to the final denial of the challenge, the lender shall fail to show up within the above described term, at the public notary’s office indicated by the debtor, or if one such challenge has never been filed by the debtor and it has failed to show up at any one of the two consecutive convocations mentioned within the notification on giving in payment, the debtor may ask the court for the issuance of a judgment by which it shall find the settlement of those obligations deriving out of the mortgage loan agreement, as well as to transfer the property right to the lender. The petition shall be trialed with celerity, therefore by means of an emergency procedure, with the subpoena of the relevant parties, by the court in whose circumscription the debtor has his residence.

In order to avoid any ambiguity whatsoever, which might trigger any eventual abusive actions or attitudes on the lenders’ part, the law [2] stipulates on the one hand the maintenance, up until the final settlement of the petition for finding purposes, of the suspension of any payment to the lender, as well as of any legal or extra – legal procedure initiated against the debtor by the lender, or by any individuals subrogating to the latter in rights, and on the other hand it exempts the debtor from the payment of the legal stamp duty in terms of the relevant action in court.

Following the admission of the action in court, as filed by the debtor or the materialization of any agreement of will before the public notary, the impact shall be registered both in terms of the debtor’s patrimony and in terms of the lender’s patrimony as well. Thus, as far as the debtor is concerned, one shall settle any debt of the latter, as deriving out of the mortgage loan agreement, there being included the main debt, the interests or penalties, yet the latter shall lose the property over the mortgaged immovable. As far as the lender is concerned, the latter’s entire receivable is settled, in correlation with the debtor’s payment obligations, yet the property right over the mortgaged immovable asset shall be transferred into the latter’s patrimony.

2.3. Legal nature of giving in payment, as regulated under Law no. 77/2016

If, just as previously shown, the common law giving in payment has a conventional nature, being the result of any agreement of will by which there is the acceptance by the lender of any other service instead of the one owed by the debtor, this shall not apply in the case of the datio in initium procedure, as regulated under Law no. 77/2016.

Thus, analyzing the legal regulation in terms of the running of this particular procedure and the way how the impact of this form of giving in payment occurs, we easily draw the conclusion that the latter’s effects do not have as a triggering cause the parties’ agreement of will, but the unilateral expression of will on the debtor’s part, acknowledged as such by the law in the event of one’s meeting certain expressly required conditions.

Given the fact that the impact triggered by the giving in payment form under analysis, as well as by the common law giving in payment, consists of the settlement of any debt, it is just obvious that this particular procedure, as a legal operation, can be classified under the methods relating to obligations settlement [3], as those circumstances, other than payment, which have as an impact the termination of the binding legal relation [4].

Synthesizing we can say that the giving in payment, as regulated by virtue of Law no. 77/2016 stands for one particular method of settling one’s obligations, as deriving out of mortgage loan agreements by the unilateral expression of will on the debtor’s part and provided that one shall cumulatively meet certain expressly stipulated requirements.

3. Giving in payment as a specific form of unforseeability

Whereas the overall provisions of Law no. 77/2016 as well as by relating these provisions to the legal framework regarding loan agreements and the overall general normative framework, the debtor’s possibility to turn to getting out of a contractual relation by means of such giving in payment can be perceived and understood as a specific form of unforseeability as well, which shall apply within the economic evolution context.

Thus, although one of the fundamental principles of the effects of any legal deeds is represented by the principle relating to the binding power or pacts sunt servanda, as per which the legal deed having been concluded shall be binding upon the parties exactly as the law itself [4], within the relevant doctrine and jurisprudence one has accepted as an exception from this particular principle, the event relating to a review of the agreement effects due to a disruption of the relevant contractual balance.

More precisely, one focuses on the situation relating to a certain disruption of the contractual balance as a consequence of any change in terms of the circumstances taken into account by the parties upon concluding the relevant legal deed, so that one reaches the point when the effects of such legal deed shall differ from the ones that the parties, upon concluding such deed, have understood and agreed to establish, undertake and to be
binding for the same, this legal institution being regulated by the dispositions of art. 1271 of the New Civil Code under the name of Unforeseeability [5].

According to paragraph (2) of art. 1271 of the New Civil Code [6], the existence of any unforeseeability situation shall be conditional upon the proving by the individual invoking the same, on the one hand the occurrence of any exceptional changes of circumstances which render the debtor’s being bound to be obviously unfair, and on the other hand the fact that the agreement performance has become excessively onerous.

In terms of the consequences of such unforeseeability, the same normative text stipulates that the latter’s occurrence can alternatively lead either to the adjustment of the relevant agreement within the meaning of a fair distribution of consequences between the parties, as concerned, as the said consequences derive out of the change in terms of circumstances, or to the said agreement termination.

Whereas the unequal positions as from which the parties act within the loan agreement, and in view of setting a re – balance of the relations between the latter, the law enforcement agent has established one particular case of such unforeseeability, setting up a specific method for the contractual unbalance remediation, namely the consumer’s getting out of this type of contractual relation by means of the giving in payment of the said immovable asset, as purchased, or which is placed as a security for the loan having been granted.

As related to the legal provisions in the field of abusive clauses, the loan agreement stands for one adherence agreement including pre – set clauses established by the bank, which clauses shall be binding for the client, without giving the latter the opportunity to have an influence on the latter’s contents, which fact triggers the inequality of the contracting parties’ legal position, within the meaning of the assertion of the bank interests, in a capacity of a professional, to the consumer’s detriment, as the latter stands for the weaker party to the agreement.

Given this context, providing the client with the possibility to get out of a financial – legal context that is too burdensome or impossible to be achieved, by means of such giving in payment, shall stand for one method for the re – balance of the legal relation, and not for an excessive benefit as far as the consumer is concerned.

Whereas the scope of applicability and the effects it causes, the unforeseeability case stipulated under Law no. 77/2016 shows a series of particularities that identify and shape it up as a legal institution.

Thus, on the one hand this particular unforeseeability case has a restricted applicability scope, being limited to the applicability range of the provisions of Law no. 77/2016, namely the situation relating to the mortgage loan relations, where the debtor meets the conditions that are expressly stipulated by the law, thus having the character of a special unforeseeability case, which shall apply to a particular, clear case, as circumscribed from a legislative perspective.

On the other hand, from the perspective of the effects it causes, if such unforeseeability regulated under art. 1271 of the New Civil Code may alternatively lead either to the adjustment of the relevant agreement, or to the said agreement termination, the said unforeseeability case stipulated under the Law no. 77 / 2016, shall only lead to the termination of the legal relations and to the transfer of the property right over the mortgaged immovable to the lender.

However, the most significant particularity of such unforeseeability applicable within the system of Law no. 77/2016 consists of the fact that in this particular case, once someone meets the expressly stipulated objective conditions, the law shall presume both the existence of an exceptional change in terms of circumstances, which makes the debtor’s being bound to be obviously unfair, and the fact that the agreement performance has become excessively onerous.

As such, within the acceptance of the law, non only that the debtor is not held to prove the existence of these two elements, but the lender is also not allowed to prove the latter’s inexistence, and the analysis conducted by the court is limited to the existence of those objective conditions and the parties’ classifying under the categories which are expressly stipulated by the law.

This particular legal conception has been radically changed by means of the Constitutional Court Decision from 25.10.2016 [7], which basically changes the ”rule of the game”, requiring the debtor’s bringing proof to the occurrence of any exceptional change in terms of circumstances, which would render the obligation fulfillment as obviously unjust and as to the latter’s excessive onerous character.

All the aforementioned are due to the fact that the Constitutional Court has found, among other things, that the relevant provisions of Law no. 77/2016, more precisely those of art.11 first thesis, as related to art.3, second thesis, art.4, art.7 and art.8, are constitutional, to the extent the court shall check the conditions relating to the existence of such unforeseeability [8].

The practical consequences of any such decision of the constitutional court are to be shaped up upon the development of jurisprudence on this particular topic of discussion, obviously subject also to the reasoning filed by the Constitutional Court, yet for certain, the envisaged legal paradigm by the adoption of the law, while questioning for instance the emergency character of the relevant legal procedure.
BIBLIOGRAPHY NOTES AND BENCHMARKS

[1] "Art. 1492-(1) The debtor shall not be allowed to free himself by performing another service than the one, as owed, even if the value of such service, as provided were either equal or higher, unless the lender shall agree upon it. In any such latter case, the obligation shall be settled when the new service shall be provided.

(2) If the service granted in exchange shall consist of the transfer of property or of any other right, the debtor shall be held by the security against eviction and by the guarantee against asset – related vices, according to the applicable rules in the sales field, save for the case when the lender shall prefer to ask for the initial service and for the remedy of the relevant prejudice. In any such latter cases, the guarantees provided by third parties shall not arise again”.


[6] Art. 1271 paragraph (2) of the New Civil Code- “However, if the agreement performance has become excessively onerous due to any exceptional change having occurred in terms of circumstances, which would render the debtor’s being bound to perform the obligation as obviously unjust, the court may rule as follows: a) the agreement adjustment, so as to equally distribute the benefits and losses deriving from the change of circumstances, between the relevant parties to the agreement; b) the agreement termination, upon the time and under the conditions to be established by the court”.

[7]- Upon drawing up the present paper, this decision was not grounded and one could not identify a decision number on the official website of the Constitutional Court

[8]- The Constitutional Court Decision from 25.10.2016- Excerpt: "Following deliberations, the Constitutional Court by unanimity of votes:

2. Has admitted the exception and has found that the provisions of art. 11, first thesis, as related to art. 3, second thesis, art. 4, art. 7 and art. 8 of Law no. 77/2016 regarding the giving in payment of certain immovable assets in view of settling the obligations undertaken by virtue of loans, are constitutional to the extent the court of law shall check the conditions relating to the existence of any such unforeseeability”.
CONSIDERATIONS OF THE NON-CONSTITUTIONALITY OF ARTICLE 25 PARAGRAPH (5) OF THE CODE OF CRIMINAL PROCEEDINGS

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Abstract: Although the intention was to be in line with the provisions of the Constitution, the European Union Founding Treaties, other European Union settlements in matters of criminal proceedings, as well as of pacts and treaties regarding fundamental human rights which Romania is a part thereof, nevertheless we can see that in the activity of judicial bodies related to the settlement of cases submitted for judgement, some exceptions are raised on the non-constitutionality of some provisions which regulate the course of the criminal trial and determine the amendment and completion of the provisions of the Code of Criminal Proceedings in case that they are admitted by the Constitutional Court.

1. GENERAL CONSIDERATIONS

The purpose pursued in the construction of Law 135/2010 on the Code of Criminal Proceedings envisaged the application of a fair criminal trial, in a reasonable period of time, in the course of which the judicial bodies participate in the achievement of independent and impartial criminal justice, and which continues to be grounded on both the classical principles (finding out the truth, the presumption of innocence, the right to defence, the respect for human dignity), and new principles, such as the right to a fair trial carried out over a reasonable period of time, the separation of judicial functions in the criminal trial, the obligatory character of criminal action in close connection to the subsidiary one of opportunity, the right to freedom and security, ne bis in idem, and in the matter of evidence, the loyalty in obtaining the evidence. These new principles are general rules present in the legislations of the European Union Member States, which underlie the modern criminal trial, and the validity and efficiency of such rules were proved in the judicial practice and the jurisprudence of the European Court of Human Rights 119.

As a matter of fact, in this line, even the legislator of the Code of Criminal Proceedings transposes this purpose in the content of provisions in Article 1 par. (2) of the Code, considering that the criminal proceeding norms aim to ensure efficient execution of duties of judicial bodies with a guarantee of rights of the parties and other participants in the criminal trial so as to respect the provisions of the Constitution, the European Union Founding Treaties, other European Union settlements in criminal proceedings matters, as well as of pacts and treaties regarding the fundamental human rights which Romania is a part thereof.

2. THE CIVIL ACTION IN THE CRIMINAL TRIAL

Therefore, according to the provisions of Article 19 par. (1) of the Code of Criminal Proceedings, the object of the civil action taken within a criminal trial is the civil offense liability of those who are responsible according to the civil law for the prejudice incurred by the act which is the object of the criminal action.

According to the provisions of Article 1349 par. (1) and (2) of Law 287/2009 on the Civil Code named “Offense Liability”, “any person has the duty to respect the behaviour rules imposed by the law or habits of a particular place and to not affect, by their action or lack of action, the legitimate rights or interests of other people. The person who having judgement breaches this duty is liable for all prejudices that were caused and has the obligation to fully repair them”. Moreover, according to the provisions of Article 1357 par. (1) of the Civil Code, “The person who causes to another person a prejudice through an unlawful act, of which the person is guilty, has the obligation to repair it”.

This circumstance is the legal ground for which, in the case of a crime resulting in a prejudice, at the same time with a right to criminal action, a right to civil action is born too.

Being connected to the criminal action, the civil action has an accessory character 120, and it can be taken within the criminal trial only as long as the criminal action can begin.

As an effect of this specific trait, we give as an example the provisions of Article 25 par. (1) of the Code of Criminal Proceedings and of Article 397 par. (1) of the Code of Criminal Proceedings, where for settling the civil action in a criminal trial, the court makes the same decision in relation to both the criminal action, and the civil action, a fact revealed also by the provisions of Article 393 of the Code of Criminal Proceedings regarding the object of the deliberation of the court panel, which means that the deliberation is concerned first with the existence

of the act and whether the defendant is guilty or not guilty, on the penalty, the educational and safety measures, and then on the repair of the prejudice caused by the crime, on preventive and assurance measures.

The civil action can be taken in a criminal trial if the following conditions are met:

a. the crime caused a material or moral prejudice;

b. there is a causality relation between the committed crime and the prejudice claimed to be covered;

c. the prejudice must be certain;

d. the prejudice must not have been repaired;

e. there is a will of the natural or legal person with full acting capacity for being indemnified.

On the other hand, the person who suffered the prejudice or his/her successors who became a civil party in the criminal trial can abandon this way of action and they may take the civil action to a civil court if that:

- the prosecutor decided to close the action or to stop the criminal investigation, without deciding however, after consulting the suspect or the defendant, that he/she must remove the consequences of the criminal act or repair the damage caused or to agree with the civil party on a way to repair it, according to the provisions of Article 318 par. (6) letter a) of the Code of Criminal Proceedings;
- the criminal trial was suspended;
- the court leaves the civil action unsettled.

The situations where the civil court leaves the civil action unsettled are those provided by Article 25 pars (5) and (6) of the Code of Criminal Proceedings.

Therefore, in case that the defendant is acquitted or if the criminal trail stops, based on Article 16 par. (1) letter b) thesis 1, letters e), f), g), i) and j), as well as in the case stipulated by Article 486 par. (2) of the Code of Criminal Proceedings, as well as when the heirs or, accordingly, the successors with regard to rights or the liquidators of the party responsible do not express their option to continue the civil action or, as appropriate, the civil party does not indicate the heirs, the successors with regard to rights or the liquidators of the party responsible from a civil point of view within the period stipulated by Article 24 par. (1) and (2) of the Code of Criminal Proceedings.

Analysing both the provisions of Article 25 par. (5) and (6) of the Code of Criminal Proceedings and the provisions of Article 27 par. (2) of the Code of Criminal Proceedings, the conclusion is that in case the criminal court left the civil action unsettled, then the person who suffered the prejudice or his/her successors, who became a civil party in the criminal trial, may bring the action to a civil court.

For that matter, by Decision 594 of 1 October 2015121, the Constitutional Court rejected as non-admissible the exception of non-constitutionality of the provisions of Article 25 par. (5) of the Code of Criminal Proceedings, an exception raised by the representative of the Public Ministry in the File no. 4.758/3/2006 of the Appeal Court of Bucharest – Section I Criminal, when in support of the exception an hypothesis was invoked that the court by admitting the appeals promoted in that case shall modify the acquittal settlement into a closure of the criminal trial, as a consequence of the intervention of the prescription, and according to Article 25 par. (5) of the Code of Criminal Proceedings it would leave unsettled the civil action, showing that the intervention of the prescription of criminal liability, and the excessive duration of the criminal trial respectively, is an aspect that cannot be imputed to the defendants or the other parties, it representing a guilt of authorities, claiming that, in this situation, the criticised text infringes the right to a fair trial of the participants in a criminal trial, even if they have the possibility to defend their interests in a civil lawsuit, subsequent to a definitive criminal decision made in that case.

However, based on the reason that the criticised text is not applicable in the proceeding phase where the non-constitutionality exception was raised, this exception was considered non-admissible, the civil party being obliged that in case a settlement is given for the closure of the criminal trial in consequence of the intervention of the prescription of criminal liability of the crime (Article 16 par. 1 letter f) of the Code of Criminal Proceedings) to leave the civil action unsettled, and the civil party to address a criminal court for the repair of prejudice.

Of course, to sustain its decision, the Court states that the legislative solution to leave the civil action unsettled with a view to the hypothesis of the intervention of a prescription is at contradiction with the jurisprudence of the European Court of Human Rights, referring to the decisions of 2 October 2008 and 22 January 2009 in the cases Dinchev vs. Bulgaria and Atanasova vs. Bulgaria, as well as the decision of 19 June 2012 given in the case Constantin Florea vs. Romania, judging that in such an hypothesis the right of the civil party to a fair trial and free access to justice is infringed as, if the national legislation allows the person who suffered the prejudice to become a civil party in the criminal trial, the state has the obligation to provide to this person the guarantees conferred by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, considering that it is unfair for the civil party to be in a situation to start once again by bringing an action to a civil court122.

121 Published in Monitorul Oficial no. 820 of 4 November 2015.
122 The document is available online on www.legisplus.ro.
Moreover, it shows that the situation is similar when the death of the suspect or the defendant occurs or the winding up of a legal person as suspect or defendant, by considering that the settlement of the civil action by the criminal court has the advantage of the existence of evidence.\footnote{Idem.}

Also with regard to the unsettlement of a civil action based on the provisions of Article 16 par. (1) letter f) of the Code of Criminal Proceedings, the plenum of the Constitutional Court debated the non-constitutionality exception of the provisions of Article 25 par. (5) of the Code of Criminal Proceedings with reference to the provisions of Article 16 par. (1) letter f) of the Code of Criminal Proceedings, on 13 September 2016.

The Court\footnote{Decision of the Constitutional Court, without rationale and not published at the time when the article was composed. The document is available online on www.ccr.ro.} stated that the provisions of Article 25 par. (5) of the Code of Criminal Proceedings, with reference to the provisions of Article 16 par. (1) letter f) of the Code of Criminal Proceedings, are non-constitutional with regard to the unsettlement of the civil action by the criminal court in case that the criminal trial stops as a consequence of the intervention of the prescription of criminal liability, considering that the criticised legal texts infringe the right to a fair trial of the person who suffered the prejudice or his/her successors, who become a civil party in a criminal trial, and in this way it is at conflict with the provisions of Article 21 par. (3) of the Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

As a matter of fact, the provisions of Article 21 of the Constitution regarding free access to justice reiterate in fact the provisions of Article 6 of the Convention with regard to the right of every person to appeal to justice for the defence of his/her rights, freedoms and legitimate interests, having at the same time the right to a fair trial and the settlement of cases within a reasonable period of time.

Therefore, according to the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

We consider however that, with regard to the latter decision of the Constitutional Court, the unsettlement of the civil action in the criminal trial, as regards the lapse of the time for the prescription of criminal liability as resulting from the provisions of Article 16 par. (1) letter f) of the Code of Criminal Proceedings, does not infringe the right to a fair trial as long as the civil party can bring the action to a civil court for the repair of prejudice as the legislator provided in the text of Article 19 par. (4) of the Code of Criminal Proceedings that “the civil action is settled within the criminal trial if this will not lead to an unreasonable duration of the trial”.

For that matter, as directly resulting from Article 6 par. 1 of the Convention, this text refers to breaches of rights and obligations of a “civil nature”, as well as to “any criminal charge”, so that the right to a free trial may be considered with two meanings: in its broad meaning, one could say that it includes all guarantees established by Article 6 of the European Convention of Human Rights, such a global approach being justified by its unity of regulation, giving the fact that these paragraphs substantiate the general right to a fair trial both in civil and criminal matters, and on the other hand, in its narrow meaning, we consider that the provisions of Article 6 par. 2 and 3 are specific guarantees of the right to a fair trial in criminal matters.

For the reason that: “civil rights and obligations” and “criminal charges” are not defined by Article 6 par. 1 of the Convention, the intervention of the European Court of Human Rights was necessary for clarification.

Therefore, in connection with “civil rights and obligations”, the Court judges that the notion “content of the right” in a litigation is analysed by reference to the provisions of the Convention and to the national legal norms by considering the “autonomous nature” of the notion, any other solution risking to lead to results that are incompatible with the provisions of the Convention\footnote{See Pătulea V., Proces echitabil, Jurisprudența comentată a Curții Europene a Drepturilor Omului (A Fair Trial. The Jurisprudence of the European Court of Human Rights Commented), Institutul Român pentru Drepturile Omului, Bucharest, 2007, page 9. The document is available online on www.irdo.ro.}.

The right to indemnification formulated in the civil action connected with the criminal one was also the object of consideration by the Court with regard to the applicability of Article 6 par. 1 of the Convention, as it is known that in such cases the right to indemnification comes from a crime that was committed, which is also an act “causing prejudices”, and with the capacity of a civil party in a criminal trial, it envisages not only the criminal conviction of the author of the crime, but also the pecuniary repair of the prejudice suffered.\footnote{Idem, page 16.}

Also in this context, it is necessary to add the first objective which is found also in the content of the Rationale of the Draft Code of Criminal Proceedings, referring to setting up a legislative framework for a quicker and more efficient, and consequently less expensive, criminal trial, and in relation to the civil action, the legislator provided in the new Code of Criminal Proceedings that the civil action can be executed within the criminal trial only if this does not lead to an unreasonable time of the trial.
3. CONCLUSIONS

Although the Romanian legislator stated in the provisions of the Code of Criminal Proceedings that the civil action shall be settled by a civil court, in case of the prescription of criminal liability, we can see that the ECHR jurisprudence has already expressed its view on its settlement, but still within the criminal trial, upon the prescription of criminal liability.

Notwithstanding that our arguments with reference to the ECHR jurisprudence in this matter are aligned with those of the Romanian legislator, we are assured that from now on we can see other exceptions of non-constitutionality being raised with regard to the settlement of the civil action by another civil court also with reference to the provisions of Article 16 par. (1) of the Code of Criminal Proceedings, but with regard to the solution of closing the criminal trial as a consequence of the death of the suspect or the defendant or the winding up of a legal person as suspect or defendant.

REFERENCES

THE CRIMINAL LIABILITY OF A LEGAL PERSON FOR ACTS OF CORRUPTION

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Abstract: Legal persons may be involved sometimes in committing corruption offences, especially in commercial transactions, and in practice it is quite difficult to prosecute natural persons acting on behalf of a legal person, considering the size of companies and the complexity of their activity, and sometimes the corruption practices continue even after the application of deprivation of liberty sanctions to the members of its leadership, giving that the company is not affected by individual sanctions. This is the reason why it is appropriate to analyse the opportunity to incriminate some acts committed by legal persons as corruption offences.

Keywords: corruption offences, criminal liability, natural person, legal person

1. Overview of the corruption phenomenon

There have been many corruption scandals over time that shattered big powers of the world such as the United States of America, Russia, France, Italy, and Japan. Corruption scandals reverberated also in developing countries due to the involvement of governments from developed countries.

We can see that today the generalised corruption phenomenon tends to be associated with generalised and persistent poverty, some countries remaining poor because they are corrupt, because where the legitimate alternatives for payments are insufficient, the incentives for making and demanding payment are even bigger. In countries where the degree of corruption is high in economies where competition is low, the antitrust policies are deficient, and the markets are dominated by a few big companies.

These ideas are confirmed by a careful analysis of the present tendencies at international level, both with regard to the legislative aspect, and the aspect of the bodies involved in the prevention and control of the corruption phenomenon.

Therefore, the provisions of Article 3 of the second Protocol of the Convention on the Protection of the European Communities’ Financial Interests stipulate the obligation of the Member States to take the necessary measures related to the criminal liability of legal persons for committing three categories of offences: fraud, active corruption and money laundering.

In the same line, the provisions of Article 2 of the O.E.C.D. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions developed in 1997, also set the obligation for the signatory states to take such measures as may be necessary to include in its legal norms provisions related to the liability of a legal person in case of committing a corruption offence.

Moreover, the provisions of Article 18 of the Criminal Law Convention on Corruption, adopted by the Multidisciplinary Group in the Action Programme against Corruption from 1999 recommends to each party to

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129 O.E.C.D. is an international body established in 1960, its members are 30 countries and its object is to carry out economic and social research by gathering and analysing information referring to economic development and financial stability of countries. Romania is not a member of OECD, but the Government Decision 1607/2004 (Published in Monitorul Oficial no. 932 of 12 October 2004) established the Romanian O.E.C.D. Centre for Information and Documentation and an Information and Documentation Point at the Ministry of Foreign Affairs. The fight against corruption has been a constant priority of the activity of this international body.
adopt the necessary legislative measures to ensure that legal persons can be liable under criminal law for offences of active corruption, trading in influence and money laundering, determined on its grounds, in case that these offences are committed on behalf of the legal persons by a natural person acting either individually, either as a member of a body of the legal person within which the natural person exercises leadership responsibilities manifested in the power to represent the legal person, making decisions and exercising control within the legal person. At the same time, the provisions of point 3 of the same Article of the Convention brings under regulation the responsibility of the legal person which does not exclude the criminal prosecution of natural persons in their capacity of authors, instigators or accomplices to corruption offences, in this way making a plurality of the criminal liability of the legal person and that of the natural person who has responsibilities within the legal person and participated in committing the offence as author, co-author, instigator or accomplice\textsuperscript{132}.

With regard to the incrimination of corruption acts, the effort to adopt some legal norms which incriminate such acts paid off with the entry into force of Law 286/2009 on the Criminal Code and the change and completion of Law 78/2000 on preventing, discovering and sanctioning acts of corruption\textsuperscript{133}, and thus the incrimination of corruption acts committed by a legal person as active subject of these categories of offences becomes necessary.

2. The criminal liability of a legal person

With regard to the criminal liability of a legal person who committed a crime, there were some controversies in the criminal doctrine as to whether a legal person can be considered the active subject of a crime. Therefore, two tendencies have existed, namely the negative thesis based on which legal persons do not have their own existence, being rather a creation, a fiction of the law, and according to this thesis companies cannot commit crimes, and an affirmative thesis supported based on the theory of reality and according to this thesis legal persons represent a reality, being entities provided with their own will and conscience.

So, for the criminal liability of the legal person who committed a crime it is necessary that the act to be committed by a natural person with a form of guilt required by the incrimination norm, but imputable to the legal person\textsuperscript{134}.

In matters related to the engagement of criminal liability of legal persons for corruption offences we mention that there were provisions about the liability of the legal person in the previous Criminal Code too.

Therefore, the Article 19\textsuperscript{1} of the Criminal Code provided that “legal persons, except for the State, public authorities and public institutions carrying out an activity that cannot be an object of the private domain, are liable under the criminal law for crimes committed in carrying out their object of activity or in the interest of or on behalf of the legal person, if the act was committed with a form of guilt stipulated by the criminal law”. Here we can mention companies, and also other legal persons under private law (for example, associations, foundations, unions, political parties, employers’ organisations), as well as legal persons for which subsequent to the crime committed, a nullity of establishment procedure is found, this fact resulting also from the provisions of Article 58 al of Law 31/1990 on Companies\textsuperscript{135}. On the other hand, a legal person in the course of being established could not be liable under criminal law for committing a crime. The provisions of Article 19\textsuperscript{1} of the Criminal Code specified that the State, and public authorities and public institutions with activities that are not objects of the private domain are excepted from criminal liability.

Provisions referring to the liability of the legal person are also found in Article 135 of the Law 286/2009 on the Criminal Code, which compared to the provisions of Article 19\textsuperscript{1} of the previous Criminal Code are superior as this article includes the provisions of paragraph (2) stipulating that the public institutions are not liable under the criminal law for crimes committed in carrying out an activity that cannot be an object of the private domain.

In case of corruption offences, the provisions of Law 301/2004 on the Criminal Code\textsuperscript{136}, according to the dispositions of Article 313 on sanctioning the legal person, mentioned that the legal person can be liable under the criminal law for committing offences stipulated by Article 309 (bribery) and 312 (trading in


\textsuperscript{133} Published in Monitorul Oficial no. 219 of 18 May 2000.


\textsuperscript{135} Published in Monitorul Oficial no. 126-127 of 17 November 1990.

\textsuperscript{136} Published in Monitorul Oficial no. 575 of 29 June 2004, abrogated by Law 286 of 2009 on the Criminal Code (Published in Monitorul Oficial no. 510 of 24 July 2009).
influence), and these dispositions are no longer found in the Law 286/2009 on the Criminal Code, while provisions for that matter are found neither in the Law 78/2000 on preventing, discovering and sanctioning acts of corruption\textsuperscript{137}, nor in the Law 187/2012 for the application of Law 286/2009 which brings changes and completions to the Law 78/2000.

On the other hand, the bribery offence\textsuperscript{138} cannot engage the criminal liability of a legal person, because this offence, according to the incrimination norm, can only be committed by an official in the meaning of the law, and in a situation where a briber acts in the interest of or on behalf of a legal person, the briber can be liable under the criminal law for the bribery offence and the legal person shall be liable in capacity of moral person.

To know who the persons who committed crimes are and for their operative identification, the Law 290/2004 on Criminal Record organised the computerised criminal record within the Ministry of Administration and the Interior, which was changed in 2009 given the need to transpose the Decision 2005/876/JAI and Decision 2009/315/JAI on the organisation and the content of exchange of information extracted from the criminal record which imposed also a record of legal persons for which a conviction or other measures with a criminal or administrative character were disposed.

3. Special procedures for the prosecution and trial of corruption acts

As we previously stated, the bribery offence cannot engage the criminal liability of a legal person\textsuperscript{139}, however in a situation where a bribery offence is committed and the briber acts in the interest of or on behalf of a legal person, it is possible that the briber is liable under the criminal law for committing the bribery offence along with the legal person that shall be liable in capacity of moral person. So it is considered that the criminal liability of a legal person appears a need of today’s society when the crime phenomenon involving legal persons has become widespread lately\textsuperscript{140}.

With the provisions of Law 83/1992 on the urgent procedure for the prosecution and trial of some corruption offences\textsuperscript{141}, regulation was provided for an urgent procedure for the prosecution and trial of taking bribe, offering bribe, receiving undue interests and trading in influence (in the manner in which these acts were incriminated the Criminal Code of 1968).

The procedure for the prosecution of corruption offences as they were regulated in the previous Criminal Code differed as to whether or not they were flagrant. In case that the offences were flagrant, their criminal prosecution was in compliance with Articles 465 - 479 of the Code of Criminal Proceedings\textsuperscript{142} through an urgent procedure, and in case that they were not flagrant, the prosecution was in compliance with a procedure characterised by celerity, where the criminal prosecution was carried out in 10 days at most from the date when the prosecuting bodies were informed, and the judgement of corruption offences took place in accordance with the norms of a procedure especially established for some flagrant crimes, provided for in Articles 471 - 479 of the Code of Criminal Proceedings.

After the entry into effect of Law 78/2000, the scope of corruption offences was extended, and besides the corruption offences incriminated by the provisions of the Criminal Code, other offences assimilated to corruption offences were also incriminated, as well as offences against the financial interests of the European Union, while the Article 21 provided a regulation for the procedure for their prosecution and trial. Therefore, if they were flagrant offences, they were prosecuted and judged according to the provisions of Article 465 and Articles 467 - 479 of the Code of Criminal Proceedings (the urgent procedure for some flagrant offences), and if they were not flagrant, the prosecution and trial were according to the common law procedure.

The provisions of Article 27 of Law 78/2000 brought under regulation the possibility for the prosecutor to authorise, for a period of 30 days at most, the surveillance of the bank accounts and accounts assimilated to bank accounts, the surveillance or interception of communications, access to information systems, communication of deeds, bank documents, and financial or accounting documents.

For sound reasons, the authorisation provided for in Article 27 paragraph 1 of Law 78/2000, changed and completed, could be extended, on the same conditions, and every extension could not exceed 30 days. The

\textsuperscript{137} Published in Monitorul Oficial no. 219 of 18 May 2000.


\textsuperscript{140} M. Gorunescu, I. A. Barbu, M. Rotaru, the work above, page 287

\textsuperscript{141} Published in Monitorul Oficial no. 173 of 22 July 1992.

\textsuperscript{142} The Code of Criminal Proceedings, adopted in 1968, republished in Monitorul Oficial no. 78 of 30 April 1997.
maximum duration of the measures stipulated by Article 27 paragraph 1 letters a) -c) of the Law 78/2000, changed and completed, was 4 months.

In the course of the trial, the court could dispose the extension of measures stipulated in Article 27 paragraph 1 of Law 78/2000, changed and completed, through a grounded conclusion; the provisions of Articles 91-91³ of the Code of Criminal Proceedings were applied accordingly.

In the same context, in case there were clear and concrete signs that an official committed or is going to commit an offence such as bribery, stipulated by Article 254 of the previous Criminal Code, receiving undue interests, stipulated by Article 256 of the previous Criminal Code, or trading in influence stipulated by Article 257 of the previous Criminal Code, the prosecutor could authorise the use of an undercover investigator or investigators with their real identity in order to discover the acts, identify their authors and obtain the evidence, according to the dispositions of Article 26¹ paragraph 1 of Law 78/2000.

In case that the corruption offences, the offences assimilated to them, the offences in close connection with corruption offences or the offences against the financial interests of the European Communities were flagrant, the criminal prosecution and trial procedure were carried out in accordance with Articles 471 - 479 of the Code of Criminal Proceedings (the urgent procedure applied to some flagrant crimes). Otherwise, if the corruption offences, the offences assimilated to them, the offences in close connection with corruption offences or the offences against the financial interests of the European Communities were not flagrant, the prosecution and trial were carried out according to the common law procedure.

For the trial of corruption offences and offences assimilated to them, provided by Law 78/2000, it was possible to establish specialised panels, while for corruption offences according to the 1968 Criminal Code, the court had material competence¹⁴³. Law 135/2010¹⁴⁴ on the Code of Criminal Proceedings does no longer provide a distinct regulation of a special procedure for some flagrant crimes.

With the Law 187/2012 for the application of the Criminal Code and change and completion of some norms which include criminal provisions¹⁴⁵, in order to bring the current criminal legislation in line with the provisions of Law 286/2009 on the Criminal Code, a few changes were adopted also with regard to Law 78/2000 for preventing, discovering and sanctioning acts of corruption.

Therefore, the categories of offences brought under regulation by Law 78/2000 are the corruption offences provided by Articles 289 - 292 of the Criminal Code (taking bribe, offering bribe, trading in influence, buying influence), offences assimilated to corruption offences provided by Articles 10 - 13 of Law 78/2000 and offences against the financial interests of the European Union.

Given the fact that Law 135/2010 on the Code of Criminal Proceedings does no longer regulate distinctly a special urgent procedure for flagrant crimes, through the abrogation of Article 21 of Law 78/2000 which makes a distinction, depending on the flagrant or non-flagrant character of corruption acts, between the application of the special urgent procedure and the application of common law procedure, the legislator has no longer provided a special urgent procedure, but only some special dispositions expressly provided by law.

On the other hand, with the adoption of the Law for the application of the Code of Criminal Proceedings, the provisions of Articles 26¹, 27 and 28 of Law 78/2000 were also abrogated, their abrogation being necessary in order to bring the legislation in line with the provisions of Law 135/2010 on the Code of Criminal Proceedings, so much the more as according to the dispositions of Article 139 of the Code of Criminal Proceedings, technical surveillance is disposed by the judge of rights and liberties (among others, also in the case of corruption offences and offences against the financial interests of the European Union), where “technical surveillance” means the use of one of the following special surveillance or investigation special techniques: interception of calls and communications; access to a computer system; video, audio or photographic surveillance; localisation or watching with technical means; and requesting and obtaining, in compliance with the law, data referring to financial transactions, as well as personal financial data.

We can conclude that, with regard to corruption offences, even if there is no more discussion about a special urgent procedure, which ensures celebrity in solving cases involving this type of crimes, we can say that in the case of an active subject - legal person - the prosecution and trial of cases are carried out according to the provisions of Articles 489 - 503 of the Code of Criminal Proceedings, regarding the procedure for the criminal liability of the legal person.

¹⁴³ G. A. Radu, the work above, page 126.
¹⁴⁴ Published in Monitorul Oficial no. 486 of 15 July 2010
¹⁴⁵ Published in Monitorul Oficial no. 757 of 12 November 2012
4. Conclusions

In the context of changes in international legislation, given the need to bring the criminal legislation in line with the European legislation in corruption matters, Romania made efforts for the adoption of Law 78/2000 on preventing, discovering and sanctioning the acts of corruption in order to counteract the illegal activity of some categories of persons who, standing on their positions and responsibilities, break the law for the purpose of acquiring for themselves or for other people money, goods or other material interests.

For this purpose, it is now necessary to analyse the opportunity of incriminating the acts of corruption committed by the legal person as an active subject of these categories of offences, as well as their criminal liability based on the provisions of Law 135/2010 on the Code of Criminal Proceedings.

References

ASPECTS REGARDING THE STATUS OF THE HUMAN EMBRYO AND THE ISSUES ASSOCIATED WITH THIS MATTER AT INTERNATIONAL LEVEL

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Abstract

The purpose of this article is to bring to the fore the complex issue of using assisted reproductive technology (ART) by people who want to become parents, especially with regard to the production and use of embryos through the procedure of in vitro fertilisation (IVF). A significant aspect engendering controversy in the area of protection of human rights is the legal status of the human embryo, due to its feature of a potential human being.

Technological progress in contemporary society has opened and will continue to open new dimensions in the area of biotechnology research in the medical field. Human life can be created in vitro by the fertilisation of an ovum by a spermatozoon, and the embryo created in this way will be implanted in the uterus of the future mother where it can continue its evolution. However, not all embryos created for a reproductive purpose will be implanted in a woman’s uterus, and they can remain cryopreserved in the laboratories where they were created, or they can be donated to another couple, or used for research purposes or they can be even destroyed. For this consideration, it is necessary from a legal point of view to adopt a consistent legislative framework at European and international level in order to ensure the appropriate legal protection for the human embryo, both with regard to its use for procreation purposes, and for carrying out scientific research.

Keywords: bioethics, the right to life, the right to private life, embryos, human being status, assisted reproductive technology, the legal status of embryos, legal protection, CEDO – Parrillo v. Italy, the right to dispose of embryos

1. LEGAL STATUS OF THE HUMAN EMBRYO. INTRODUCTORY ASPECTS

The issue of assisted reproductive technology (ART) used for human reproduction is at present an object of research at national, European and international level, both for jurists, and for doctors. The phenomenon is continuously developing and there are different levels of concern about and interest in this matter depending on the degree of development of scientific knowledge is in different countries.

In Romania, we can say there is a singular regulation referring to “assisted human reproduction with a third donor”, this matter being settled in Section 2, Chapter 2 “Lineage”, Title 3 “Kinship”, Charter 2 “About Family” of the Civil Code. This regulation contains details regarding the implications of using assisted human reproduction with a third donor for the future parents. In the current national legislation, there are no concrete regulations regarding the technology for in vitro fertilisation, a technology which is used to create human embryos in laboratory. Instead, at international level, in countries such as the United Kingdom, Canada, U.S.A., France etc., there is an appropriate legislative framework for the assisted reproductive technology, and current


147 The provisions of Article 441 paragraph (3) of the Civil Code with regard to the lineage regime define the concept of “parents” as follows: “Parents, with the meaning used in this Section, can only be the man and a woman or a single woman”. We can see that the right of a single man to use assisted reproductive technology with a third donor is forbidden, and as a consequence the man cannot appeal to in vitro fertilisation with a surrogate mother, where the mother carrying the pregnancy is artificially inseminated with the sperm of that man or an embryo was transferred to her uterus (the ovum belongs to a third donor, and the sperm to the man who wants to become a parent or to a third donor). For example, the situation of a man who after the death of his wife does not want to marry another woman, but he wants to have a child genetically related to him and not an adopted child. However, in this situation, the single man (the widower) will have the possibility to appeal to a surrogate mother if, prior to the death of his wife, the two appealed to a fertilisation clinic and decided to cryopreserve a number of embryos for a possible future transfer. Therefore, the man will not appeal to a third donor since the surrogate mother is not a third donor, and the embryos used in the embryo transfer were not obtained from involvement of a third donor.

148 Some of the most used procedures of assisted reproductive technology for human reproduction are: artificial insemination, in vitro fertilisation, assisted human reproduction with a third donor, surrogacy. For a more detailed presentation of these procedures, see: Charles P. Kindregan, Jr., Maureen Mc.Brien, Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science, Second Edition, ABA, 2011; Nicoleta-Ramona Predescu, Legal aspects regarding assisted reproductive technology, published in the volume The International Conference “Education and Creativity for a
issues are far more complex and are concerned with the use of embryos for research purposes with a view to the diagnosis and treatment of some diseases or in order to obtain stem cells. Moreover, the surrogate, the euthanasia, the post-mortem reproduction, the reproductive cloning raise ethical, legal and social issues, both at doctrine level, and at legislative and jurisdictional level.

Considering the complexity of this phenomenon, we thenceforth undertake to analyse some aspects related to the legal status of the human embryo, especially with regard to the moment when the embryo acquires the status of human being, the right of parents to dispose of the embryos in vitro and the special protection that must be conferred to them with reference to the European and international legislation in force and in continuous dynamics.

Our endeavour can be encompassed in the fundamental concept regarding the answer which should be formulated to the question: “What human embryo in vitro is?”. For this matter, there is no unitary doctrine-based answer and there is no uniform regulation, and jurisprudence is consequently different.

2. THE RIGHT TO LIFE AND THE STATUS OF POTENTIAL HUMAN BEING ASSIGNED TO THE EMBRYO

A particularly important aspect that attracts the interest of researchers worldwide with regard to the human embryo created in vitro refers to the protection of human life as provided by declarations, conventions, pacts etc. that were adopted at international level.

First, the protection of human life is ensured by the dispositions of Article 3 of the Universal Declaration of Human Rights149 which stipulates that “Everyone has the right to life [...]”. Moreover, the European Convention on Human Rights150 states in Article 2 that “Everyone’s right to life shall be protected by law [...]”, and Article 6 of the International Covenant on Civil and Political Rights151 sets out that “Every human being has the inherent right to life [...]”. The application of these international regulations refers to the idea that the holder of non-patrimonial rights is the human being, meaning the human person152.

With reference to the legal status of the human embryo, the following questions arise naturally: “At what moment does an embryo become a person?”, “At what moment does it become protected by human rights?” or moreover, “Can we assign to the embryo the status of a “person”? In the specialist doctrine an opinion153 has been formulated saying that a human embryo could be assigned a new status, that of a “semi-person”, and since the time of birth it acquires the status of “human person”.

As a general rule, in the world of science, the conclusion154 was that the moment of conception is the moment when the human being begins his/her existence, although there is also an opinion in the specialist literature155 saying that human life begins before fertilisation since the ovum is “alive” before being fertilised by the spermatozoon. Similarly, the dispositions of Article 36 of the Civil Code in matters related to the natural person underlines that “the rights of the child are recognised since his/her conception”, but only with the condition that he/she is born alive.

Considering the procedure of in vitro fertilisation which involves, strictly determined, several phases156 - ovary stimulation, collecting the ova, fertilisation and embryonic transfer (ET) – it is necessary to clarify that the period between the moment of fertilisation of the ovum by the spermatozoon in laboratory (the moment of conception) and the moment of the embryonic transfer can be quite long157, like months and even years, and for

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152 The expression “human person”, according to national regulations, envisages the natural person as a holder of non-patrimonial rights.

153 On this matter: C. Marco Mazzoni, Real Protection for the Embryo, in Revista de derecho y genoma humano nr. 22/2005, page 115.

154 In this line: http://naapc.org/why-life-begins-at-conception/, visited on 19 October 2016.


157 For example: the situation of a woman who, following her doctor’s recommendations, needs to get some particular treatment and only after that treatment the transfer of the embryo can take place (in the case of patients diagnosed with cancer who need to be given a cytostatic drug treatment) or the situation when the embryos are frozen in order to test them for some diseases, for example, testing embryos for HIV can be done in 6 months.
this reason the embryos that were created are cryogenized. Therefore, from a legal point of view, a question arises: which is the moment of conception, the moment when the ovum was fertilised in the laboratory by the spermatozoon or the moment when the embryo is implanted in the mother’s uterus; where does it continue its evolution from?

It is important to know the moment of conception, so much the more as the legislation, both national and international legislation, seems to be quite explicit about providing protection to the human being ever since his/her conception. Moreover, even with the adoption of the Declaration of Geneva by the World Medical Association in 1948 there is this statement that “I will maintain the utmost respect for human life from the time of conception [...]” reinforcing in this way the idea of protection of human rights.

In the same context, we must say that there are also other opinions. Therefore, the French National Consultative Ethics Committee concluded that the embryo and the foetus are potential human persons, so the embryo acquires the biological quality of human being, but from a legal point of view it receives this status only as potentiality.

In the law of the United States of America it is provided by statute that embryos are not persons from a legal point of view from the moment of their conception. From the moment when it is transferred in the uterus, an embryo is considered to have human potential, but even when it becomes a viable foetus there is no recognition of a legal status equivalent to that of an already born person.

It is easy to understand that it is necessary to protect the human embryo due to its potential of becoming a human, but if we extended in this manner the protection offered to the human person to beings that are not born yet, the whole notion of “human being” would then acquire a new meaning.

Another significant distinction referring to the legal status of the human embryo is that between conferring to it the status of a “good” or the status of a “person”: As shown above, there is no recognition of a legal status of “human person” for the embryo, but the embryo is recognised as “potential human person”. Starting from this point, if we assigned to the embryo the status of a good, consequently we should recognise also the right of ownership of those who hold it (the couple, mother, father), with all the consequences of the right of ownership. Or the human embryo enjoys a distinct position compared to other goods or other tissues or parts of the human body precisely because of the possibility for the embryo to become a human, meaning its potential to become a human being.

Surely, classifying the human embryo with an entity especially created for this purpose, as a middle-ground solution between “good” and „person” would represent a very important step towards the unification at international and European level of divergent opinions regarding the legal status of the embryo, and this would facilitate considerably the assisted reproductive technologies.

3. THE RIGHT TO DISPOSE OF THE HUMAN EMBRYO

To continue the statements made in the previous section, another series of controversies at European and international level is concerned with the right of the future mother/ couple/ future father to dispose of the embryos conceived through the procedure of in vitro fertilisation. More precisely, in the situation where the embryos created for a reproductive purpose were cryogenized for a future transfer, those who appealed to this procedure have the possibility to dispose of the embryos, meaning to use them for obtaining pregnancy, to donate them to another infertile couple, to donate them for research purposes, to destroy them or, obviously, to let them frozen until they are no longer viable.

Most of the times the solutions presented above are encountered when there is a surplus of embryos, more precisely when after a successful IVF (which resulted in the birth of a child), and the parents no longer wish to...
use the remaining embryos and they find themselves in a situation where they have to decide what will happen to them.

With regard to the right of parents to dispose of the embryos created after an IVF procedure, the Grand Chamber of the European Court of Human Rights expressed its opinion in 2015, in the case Parrillo v. Italy. More exactly, the case is about the donation of the embryos in vitro for research purposes. The Court stated that in this case there was no infringement of Article 8 of the European Convention on Human Rights, with reference to the right to private life of the applicant and there was also no infringement of Article 1 of the Protocol 1 of the Convention referring to the right of ownership of the applicant.

The case refers to the situation of a woman (A. Parrillo), aged 48 who, together with her partner decided in 2002 to use the IVF treatment, and following the treatment five embryos were obtained and they were cryogenized in order to be used in a future implantation. In 2003, the partner deceased before the embryos were implanted, and the woman decides that she no longer wishes to implant them and that she wants to donate them for research purposes. In 2011, she addresses ECHR directly, being not content with the national Italian legislation (Article 13 of Law 40/2004) which forbade the donation of embryos for research, and considering that her right to private life and the right of ownership of the five embryos were infringed by the Italian state.

With regard to the right of ownership of the embryos invoked by the applicant, the Court considered that the human embryo is not a good, due to the fact that it has no patrimonial or economic value. Moreover, in the separate opinion formulated by several judges, they affirm that the connection between those who used IVF to create embryos and the embryos created in this way is such that “the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person’s genetic material and biological identity”.

Referring to the infringement of the right to private life provided for by Article 8 ECHR by denying the right to donate the embryos obtained through IVF to scientific research, the Court retained that the ability to have an option referring to what will happen to the embryos represents an aspect of the personal life of the potential mother which is closely connected to the right to self-determination. The five judges mentioned in their separate opinion that “prospective parenthood is not an issue in this case; the applicant’s right to ‘self-determination’ as an aspect of her private life simply does not arise”.

What has importance in this case is the separate opinion of the judge Dedov, who affirms that: “The embryo’s right to life cannot be called into question by the fact that, until implantation, its potential for development is something that can be maintained artificially, because any such new technology is a natural development created by human beings”.

Moreover, the judge Sajó, in a separate opinion, stated that the intention of a state to protect potential human life is not equivalent to the rights conferred to a person.

Essentially, the Court retained that there was no infringement of Article 8 of the Convention in this case and that the legislation of the Italian state did not affect the right invoked by the applicant.

Since a woman has the possibility to choose to interrupt the course of her pregnancy until the pregnancy is 14 weeks old, and after this moment the act is considered a crime according to the dispositions of Article 201 paragraph (1) letter c) of the Romanian Criminal Code, it is so much the more necessary to have concrete legislation which stipulates the right of a woman to destroy the embryos created after an IVF treatment, because the cryopreserved embryos are at a stage of evolution which is even more incipient compared to a stage of evolution where they were implanted in the uterus of a future mother. Of course, one should also take into account that the embryos are less likely to reach their maturity.

Otherwise, the Additional Protocol to the Convention on human rights and biomedicine, referring to the forbiddance to clone human beings, signed in Paris on 12 January 1998 includes provisions referring to the forbiddance to create human embryos for research purposes. (Article 18)

Indeed, the issues raised in the field of research of human embryos requires that the states (parliaments and governments) adopt some consistent and appropriate legislation, considering the potential for negative effects that research could have in the case of human genetic material, including here various areas such as human cloning, creation of beings that are clearly superior by modifying human genes etc.

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165 The entire decision is available online: https://lovdata.no/static/EMDN/emd-2011-046470.pdf
166 A separate opinion formulated by the judges: Casadevall, Ziemele, Power-Forde, de Gaetano and Yudkivska
167 § 5 Parrillo c. Italy Judgement -Separate opinion.
168 As regards the right to self-determination of the human being, we shall refer to it in a future study.
169 § 9 Parrillo c. Italy Judgement -Separate opinion.
170 § 6 Parrillo c. Italy Judgement -Separate opinion.
171 § 6 Parrillo c. Italy Judgement -Separate opinion.
172 On this matter: http://ipsaunders.blogspot.no/2013/07/the-moral-status-of-human-embryo.html
173 Ratified by Romania with Law 17 of 22 February 2001 (Monitorial Oficial no. 103 of 28 February 2001).
CONCLUSION

Scientific breakthrough in the area of medicine has opened new perspectives to humans that have lead to a better and improved life for infertile people everywhere. This fact has inevitably lead to the appearance of multiple controversies which are ethic, moral, legal and social. Even if at European level ECHR conferred solutions to controversial aspects in the area of assisted reproductive technology (ART), such as the case Parrillo v. Italy, the case Knecht v. Romania, nevertheless there is no consistency at European or international level, and the questions and debates on this topic will continue.

People’s different perceptions of life and the different stages of research of the phenomenon as a whole, but also with special regard to the legal regulation of medical and social aspects show that at present the regulations are insufficient and inconsistent as regards the definition of an appropriate legal framework for the legal status of the human embryo.

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CONSIDERATIONS REGARDING THE LEGAL ERROR IN THE REGULATION OF THE NEW CRIMINAL CODE

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Abstract
Along with the implementation of the New Criminal Code, the legislator has decided to further regulate the institution of legal error. As simple as this statement may seem, the situation is not so. During these modern times, there are still states where the institution is not regulated, or it is defective. As for the situation in Romania, the legal error can take the shape of the criminal or extra-criminal legal error. Both of them regulate situations having the same source: the incognizance of the juridical norms for several reasons. The institution is all the more important so as it regulates aspects regarding the exoneration from criminal liability but, even so, we still encounter situations, in practice or doctrine, in which opinions are not unitary, especially in the field of the criminal procedural aspects.

General considerations
The criminal law notion is, according to a first opinion, a specific branch of law that reunites the entirety of the criminal juridical norms. According to another opinion, the criminal law defines that distinct juridical science which deals with the study of the criminal law norms.

Although the notion rather knows definitions coming from several authors, we shall consider that "criminal law is a branch of our law system, and it is made up of an entirety of juridical norms legislated by the legislative power, establishing which actions are crimes, the conditions of the criminal liability, the sanctions and other measures to be enforced to the persons who have committed crimes, or taken by the courts of law, with the purpose of defending the most important social values of the rule of law."

According to certain opinions, the object of the criminal code is represented by the criminal repression relations which have been established further to committing the accusatory norms. Other authors present the situation according to which the criminal law includes dispositions regarding the social defence relations, which emerge not at the time of committing the act but prior to it, i.e. when the criminal law comes into force. As for this aspect, we mention that one can highlight the function of recommendation and claim of a conduct towards the individuals of a society in relation to the primary social values, defended by the criminal law and the criminal laws. Criminal law thus becomes a preventive instrument, not only an abatement instrument. 176

Following the preparation technique which the legislator has chosen in preparing the previous Criminal Code but also regarding the New Criminal Code, we can see that both are divided into two large sub-branches. The first one is represented by the general part which includes general norms such as: the dispositions regarding the enforcement of the criminal law in time and space, dispositions regarding crime and criminal partnership, dispositions regarding the causes removing the criminal nature of the act, such as the dispositions regarding the causes of justification and causes of non-imputability, etc. The second sub-branch regards the special part of the criminal law, and includes dispositions regarding certain acts (actions), incriminated by the criminal law, hereinafter called criminal acts.

Within the general part, in Title II, Chapter III, we find dispositions regarding certain institutions of criminal law regulating the causes of non-imputability. Among these we mention: physical constraint [art.24 of the Criminal Code], moral constraint [art. 25 of the Criminal Code], non-imputable excess [art. 26 of the Criminal Code], minority of the offender [art. 27 of the Criminal Code], irresponsibility [art. 28 of the Criminal Code], intoxication [art. 29 of the Criminal Code], error [art. 30 C. pen], and foruity [art. 31 of the Criminal Code].

In this study, we have proposed to bring light to a series of characteristics regarding certain theoretical and practical aspects related to error, especially the legal error.

Error, regarded with certain scepticism at the beginning of the implementation periods of the criminal law, has not always been an exoneration cause of the criminal liability. The specialized works in the social sciences field or those studying the human behaviour, including the cognitive functions and processes, have shown that this can have multiple causes, precisely referring to the field of the intellectual level or human genetic material.

For a long time, by enforcing the principle "nul n’est cense ignorer la loi", the legal error has been deprived of any criminal effects. "This absolute presumption of being aware of the law has been appreciated in time as being in clear contract with reality. The social life has imposed certain concessions, first coming to a differentiation of the legal error, as this refers to a criminal norm or an extra-criminal norm; only in this case can the error be permitted an exonerating effect of criminal liability. Eventually, under the pressure of the doctrine, it has come to the legislative and jurisprudential recognition of the error of criminal law".177

176 Idem. p. 3;
Legal content and characterization

The incidence of art. 30 of the Criminal Code regarding error removes the criminal nature of the act, and thus, the act provided by the criminal law, committed by the person who, at the time of committing it, was not aware of the existence of a state, situation or circumstance on which the criminal nature of the act depends, is not a crime [art. 30, align. (1)]. This criminal liability exoneration framework is also enforceable for the acts committed based on exclusive fault, which the law punishes, only if the failure to recognize the respective state, situation or circumstance is not itself the result of the fault [art. 30, align. (2)]. Moreover, the state, situation or circumstance which the offender was not aware of at the time of committing the crime shall not be considered an aggravating circumstance or an aggravating circumstantial element [art. 30, align. (3)]. All these dispositions find their enforcement also in the situation in which the incognizance aims at an extra-criminal norm of law [art. 30, align. (4)]. The act provided by the criminal law, committed further to the incognizance or wrong cognizance of its illicit nature because of a circumstance which could not in any way have been avoided is not imputable [art. 30, align. (5)].

Under these circumstances, we can define institution as the wrong representation, by the doer of an act provided by the criminal law, of the reality at the time of committing the act, a representation determined by the incognizance or wrong cognizance of reality data.

The wrong representation of reality at the time of committing the criminal act has a strong impact on the constitutive elements of the crime, of guilt in general; thus, it can even be removed if the conditions of error appear as fulfilled.178

As a source, error can originate from a complete incognizance of a state, situation or circumstance of reality in which the perpetration of the act has taken place (absolute or total ignorance), or a wrong inaccurate cognizance of such data of reality (relative or partial ignorance)179. We can see that it is required that the resultant of representing the exterior aspects lead to a total distortion of reality, not only partial, as in this case, we will no longer deal with error but maybe only with a form of guilt related to the indirect intention, because the person acting with the conscience of the uncertain cognizance of reality accepts the risk of the socially dangerous result of his act.180 "The incapacity or professional negligence which has determined the ignorance that has led to a calculation mistake or the wrong enforcement of a scientific procedure in exerting a profession or trade (engineer, pharmacist, surgeon, etc.) cannot be considered an error, as in such cases there is the legal obligation for those in question to take cognizance of the reality."181

Classification of errors

In relation to the classification of error, we shall mention that the defining elements consist in: the causes which have determined it, the object on which it is manifested, the factors which have determined it, the range of the consequences and the avoidance possibilities. Thus, we distinguish between:

Factual error and legal error (classification related to the object of error). The factual error refers to the incognizance or wrong cognizance of states, situations or circumstances on which the criminal nature of the fact depends (e.g. the age of the victim regarding the perpetration of a crime, which depends on it; the offender considers that he is attacked by a person, and considers that his attack is in the scope of self-defence). The legal error regards the incognizance or wrong cognizance of a juridical norm (e.g. in case of an earthquake, the Romanian Government issues a time-restricted Emergency Ordinance which incriminates a certain conduct, and because of the situation caused by the natural disaster, this is not known to a certain person; we could also mention the legal error in the situation in which a person, who has been acquitted within the instance of appeal regarding a certain act which (s)he committed, continues to commit that action <<thinking that it is a licit action caused by the act>> or not aware of the event>>, while the cassation recourse court has found him guilty further to retrial).

Main error and secondary error (classification related to the range of the juridical effects). The main error considers a constitutive element of crime, on which its existence depends. The secondary error refers to any circumstance which can constitute an aggravating circumstance or an aggravating circumstantial element.

Error by ignorance and error by deception (classification related to the elements which have caused the error). The error by ignorance is exclusively caused by the offender's oblivion. The error by deception is caused by a third party.

The amendable error and invincible error (classification related to the possibilities of avoiding the error). The amendable error defines the situation in which a plus of attention, vigilance or diligence would have avoided the subsequent situation. The amendable error shall remove the criminal nature of the act if this can be committed under the form of guilt of intention but, if the criminal act is incriminated and based on exclusive fault, this shall be considered a crime, and shall entail the offender's criminal liability. The invincible error forms

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180 Idem;
181 Idem, p 274;
the object of the situation in which this could not have been avoided, irrespective of how ample the offender's efforts would have been in this respect.

**Essential error and non-essential error** (classification related to the consequences which it produces). The error is essential when it constitutes a complete justification for the one in error, and its effect is the exclusion of imputability. The non-essential error appears when this cannot be regarded as a justification for the one in error. 182

**The effects of error on the aggravating circumstances**

The error does not obviously find its incidence only in what committing a crime means but this can also affect circumstances which constitute circumstantial elements in the aggravated or qualified content of a crime, or on an aggravating circumstance, and it shall consequently deprive them of effects. These effects are normatively provided by align. (3) of art. 30 which provided that the state, situation or circumstance which the offender was not aware of at the moment of committing the crime is not an aggravating circumstance or an aggravating circumstantial element. Thus, the criminal nature of the act is not removed but only its aggravated nature. If the unknown state, situation or circumstance is a circumstantial element, the effect of the error is removing the aggravating variant of the crime, however leaving the crime subsist in its simple or typical configuration. Similarly, if the unknown state, situation or circumstance is a simple aggravating circumstance, the factual error removes the aggravated nature of the act, as the aggravating circumstance is no longer taken into account when establishing the punishment for the committed crime. 183

**The legal error. Introductory notions**

Obviously, in order to better understand the institution, for starters, we shall analyse a series of historical aspects in this respect.

In relation to an international framework, we shall say that the juridical opinions are divided. On the one hand, they consecrate the idea according to which the legal error would be included in the field of responsibility, others opine that this institution belongs to the sanctioning field.

As for the Romanian criminal law, error iuris has quite a large application as compared to the notion of incognizance of the existence of the criminal law (ignoratio juris) as it also aims at the situation when the offender is in an error of interpretation of the legal dispositions, wrongly believing that his/her act is legitimate, as it it permitted by the law. 184

The juridical fundament of the legal error is not something new, as some would wrongly believe. The theory of intention and the theory of guilt in the German doctrine lay the bases of this institution.

As for the theory of intention, it is based on the idea according to which intention implies two elements: will and conscience of committing a crime. The fact that a certain person intends to cause a certain consequence is not enough in order to consider his act as being intentional but (s)he also has to know that his/her act is in the scope of an incrimination text. In this case, the offender considers both the constitutive elements of the crime, and the fact that that conduct is incriminated. In this sense, the intent also implies the cognizance of law. The essence of this theory has been expressed by a German doctrinarian who used to say that "the who does not have the conscience of committing an illicit act cannot be punished for an intentional crime" 185

As for the second theory, this is grounded on culpability, which in its turn has been approached in the doctrine from two perspectives: First of all, this would be translated by the theory of formal guilt. The supporters of this theory define intent as the provision and will to commit an objective actual act, forbidden by the law. Consequently, the legal error exceeds the content of guilt. There is no joint element between guilt, which pertains to the content of crime, and ignoratio legis, which pertains to the legal (normative) aspect of the crime. The consequence of such juridical nature is that the legal error cannot be invoked as a justificatory cause. The second theory pertaining to guilt is the so-called theory of moderate culpability, which presents the situation according to which there is no guilt without the cognizance of all the elements of crime but not knowing the law depends on the nature of the error, the ignorance or negligence regarding the licit or illicit nature of an act being defining.

Finally, it shall be mentioned that: in order to find ourselves in the scope of the legal error, there must be no doubt on the legitimacy of the respective act. Contrarily, error, under this form, loses its effectiveness, turning into a guilt of the offender of the criminal act which no longer knows an exonerating nature. 186

182 Constantin Sima, op. cit, p. 197;
183 Costica Bulai, Bogdan Bulai, op. cit, p.279;
184 http://legeaz.net/dictionar-juridic/eroarea-de-drept-penal
185 Idem;
186 Idem;
The legal error. Aspects of comparative law
The "old" ideology has not significantly changed. Thus, there are states relieving of any kind of liability the one in legal error but there are states where the legal error is devoid of effects, as we shall mention Italy's case.

The first regulation appeared in 1902 in the Norwegian criminal code regulating the institution of the legal error.

Based on the fundament of the intention theory, Switzerland also consecrated this institution. Like Switzerland, Germany also regulates the legal error based on the theory of culpability; thus, if at the time of committing the act, the offender does not have the conscience that he acts illicitly, he commits an act with no guilt, if he could not avoid this error. Just as Switzerland and Germany, the French criminal code includes dispositions regarding the legal error. The consecration of the invincible error also appears in the criminal law norms of Japan, Portugal, Spain, etc.

Of course, we said that the old ideology of the regulation has been kept. Thus, the second category of legislations expressly consecrates the principle nemo censetur ignorare legem in the criminal code. In this case, the legal error does not have an exonerating effect. The most radical case in this respect is represented by Italy, where: the judge must enforce the law, even though he finds it unjust to do so, the institution of the legal error remaining without effects. 187

The error of extra-criminal law
In order to effectively determine the influence the legal error has on the criminal liability, it is required to distinguish between the error of criminal law and the error of extra-criminal law. The error of criminal law can be translated by an incognizance or distorted cognizance of the criminal law, i.e. of a criminal disposition which provides an act as being a crime, a punishment or a rule regarding its execution. The error of extra-criminal law consists in the incognizance or wrong cognizance of a norm of law outside the criminal law; for instance, this occurs in the case of a norm of civil, administrative, tax, family, labour, etc. law, whose cognizance depends on the existence of a crime. This is possible in case the accusatory norms provide, as a constitutive element of a crime, the condition that the act be committed "unjustly" or "contrary to the legal dispositions", etc. In such situations, the guilty perpetration of the act provided by the criminal law implies being aware of the regulations of an extra-criminal law but not knowing them equals an factual error, and entails the same consequences as the main factual error, i.e. it removes the criminal nature of the act provided by the criminal law. 188 We mention the error of extra-criminal law when the offender of the criminal act is in errors regarding the dispositions of a civil law norm concerning the property transfer (thinking that this grants it a disposition right), and sells the asset, thinking that he has this right but in reality he commits an abuse of confidence.

The error of criminal law
In relation to the above-mentioned error of extra-criminal law, which is manifested under the form of the factual error, the error of criminal law refers to the illicit nature of the act.

"In order to invoke the error of criminal law, the following conditions must be fulfilled:
- committing an act provided by the criminal law;
- the offender should have been in an error of criminal law for the entire duration of executing the act;
- the error of criminal law must be invincible, which implies that the offender had been in the absolute impossibility to be aware of the criminal norm." 189

The specialised literature has stated the idea according to which there could be an error of criminal law when, because of a disaster, the Official Monitor could not be exposed to the public, or it has been published with a serious typing error (material error), or it has been cause by a jurisprudence change, by contradictory interpretations of the judiciary bodies, by an acquittal solution for an identical act, or other such situations. 190 Thus, the imputable nature of the criminal act is removed.

Criminal procedural aspects
The current regulation of error has been prepared based on the classification view of distinguishing between the error on the elements of the crime (error on typicity), and the error on the forbidden nature of the act (error on anti-juridicity), forms of error which, under the conditions provided by the law, exclude crime, and affect, as the case may be, either the subjective element of the constitutive content, or the essential trait of

187 Idem;
188 Costica Bulai, Bogdan Bulai, op. cit, p.280;
189 Constantin Sima, op. cit, p. 200;
190 Idem;
imputability. The statement resides from the Recitals of the Draft for the New Criminal Code but a series of questions may appear here, as they could be noticed by the famous Romanian criminal code authors: We wonder if the vision presented in the recitals is the only variant of interpreting the institution of error. If incidents occur, according to the dispositions of art. 30 of the Criminal Code, the criminal law shall not be considered a crime, and it is clear that, depending on the procedural phase in which the cause is found, a dismissal solution (for the criminal prosecution phase) or an acquittal solution (for the trial phase) shall be imposed but what will be the legal ground? Thus, we feel the need to precisely determine the ground on which the solution for the failure to exercise terminate the legal action shall be based on.

In the doctrine, there are two hypotheses on the analysed institution: In the first one, the dispositions of align. (1), (2) and (4) aim at the error on the constitutive elements of the crime (whether this is an factual error, or an legal error - extra-criminal or even criminal), and the disposition at align. (5) regulates the error on the illicit (anti-juridical) nature of the act (i.e. the error on a justificatory cause), which removes imputability (whether this is an factual error, or an legal error, even criminal law). In the second situation, the doctrine presents the hypothesis according to which the first four alignments of art. 30 of the New Criminal Code regulate the factual error and of extra-criminal law, the dispositions of align. (5) being dedicated to the error of criminal law, which produces its exonerating effects of criminal liability only when it is an invincible error.

We consider that the correct solution in case of acquittal for error would be grounded on the dispositions of art. 16 letter d of the Code of Criminal Procedure because it expressly refers to the causes of non-imputability, i.e. also to the hypothesis of the factual or legal error, even though at align. 1 of art. 30 of the Criminal Code one can find the phrase "the act does not constitute a crime", and at align. 5 "the act is not imputable", which might lead us to a potential acquittal based on art. 16 letter b, 2nd thesis of the Code of Criminal Procedure.

Conclusions
Of course, in relation to the Romanian principles of law, jurisprudence and doctrine, we could not conceive that the institution of the legal error would not appear as regulated in the contents of the New Criminal Code. As enumerated and presented by us, we found that any of the forms of error can find its practical applicability, and the institution does not only have a theoretical nature. Actually, it could not even find a strictly theoretical nature as the institution regulates situations of criminal liability exonerating, so it is all the more important. We consider that the legal error is an important element regarding the compliant, effective and equitable enforcement of law, and we could not conceive the absence of this institution.

As, in terms of jurisprudence, we are facing non-unitary practices in relation to the juridical ground for dismissal or acquittal, depending on the procedural phase, we consider that the High Court of Cassation and Justice must intervene by means of a Referral in the Interests of the Law, or a previous decision for solving certain matters of law.

Moreover, the social and juridical reality shows us that, although the repressive nature of justice tends to condemn any kind of criminal deviation, one must be careful in judging and sanctioning the individual actions, especially because they could actually be in the scope of the legal error. Although they are making major efforts regarding advertising and individual awareness of the entirety of the regulatory documents, especially the criminal ones, by implementing the online system of the Official Monitor, low prices of the publishing houses printing regulatory documents, and the contribution of mass-media, it is clear that the criminal law does not reach everybody’s ears, especially in villages, where the level of juridical education is much lower.

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193 Tudorel Toader, op. cit., p.81;

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THE REQUIREMENTS OF THE RULE OF LAW DEVELOPED IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

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Summary
Building on the recent Report on the rule of law, adopted by the Venice Commission at the 106th Plenary Session, this study aims at identifying, in the Constitution of Romania, the requirements that define the rule of law, as well as the role of the Constitutional Court in order to define them, develop and guarantee. The approach developed leads to the conclusion according to which the Constitution of Romania contains rules which give efficiency to these requirements whose content is constantly enriched by the acceptance of international law, with the significant contribution of the Constitutional Court. However, the list of the criteria of reference in the analysed area is neither exhaustive nor final. They are in a constantly development and new dimensions may intervene in time, with the consequence of reassessing the concept of rule of law.

Keywords: rule of law, legality, legal certainty, free access to justice, constitutional review

I. INTRODUCTION
The first article of the Constitution of Romania enshrines the general principles, which, according to the authors of its sentences, “define the citizen’s status within the national community, in other words, the vital interests of the nation, as a whole”\(^{194}\). These are reflected and developed in the other constitutional rules, and then in the infra-constitutional legislation. Among the principles embodied in Article 1 of the Constitution, the rule of law has an integration, synthesis feature, considering the multitude of dimensions, the requirements that define it. Moreover, the rule of law is a universally valid concept and the need for its accomplishment, both nationally and internationally, is generally recognized.

The abundance of meanings and the complex content of the concept of rule of law resulted in the concern of defining it and gathering, in a summary, the main criteria that characterize it. In this regard, we consider as particularly significant the actions of the Venice Commission, which adopted at the 86\(^{th}\) plenary session (March 2011), the Report on the rule of law\(^{195}\), containing a list of requirements / criteria for assessing the compliance with/ existence of a rule of law. Following the conference “The Rule of law as a practical concept”, organized by the Venice Commission on 2 March 2012, under the auspices of the UK Presidency of the English Committee of Ministers of the Council of Europe in cooperation with the Bingham Centre for the rule of law, it resulted the conclusion according to which the dynamics of the rule of law concept makes this list of criteria / requirements to be subject to a permanent enrichment. The latest document adopted in this matter was approved at the 106\(^{th}\) Plenary Session of the Commission (Venice, 11 to 12 March 2016)\(^{196}\).

With respect to the acts adopted by the Venice Commission, the Constitutional Court of Romania noted, as a principle, that they are not legally binding, but their recommendations constitute coordinates of the democratic system, which is the essence of the rule of law\(^{197}\). Thus, in this study, following the structure of the report recently adopted by the Venice Commission in this matter, we wish to identify, with effect to the Constitution of Romania, the requirements that it has held as defining for the rule of law. However, we will emphasize the role of the Constitutional Court in order to ensure their protection and guarantee

\(^{195}\) CDL-AD (2011)003rev
\(^{197}\) See Decision no. 51 of 25 January 2012, Official Gazette no. 90 of 3 February 2012.

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II. THE REQUIREMENTS OF THE RULE OF LAW

1. General presentation

The Report of the Venice Commission constituting the analysis framework of the study identifies the following dimensions / criteria of the rule of law: legality (including requirements related to the supremacy of the law, observance / compliance with the law, relationship between international law and domestic law, law-making powers of the executive, law-making procedures, exceptions in emergency situations, the duty to implement the law, private actors in charge of public tasks); legal certainty (including accessibility of legislation, accessibility of court decisions, clarity of the laws, stability and consistency of law, legitimate expectations, non-retroactivity of law, legality of criminal offences, compliance with res judicata), prevention of abuse of power, equality before the law and non-discrimination, access to justice (including independence of the judiciary, independence of judges, impartiality of the judiciary, autonomy and control of the prosecution service, independence and impartiality in respect of other legal professions / lawyers, access to courts, presumption of innocence, other aspects of the right to a fair trial, effectiveness of judicial decisions, constitutional review), other particular issues / challenges to the rule of law (in particular the issue of corruption and conflict of interest).

We find these dimensions either expressly enshrined in the Constitution of Romania, either deducted by the Constitutional Court, by way of interpretation, including the acceptance of international human rights treaties to which Romania is a party.

2. Legality

2.1 Supremacy of the law

This requirement is enshrined in Article 1 (5) of the Constitution of Romania, according to which “Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania.”

Underlining the relation between the mentioned constitutional rule and the rule of law, the Constitutional Court held, in its case-law, that the essential feature of the rule of law is the supremacy of the Constitution and the observance of the laws198 and that the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all normative acts with it199. The democratic rule of law is, par excellence, a State where there is rule of law200.

2.2 Compliance with the law

This obligation subordinated to the rule of law is enshrined in the same constitutional text of Article 1 (5) which establishes both the position of the Constitution and of the law into the domestic law, as well as the obligation to comply with them. In this regard, the Constitutional Court held that the principle of legality is a constitutional one201, so that the infringement of the law results immediately in the disregard of Article (5) of the Constitution, which provides that compliance with the laws is binding. Violation of this constitutional requirement affects implicitly the principle of rule of law enshrined in Article 1 (3) of the Constitution202.

2.3 Relationship between international law and domestic law

The Constitution of Romania comprises three texts of reference on international sources of law and their reporting to the Romanian law system: Article 11 – International law and domestic law; Article 20 – International human rights treaties; Article 148 – Integration to the European Union. Therefore, we note the existence of a constitutional text framework (Article 11), as well as the other two which comprise particular provisions for international treaties on human rights (Article 20), respectively, the European Union acts (Article 148).

Constitutional rule - framework governing the State’s obligation to carry out such and in good faith its obligations as deriving from the treaties to which it is a party and which reinforces the supremacy of the Constitution by establishing the rule according to which the ratification of a treaty containing provisions contrary to the Constitution cannot take place until its revision. The text of Article 20 of the Constitution gives expression to the imperative of the protection of fundamental rights, connecting the national regulations with the international ones in this matter in order to achieve the priority idea of the rules that ensure a higher protection of these rights, namely the application of the Constitution for the purposes of such protection. The interpretation of Article 20 of the Constitution results in two rules: the interpretation and application of the provisions regarding the citizens’ rights and freedoms contained in the Constitution must be consistent with international human rights instruments to which Romania is a party; the priority of these international regulations, in case of a conflict with domestic laws, unless the Constitution or domestic laws comprise more favourable provisions.

200 Decision no.13 of 9 February 1999, Official Gazette no. 178 of 26 April 1999
201 Decision no.901 of 17 June 2009, Official Gazette no. 503 of 21 July 2009
Article 148 of the Constitution establishes the position of the EU founding treaties and of the resulted regulations in relation to domestic laws (the provisions of the founding treaties and the other binding regulations have precedence over the provisions contrary to the domestic laws; the obligations of public authorities as a result of accession the European Union. The latter were also enshrined at infra-constitutional level, being expressly regulated by Law no. 24/2000\textsuperscript{203} on the legislative technique norms for drawing up regulatory acts, republished, which establishes in Article 22 (1) that “the legislative solutions considered in the new regulation shall take into account the European Union regulations in the matter, making them consistent with the latter”.

We underline the importance of constitutional norms cited as they provide a connection between the legal systems, particularly the importance of the provisions of Article 20, which enshrine the so-called “block of constitutionality”. In this regard, it has been noticed\textsuperscript{206} that the incorporation of international instruments on human rights into the States’ constitutions is one of the current trends worldwide and one of the ways - perhaps the most important one- by which the constitutions become “international” or “internationalized”. As a result, imposing the interpretation of the Constitution in the light of international treaties on human rights and integrating them into the block of constitutionality, meaning to give a constitutional interpretative value, the Romanian constituent legislature opted for a progressive solution as concerns the relations between conventional international law on human rights and domestic law. Thus, ratification of any international act in this matter determines an implicit amendment of the Constitution, without using the complicated and rigid procedure of a formal review.\textsuperscript{206} Moreover, Article 20 of the Constitution, as well as Article 148 (as concerns the Charter of Fundamental Rights of the European Union) provide the legal framework and basis for a continued renewal of the domestic law, meaning raising the standards of protection of fundamental rights and freedoms whose defence is the essence of the rule of law. Thus, international case-law, in particular that belonging to the European Court of Human Rights, reveals itself as an important source of law.

\subsection*{2.4 Law-making powers of the executive}

The Constitution of Romania regulates, in Article 115, the concept of legislative delegation, which is essentially a transfer of legislative powers to the executive through an act of will of Parliament or constitutionally, in extraordinary cases\textsuperscript{206}. Both as an origin and as a current constitutional consecration, the legislative delegation shall be distinguished by its exceptional status in matters of law-making. The plenitude of the law-making powers belongs to Parliament, as “the supreme representative body and the sole legislative authority of the country” [Article 61 (1) of the Constitution]. As for the Government, its fundamental role is that, “in accordance with its governing programme accepted by Parliament”, to ensure “the implementation of domestic and foreign policy” and to exercise “the general management of public administration” [Article 102 (1) of the Constitution].

Being notified with exceptions of unconstitutionality covering Government emergency ordinances and within the constitutional review \textit{a priori} of the laws approving Government emergency ordinances, the Constitutional Court ruled on the constitutional limits of law-making through emergency ordinances,\textsuperscript{207} noting that “the possibility of the Government that, in exceptional cases, it can adopt emergency ordinances, within certain limits, even in the reserved area of the organic law, cannot be tantamount to a discretionary right of the Government and, more than that, this constitutional empowerment cannot justify the abuse in issuing emergency ordinances.”\textsuperscript{208} According to the Court, regulating through ordinances and emergency ordinances is, as expressly provided in Article 115 of the Constitution, a power exercised by the Government under legislative delegation and exceeding the limits of this delegation, established by the Constitution itself, is an impermissible intrusion into the law-making powers of Parliament, in other words, a violation of the principle of separation of powers\textsuperscript{209}.

\subsection*{2.5 Law-making procedures}

The constitutional rules that establish the basic principles of law-making process were explained and developed in the case-law of the Constitutional Court. Of all the benchmarks set, we consider as particularly relevant the principle of bicameralism which has no express constitutional rules, resulting by way of interpretation. In this regard, the Court held that through the provisions of Article 61 (2), the Constitution of Romania enshrines the organization of Parliament in two Chambers and the relationships between them - regarding the performance of the functions exercised by Parliament, including with regard to the law-making power - is determined by the provisions of the entire Chapter I of Title III of the Constitution. Regarding the law-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{203} Official Gazette no. 260 of 21 April 2010
\item \textsuperscript{204} W.C. CHANG, J.R. YEH, cited work, p. 1167.
\item \textsuperscript{206} M. Safta, Constitutional Law and Political institutions, Hamangiu Publishing House 2014, p.45
\item \textsuperscript{208} Decision no. 15/2000, published in the Official Gazette of Romania, Part I, no., 267 of 14 June 2000
\item \textsuperscript{209} Decision no. 544 of 28 June 2006, Official Gazette no.568 of 30 July 2006
\end{enumerate}
\end{footnotesize}
making power, the legislative initiative belongs equally to Deputies and Senators, which involves both the right of parliamentarians to submit a legislative proposal to Parliament and their right to amend any legislative initiative submitted to Parliament. The MPs’ right to the legislative initiative leads to the right of each Chamber to decide on the legislative proposals brought before it. At the debate of a legislative initiative it participates equally, both Chambers of Parliament, observing the referral power provided for by Article 75 of the Constitution, both Chambers having autonomy in adopting legislative solutions on the initiatives to be discussed. From these principles of the bicameral system, it results that a legislative initiative may be amended or supplemented by the first Chamber notified without its decision to be limited by the content of legislative initiative in the wording submitted by the initiator, as so the decisional Chamber has the right to amend, to supplement or to abandon the initiative in question. Two criteria are essential in order to determine where legislative procedure violates the principle of bicameralism. These cumulative essential criteria are, on the one hand, the existence of major differences of legal content between the wordings adopted by the two Chambers of Parliament and, on the other hand, the existence of a special configuration, significantly different, between the forms adopted by the two Chambers of Parliament.

2.6 Exceptions in emergency situations
In this regard, we believe that they are incidental, in particular, the provisions of Article 53 of the Constitution of Romania which, accepting the limitation of certain rights and freedoms, regulate, expressly and exhaustively, the conditions under which this can occur. As the Constitutional Court noted, the exercise of a right cannot be absolute, by removing any restrictions, inherent to the existence of other rights belonging to other holders, to whom the State authority shall equally guarantee them protection. In other words, freedom – especially with the meaning usually conferred by the legal framework in whose boundaries the capitalization of law is legitimate – ceases where freedom on other subjects of law begins. The limitation of certain constitutional rights is upheld as addresses to the need to ensure the legal certainty of the rights and freedoms of others, both in the perspective of individual interests and of domestics ones or of group and the public wealth, being also a way to safeguard certain rights in situations where their exercise has an antisocial character. The essence of the constitutional legitimacy to limit the exercise of a right or freedom is its exceptional and temporary character. In a democratic society, the rule is the unrestrained exercise of fundamental rights and freedoms as the limitation is provided as an exception, if there is no other solution to safeguard the values of the State which are endangered.

In this context we should underline the capitalization of the principle of proportionality, as governed in the particular hypothesis of Article 53 of the Constitution, but also as integrated principle implicitly into the normative content of the rights and freedoms set forth in the Constitution, in the sense that any measure taken shall be appropriate - objectively able to accomplish that purpose, necessary and appropriate to the aim pursued.

2.7 Duty to implement the law
The supremacy of the law means the observance and implementation by all its recipients. The law shall be effective and the State authorities shall have the necessary tools to ensure this effectiveness. As it is revealed by the Report constituting the reference framework for this analysis, the obstacles to the effectiveness of the law can occur not only due to the actions of the authorities of its violation, but also when the quality of legislation, or rather the lack of its quality makes it difficult to apply and observe. From this perspective we should underline the role of the constitutional review as it is enshrined in Article 146 of the Constitution of Romania, which provides the opportunity to assess this quality through both an a priori and a posteriori review of the law, but of course that only upon referral and within its limits.

3. Legal certainty
31 Enshrinement
Regarding the principle of stability / legal certainty, the Constitutional Court held that, although it is not expressly enshrined in the Constitution, this principle results both from the provisions of Article 1 (3), according

210 Decision no. 1018 of 19 July 2010, Official Gazette no.511 of 22 July 2010
212 Decision no. 1 of 14 January 2015, Official Gazette no.85 of 2 February 2015
213 Decision no. 587 of 8 November 2005, Official Gazette no.1159 of 21 December 2005
214 Decision no. 245 of 27 May 2004, Official Gazette no.716 of 9 August 2004
215 Decision no.1414 of 4 November 2009, Official Gazette no.796 of 23 November 2009
217 Decision no. 270 of 7 May 2014, Official Gazette no.554 of 28 July 2014

111
to which Romania is a democratic and social state governed by the rule of law, and from the preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its case-law. The principle of civil legal certainty is a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of Article (3) of the Basic Law.

3.2 Accessibility of legislation
According to Article 78 of the Constitution, namely the provisions of Law 24/2000 on the legislative technique norms for drawing up regulatory acts, the regulatory acts shall be published in the Official Gazette. No law can take effect before its publication. For full accessibility of legislation, in the sense of the above-mentioned principle, it would require to ensure the free access to this publication, currently provided only in part (a number of days after publication).

3.3 Accessibility of court decisions
Regarding court decisions, only those delivered by the High Court of Cassation and Justice in the settlement of appeals on points of law, respectively prior decisions as to points of law are subject to publication in the Official Gazette of Romania, as they produce wider effects than the other categories of court decisions. In terms of these effects, they can be described as having the quality of indirect source of law. It is noteworthy their role in achieving legal certainty; thus, the appeal on points of law constitutes an instrument for the unification of case-law, and the prior decision as to points of law constitutes a “reactive measure against non-unitary practice”, the referral to the supreme court could lead to the prevention of certain miscarriages of justice made by the courts. We will also emphasize here, even if the Constitutional Court is a body distinct from the judiciary, that all decisions, rulings and opinions which it delivers in the exercise of its constitutional and legal powers shall be published in the Official Gazette of Romania.

3.4 Clarity of the laws
Article 1 (5) of the Constitution enshrines the principle of mandatory compliance with the laws. In order to be complied with by its recipients, the law must meet certain requirements of precision, clarity and foreseeability so that these recipients may adapt properly their conduct. In this regard, the Constitutional Court held that, in principle, any law must meet certain qualitative conditions, among them is foreseeability, which means that it must be sufficiently precise and clear in order to be applied. Thus, the wording with sufficient precision of the law enables the concerned parties - who can call, if necessary, to expert advice - to foresee a reasonable extent, in those circumstances, the consequences which may result from a determined act. Of course, it may be difficult to draft totally precise laws, with a certain flexibility which may even prove desirable. However, such flexibility should not affect the foreseeability of the law. The development of this requirement was achieved in particular by accepting the case-law of the European Court of Human Rights, frequently invoked by the Constitutional Court in its decisions. We consider important to reveal the connection made by the Constitutional Court does, through Article 1 (5) of the Constitution, with the legislative technique norms for drawing up regulatory acts which, although “they are not constitutional, (...) by their regulation, the legislature imposed a series of binding criteria for the adoption of any regulatory act, whose observance is necessary in order to ensure systematization, uniformity and coordination of the laws, as well as the appropriate content and legal wording for each regulatory act. Thus, the compliance with those rules contribute to ensuring laws complying with the principle of legal certainty, having the necessary clarity and foreseeability”. Therefore, “non-compliance with the legislative technique norms results in certain situations of inconsistency and instability, contrary to the principle of legal certainty in its component relating to clarity and foreseeability of the law”.

3.5 Stability and consistency of law. Legitimate expectations
The recitals underlined above are equally applicable in respect of requirements related to the stability and consistency of law. The existence of certain contrary legislative solutions and the cancellation of certain legal provisions through other provisions contained in the same regulatory act lead to the infringement of the principle of legal certainty because of a lack of clarity and foreseeability of the rule, a principle which constitutes a fundamental dimension of the rule of law, as it is expressly embodied in the provisions of Article (3) of the Basic Law.

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222 Decision no. 448 of 29 October 2013, Official Gazette no. 5 of 7 January 2014
223 Decision no. 26 of 18 January 2012, Official Gazette no. 116 of 15 February 2012
3.6 Non-retroactivity of the law

The principle of non-retroactivity of the law, except for the criminal law or the more favourable criminal law, is enshrined in Article 15 (2) of the Constitution and has the main role to ensure stability and legal certainty. Only a foreseeable rule can clearly determine the conduct of the subjects of law, the recipients of the law. Therefore, a law, once adopted, take and must take legal effects only for the future. It has been found that it is absurd to claim a subject of law to take responsibility for behaviours and conduct which it had before the entry into force of a law regulating such conduct. The subject of law could not foresee what the legislature will govern, and his behaviour is normal and natural if conducted within the legal order in force. Non-retroactivity of the law applies to any law, regardless of its regulatory field. The only exception allowed by the constitutional rule concerns the criminal law or the more favourable criminal law. We face a mandatory rule from which no derogation can be made in civil matters, whether of material laws or procedural laws. The consequences of the enshrinement of the non-retroactivity principle in the Constitution are very severe and perhaps that is why this solution is not found in many countries, but the elevation to the rank of constitutional principle guarantees legal certainty and public confidence in the legal system, constituting an expression of the principle of separation of powers, namely the separation between the legislative power, on the one hand, and the judiciary or the executive, on the other hand.

3.7. Compliance with the res judicata authority

For the importance granted to this principle, we want to emphasize a recent decision of the Constitutional Court on the case of review governed by Article 453 (1) f) of the Criminal Procedure Code, determined by the current legislature’s intention to give further efficiency to the constitutional review, in which it rules that the opportunity to benefit from the effects of the admission decision of the Court is required to be circumscribed to the scope of persons who caused this review, before the moment of publication of such decision, as provided by law. Emphasizing the importance of the principle of res judicata, the Court found that in order to ensure both the stability of laws and a good management of justice, it is necessary that those decided by the Constitutional Court, judicially, regarding the conditions when review may be filed, pursuant to an admission decision of the exception of unconstitutionality, to integrate into the contents of the criminal procedural rules examined in this case. Therefore, a decision finding the unconstitutionality of a legal provision must take advantage, in the wording of the appeal of the review, only that category of persons who raised the exception of unconstitutionality in cases decided definitively until the publication in the Official Gazette of the decision finding the unconstitutionality, as well as authors the same exception, invoked prior to the publication of the decision of the Court, in other cases, settled definitively. This imposes from the need for legal order and stability. The Court held that since the principle of res judicata is of fundamental importance both in domestic law and in Community law, as well as at the level of the European Court of Human Rights, its infringement through domestic legislation must be limited. This principle shall be given derogation only if substantial reasons and compelling require this aspect (Judgment of 7 July 2009 in Case Stanca Popescu v. Romania, paragraph 99, and Judgment of 24 July 2003 in Case Ryabykh v. Russia, paragraph 52). In this case, the Court finds that the substantial and compelling reason justifying derogation from the principle of res judicata is the decision upholding the exception of unconstitutionality, pronounced by the Constitutional Court. But the failure to regulate the condition that the exception of unconstitutionality has been invoked in the case in which it has been delivered the decision whose review required ex tunc effects of the Court’s judicial act, in violation of Article 147 (4) of the Constitution, determines an impermissible violation of res judicata, a breach of the principle of legal certainty - a fundamental element of the supremacy of the law, which provides, inter alia, that the solution definitively pronounced to any dispute by the courts can no longer be subject to retrial (Judgment of 28 October 1999 in Case Brumărescu v. Romania, paragraph 61).  

4. Prevention of abuse of power

In this regard, there are equally relevant both the constitutional provisions of Article 1 (4) which enshrines the principle of separation of powers, and all the constitutional provisions that establish mechanisms for cooperation and control between public authorities, including the Constitutional Court’s powers to settle constitutional legal conflicts between them (Article 146 subparagraph e of the Constitution). This is because the principle of separation and balance of powers implies a reciprocal control between the State powers in terms of exercising their specific tasks in accordance with the law, being a mechanism specific for the democratic state governed by the rule of law, in order to avoid abuse by one or other of powers.

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224 Decision no. 11 of 15 January 2015, Official Gazette no. 102 of 9 February 2015
225 Decision no. 88 of 27 February 2014, Official Gazette no. 281 of 16 April 2014
226 Decision no.126 of 3 March 2016, Official Gazette no. 185 of 11 March 2016
227 Decision no. 1109 of 8 September 2011, Official Gazette no. 773 of 2 November 2011
5. Equality before the law and non-discrimination

This requirement is enshrined as a principle in Article 16 of the Constitution, other constitutional texts containing its particular applications. Equality before the law and public authorities, enshrined as a principle in Article 16 (1) of the Constitution, is normally applicable only when the parties are in identical or equal situations, which impose and justify the same legal treatment and therefore the establishment of the same legal regime. Per a contrario, when they are in different situations, the legal regime applicable to each of them can only be different, a legislative solution that does not contradict, but rather results logically from the very principle stated. When the criterion in relation to which applies, a legal regime or another is objective and reasonable and not subjective and arbitrary, consisting of a certain situation covered by the hypothesis of the rule and not by the membership or the quality of a person in relation to whom it finds its application, therefore intuitu personae, there are no grounds in order to establish the regulation deducted as discriminatory, so contrary to the constitutional norm reference. In other words, the observance of the principle of equality does not mean the reflection into the legal norm of a full uniformity in social situations, but rather the diversity of social situations can be corrected by the legislature proportionally, to bring them to a common denominator.

6. Access to justice

The principle of free access to justice is enshrined in Article 21 of the Constitution, and gives everyone the right of access to court in order to defend its rights, as well as the right to a fair trial settled within a reasonable period of time. As the Constitutional Court noted, its mere legal enshrinement, even at the supreme level, by the Constitution, is not likely to ensure also its real effectiveness, as long as in practice it exercise faces obstacles. Consequently, access to justice must be ensured effectively and efficiently. Any restriction of free access to justice, no matter how insignificant it may seem, must be duly justified, analysing to what extent the disadvantages created by this restriction exceed the possible benefits. Access to justice is not an absolute right and may be limited by certain conditions of form and substance imposed by the legislature, by reference to the provisions of Article 21 of the Constitution. These restrictions are not acceptable if they violate the fundamental right in its substance. Therefore, the restrictions on the fundamental right are permissible only to the extent that they pursue a legitimate aim and there is a relationship of proportionality between the means used by the legislature and the aim sought by it.

In all constitutional provisions, the guarantees enshrined in Article 21 shall be supplemented by the one related to the right to equality before the law (Article 16), right to defence (article 24), the achievement of justice and the independence of judges (Articles 124 and 126), the status and role of the Public Ministry (Article 131). A special place is taken by the access to constitutional justice, the enrichment of the tasks or of the subjects that can notify the Constitutional Court, achieved during the revision of the Constitution and the Constitutional Court’s judicial activism contributed to the effectiveness of this access and to the constitutional review in general.

7. Fight against corruption and conflicts of interest

This issue constitutes one of the complex challenges in the context of the requirements of the rule of law. The increasing number of the referrals addressed to the Constitutional Court that concern incidental regulations in the matter reveals in this reality. From the recent case-law of the Constitutional Court, we mention the decision by which the Court held that the regulation as an active subject of the crime of conflict of interest to private individuals by the provisions of Article 308 of the Criminal Code is excessive, as it determines an impermissible expansion of the coercive force of the State, through the use of criminal actions on freedom of persons, circumscribed to the labour rights and economic freedom, without any criminological justification in this regard. That being so, the Court found that the phrase “or within any legal person” contained by the provisions of Article 308 (1) of the Criminal Code with reference to Article 301 of the Criminal Code is unconstitutional. As a result, at present, if the actions of individuals cause damage, civil liability may be held against them, regarding the labour law or other form of liability that does not involve the coercive force of the State by means of criminal law.

III. CONCLUSIONS

The above-mentioned benchmarks reveal the fact that the Romanian Basic Law contains rules which give effectiveness to the rule of law whose content is constantly enriched by the acceptance of international law, within the limits of the Constitution and with the support of the Constitutional Court of Romania. Thus, the

228 Decision no. 192 of 31 March 2005, Official Gazette no. 527 of 21 June 2005
229 Decision no. 349 of 24 September 2013, Official Gazette no. 708 of 19 November 2013
231 Decision no. 266 of 7 May 2014, Official Gazette no. 464 of 25 June 2014
233 T. Toader, M. Safta, Development of constitutionalism in Romania, in Constitutional Law Review no. 1/2015
234 Decision no. 603 of 6 October 2015, Official Gazette no. 845 of 13 November 2015
Constitutional Court’s decisions reveal its role as a source of law by contributing to the development of certain concepts essentially for the democratic development of the State. As emphasized by the Venice Commission in the document cited, the list of the criteria of reference for the assessment / definition of the rule of law is neither exhaustive nor final. The above requirements are revealed in a constantly development and new dimensions may intervene in time, with the consequence of reassessing the concept of rule of law.

REFERENCE
3. CDL-AD (2011)003rev
INTERNATIONAL LEASE CONTRACT

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Abstract
The role that the circuit of material and spiritual values between countries of the world has had on economic progress and development of civil society has been and will remain undeniably acknowledged.

Under this aspect, capital investments have emerged as strategically important because only in this way was it possible to create new better structures, in line with the strategic options of a market economy which continues to grow, which has led to the emergence of new forms of classical contracts. Among the legal realities of international trade, leasing proved to be the most important means of financing of investment in goods and services.

International trade analysts have pointed out that leasing is an expression of modern contracting techniques in this field. The pragmatism and effectiveness of this operation have led to the attempt of creating a uniform legal framework at international level, while the harmonization and supplementation of our current legislation, in compliance with these rules no longer represent an option, but a necessity.

By means of the present study we did not want to solve an already solved equation, but only to succeed in consolidating the "status" of the lease contract through a balanced harmonization between national and international rules in terms of incidental international rules in the matter.

Key words: financier, user, international leasing, international convention

Due to the development and evolution of human society, today we are witnessing a continuous multiplication and diversification of international commercial contracts that individuals and / or legal persons conclude between them. Today's business requirements imposed new techniques and concepts that have been developed so that they led to the emergence of new commercial contracts.

Among the legal realities of international trade, leasing has established itself as an important means of financing of investment in goods and services. The lease contract along with the factoring, construction and installation contract and the contract of international tourism is part of the complex international contracts group.

The benefits of this contract may become real only within a firm, clear and concise legislative framework, which is not open to personal interpretation, and this framework can be achieved only after an objective analysis of national rules and by adopting where appropriate, the provisions contained in the relevant international standards both from a legal, but also from an economic perspective.

The leasing operation represents all the legal and economic provisions that the parties will conclude in their capacity as participants in this action. According to Italian author R. Rouzi "the leasing is an operation of medium and long-term financing which is based on a lease contract of movable and immovable property". The main feature of the lease contract is its unusual nature in that it is situated somewhere between the rental, purchase and lending contracts, but in no way should it be seen as a combination thereof

Leasing, in essence, is a way of fully funding consumers, natural or legal persons, who wish to purchase movable or immovable assets, with a long duration of use, but who do not have immediate financial possibilities immediate or who do not consider the investment imperative. So, this method of financing comes to meet those unable or unwilling to access credit from banks, by encumbering tangible and intangible assets while establishing mortgages or pledges. It proved to be an extremely effective funding opportunity, mainly of the productive investments, providing extra safety for those who do not have enough capital.

The leasing operation, as we have seen, is a complex operation which is performed in several stages that precede, accompany and succeed this operation, the lease contract itself being just one of those stages. In this context, it has been argued that "the leasing operation" is a complex of legal relationships which includes, besides the actual lease contract, all other legal consequences springing from the conclusion of the contract.

The leasing operation is therefore a tripartite transaction attended by a manufacturer or a supplier of goods, a financier, namely the leasing company and a lessee / user, be it a natural person or a legal person.

As previously noted, the leasing operation involves some ancillary contracts that participants conclude, of which we can mention: the contract concluded between supplier and financier (sale-purchase or novation), the insurance contract of the property that is the object of leasing, the mandate between financier and lessee / user (lease contract).

237 Achim Monica Violeta, Leasing- o afacere de success (Leasing – a successful business, Editura Economica, Bucharest, 2005-p.70
238 Dorin Clocotici, Ghe.Gheorghiu, Operatiunea de leasing, ed. Lumina Lex 2000
By G.O. no. 51/19971 Romanian legislature dissociates in terms of terminology between the lease contract, on the one hand and leasing operations, on the other hand. From this point of view, the ordinance regulating leasing operations, establishes in Article 1 that the parties to a lease contract are the financier / lessor and the user / lessee. Regarding the quality of financier / lessor the legal rule stipulates imperatively that the legal entity shall be a leasing company, while regarding the quality of user / lessee, the law is much more permissive, so that any natural or legal person, Romanian or foreign can have this quality. So, when in the lease contract one party is a foreign natural person or legal entity or when the registered office of the financier / lessor or user / lessee is in different states, the lease contract will benefit from an element of extraneity, which will turn it into a legal relationship of international law.

To define internationality, international conventions use different solutions, depending on the nature of the contract, often the registered office of the contracting parties being a main, but not decisive criterion, adding other complementary elements depending on the specificity of the contract.

Participants in the legal relationship of international trade will therefore be a matter of national law, belonging to national legal order and a matter of international law, belonging to the international legal order. It is indeed the solution of the Ottawa Convention 1998 (Article 3).

Within the international commercial law relations, the legal position of the parties will be equally acknowledged, regardless of the status held, the natural person or legal entity, and the position of the state toward the foreign partner will also respect this principle.

The doctrine supported the view according to which when the conclusion of a contract does not involve the transmission of goods from one country to another, one will take into account as a criterion of internationality, the objective fact of residence / office of parties located in different states. Conversely, if the contract involves the transfer of assets or valuables from one country to another, this objective circumstance is the criterion for determining the international character of the contract. In other opinions, on the contrary, it is said that in case the parties which conclude a lease contract are located in the same country, the contract is not international, even if the property to which it relates, is "international property." We are not in the presence of an international contract even if the credit institution and the user are located in the same country, and the supplier is established in another country. In this case, only the sale is international.

In terms of the law applicable to the contract, while in case of the internal lease contract, this is governed by the national law of parties, for the international lease contract there is no law that applies automatically in international trade, and the determination of the law which governs the contract rests with the parties or, where appropriate, with the court.

Naturally, the contract law is inherent in any type of contract, whether a domestic or international contract, because only this can validate and enable the contract to produce legal effects.

Under lex voluntatis conflict rule, the substantitive conditions are subject to the law designated by the Contracting Parties. The normal conduct of international trade relations requires the harmonization of conflict rules because the different legal systems have similar solutions for cases where the parties have not chosen lex contractus.

Thus, lex voluntatis best meets the needs of international trade allowing contracting parties to choose the material law of the country which will correspond to the greatest extent to the specificity of the transaction in question, to their interests and which is known to them.

Given the importance of values and the risks implied by a contract of international trade, and the continuous development of international trade, the uniform normative regulation was imposed as a necessity in order to ensure certain and reliable contractual relations. So, the doctrine established the so-called general clauses or of common law, which must be present in the content of any contract because their existence depends on the validity of the operation, to which the specific clauses will be added, as they highlight the characteristic features that individualize the contract.

Another issue that requires to be solved concerns the regulation of the conflict of laws. In this regard, national regulations differ. Some authors are in favour of the law of location of property, which is that of the lessee and of the place of execution, considering that the characteristic performance of the contract is tenancy.

Other authors believe that the characteristic performance of the leasing operation is that of financing that the lessor ensures. This would enable it to give competence of application, as lex causae, to the law of the seat of the financing institution. The solution appears closer to the essence of leasing which is, above all, a financing technique.

The international economic and legal society, as an acknowledgment of the importance and of course of the benefits that the lease contract has developed over time, has elaborated and adopted a number of specific

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239 Sergiu POPOVICI, CONTRACTUL DE LEASING (LEASE CONTRACT), Universal Juridic, Bucharest -2010.
241 I. Macovei, Tratat de drept al comertului international (International Trade Law Treaty), op.cit., p.264 and following.
243 C. Gavalda, Jurisclasseur International Dalloz; 1985.
rules devoted exclusively to this complex operation, which not infrequently was both a source of research and information, but also the source of controversial conflicts.

The principle of the priority of substance over form is best represented in the leasing legislation adopted internationally.

Although Romania has a specific legislation for this operation, in most world countries the regulatory framework of leasing is shaped by means of the provisions of financial and accounting rules, their contents including both definitions specific to the leasing operation and the manner of registration and taxation of these operations.

As a result of the obvious necessity to create a uniform framework capable of providing certainty and predictability, numerous international conventions of substantive law were drafted and concluded covering the main types of contracts (sale-purchase, transportation, factoring, leasing)\textsuperscript{244}. Under these considerations, the International Financial Reporting Standards - IFRS were designed, which are a set of accounting standards issued by the International Accounting Standards Board - IASB.

The standard individualizes the leasing operations in Chapter 17, entitled "Lease Contract", quantifying thus clearly and precisely the core and defining issues of certain characteristic concepts or terms, starting from the definition or classification of the lease contract up to its material reflection in the financial statements of the companies participating in the contract\textsuperscript{245}. All listed companies in the EU must keep records and draw up the statements in accordance with those standards.

Without wanting to be exhaustive, through a comparative analysis of the terms specific to leasing operations defined by national legislation (GO 51 / 1997) to the definitions established by IAS17 it can be seen that some of them were taken over in a fractionated manner or they are totally missing.

We also retain, of a significant importance, the provisions contained in the UNIDROIT Convention which regulates in this matter, a number of conceptual clarifications obtained by using certain doctrinal and jurisprudential opinions expressed about the legal regime applicable to the financial lease contract with an element of extraneity. To subordinate to the Convention, Article 3 specifies the rule according to which the financier / lessor and the user / lessee should have offices in different states.

Being imposed as a consequence of the evolution of the business environment of a modern and expanding world, in 1988 at the initiative of the International Institute for the Unification of international private law\textsuperscript{246}, they adopted in Ottawa UNIDROIT Convention on International Financial Leasing, with the aim of standardizing the rules governing international financial leasing operations\textsuperscript{247}.

These principles constitute to a certain extent, a codification of the fundamental rules in matters relating to contracts of international trade, the purpose of the Convention, as it is clear from its preamble, being to eliminate certain legal barriers existing in the way of leasing operations and to balance the interests of different parties to such operations, adapting the rules of the traditional rental agreement to the triangular relationships created by the financial leasing operations and establishing certain uniform rules of civil and commercial law for this purpose. The field of application of the Convention is limited to the operation of financial leasing, under consideration that this type of lease is found most often in international trade agreements\textsuperscript{248}.

The Convention draws the coordinates of the financial leasing transaction, whereby one party (the financier / lessor), at the direction of the other party (user / lessee) will sign a contract with a third party (the supplier) in order to purchase capital goods or other equipment, under the conditions and terms specified by the user / lessee and according to its interests. The user / lessee will benefit from a right to use the property against a periodic payment (Article 1, paragraph 1).

From the contents of UNIDROIT Convention on the financial international leasing we can draw the following characteristics of the leasing operation:


\textsuperscript{246} UNIDROIT has 59 members, including all European Union member states.

\textsuperscript{247} Although all these development efforts of national laws use UNIDROIT Convention as benchmark, we must retain that the provisions of the Convention have not been developed primarily to address the need for a national legislative framework. As was shown by the Swedish Parliamentary Committee report on leasing, the balanced legal framework proposed by the Convention constitutes an authentic model based on which it is possible to strive for a domestic legislative reform in this area.

\textsuperscript{248} E. Turcu, Contractul de leasing (Lease Contract), Hamangiu Publishing House, 2008, p. 324.
a) the Lessee shall specify the characteristics of the assets and the supplier, that it wants to purchase under a lease, without the intervention of the financier;

b) the financier / lessor will purchase the assets indicated, by virtue of a lease contract, of which the supplier is aware and which is concluded or is to be concluded between the financier / lessor and the user / lessee;

c) the leasing rate\footnote{The term of lease rate being specific to the financial leasing operation, the rental term being specific to the operational leasing operation} due under the lease contract will be set so as to cover the full amortization of the asset or at least a substantial part thereof (Article 1, alin.2-3).

Unlike the definition found in GO 51 / 1997, we note that the definition that is given to us by the convention, does not specify the manner in which the contract will be completed or the option of the lessee to extend the contract, to return the property or to operate a transfer of the ownership. This matter is referred to in Article 9, paragraph 2, which specifies that in the event that at the end of the lease contract, the user has no intention to purchase the property or to continue the lease, it will have to return the property in the same conditions in which it has been provided to it (article 9, paragraph 2).

Of major importance are Articles 5-6, which specify the optional nature of application of the convention’s provisions, so that the contracting parties, belonging to states which are party to UNIDROIT Convention on international leasing, may derogate from its provisions, except the provisions of Article 8, paragraph 3 and of Article 13, paragraph 3b-4.

Although in practice the cases where the parties completely exclude the terms of the Convention were not very common, we consider that this alternative causes the principle of the autonomy of the will to prevail in this convention. Equally important is to emphasize the fact that partners that do not belong to the signatory States or acceding to the UNIDROIT Convention on international leasing may, to the extent not prohibited by domestic legislation, apply in full or in part, the provisions of this Convention.

While the text of the Convention must be strictly implemented, the interpretation of the contract would be made taking into account its object and purpose, its character of internationality and the need to promote the uniformity of application, as well as by ensuring good faith respect in international trade.

Also, the issues not covered in the contract, or by UNIDROIT Convention are to be resolved under the general principles used by the Convention or - if they are missing - according to the law applicable by virtue of the rules of private international law.

**Conclusion**

Based on these facts, although between theory and practice will inevitably occur major disagreements, sometimes daunting, I however, maintain the opinion that the option of leasing, financial or operational, gives investors an account of indisputable advantages, as compared to other methods of purchase or rent.

So, in the light of international regulations in the field and by adapting national legislation in line with these, the indisputable benefits of leasing operations will be able to be used, in order to meet the needs of a modern society in which international trade relations are not only easier day by day but also impetuously necessary to the evolution of a market economy that continues to grow.
SOME CONSIDERATIONS ON THE LEGAL STATUS OF ROMANIAN CITIZENSHIP LAW

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Abstract:
Romanian Citizenship Law no.31 / 1991 republished with subsequent amendments is the framework law governing the modes of granting Romanian citizenship loss. Government Emergency Ordinance no. 37/2015 amended and supplemented Law No. 21/1991 Romanian citizenship and changed in part general legal framework of the institution of citizenship, leading to the elimination of some misinterpretations of the provisions of the Act and new solutions were introduced covering all the issues on the subject regulatory law.

Keywords: Law no.21/1991 Government Emergency Ordinance, citizenship bill, amendment, completion

GENERAL CONSIDERATIONS

Citizenship is the body of law that includes all the legal rules governing the political and legal bond between an individual and the state. All these rules are aimed more concern, bodies with responsibilities in this regard in order to ensure legal certainty for citizens as beneficiaries of these rules. In determining the legal nature of citizenship should leave the category of legal subjects. As stated prof. John Muraru citizenship is an element of legal capacity, but the required legal capacity of legal constitutional issues. Natural person as a citizen is a holder of rights and obligations which are often subject to status.

Citizenship is the legal situation arising from lasting relationships that occur between an individual and the state, a situation that is characterized by the fullness of their mutual rights and obligations predetermined by the Constitution and other laws. Starting from the thesis that to define citizenship, should start from the fact that citizenship has content and purpose that correlate to economic realities, social and cultural concrete of a given society, prof. John Muraru defines Romanian citizenship as that quality individuals the opportunity to be the holder of all rights and duties stipulated by the Constitution and laws of Romania.

This definition emerges that the Romanians citizenship proves belonging to the Romanian state in which national sovereignty belongs to the people, Romanian citizens enjoying democratic rights and liberties, but also having duties such as: dedication and loyalty to the homeland, serving the people's interests and fulfillment in good faith of obligations enshrined in the Constitution and laws of the country.

Law No. 21/1990 republished Romanian citizenship amended and further establishes Component modes granting and losing the Romanian citizenship, the procedure for processing requests for granting Romanian citizenship, the withdrawal of its approval procedure for renunciation of citizenship Romanian, procedural deadlines and the competent authorities in this matter. By Government Emergency Ordinance (GEO) no. 37/2015 amending and supplementing Law No. 21/1991 Romanian citizenship was partially changed the general legal framework of the institution Romanian citizenship. Romanian government said it was necessary to amend the basic law that was to become more efficient and uniform, clearer and eliminate the possibility of erroneous interpretations of the provisions of the Act – The Government considered justified drafting the emergency ordinance under Article 115 paragraph (4) of the Constitution and adopted by Parliament.

It was considered that it was necessary to make amendments to the Law no.21/1991, taking into account the current national and international context and Citizenship Committee of the National Citizenship Authority had to ensure its obligations through a normative act efficiently and consistently. Thus it was regulated with clarity of persons that may require granting Romanian citizenship under Article 11 of Law 21/1991, republished as amended. The dynamics of social relations in recent years have shown us that were necessary legislative changes

253 I. Muraru, op. cit. p. 153-155
254 Ana Daniela Bobaru, The constitutional principles applicable to the fundamental rights, freedoms and obligations, in "Studia Lex" Revue nr.1/2009, p.162-166
and to be introduced certain facilities regarding granting Romanian citizenship to foreign citizens and persons without citizenship who have helped to promote Romanian culture, civilization and our spirituality and to promote the image of our country through outstanding performance in sports. By Ordinance no.37/2015 was eased the procedure regarding the possibility of taking an oath before the head of the country not only diplomatic mission or consular office of Romania in the country where the person resides, but also in front of other people provided by law.

By GEO No. 37/2015 also was pursued by the effects solutions delivered in criminal cases in the country or abroad regarding possible solutions to the Commission for Citizenship impose establishing a case for suspension of the procedure for granting Romanian citizenship until completion of final process in how to handle the situation when the case would have a decisive role on completing the application. It was also aimed at avoiding situations where a person may come under statelessness. On the legal regime of article 5 of the Constitution establishes citizenship:

(1) "Romanian citizenship is acquired, retained or lost as provided by the organic law"

(2) "Romanian citizenship cannot be withdrawn person who has acquired by birth"

Obvious that both the text of the Constitution and the law No. 21/1991 republished organized with additions and changes enshrines the principle of jus sanguinis on citizenship and the prohibition of deprivation of citizenship if acquired by birth. After defining the Romanian citizenship as a natural connection and belonging to the Romanian state and Romanian citizens after mentioning that enjoys the protection of the Romanian state, in Chapter II of Law No 21/1991, that observe the Romanian citizenship is acquired by birth, principle art5 section 1 of that "children born in Romania, from Romanian parents are Romanian citizens."

Acquiring Romanian citizenship by birth and other variants known. According to them are Romanian citizens and people born in Romanian territory, even if only one parent is a Romanian citizen or if they are born abroad but both parents or only one of them is a Romanian citizen.257 The law presumes that if children with unknown parentage is found in Romania it is considered Romanian citizen until proven otherwise.

Romanian citizenship can be acquired by a foreign citizen child or without citizenship through adoption, if the adopters are Romanian citizens. If the adopted person is of age, consent is needed. Where only one of the adopters is a Romanian citizen, the citizenship of the adopted minor will be decided jointly by adopters. If adopters do not agree competent court approve the adoption will decide on citizenship, taking into account its interests.

Granting the request of Romanian citizenship is the most used, provided by Article 4, letter c) and Article 8 of Law No. 21/1991. Of course, we must say that there is a special situation when the applicant or his family members had Romanian citizenship, variant is known as repatriation. The law provides another way of obtaining Romanian citizenship, namely acquiring Romanian citizenship by repatriation. Thus Article 10 of Law 21/1991 regulates this situation as follows: "(1) Romanian citizenship can be granted to persons who have lost their citizenship and their descendants up to second degree inclusive and ask to recover them, keeping foreign citizenship and establishing residence in the country or keep it abroad if it meets the appropriate conditions laid down in Article 8 (1), letter b) - e)." Under the same conditions the previous paragraph also applies to stateless, former Romanian citizens and their descendants up to second degree inclusive. So for acquiring Romanian citizenship following conditions must be met:

a) The applicant was born and residing at the time of filing the application or within the territory of Romania, although he was born in the territory of our country of residence under the conditions laid down by the law in the territory of the Romanian State for at least eight years, or in a situation where he is married and living with a Romanian citizen of at least 5 years from the date of marriage;

b) The applicant proves the behavior, actions and attitude loyalty towards the Romanian state does not initiate or support actions against legal order or national security and declares he has never performed such action;

c) The age of 18;

d) Romania has secured legal means for a decent life under conditions laid down by legislation on aliens;

e) It is known with good conduct and has not been convicted in the country or abroad for a crime that makes him unworthy of being a Romanian citizen;

f) Know the Romanian language and has elementary Romanian culture and civilization as sufficiently to integrate into society;

g) Know the Romanian Constitution and the national anthem. Deadline, can be halved if the applicant is an internationally known personality, a citizen member of an EU member state, has acquired refugee status according to the law in force or has invested in Romania amounts exceeding EUR 1000000.

Obvious that the child born to parents Romanian citizens or stateless, who has not attained the age of 18 acquires Romanian citizenship together with his parents. After 8 of Law No 37/2015 introduced by GEO regulation by modifying Article 81 and Article 82 reads as follows: Article 81 provides that "Romanian

256 Citizenship Law no. 21/1991, republished in Official Gazette of Romania, Part I, No. 576/13.08.2010, with subsequent additions and amendments

257 idem
Romanian citizenship may be granted upon request to persons without citizenship or a foreigner who has contributed particularly the protection and promotion of culture, civilization and spirituality Romanian possibly with residence in the country or keep it abroad if they fulfill the conditions of Article 8 (1), letter b), c) and e) "and Article 82, which states that:

"Romanian citizenship can be granted, upon request, a person without citizenship or a foreigner who can contribute significantly to promoting Romania's image through outstanding performance in sport, possibly with residence in the country or keep it abroad if met the following conditions:

a) The applicant will represent Romania in the national teams, in accordance with statutory regulations of international sports federation to which Romania is affiliated;

b) The applicant meets the conditions laid down in Article 8 (1), letter b), c) and e) and expresses its commitment to the Romanian specific value system."

Regarding the acquisition of Romanian citizenship by foreign citizens or persons without citizenship must specify that change by GEO No. 37/2015 enactment established new facilities for them in the sense that by virtue of qualities or functions they have fulfilled or meet them contributed significantly to the preservation and promotion, culture and civilization Romanian spirituality. We refer to Article 81 of Law No 21/1991 introduced by GEO No. 37/2015 which rightly introduced more favorable provisions for the persons mentioned above.

We believe that the new specifications introduced are consistent with international norms and standards regarding citizenship, these corresponding to those in other European countries. We also note that the text requires the cumulative fulfillment of several conditions aimed particularly a contribution from the person seeking citizenship, character of this contribution that, most times must be widely recognized, but also a remarkable amplitude on the protection and promotion of culture, spirituality and civilization of the Romanian people.

It contains similar provisions and Article 82 of Law No 21/2015 introduced by GEO No. 37/2015, but this time for the benefit of people who contribute significantly to promoting the image of our country through outstanding performance in sports and that extends to the their attachment Romania, but also to the system of values specific to Romania. Considering that it is in the interest of promoting Romania's image through sport legislature decided to grant Romanian citizenship through a simplified procedure to persons of foreign citizenship or without citizenship who have outstanding sporting performances, so as to represent the Romanian state in various international competitions.

We note that international sports federations allow naturalized athletes setting criteria for their participation in competitions and giving them the right to represent another country under specific conditions from case to case.

In our country this area is regulated by the Law no.69 intake and physical education / 2000 belonging directly organizing sports national sports federations that operate under their own statutes that are recognized by international bodies. We should note that in recent years there is a certain rivalry in asking the specialized federations naturalization of athletes who wished to represent Romania in international competitions. The new law amended the provisions of paragraph (1) of Article 11, which reads: "People who were Romanian citizens, but have lost the Romanian citizenship for reasons beyond their or have citizenship have been raised by their will, and their descendants to the third degree, demand may recover or be granted Romanian citizenship, with the possibility of keeping foreign citizenship and establishing residence in the country or keep it abroad if they fulfill the conditions of Article 8 (1), letter b), c) and e)."

In our view, we believe that by amending Law No. 21/1991 has been taken to expressly regulate the situation of persons who provide proof of their birth or ascendants to grade III prior accomplishment of the Great Union from 1918 territories at that time did not belong to the Romanian state (people who practically could not acquire Romanian citizenship because of this, either by birth or by adoption, as required by Law no 21/1991, but as a result of State succession)258.

GEO No. 37/2015 has introduced a new paragraph in art13 and legislature sought to ensure people benefit from the provisions of Article 81 CEBR settlement with their applications for Romanian citizenship. So applications for Romanian citizenship can be submitted to the diplomatic missions or consular offices of the State in which the applicant is domiciled. In this case the application will be sent immediately to the Commission for Citizenship within the National Citizenship Authority, through the Ministry of Foreign Affairs, accompanied by an opinion issued by the diplomatic mission or consular post on the condition that the applicant contributed significantly to the protection and promotion of culture, civilization and spirituality Romanian. If the application was filed at the headquarters of the National Citizenship Authority, the Commission for Citizenship will ask the Foreign Ministry views on the condition that the applicant significantly contributed to the protection and promotion of culture and civilization Romanian spirituality.

To put Article 81 and Article 82 in accordance with the simplified procedure by introducing 131 was established the following regulation:

"(1) If persons referred to in Article 81, notwithstanding the provisions of Article 12, granting Romanian citizenship is made by Government Decision initiated by the Ministry of Youth and Sports.

258 Ioan Chelaru, New regulations on establishing the legal status of citizenship in the Roman law, in "Law" Revue No 12/2015, p.14
(2) The application for Romanian citizenship based on the provisions of Article 82 shall be submitted to the Ministry of Youth and Sports, as the sole public authority proposing granting Romanian citizenship under this Article.

(3) Youth and Sports Ministry will submit to the Commission for Citizenship within the National Citizenship Authority request accompanied by supporting documents and a proposal for granting Romanian citizenship in order to verify the conditions laid down in Article 8 (1) b) c) and e)

(4) the report of the Commission for Citizenship within the National Authority for Citizenship, which finds that the conditions of Article 8, paragraph (1), letter b), c) and e), Ministry of Youth and Sport proposes the Government granting Romanian citizenship.

(5) Where the Commission finds non-compliance citizenship under article 8 (1), letter b), c) and e), chairman of the National Citizenship Authority rejects injunction request for citizenship. The order shall be communicated forthwith to the applicant by registered letter with acknowledgment of receipt and the Ministry of Youth and Sports.

(6) Romanian citizenship is acquired on the date of taking the oath of allegiance to Romania. The provisions of Article 20 concerning the oath of allegiance are applied accordingly.

(7) Failure reasons attributable to the person who obtained Romanian citizenship under Article 82 of the oath of allegiance within the period prescribed by law, leads to the cessation effects of the judgment referred to in paragraph (1). The finding of terminating the decision to grant Romanian citizenship is made by the President of the National Citizenship Authority. 

By the same order they amended the provisions of par. (4) in Article 14 of Law No. 21/1991 on the composition of the Commission for Citizenship, highlighting the fact that the president is a member. Commission members are also legal staff assimilated to judges and prosecutors are. "The Commission has continuous activity and is composed of 21 members, legal staff assimilated to judges and prosecutors of the National Citizenship Authority and one as a president. The Commission's work is not public, they are held in the presence of at least 3 members and chaired by the President, and in his absence by a member designated by him" 259

The procedure for granting citizenship, Article 16, paragraph (2) was amended both in letter b) and the letter c), having now read as follows:

"b) the dossier is completed within 4 months of receiving the request the Technical Secretariat of the Commission by the complainant, if it finds the missing documents are necessary to solve the application, otherwise the application is rejected as unsubstantiated.

c) The first date on which the Commission verifies the conditions required for granting or regaining the Romanian citizenship according to art. 11 within 5 months from the date of filing:"

Practical experience and specialized bodies lately about the necessity and urgency of regulating reasonable time for submitting the documentation required to address specific demands regarding citizenship or for performing procedural activities. It has established the possibility to suspend the granting or regaining the Romanian citizenship if the applicant is accused in a judicial proceeding, a criminal offense until the conclusion of the case. This new amendment was introduced by art. 161 and traversing this article is justified by the fact that the way of solving a criminal case has a decisive power on the outcome of the Commission for citizenship from the perspective of the applicants fulfill the conditions of grant laid down in Article 8 (1), letter b) and e).

Article 20 of Law No. 21/1991 concerning certain aspects of granting citizenship amended and reads:

"(1) Romanian citizenship is granted or regains the date of taking the oath of allegiance.

(2) Within 6 months from the date the order of the President of the National Citizenship Authority granting or regaining the Romanian citizenship or, if applicable, its publication in the Official Gazette of the Government decision to grant Romanian citizenship to persons who have been granted or who regained Romanian citizenship take the oath of allegiance to Romania.

(3) In duly justified cases the period provided in paragraph (2) may be extended once, if the extension application together with supporting documentation is submitted before reaching it.

(4) The extension request under paragraph (3) shall be approved by the president of the National Citizenship Authority or as the case of the head of mission or consular office.

(5) The oath of allegiance is deposited in a solemn session before the Minister of Justice or the President of the National Citizenship and one of the two vice presidents delegate authority in this respect and reads as follows:

- I swear to be loyal Romanian country and people, to defend national rights and interests, to respect the Constitution and laws of Romania.

(6) After the oath, the Commission issued the Romanian citizenship certificate, which will be developed in two copies, signed by the President of the National Citizenship Authority, of which a copy will be forwarded to the holder. Both examples contain elements safety certificate and pictures of the holder.

(7) If minor children acquire the Romanian citizenship together with their parents or one of them, they shall be registered in the citizenship certificate of the parents and not take the oath.

(8) A person who obtained Romanian citizenship as stipulated in Articles 10 and 11, with keeping the domicile abroad, will take the oath of allegiance within the period prescribed by law before the head of diplomatic mission or consular office of Romania in the country where resides. In this case the Romanian citizenship certificate will be issued by the head of the diplomatic mission or consular office. The head of the diplomatic mission or consular post may delegate these powers to another member of staff diplomatic or consular.

(9) The person who obtained Romanian citizenship as stipulated in article 10 and 11 with keeping the domicile abroad may take the oath of allegiance in terms of paragraph (5) within the period prescribed by law with the consent of the head of mission or consular Office of Romania in the country where they reside

(10) Paragraph (8) and (9) shall apply accordingly to the persons who have obtained Romanian citizenship as stipulated in art. 8.

(11) If the child becomes of age during the request settlement and until the parents acquire Romanian citizenship oath and he will be issued a distinct citizenship certificate.

Behold, many of the issues concerning the procedure of taking the oath of allegiance were modified and substantially improved. It has governed the possibility that justified reasons to extend this term. Failure to file within the prescribed oath of allegiance by law (3 months) for reasons attributable to the person who obtained Romanian citizenship terminates the effects of the order granting or regaining the Romanian citizenship to the person concerned. We should mention that the number of increasingly large applications for Romanian citizenship has contributed to speeding up the procedure of taking the oath. As I mentioned before, Romanian citizenship is granted or regain with the oath of allegiance, and after its submission to the Commission issuing Romanian citizenship. Regarding the Romanian citizenship loss specify that it can be lost by:

- Withdrawal
- Approval of disclaiming the Romanian citizenship
- Or in other cases provided by law

Given the constitutional principle according to which Romanian citizenship can not withdraw the individual who has acquired by birth, the text of the organic law governing the four cases in which withdrawal can act. Thus the withdrawal of Romanian citizenship occurs in the following cases:

Found abroad a person commits very grave harms the interests of the Romanian state or leases the prestige of Romania.

a) abroad, a person enlists in the armed forces of a state with which Romania broke off diplomatic relations or with which it is at war.

b) A person obtained citizenship fraudulently.

c) A person is known to have links with terrorist groups or supported them in any form or has committed acts that endanger national security.

Since the withdrawal of Romanian citizenship is a penalty, it does not produce a legal effect upon the spouse or children. The penalty is applied against the person at fault according to the facts mentioned above. Another possibility of losing the Romanian citizenship lies in the renunciation it for 'good reasons'. For such approval the applicant must prove that:

a) There is charged or indicted in a criminal case or has not executed a criminal penalty.

b) There is pursued for debts of the state, natural or legal persons in the country or, having such debits, pays them or presents adequate guarantees for their work.

c) Has acquired or solicited citizenship and has the assurance to acquire another nationality.

can there be a situation where a minor child, Romanian citizen, adopted by a foreign citizen can lose Romanian citizenship if, at the request of the adopter or where appropriate, adopters, acquires their nationality, under the terms of the foreign law.

Application to waive the Romanian citizenship accompanied by supporting documents, shall be submitted to the Commission for citizenship or diplomatic missions or consular offices in the country where the applicant is domiciled or resident. President of the National Citizenship Authority after completion of the procedure, has by order, approve or where appropriate, the refusal of waiver of Romanian citizenship, which order shall inform the applicant. Order rejection can be appealed within 15 days from notice from the Tribunal and in turn the decision can be appealed to the Department of Administrative and Fiscal Court of Appeal.

Loss of Romanian citizenship by renunciation takes place on issue certificate of renunciation of Romanian citizenship. Proof of disclaiming the Romanian citizenship is the certificate issued by the Secretariat of the Commission for persons residing in Romania, either by diplomatic missions or consular offices of Romania, persons residing abroad or residing abroad on the order of President of the National Citizenship paragraph (8) of Article 31 of Law 21/1991 republished.

Conclusion

- Citizenship is the legal situation arising from lasting relationships that occur between an individual and the state, expressing person belonging to stat.
- By adopting GEO 37/2015 was intended to prompt resolution requests applicants for granting Romanian citizenship. Also it has character repaire not noting that within 6 months from the effective date of this ordinance persons who by order of the President of the National Citizenship Authority were approved application to waive the Romanian citizenship until the entry into force of GEO could require by law be issued certificate of renunciation of Romanian citizenship

REFERENCES

LEGAL ISSUES IN RARE DISEASES – MASTOCYTOSIS

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MASTOCYTOSIS

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Abstract

Mastocytosis is a rare disease, in Romania being only 62 patients. The treatment is symptomatic or preventive, with disodium cromoglycate. We need to include cromoglycate on the compensated drug list, in order to be brought and distributed in Romania. In the last 8 years the Ministry of Health and the Agency for Medication and Medical devices ignored this request. EU directives impose an answer in 90 days. Romania needs diagnostic and treatment centers for rare diseases.

Key words: rare disease, mastocytosis, national strategy, discrimination, handicap, disability

In EU countries, a rare disease is considered if it affects fewer than 5 people in 10 000. A figure that may seem insignificant, but at the level of the 28 EU Member States we are talking about 246 000 cases. It is estimated that at present in the EU, a number of 5000 to 8000 rare diseases affect 6-8% of the population (27-36 million people). Examples of rare diseases: AIDS, systemic lupus, multiple sclerosis, pulmonary hypertension, lymphomas, certain types of cancer.

Mastocytosis is a rare chronic disease, representing a heterogeneous group of clinical forms, characterized by the accumulation of mast cells in different tissues, including bone marrow, skin, gastrointestinal tract, liver, and spleen (systemic mastocytosis). It is framed in the group of rare diseases, with an incidence of 3 per 125,000 people.

The average survival rate is 16 years for indolent systemic mastocytosis patients, 3 years in aggressive systemic mastocytosis and 2 months in mast cell leukemia.

Because of the clinical polymorphic appearance and that it is situated at the border of several medical specialties, especially allergy, dermatology, hematology and oncology, is a little known disease, and diagnosis is often late.

According to WHO classification mastocytosis are divided into:

A. Cutaneous Mastocytosis (MC)
B. Systemic Mastocytosis (SM): indolent systemic mastocytosis (MSI), the most common form of systemic mastocytosis, a bone marrow mastocytosis, Smouldering Systemic Mastocytosis (SSM), systemic mastocytosis, clonal haematological disease not associated with the mast cell line (SM-AHNMD), aggressive systemic mastocytosis (MSA), mast cell leukemia (MCL), mastocytary sarcoma, extracutaneous mastocytosis.

Indolent Systemic Mastocytosis is the most common form of the disease, and patients may come to the doctor for various forms of allergies, some severe and life-threatening conditions, such as anaphylaxis caused by anesthetics or iodine, by insect stings as of bees or wasps or without any cause.

Without a proper quick diagnosis, the patients are exposed to major risks and suffering that could be prevented by the administration of a prophylactic long term treatment.

International guidelines in mastocytosis, reports of the best specialists in the field in the world and in Romania emphasise that in indolent systemic mastocytosis, the first treatment without side effects and at a rate of success in over 80% of cases is the disodium cromoglycate. It is a mast cell stabilizer that prevents their degranulation, improving symptoms and increasing life quality of the patient.

Romania Association Support Mastocytosis approach was focused on:

1. introducing disodium cromoglycate in the list of compensated drugs, because in this way patients with mastocytosis had access to treatment,
2. introducing a therapeutic protocol approved by and included in the National program for rare diseases.

Basically mastocytosis has a specific mutation, C KIT D 816 V located on chromosome 4. It is the only haemato-oncological disease with a specific mutation of the 4th chromosome, which does not
have access to free analysis and cheap medication, but which is given chemotherapy 30-50 times more expensive and unnecessary.

In 2008 the Communication Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions declared the following: “The Commission proposes that Member States should rely on common approach in addressing rare diseases, based on existing best practice, through the adoption of a Council Recommendation. The Commission calls on Member States to establish strategies organized around:

- The establishment of national action plans for rare diseases;
- Adequate mechanisms for definition, codification and inventory of rare diseases and production of good practice guidelines in order to provide a framework for recognition of rare diseases and sharing of knowledge and expertise;
- Fostering research on rare diseases, including cooperation and collaboration to maximize the potential of scientific resources across the EU;
- Ensuring access to high quality healthcare, in particular through identifying national and regional centers of expertise and foster their participation in European Reference Networks;
- Ensuring mechanisms to gather national expertise on rare diseases and pool it together with European counterparts;
- Taking action to ensure empowerment and involvement of patients and patients’ organizations;
- And ensuring that these actions include appropriate provisions to ensure their sustainability over time.

Also in this communication in 5.3, on access to orphan drugs:

"In the way of access to orphan drugs there must be no obstructions caused by making decisions on pricing and reimbursement linked to rarity status. To make progress, it needs to intensify cooperation at European level for the scientific assessment of the therapeutic value (added) on orphan medicinal products. Collaborations of this kind could lead to the development of evaluation reports, common and optional on the clinical added value, including improved information to facilitate decisions on pricing and reimbursement nationally, without the authorities being dispensed to their respective roles [So as stated in the document Improving access to orphan medicines for all affected EU citizens].

Also should be considered:

- Council Recommendation of 8 June 2009 on action in the field of rare diseases (2009 / C 151/02)
- European Parliament Opinion no. 2008/0218 (CNS) - 08/06/2009 Final act
- Opinion of the Economic and Social Committee no. COM (2008) 726 final - 2008/0218 (CNS)
-Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Rare Diseases: Europe's Challenges, Brussels, 11.11.2008, Com (2008) 679

Relevant decisions of the Court of Justice of the European Union

1. Case C-245/03 Merck, Sharp & Dohme vs Belgium

In 2003, the Belgium State Council has made a question about whether the term of 90/180 days provided by art. 6 par.(1) Directive 89/105 / EEC of 21 December 1988 on the inclusion of drugs on the list of products covered by the health insurance system. This preliminary procedure was initiated in the context of a national dispute between Merck, Sharp & Dohme and Belgian State covering the non-inclusion of a pharmaceutical product on the list of subsidized drugs.
The Court of Justice of the European Union ruled that the deadline set - 90 / 180 days - the art. 6 par.(1) Directive 89/105 / EEC of 21 December 1988 is "a mandatory term that national authorities have not the right to exceed."

2. Case C-296/03 Glaxo Smith Kline vs Belgium

To resolve a dispute with the applicant Glaxo Smith Kline - producer of drugs - Belgium State Council asked the Court of Justice of the European Union the interpretation of the character period prescribed by art. 6 par.(1) Directive 89/105 / EEC of 21 December 1988.

In this case, the Court of Justice of the European Union has determined that this term is "a mandatory term that national authorities have not the right to exceed."

3. Case C-424/99 Commission v Austria

In this case, the Commission submitted to the Court of Justice of the European Union the Austrian national legislation, after Austria had implemented the Directive 89/105 / EEC of 21 December 1988. In particular, the Austrian legislation provides that if the applicant is not satisfied with the decision to include / exclude a product from the list of compensated drugs then it can file a complaint with an administrative body (technical advisory board). The Commission considered that this legal provision does not comply with the requirements specified in art. 6 par.(2) of the Directive.

In this regard, the Court of Justice of the European Union ruled that Austria violated the provisions of art. 6 par.(2) of Directive 89/105 / EEC of 21 December 1988 because applicants must have the right to submit a complaint to genuine judicial bodies.

1. Sentence no. 1516/2015 issued by the Court of Appeal on 05.27.2015 in case no. 6874/2/2014, regarding the inclusion of Vemurafenibum in the list of compensated drugs.

The Council Directive 89/105 / EEC of 21 December 1988 on the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems was designed to ensure the free movement of goods and services.

It is an act which regulates strict conditions for inclusion in the list of drugs reimbursed by the national health system and a transparent mechanism. Basically, non-including a drug found on the list in EU member countries must have clear arguments, public sustainable.

Member States have the right to establish national legislation for the calculation of prices for medicinal products and the criteria for inclusion / exclusion from the lists of compensated drugs.

Articles 1-5 of Directive refer to transparency of measures regulating the prices for medicinal products.

Questions concerning the inclusion of new medicines on the product list covered by the health insurance system are answered by art. 6, where par. (1) of the DSE show that "decisions by national authorities regarding inclusion of drugs on the list of products covered by the health insurance system, and that those decisions are communicated to the applicant within 90 days of receipt. Under certain conditions, this period may be extended by 90 days”.

According to art. 6 par.(2) of the Directive "any decision not to include a medicinal product in the list of products covered by the system of health insurance must contain a statement of reasons based on objective and verifiable criteria, including, where appropriate, any expert advice or recommendations underlying the decision. The applicant shall also be informed of the remedies available to it under the laws in force and the time limits for the exercise thereof.

In other words, the 3000 days of waiting cromoglycate inclusion in the list of subsidized drugs strictly related to the Romanian authorities are matter to be referred to trial for serious breach of access to medicines.

Basically by almost 3,000 days, exceeding 20 times the worst term given by EU Council Directive 89/105 / EEC of 21 December 1988, Romania has violated the right to life, to health of a group of patients with a very rare disease, mastocytosis, of which four died in the last two years. The only argument was that a manufacturer has not requested the marketing authorization, although it is understandable that no one would ask this for 63 people, considering they have no commercial market
in that country. Moreover, the off label is an approved medical practice in Romania, there are files without RPC chemotherapy for the disease, but settled for that disease.

Thus we consider the Government Decision no. 124 of 27 March 2013 approving national health programs for the years 2013 and 2014, art. 1 par.(1) and the structure and objectives set out in the annex part of this decision.

In the same law, in Article 23 par.(8) shows that drugs that are granted under national health programs for treatment of patients with diabetes and those who carried out a transplant and patients with some rare diseases, can be bought in open circuit pharmacies that are under contract with health insurance funds.

All these objectives are reiterated in Government Decision No. 206/2015 on the National Public Health Progr, which is a copy / paste of the previous legislation, concerning rare diseases. But WHO 861/2014 for approving the criteria and methodology for evaluation of health technologies, specifies in Article 4: "the specialty commissions of the Ministry of Health develops therapeutic protocols laid down in art. 3 within 30 days of receipt of the request of the National Agency for Medicines and Medical Devices."

The situation is paradoxical, for this treatment protocol has been sent by the Commission of mastocytosis to the Ministry of Health and the National Agency for Medicines since 24 July 2015. Unfortunately, the protocol can not be approved without the vital drug list in mastocytosis, in this case disodium cromoglycate.

Article 5 of the WHO 861/2014 brings news regarding the evaluation criteria, as follows:
- Creating addressability for patients will show how it will solve the lack of access to treatment for certain categories of patients, population segments or disease states.
- Similar level of compensation - Take into account additions / removals in the same maximum level of compensation, eg from 100% to 100% and so on.
- Proof of compensation in EU countries is necessary to demonstrate the widespread use of the product in the Member States of the European Union and maintaining a uniform approach.

They are useless for people with mastocytosis, including oncology program, so the similar level of compensation is hiding abuse: cytostatics cost a minimum 10,000 lei / month / patient, while cromoglycate barely exceeds 500 lei / patient / month.

The Association Mastocytosis Support Romania filed in vain proof of compensation of cromoglycate not only in EU countries: based RPC or off label, the supporting legal acts and points of view of the major world specialists in the field.

Moreover, based on the right to life guaranteed by Article 22 paragraph (1) of the Constitution and Article 34 of the constitutional right to health care and Directive 24/2011 on cooperation on cross-border healthcare and the International Guide for mastocytosis and protocols of all EU countries, Romania Mastocytosis Support Association asks for the inclusion of the disodium cromoglycate in the compensated drugs list for the last 8 years.

Actual costs of treatment with disodium cromoglycate have an average value of approx. 500 lei / month / patient. These costs are unique, there are no additional costs by induced side effects of medication.

The option for treatment - interferon / Liptak, costs rise sharply to 25 times at 11,000 lei / month / patient. The quality of life decreases to 30% and there are side effects, plus the cost of treatment side effects.

Basically the Ministry of Health refuses to include disodium cromoglycate in the list of compensated drugs with a cost of 500 lei / month / patient and the total of 3000 euro / month / all patients, but accepts cytostatics as treatment, much more expensive respectively 11,000 lei/ month / patient!

The best available therapeutic alternative has two major components: efficiency and cost. If disodium cromoglycate efficiency is over 90%, costs are 30 times smaller than with cytostatics, and life expectancy is about 70 years, the quality of life of about 70-75% of normal.

The therapeutic option proposed by the authorities has an efficiency of 15-20%, life expectancy four years, costs 30 more times, quality of life below 30%.

In conclusion, basically we are in the paradoxical situation of a very rare disease that has minimal cost with a very good yield of the treatment.
Romania Mastocytosis Support Association followed the invitation of the Environmental, health and food safety Commission of the European Parliament and proposed an amendment to the motion on access to medication.

We understand we must have access to legal medication, like any European citizen, to the best available therapeutic alternative that meets our needs for health, and this is, in mastocytosis, disodium cromoglycate.

Conclusions

• The cases must be treated by a team of physician-psychologist with expertise in rare diseases;
• We support the founding of centers of excellence for each rare disease;
• Rare diseases must receive recognition, adequate treatment and care.

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INTEREST – BASED LOAN – IN BETWEEN THE DEED ALLOWED UNDER THE CIVIL LAW AND THE DEED INCRIMINATED UNDER THE CRIMINAL LAW

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Abstract

By virtue of the present article, I have intended to conduct a study on the extortion crime, as the latter is stipulated under art. 351 of the Criminal Code. The present study starts with the way in which the interest – based loan has been regulated under art. 2.167-2.170 of the Civil Code, to which one shall add art. 1-11 of Government Ordinance no. 13/2011, which regulates the remunerating legal interest and the penalizing legal interest in terms of pecuniary obligations and which stands for the common law in the interest – based loan field. Such aforementioned normative deeds shall be adjusted with other special laws and regulations regarding the lending activity that is conducted at a professional level. Given all these civil law norms, one might jump to drawing the conclusion that any activity run by any natural person or legal entity in terms of granting an interest – based loan is legal, since it is expressly stipulated by the civil law. However, we are about to see that the aforementioned regulations provide for the general regulation of the interest – based loan agreement, as well as of the remunerating and penalizing legal interest which may be set in case of any reimbursement of a loan in a given amount of money, yet such operations may not take place but under certain conditions that are strictly stipulated under the law. The present paper provides for a better highlighting of the conditions under which the interest – based loan agreement, although expressly allowed under the civil law, may under certain specific circumstances meet all the constitutive elements of the extortion crime, as the same is stipulated under art. 351 of the Criminal Code.

Keywords:
Extortion, loan agreement, interest, crime, activity

1. LEGAL REGULATION OF THE INTEREST – BASED LOAN AGREEMENT

Consumption loan gets regulated under title IX, Chapter XIII, Section 3 of the Civil Code, as per art. 2.158-2.170. According to art. 2.158 paragraph (1) of the Civil Code, such consumption loan stands for an agreement by virtue of which the lender provides the borrower with a given amount of money, or any other such fungible and consumable assets, and the borrower undertakes to reimburse to the lender, after a certain period of time, the same amount of money or the similar type and quantity of such assets. Having analyzed the legal definition of such consumption loan, it follows that any given amount of money can also make up the subject matter of the said consumption agreement.

Within art. 2.164 paragraph (2) of the Civil Code, it is stipulated that in the event the loan refers to any amount of money, the borrower shall not be held to reimburse but the nominal amount, as having been received, regardless of the latter’s value variation, unless otherwise agreed by the Parties. According to art. 2.168 of the Civil Code, the relevant interest may be set either in money, or in any other services under any title or name that the borrower shall undertake as equivalence for the use of the capital, and within art. 2.169 of the Civil Code, it is stipulated that the amount of money having been lent shall bear interest as of the day when the same has been delivered to the borrower. As a consequence, having analyzed sub – section 2 within Section 3 – Consumption Loan, of the Civil Code, which has the restricted title of “Interest – based Loan”, it follows that the interest - based loan enjoys a general regulation, being allowed under the civil law.

Also, in the relevant doctrine one also stipulates the fact that the loan agreement for consumption purposes, as regulated under the Civil Code stands for the common framework for the lending activity, which is professionally carried out by means of credit institutions, as well as by the financial institutions stipulated by virtue of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, by means of payment service providers granting loans in connection with such payment services, as per the dispositions of Government Emergency Ordinance no. 113/2009, as well as by means of non – bank financial institutions, under the conditions which are established by virtue of Law no. 93/2009 on non - bank financial institutions. It is true that the lending activity is mainly regulated by special laws and by other such regulations issued by the

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National Bank of Romania for the latter’s enforcement, yet the dispositions of the Civil Code stand for the common law of all these normative deeds.

Thus, the Civil Law dispositions in terms of the interest – based loan shall also apply to the other civil law relations. To this end, we shall hereby remind art. 2 paragraph (1) of the Civil Code, as per which, the dispositions of this particular code regulate the patrimonial relations between individuals, as civil law subjects, as well as art. 2, paragraph (2) of the same normative deed, which stipulates that the Civil Law rules stand for the common law for all the fields referred to by its letters or by the spirit of its dispositions. At the same time, out of art. 3 paragraph (1) of the Civil Code, it follows that the latter’s dispositions shall apply both to the relations between professionals, and to the relations between the latter and any other civil law subjects. Such professionals shall be deemed to be all those individuals operating a certain enterprise [art. 3 paragraph (2) of the Civil Code], and the operation of one such enterprise shall stand for a systematic exercise, by one or several individuals, of an organized activity consisting of the manufacturing, managing or alienation of assets, or of the provision of services, regardless of whether or not the same shall be non – profit or profit – based [art. 3 paragraph (3) of the Civil Code]. Further on we shall analyze the lending activity carried out at a professional level.

2. LENDING ACTIVITY CARRIED OUT AT THE PROFESSIONAL LEVEL

Just as above described, within Law no. 93 / 2009 on non – bank financial institutions, one stipulates that the lending activity shall be carried out at the professional level, by means of credit institutions and by means of the financial institutions stipulated under Government Emergency Ordinance no. 99 / 2006, by means of payment service providers granting loans in connection with such payment services, and by means of non – bank financial institutions [art. 2, paragraph (1)]. Moreover, within this particular normative deed, it is expressly stipulated that one shall prohibit the professional conducting of such lending activity by any other entities than the ones stipulated under paragraph (1), [art. 2, paragraph (2) of Law no. 93/2009]. The sole institution holding the authority to decide whether an activity being carried out by any given entity is of the type of the lending activity carried out at the professional level is the National Bank of Romania, which shall issue a license to this end, to the relevant entity, as interested in conducting one such activity. Of the various matters that the National Bank of Romania focuses on, in view of classifying certain lending activities under the category of those activities carried out at the professional level, one may also find the analysis if the same are self – sustained economic activities, oriented towards the getting of regular incomes. Any credit institution should have such a license which is to be issued by the National Bank of Romania, so as for its being able to conduct its business activity on the Romanian territory [art. 10 paragraph (1) of Government Emergency Ordinance no. 99/2006].

Within art. 14 paragraph (1) of Law no. 93/2009 one stipulates the lending activities that may be carried out by non – bank financial institutions, and within art. 61 paragraph (1) it is shown that the unauthorized professional conducting of such lending activities, as the same are stipulated under art. 14 paragraph (1) shall stand for an extortion crime and shall be punished under the Criminal Code.

Having analyzed these legal dispositions, it follows without any doubt whatsoever, that any lending activity carried out at a professional level, or in other words, the interest – based lending activity carried out at a professional level, can only be accomplished by the institutions that are restrictedly stipulated by the legislation in the field (credit institutions, financial institutions, payment services providers granting loans in connection with such payment services and the non – bank financial institutions) as well as provided that one shall get the license issued by the National Bank of Romania, in compliance with Government Emergency Ordinance no. 99/2006.

3. LENDING ACTIVITY NOT CARRIED OUT AT THE PROFESSIONAL LEVEL

We have seen that the lending of various amounts of money on an interest – related basis, at the professional level, can only be accomplished by certain legal entities, which shall have to get a license from the National Bank of Romania for any such business activity. No other natural person or legal entity may conduct any such activity at a professional level. By construance per a contrario, it follows that one such activity could be carried out by natural persons or legal entities, if the lending activity in terms of various amounts of money on an interest – related basis, were not accomplished at a professional level. As a matter of fact, art. 2.158 paragraph (2) of the Civil Code stipulates that when an entity grants a certain loan without conducting such activity at a professional level, the latter entity shall not be applied the legal dispositions in terms of credit institutions and non – bank financial institutions.

In terms of natural persons, I believe that the latter can grant a loan to any other natural person or legal entity, in any interest – based amount, yet provided that such loan shall be carried out under exceptional circumstances (for instance, once a year), namely that the interest – based loan shall not stand for one systematic activity which would enable its classification under the term of an occupation, as stipulated under art. 351 of the Criminal Code, or under the term relating to one’s operating an enterprise, as stipulated under art. 3 paragraph (3) of the Civil Code. Within the methodological norms for the enforcement of art. 67 of the Tax Code, in Chapter II, Section 1, art. 6.(2), it is shown that the exercising of one independent activity involves the latter’s being carried out on a regular and constant basis, on one’s own account and by aiming at the getting of incomes.
Thus, we can say that one such activity is carried out at a professional level if the same shall be regularly carried out for the purpose of getting constant incomes.

In terms of legal entities, I believe that a company can lend another company with any interest – based amount of money, however under the following conditions:

a) the lending of any such interest – based amounts of money shall be carried out under exceptional circumstances (for instance, once a year, to be justified by any event which might require the granting of one such loan as being to the company’s benefit, yet without the purpose of getting any incomes whatsoever), namely that the same shall not be conducted at the professional level. If such interest – based loans were performed with any given regularity, one would breach upon both the dispositions regarding the lending activity, since there would not be any license issued by the National Bank of Romania for any such activities, and on the provisions of the company’s Articles of Incorporation, since the company would conduct an activity which is not stipulated in the said Articles of Incorporation, nor is it authorized by the relevant Trade Register.

b) The loan cannot be granted without an interest, since this would infringe the principle relating to the purpose of one’s establishing a company, namely the getting of incomes, given the acknowledgment of the fact that a company cannot perform liberalities since one such operation would contravene the purpose for which the company has been incorporated. Given the aforementioned, my recommendation is that by virtue of art. 3, paragraph (1) of Government Ordinance no. 13/2011 on the remunerating and penalizing legal interest for any pecuniary obligations, as well as for the regulation of various financial – tax measures in the bank field, the relevant interest shall be at the level of the remunerating legal interest, which shall be set at the level of the reference interest rate of the National Bank of Romania.

4. REMUNERATING AND PENALIZING LEGAL INTEREST

According to Government Ordinance no. 13/2011, parties shall be free to set the interest rate in the relevant conventions, both for the reimbursement of any amount of money and for the delayed payment of any pecuniary obligation. The interest owed in connection with the period prior to the reaching of the due date in terms of the relevant obligation of reimbursing the amount of money, as borrowed, shall be referred to as remunerating interest and the interest owed by the debtor of the obligation of reimbursing the amount of money, as borrowed, in the event of any failure to fulfill the said obligation upon due date, shall be referred to as penalizing interest.

Unless the parties have expressly stipulated the interest level for the reimbursement of any given amount of money, the legal interest is to be paid. The remunerating legal interest rate shall be set at the level of the reference interest rate of the National Bank of Romania, which stands for the monetary policy interest rate, as established by virtue of the decision of the Board of Directors of the National Bank of Romania. The penalizing legal interest rate shall be set at the level of the reference interest rate of the National Bank of Romania, plus 4 percentage points, save for the relations between professionals and between the latter and the contracting authorities, in which case the penalizing legal interest shall be set at the level of the relevant reference interest rate, plus 8 percentage points. In the case of those relations that do not derive out of the operation of any profit-based enterprise, the remunerating legal interest rate or the penalizing interest rate shall decrease by 20%. If such remunerating or penalizing interest shall be stipulated by means of a written document, the same may not exceed the legal interest by more than 50 % per annum.

Whereas the aforementioned legal dispositions in terms of the interest – based loan, further on we shall analyze the concept relating to the extortion crime, as the same is stipulated under art. 351 of the Criminal Code.

5. EXTORTION

Incrimination norm. Incrimination history

According to art. 351 of the present Criminal Code, the act of granting money on an interest – related basis, as an occupation, by any unauthorized individual, shall be punished by imprisonment between 6 months and up to 5 years.

Prior to the coming into force of the current Criminal Code, the same deed used to be incriminated under art. 3, paragraph (1) of Law no. 216/2011 regarding the forbidding of extortion.262 However, within art. 4 of this normative deed one stipulated that the law was actually forbidding the extortion activity until the coming into force of Law no. 286 / 2009 on the Criminal Code, as published in the Official Gazette of Romania, Part I, no. 510 as of July 24th 2009. This article has been introduced upon the proposal of the Legislative Council which, in the latter’s endorsement submitted to the Senate, as related to the legislative proposal regarding the extortion activity, has duly drawn the attention on the fact that one requires the introduction of a new article, which shall regulate the legal relation between this particular normative deed and art. 351 of Law no. 286/2009, so that there shall not be any two parallel regulations upon the coming into force of the new Criminal Code.263

262 Law no. 216/2011 on forbidding the extortion activity has been published in the Official Gazette of Romania, Part I, no. 827 from 22.11.2011 and it has come into force on 25.11.2011

263 Positive endorsement on the part of the Legislative Council no. 816/28.06.2010 regarding the legislative proposal, as related to the extortion activity, duly registered within the Permanent Office of the Senate under the no. 347/29.06.2010
Extortion was also incriminated under the restricted name of “usury” upon the coming into force of the Criminal Code of 1968. Thus, according to art. 295 letter d) of this normative deed, the act of granting money on an interest – related basis, as an occupation or based upon an interest that is higher than the legal interest, as well as the act of receiving interest upon interest, used to be punished by imprisonment from 6 months to 5 years. The deed got disincriminated by virtue of Law no. 12/1990 on protecting the population against any illegal manufacturing, trade or services providing activities, which according to art. 7, abrogates the dispositions of art. 297, letter d) of the Criminal Code of 1968.

Special legal object
The special legal object of this particular crime consists of the social relations whose normal occurrence, running and development are conditional upon the compliance with the legal regime of the lending activity that may only be conducted under the conditions established by the specific legislation in the field.264. Conducting one such lending activity as an occupation, by any individuals who fail to possess the required authorization from the competent institutions to this end, shall enable the getting of some very large incomes by breaching upon the legislation in the field, to the detriment of the legal entities that are duly conducting such activities, thus bringing prejudices to the concept of free competition. At the same time, conducting such activity without the required authorization may trigger serious consequences in terms of certain people’s interests, and last but not the least, it may enable the avoidance of the payment of taxes, as related to the incomes having been achieved out of such activities carried out as an occupation. All these arguments actually highlight the high social danger represented by the act of granting interest – based money, as an occupation, which fact justifies the incrimination under art. 351 of the Criminal Code.

Material object
It is my opinion that the crime fails to have any material object, since there is no physical entity in which the social value protected under the incrimination norm shall materialize. The lending activity as an occupation, which may only be conducted under the conditions stipulated by the specific legislation in the field, cannot have as material representation the money making up the subject matter of criminal law protection, but the way the latter money has been used in order for one to get incomes. The interest achieved following the commitment of any such crime cannot be deemed as the material object of the crime, since it stands for the actual proceeds of the crime.265.

Crime subjects
The active subject of the extortion crime is non – circumstantial, as a consequence, such capacity can be held by any natural person, if the latter meets the conditions relating to criminal liability.266. Within the relevant doctrine, one has shown that although the active subject is not required to hold a certain specific capacity, the latter still has to be lacking the authorization as to granting money on an interest – related basis.267. As previously shown, this type of authorization is issued by the National Bank of Romania, according to Government Emergency Ordinance no. 99/2006.

If out of the former regulation of the extortion crime it followed without any doubt whatsoever that the active subject could only be a natural person, under the current incrimination, as resulting from the dispositions of art. 351 of the Criminal Code, there is no longer any such stipulation to this end. Given the aforementioned, in the absence of any express stipulation, one shall analyze if a legal entity may actually commit one such crime. Well, just as previously shown within the present document, given the fact that the lending activity can also be carried out by legal entities, I believe that these legal entities also can stand for the active subject of the extortion crime, if the latter conduct interest – based lending activities as an occupation and if they fail to hold the relevant authorization from the National Bank of Romania, for any such type of activity. In fact, just as we have seen it already, legal entities cannot grant interest – free amounts of money, since this way they would breach upon the principle relating to the purpose of any company incorporation, namely that of getting incomes, and the companies cannot perform liberalities. Thus, I believe that any legal entity can also stand for the active subject of this type of crime.

and within the relevant Senate, under the no. 597 from 07.09.2010

264 Ilie Pascu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chis, Costică Păun, Norel Neagu, Mirel Gorunescu, Maxim Dobrinoiu, Mircea Constantin Sinescu, New Criminal Codes, with comments included, 2nd volume, Special Part Legal Universe Publishing House, Bucharest, 2012, page 856

265 Ilie Pascu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chis, Costică Păun, Norel Neagu, Mirel Gorunescu, Maxim Dobrinoiu, Mircea Constantin Sinescu, quoted work, page 856


268 According to art. 2 letter b) of Law no. 216/2011 on forbidding the extortion activity, an extortionist is the natural person granting pecuniary loans in exchange of extortion.
*Criminal participation* is possible under all types of forms, including the co – authorship form. In one relevant opinion one has shown that the individual being lent a certain amount of money on an interest related basis cannot be held as the passive subject of such crime, since the latter willingly agrees upon the accomplishment of such operation. In another opinion, one has considered that the borrower can also stand for a secondary passive subject, in the event when such individual’s rights shall be prejudiced by the fact that the doer charges the latter with an interest that is higher than the interest used on the relevant bank market. We do not share this particular opinion and we believe that not even in this particular case, a borrower cannot stand for the passive subject of the crime, given the fact that the individual having been lent the amount agrees upon the conditions as per which the interest – based loan is actually granted.

**Objective side**

The *material element* of the objective side can only be accomplished by means of an action. This latter action consists of the granting of interest – based amounts of money, as an occupation, by any unauthorized individual.

It is just obvious that the interest – based amounts of money are granted based upon a loan agreement to be signed between the lender and the relevant borrower. According to art. 1.178 of the Civil Code, any such agreement shall be concluded by virtue of the parties’ will agreement, unless the law requires any other certain formality to be accomplished for the same to be duly concluded.

The loan agreement in terms of an interest – based amount of money stands for a loan agreement for consumption purposes, as a consequence it is a real agreement, within the meaning of art. 1.174 paragraph (4) of the Civil Code, and in order for the latter to be valid, one shall require the delivery of the relevant asset. This conclusion derives out of analyzing art. 2.158 paragraph (1) of the Civil Code which stipulates that “a consumption loan stands for the agreement by virtue of which the lender shall deliver an amount of money to the borrower”. In other words, if the amount of money making up the subject matter of the loan shall fail to be delivered, the agreement shall not be deemed as having occurred, even if the same has been concluded in authentic form, and the lending deed under authentic form may be deemed at the most as being one loan pre – agreement in the absence of any material delivery of the money.

On the other hand, the law does not require a certain formality for its valid conclusion. Not being in the presence of one solemn agreement, the latter shall be concluded upon the parties' agreement of will achievement, which shall be materialized under the form of the borrower’s being remitted the amount of money making up the subject – matter with the interest – based loan agreement. We also speak of tradition when the parties have agreed upon the money being held under the title of a deposit, remaining at the depository’s disposal under the title of a loan. The remittance of the borrowed amount may be carried out by either the lender or by any mandatory of the latter. The loan agreement in terms of an interest – based amount of money shall stand for one unilateral agreement in compliance with art. 1.171 of the Civil code, within the meaning that as of concluding the same, it shall trigger obligations on the borrower’s side only.

The written form of one such loan agreement in terms of an interest – based amount of money is not required *ad validitatem*, but only *ad probationem*. In other words, the granting of interest – based money shall also stand for a crime in the event the same fails to be accomplished based upon a loan agreement concluded in written form, but by means of any simulated deeds (for instance, any fictitious sale agreement, by which the borrower is supposed to have purchased one moveable assets from the lender, for which asset the former has to pay a certain price, within a given time range, which price shall include the borrowed amount alongside the relevant interest), or without the existence of any written agreement.

The existence of a written agreement is not enough evidence as to find ourselves in the presence of an instance of the extortion crime, if within the said agreement one fails to stipulate that the amount of money has been delivered, and there is only the stipulation that the lender shall be under the obligation to deliver the same in the future. As a conclusion, in order for the material element of the extortion crime to be achieved, we have to

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269 Alexandru Boroi, quoted work, p. 619; Ilie Pascu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chis, Costica Paun, Norel Neagu, Mirel Gorunescu, Mircea Constantin Sinescu, quoted work, p. 857
272 Ilie Pascu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chis, Costică Păun, Norel Neagu, Mirel Gorunescu, Maxim Dobrinoiu, Mircea Constantin Sinescu, quoted work, p. 857
273 Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, quoted work, p. 1657
274 Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, quoted work, p. 1658
275 Ilie Pascu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chis, Costică Păun, Norel Neagu, Mirel Gorunescu, Maxim Dobrinoiu, Mircea Constantin Sinescu, quoted work, p. 857
be in the presence of a loan agreement relating to an amount of money, out of which it should follow that the amount of money making up the subject matter of the said agreement has been delivered to the borrower and the agreement shall include a clause as per which the borrower shall undertake to pay the lender an additional amount of money, in addition to the reimbursement of the loan upon the stipulated deadline. Of course, in the absence of any such agreement concluded in written form, the accomplishment of the material element of the extortion crime can also be proven by other means of evidence.

We have seen that one first condition for the accomplishment of the material element of the objective side of the crime is that the doer’s action shall consist of the granting of any amounts of money.

Another condition is for the amounts of money to be granted by the doer on an interest – related basis. Just as previously shown, out of the dispositions of Government Ordinance no. 13/2011 it follows that an interest can be of two types, namely the remunerating interest for a certain period of time prior to the due date of the loan and the penalizing interest, in case of one’s failure to reimburse the loan upon due date. Within the relevant incriminating norm, one makes no distinction between the remunerating interest and the penalizing interest, which might lead to the conclusion that the incriminating norm focuses both on the remunerating and on the penalizing interest. However, at one closer look at the way in which one has regulated the forbidden act of conduct, we can notice that the law enforcement agent has used the phrase “granting money on an interest related basis”. Well this particular phrase means that one has considered the activity of granting various amounts of money in exchange of a certain interest, which is characteristic to the remunerating interest, as calculated for the period prior to the reaching of the due date term, and not to the penalizing interest, which is sanctioning one’s failure to meet his obligation in terms of reimbursing the amount, as borrowed, within the relevant contractual term. We notice however that in practice, any such interpretation of the incriminating norm enables a very easy simulation of an interest - based loan that is incriminated under the criminal law, by fictitiously stipulating a penalizing interest for any failure on the borrower’s part to fulfill the latter’s obligation relating to the reimbursement of the loan within a period of time that is much shorter than the real one having been agreed by the parties, so that by help of such fictitious term and the fictitious penalizing interest, one can hide a remunerating interest which would classify the deed under the dispositions of art. 351 of the Criminal Code. It is true that according to art. 5 of Government Ordinance no. 13/2011, within the legal relations deriving out of the operation of any one enterprise, within the meaning of art. 3, paragraph (3) of the Civil Code, the interest level, as agreed upon by the parties may not exceed the legal interest by more than 50% per annum, but at the same time, we would like to hereby remind you the fact that the penalizing legal interest rate is set at the level of the remunerating interest rate plus 4 percentage points.

According to art. 6 of Government Ordinance no. 13/2011, the interest shall be set by means of a written deed, and in the latter’s absence, only the legal interest shall be owed. Also, within art. 2.169 of the Civil Code, one shows that the borrowed amount of money shall bear interest as of its being delivered to the borrower. Given the aforementioned, any individuals regularly granting such interest – free amounts of money under the title of a loan, shall expressly stipulate in the relevant loan agreement that no such interest shall be owed. Otherwise, in the absence of any such stipulation, or in the absence of any written agreement, one shall assume that the legal interest shall be owed, which latter interest shall include both the remunerating interest and the penalizing interest, with the risk of one’s meeting the constitutive elements of the extortion crime.

The third condition is for the granting of money under the title of a loan to be accomplished under the form an occupation. According to art. 2.158 paragraph (2) of the Civil Code, when an individual grants any loan without doing it at a professional level, the latter shall not be applied the legal dispositions relating to credit institutions and non – bank financial institutions. We find that there is certain equivalence between the term “occupation”, as used under art. 351 of the Criminal Code and the term “activity carried out at a professional level”, as stipulated by the financial – bank legislation, namely the “operation of a certain enterprise”, as used by the Civil Code [art. 3 paragraph (3)]. As a consequence, we can say that the granting of money on an interest – related basis stands for an occupation, if the same is conducted at a professional level, or in other words, if it is performed on a regular basis, in view of getting constant incomes. Within the relevant doctrine, one has shown that in order for one to deem that the lending activity is accomplished as one such occupation, the same shall acquire the character of a profession. It has also be said that in order to find oneself in the presence of such an occupation, the action shall be frequent and shall occur on a constant basis. Whereas the requirement of the incriminating norm, namely that the action of granting money on an interest – related basis shall be accomplished as an occupation, it is just obvious that we find ourselves in the presence of a habitual crime. Given these circumstances, in a relevant opinion one has stated that in order to find oneself in the presence of one such crime, it is necessary for the accomplishment of at least three activities of

276 Alexandru Boroi, quoted work, p. 619
278 Tudorel Toader, Maria-Ioana Michinici, Ruxandru Raducanu, Anda Crișu-Ciocintă, Sebastian Raduletu, Mihai Dunca, quoted work, p. 546
granting money on an interest – related basis. In line with other authors, we believe that such an opinion can serve as a hint for one to establish the time as of which we can say that we find ourselves in the presence of one such occupation, as a requirement of the criminal activity, yet one should also analyze each and every single case, so as to determine if one has committed enough deeds which shall jointly highlight one such occupation of the relevant doer, particularly because the circumstance under which such deed has been committed is also relevant. Under the title of an example, we shall hereby show that it is possible for an individual to conduct four interest – based lending activities, yet within very large time intervals, as justified by certain exceptional circumstances. In any such latter case, it is very likely that one shall fail to meet the requirement in terms of a regular activity, for the purpose of getting constant incomes.

The fourth and last condition for the accomplishment of the material element of the objective side is for that activity relating to the granting of money on an interest – related basis, as an occupation, to be conducted by one unauthorized individual. Just as previously shown under point 2 of the present paper, according to art. 10 paragraph (1) of Government Emergency Ordinance no. 99/2006, any credit institution shall hold an authorization which is issued by the National Bank of Romania, so as for the same to be able to conduct its business activity on the Romanian territory.

Immediate consequence consists in a state of danger in terms of the social relations that are protected under the incriminating norm.

In the presence of one such danger – related crime, the causality relation shall derive ex re.

Subjective side
The extortion crime can only be willfully committed, in both manners, either directly or indirectly. Within the incriminating norm, there are no requirements, as to the motive of one’s committing the deed, or as to any goal the doer might have.

Crime forms
The attempt is not possible since we are in the presence of one habitual crime.

The crime is performed when a sufficient number of deeds relating to the granting of money on an interest – related basis, are committed by an unauthorized individual and such deeds point out to the fact that the latter doer exercises the same as an occupation.

Sanctions
According to art. 351 of the Criminal code, the act of committing an extortion crime shall be punished by imprisonment from 6 months to 5 years. Also, within art. 61 paragraph (1) of Law no. 93/2009 regarding non – bank financial institutions, it is shown that the unauthorized conducting at the professional level of the lending activities stipulated under art. 14, paragraph (1) shall stand for an extortion crime and shall be punished in compliance with the Criminal Code in force.

6. CONCLUSIONS
We may draw the conclusion that the granting of money on an interest – related basis stands for a deed that is expressly stipulated under the civil law. To this end, the incidence shall belong to the dispositions of art. 2.167-2.170 of the Civil Code and to art. 1-11 of Government Ordinance no. 13/2011 which regulates the relevant legal interest. If the lending of any amount of money on an interest – related basis shall not stand for an occupation, the latter may be accomplished by complying with the dispositions of the Civil Code and of the Government Ordinance no. 13/2011. Yet, if such activity consisting in the granting of money on an interest – related basis, is conducted as an occupation, the incidence shall belong to the special dispositions regulating such an activity accomplished at a professional level. Thus, the latter may only be carried out by means of credit institutions and the financial institutions stipulated under Government Emergency Ordinance no. 99/2006, by means of the payment services providers that grant loans in connection with such payment services and by means of non – bank financial institutions, which shall hold a valid authorization from the National Bank of Romania to this end. If such activity relating to the granting of money on an interest – related basis shall be accomplished as an occupation by any unauthorized natural person or legal entity, the said deed shall fall under the dispositions of art. 351 of the Criminal Code, which incriminates the extortion crime.

280 Tudorel Toader, Maria-Ioana Michinici, Ruxandru Raducanu, Anda Crisu-Ciocintă, Sebastian Raduletu, Mihai Dunca, quoted work, p. 546-547
Bibliography

THE REORGANIZATION PLAN. NOVELTY ASPECTS IN THE LEGISLATION REGARDING INSOLVENCY

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Abstract

From a legislative perspective, Law no. 85/2014 regarding the insolvency prevention procedures, published in the Official Gazette of Romania no. 466/25.06.2016 repealed, as specified in art. 344, Law no. 85/2006 regarding the insolvency procedure, but also another legislation which has influence in this sphere. The law establishes in its index a legal treatment which can be applied to professionals in financial difficulty, in a state of presumed or imminent insolvency. The lawmaker established that for the debtors not in payment termination, but in financial difficulty, the useful legal methods in achieving the purpose of the law are a preventive agreement with creditors and the ad-hoc mandate procedure, and for those in a state of insolvency, the bankruptcy procedure and judicial reorganization.

The state of the heritage of the debtor, the intention of the debtor to reorganize or enter the bankruptcy procedure, and last but not least, the interest of the creditor will determine the choice of procedure.

A company can undergo a reorganization plan with chances of success, even if they are confronted with a difficult situation, through fast and efficient measures of restructuring the activity, measures that need be applied both during the observation period, but also along the process of implementation of the reorganization plan of the company’s activity.

Key words: insolvency, debtor, creditor, debt, judicial reorganization, reorganization plan, debt table.

Judicial reorganization is the procedure applied to the debtor, found in a situation of insolvency, with the purpose of paying their debts, on the basis of a debt payment program, established through a reorganization program. According to the opinion expressed in the doctrine[1], the reorganization program represents a complex multilateral legal act, conventional, jurisdictional and legal in nature, drawn up through the manifestation of will of the categories of creditors that vote on it and that can incorporate a forced partial debt remittance, a modification of the payment deadline, the new payment method, its effects being produced on the basis of the confirmation decision of the plan by the syndic judge[2].

The main provisions regarding the judicial reorganization of professionals are included in Title II The Insolvency Procedure, Section 6 Reorganization of Law no.85/2014 regarding the insolvency prevention and insolvency procedures[3].

Law no. 85/2014 promulgated at the end of June 2015, also known under the improper name of The Insolvency Code, although in its actual form it doesn’t meet the requirements of a legislative code[4]. According to art. 5 point 54 of Law no. 85/2014, judicial reorganization is a procedure applicable to the debtor as a legal entity, found in a state of insolvency, in order to pay the debts they have, according to the debt payment program. The reorganization procedure presupposes the preparation, approval, confirmation, implementation and compliance with a plan, named a reorganization plan, which provides without limitation, jointly or separately:

a) the operational and/or financial restructuring of the debtor;
b) the corporate restructuring through the modification of the share capital structure;
c) restricting the activity through partial or total liquidation of the debtor’s asset.

Compared to Law no. 85/2006 regarding insolvency, Law no. 85/2004 brought more modifications when the reorganization plan is concerned.

One of the advantages brought on by the new regulation is to ensure a balanced and fair framework for voting the reorganization plan, by ensuring the support and a majority of the value of the debts, amounting to 30% of the statement of affairs, besides the condition of voting on the categories of debt[5].

Thus, a return to the amount of the claims registered in the definitive table is instituted, in case the plan fails, even if through the plan those respective debts were decreased or even eliminated. Therefore, the „discharge of debt” effect through the reorganization plan is conditioned by the success and effectiveness in the execution of said plan[6].
A distribution of the sums of money to the creditors is ensured, in a *pro rata* scheme, for every debt designated to be paid for during the reorganization, from the cash surplus left after the payment of the current debts and the needs for working capital, from the revenue gained from the current activity, the selling of unencumbered goods, including from the success of actions for annulment, during the reorganization plan[7].

Regarding the current debts born during the observation period, payment requests can be filed, by creditors, and in the case of non-payment of them, the right of the creditor to request bankruptcy, even during the observation period, within 60 days from the date in which measures were taken by the judicial administrator or from the date of the court decision. And for the debts accumulated during the reorganization procedure a request for bankruptcy can be issued. The syndic judge can deny the request in three instances: the current debt is not owed, it is either acquitted or the debtor has concluded a payment agreement with the current creditor.

The provisions of art. 175 paragraph (1) of Law no. 85/2014 also establish the fact that the reorganization procedure cannot be stopped in the absence of payment of these debts. Moreover, the reorganization plan must also provide the payment method of the current debts[8].

Regarding the provisions which regulate the reorganization plan, Law no. 85/2014 brought numerous changes, as such:

1. **The encouragement of funding, through creating of a super-priority of them:**

According to the provisions of art. 133 paragraph (5), letter B), the reorganization plan can provide obtaining financial resources for sustaining it, as well as sources for them, the funding approved by the plan awaiting to benefit from priority in the refund in accordance to art. 159 paragraph (1) point 2 or, if appropriate, in accordance to the provisions of art. 162 point 2.

The concept of “super-priority” comes from the translation of the term “super-priority”, used in terms of insolvency, to qualify the degree of satisfaction priority of the procedural funding.

The lawmaker regulated this aspect to encourage such funding, through granting a high priority satisfaction, not only in the insolvency prevention procedures, but also in the observation or reorganization procedure. On the other hand, this high priority of satisfaction would remain as a formal or illusory protection, if it didn’t reflect in the materiality of a real guarantee[9].

According to art. 87 of Law no. 85/2014, the rules of granting these grants, in the observation period are as such:
- Grants are made only with the agreement of the Creditors’ Meeting and will be dispensed mainly with goods or rights that do not form the object of a cause of preference, being free of burdens;
- With the consent of the guaranteed pre-existing creditors, in the absence of any free goods, grants will be guaranteed through already constituted guarantees;
- In the absence of goods free from burdens or in the absence of the consent of the guaranteed pre-existing creditors, the grants will be borne I) by guaranteed creditors, pro rata, based on the totality of the subject assets, and ii) in the hypothesis of insufficient subject assets, for the part lacking a guarantee, the priority will be ensured by the other available resources[10].

In the case of reorganization, these grants are protected through the provisions of art. 133 paragraph (5) letter f of Law 85/2014, which provides the beneficiaries of certain causes of preference the remedy of distribution from selling the respective goods. In the situation of a debtor, against whom the bankruptcy procedure has been put into action, the provisions of art. 159 paragraph (1) point 2, or if appropriate, art. 161 point 2 ensure the protection of these grants.

In the case of a creditor found in the middle of a reorganization procedure, the priority associated with grants provided by the plan is ensured, and where appropriate according to the method used to negotiate and establish it, concretely, either according to the provisions of art. 159 paragraph (1) point 2 of Law no. 85/2014, as a debt born during the procedure, which means a guarantee through establishing a conventional mortgage, either according to the provisions of art. 161 point 2 of the same law, that is right after the costs of the procedure, in the category of creditors that do not benefit from causes of preference.

2. **The elimination of the sanction of the revocation of the debtor’s right to propose a reorganization plan, if their appeal to the request to begin the procedure is denied:**

One of the provisions of Law no. 85/2006, which created a lot of controversy, which has presently been eliminated from the text of Law no. 84/2014, referred to the situation in which the debtor formulated the appeal to the request to begin the procedure, which was formulated by the creditor, and the possible consequences, taking into account the fact that, in the situation in which the appeal was rejected, the debtor had his right to propose a reorganization plan revoked.
3. The interdiction of preventing the debtor from participating to auctions, on grounds of beginning the procedure art. 77 par. (6):

The new text introduced by the provisions of art. 77 par. (6) states the following: “The debtor found in the insolvency procedure cannot be prevented from participating in public auctions on grounds of the procedure being in force”. The text was introduced to avoid the various situations that cropped up in practice, in which the debtors were prevented from participating in auctions, the reason being their state of insolvency. This provision comes as a special protection, because the old law, Law no. 85/2006, and the current law, Law no. 85/2014, establish the following: “Any revocation, limitation, interdiction or any other such actions instituted by legal laws or contractual provisions in the case of opening the insolvency procedure will be applicable only from the start date of the declared bankruptcy. Provisions stating otherwise are repealed”.

4. The effect of unloading the obligations of the debtor, but with the condition that the reorganization plan succeeds – art. 140 par. (1):

In the old regulation of Law no. 85/2006, the rule was that in the case in which the reorganization plan didn’t succeed, the modifications brought to the debts through the plan were kept. Thus, there have been cases in practice in which the reorganization plan was adopted exactly for the immediate effect of the unloading of obligations, the effect being that of eliminating a large part of the liabilities. The situation was of nature that could create inequities, in case they recovered debts or goods during the procedure or in the situation in which capitalizing the assets in the reorganization procedure would have led to the apparition of additional resources. Thus, the dispositions of paragraph (2) of art. 140 establish that in the situation in which, after receiving confirmation for the reorganization plan, additional sums are recovered from actions brought under art. 177, which regulates the annulment of fraudulent documents, being distributed as provided in art. 163, which regulates the rule in the case of distribution according to the priority rank. As a consequence, the sums are distributed as provided by art. 163, and in case of insufficient funds in order to cover the total value of the debts with the same priority rank, the holders will receive a bankrupt share, representing the sum proportional with the percentage the debt owns in the respective debt category. Art. 161 established the order in which the debts are to be paid, in the case of bankruptcy. The provisions of the new law, that is those in art. 140 par. (1) establish that, in the case of entering bankruptcy there will be a return to the established situation through the definitive table of debts against the debtor as provided in art. 112 par. (1), subtracting the sums paid during the reorganization plan. As a consequence, in the case of the conversion of the reorganization into bankruptcy, there will be a return to the established situation through the definitive table of debts against the debtor, with the subtraction of the sums paid during the reorganization plan. Thus, any potential modifications brought to the debts through the reorganization plan – the provision to satisfy in a lower amount the nominal values of the definitive table, is left without effect in the case of conversion into bankruptcy, the extinction of debts being done according to the provisions of art. 159 and of art. 161, starting from the definitive table of debts. Law no. 85/2014 also brings a novelty in what the person found guilty for the state of insolvency is concerned, and that is the interdiction to occupy the function of administrator for 10 years. The interdiction operates from the date of the final decision.

5. The obligation of the debtor to provide to the creditor who owns at least 20% of the value of the debts, all information and necessary documents – art. 82 alin. (1):

Besides the debtor, the creditor/creditors who own at least 20% of the total value of the debts included in the definitive table also have the standing to bring proceedings (locus standi) in formulating a reorganization plan. As a consequence, the provisions of art. 82 par. (1) regulate the duty of the debtor to provide this creditor “all information and documents considered necessary regarding their activity and assets”.

The provisions enclosed in art. 82. par. (1) can lead to interpretations, because this duty part of the debtor’s burden, can be extremely costly for them, the measure being efficient only in certain aspects. Firstly, the creditors that have small debts cannot be holders of actions for the annulment of the fraudulent and subsequent acts, this quality pertaining only to the creditors’ committee and the creditor who holds more than 50% of the statement of affairs, according to art. 118 par. (2) and (3) and art. 121. the measure is efficient only for the creditors that wish to propose a reorganization plan, and in this sense, the provisions of art. 82 need to be interpreted, in conjunction with provisions in art. 132 par. (1) let. c). Thus, the debtor has the obligation to provide the creditors only the documents enumerated in art. 132 par. (1) let. c), the notion “documents considered necessary regarding their activity and assets” awaiting interpretation within these boundaries. According to the provisions of art. 132 par. (1) let. c)one or more creditors can propose a reorganization plan, if they together own at least 20% of the statement of affairs, contained in the definitive table of debts, within 30 days of its publication. The possibility granted by the law to the creditor of proposing a reorganization plan
would be left without a certain finality if the creditor wouldn’t also be provided with the necessary information in order to prepare such a plan. As a consequence, according to the same provisions, the debtor, through the special administrator, or the judicial administrator, to the extent of the ownership they have, if the right to administer has been revoked to the debtor, they have the obligation that within 10 days from receiving the request, to provide the creditor the documents and information provided by art. 67 par. (1) let. a), b), and c), accordingly updated to the submission of the definitive table of debts. They will also provide the creditor the list of all debts born during the procedure, as well as any other requested document, useful in formulating a reorganization plan.

The text of par. (1) of art. 82 also mentions the fact that the debtor has the obligation to provide the judicial administrator/judicial liquidator and the creditor owning at least 20% of the total value of debts in the definitive table of debts, except information and documents that are considered necessary regarding its activity and assets, as well as the list containing the payments made in the last 6 months prior to opening the procedure and transferring the heritage done at least 2 years prior to opening the procedure, under sanction of revoking the right to administer.

6. The requirement of immediate distribution of sums obtained through the capitalization of the good guaranteed in the framework of the reorganization plan – art. 133 par. (5) let. F:

The purpose for which the new regulation was adopted is that of conferring to the guaranteed creditor the certitude of cashing in the sums of money procured from the capitalization of their goods during the reorganization process.

Thus, among the measures that are considered adequate, in order to put into application the plan, and which need to be specified in the plan, according to art. 133 par. (5) let. F included is partial or total liquidation of the assets of the debtor in order to execute the plan. The sums of money obtained after certain goods which hold causes of preference have been sold, according to the Civil Code, they will be obligatorily distributed to the creditors which are holders of those causes of preference, while respecting the provisions of art. 159 par. (1) and (2).

There have been in practice cases in which a guarantee valued through the reorganization plan, the sums being used in the current activity, and the payment deadline of the sums which awaited distribution was towards the end of the year.

7. Ensuring a balanced framework of voting the reorganization plans:

In order to avoid the confirmation of a plan, by voting certain categories of lesser importance, from the point of view of the share they hold in the total of the statement of affairs, the lawmaker brought in a a new provision, that being that of voting the plan by at least 30%of the total value of the statement of affairs. This percentage applies to the entirety of the statement of affairs.

Par. 4 of art. 138 also states that a plan will be accepted by a category of debt, if in the respective category the plan is accepted by an absolute majority out of the value of the debts in that category. The absolute majority represents 50% plus 1.

Par. 5 of art. 138 also establishes the fact that the creditors that, directly or indirectly, control or are controlled or are under shared control with the debtor, can vote regarding the reorganization plan, under the condition that the payment program will not offer any sum or offer a sum lower than what they would receive in the case of bankruptcy and that all such payments should be offered according to the order of priority of the subordinate debts provided in art. 161 par. 10. let. a). Thus, art. 100 par. (5) of Law no. 85/2006 didn’t provide this condition, which in the present confers comfort to the other creditors and encourages their decision, of approving the reorganization plan.


In the situation in which more reorganization plans exist, par. (6) of art. 138 establishes the fact that in the case in which more reorganization plans have been proposed, voting them is done in the same session of the meeting of creditors, in the order decided by the vote of the creditors.

9. Regulations regarding the voting method of the reorganization program:

Upon voting the plan by the creditors, their vote must respect certain rules:
- The vote is established upon the debt categories;
- In the framework of the category, the vote is considered granted through forming the absolute majority (50% plus 1) of the value of the debts int hat category;
- The vote of the creditor must be expressly voiced, the abstention from voting not being considered a vote;
- The conditioned vote is considered a negative vote;
- In the case in which more reorganization plans have been proposed, the order of vote is decided by the creditors through voting.

Thus, there can be a maximum of five debt categories which, each, benefit from a vote in the total of the formed categories: the debts which benefit from a right of preference, salary claims, budgetary claims, claims of the indispensable creditors and other unsecured claims.

Flow control claims are also a part of the category of unsecured claims. Regarding these creditors, the provisions of art. 138 par. (5) establish that voting cannot be done regarding the reorganization plan, by the creditors that be it directly or indirectly, control or are controlled or are under shared control with the debtor. The same provisions establish regarding these creditors that in order to be able to vote they must fulfill the following conditions: they must not have received any sum of money from the payment program, or to have received less than they would in the case of bankruptcy and any such payments must be received according to the order of priority of debts subordinate provided in art. 161 point 10 let. a), regarding the second condition it is necessary to also mention the fact that these creditors will cash in the allocated sums of money only after all the other creditors will have cashed them in, these allocated sums of money being paid according to the payment program.

The notion of control is defined by point 9 of art. 3, which also establishes the conditions under which it can be considered that a person is in control. Thus, control is the capacity to determine or influence in a dominant fashion, directly or indirectly, the financial and operational policy of a company or the decisions at the level of the corporate bodies.

The same provisions establish that a person will be considered as in control in one of the following situations:

a) they hold either directly or indirectly a qualified stake of at least 40% of the right to vote of the respective company and no other associate or shareholder does not hold directly or indirectly a greater percentage of the voting right;

b) they hold either directly or indirectly the majority of the voting right in the general assembly of the respective company;

c) as an associate or shareholder of the respective company they the power to name or revoke the majority of the members of the administrative, executive or surveillance body.

The provisions of art. 139 establish the conditions under which the plan is confirmed by the syndic judge:

- the situation in which there are 5 categories, the plan is considered accepted if at least 3 categories vote for the plan, under the condition that at least one of the disadvantaged categories accept the plan and at least 30% of the total value of the statement of affairs have accepted the plan.

- The provisions of par. (3) of art. 138 establish the categories of debt, which vote separately: the debts which benefit from a right of preference, salary claims, budgetary claims, claims of the indispensable creditors and other unsecured claims.

- In the case in which there are three categories, the plan is considered accepted if at least two categories vote for it, under the condition that one of the categories is disadvantaged. There is also a request for the cumulative condition that at least 30% of the total value of the statement of affairs should vote for the plan.

The provisions of art 5. par. (16) define the category of disadvantaged debts, that is: the category of debt for which the reorganization plan provides at least one of the following modifications for the debts of that certain category: a) a reduction of the quantum of debts and/or of their accessories to which the creditor is entitled according to the current law; b) a reduction of the guarantees or a rescheduling of the payments in the detriment of the creditor, without of express agreement.

- In the case in which there are two or four categories, the plan is considered accepted if it is voted by at least half the number of categories (meaning at least one, respectively two categories), out of which one is at a disadvantage. There is a also cumulative request for this case and the condition that at least 30% of the total value of the statement of affairs should vote for the plan.

In contrast to Law no. 85/2014, the provisions of law no. 85/2006 established the fact that in the situation in which there existed 4 categories, it was necessary that 3 categories should vote in favor of the plan, and if there were 2 categories, it was necessary that the category with a greater total value of the debts should vote.

Upon confirming the plan, the syndic judge needs to also take into account the existence condition of the prospects of achieving the plan or of the real chances or reorganization, which should result from the opinion of the specialist, a specialist which could be a practitioner in insolvency, a stranger to the procedure, who can be consulted prior to the confirmation.

In par. (5) of article 138, the lawmaker also made changes regarding the possibility of modification of the reorganization plan. Modification includes the extension of the plan, which cannot exceed a maximum total duration of 4 years, calculated from the initial confirmation. Hence, although there exists the possibility of modifying a plan multiple times, cumulatively the 4 years since the initial confirmation cannot be exceeded.

The modification of a plan can be initiated not only by the one who proposed the plan, but by any of them who have the power to propose the plan, and voting the modifications can be done by the creditors with debts in their
balance, at the date of the voting of the plan, under the same conditions as the voting of the reorganization plan. The modification of the plan will have to be confirmed by a syndic judge.

Law no. 85/2014 does not provide anymore the criteria of choosing the plan which will require confirmation, on the assumption in which more plans fulfill the confirmation criteria, in what the voting and the existence of the possibilities of achieving the plan are concerned. But, if the dispositions of art. 138 par. (6) establish the fact that the voting order is decided by the creditors, and in what concerns the confirmation, it is done by the syndic judge, in the situation of voting multiple plans, the same order should be respected.

10. The provision of equal treatment for all debts in the same category, with the exception of the difference in rank of the causes of preference – art. 139 par. (2) let. d):

The provision in art. 139 par. (2) let. d) of Law no. 85/2014 comes with a modification, as opposed to the text provided in art. 96 par. (2) of Law no. 85/2006, which granted uniform and equal conditions, unjustifiably, to all creditors with debts from a certain category, by infringing the pari passu priority order, making a distinction regarding the difference in rank of the causes of preference.

Thus, according to art. 139 par. (2) fair and equitable treatment exists when the following conditions are cumulatively fulfilled:
- None of the categories that reject the plan and no debt that rejects the plan can receive less than would be received in the case of bankruptcy;
- No category or no debt belonging to a category cannot receive more than the total value of its debt;
- In the case in which a disadvantaged category rejects the plan, no category of debt of rank lower than that of the disadvantaged category which rejected the plan, as results from the hierarchy provided in art. 138 par. (3), doesn’t receive more than they would in the case of bankruptcy.

Conclusions

The success of a reorganization plan is a desideratum which must be followed permanently by the judicial administrator, during the entire span of its progress. The restructuring of debts, debt collection and the profitability of the activity of the debtor company, the management, staff, financial and production activity aspect, are essential aspects that form the basis of a reorganization plan.

Thus, the success of a plan is based on, as a mandatory condition, but also not sufficient, the completion of certain stages of analysis: economic and financial, but also legal, of management and of the market as thorough as possible, with the purpose of establishing a diagnostic as close to reality as possible, and with the purpose of identifying the measures that must be taken for the viability of the activity of the debtor.

Thus, the one proposing the plan must obligatorily go over the following steps:
- The detailed analysis of the economic and financial results of the debtor, on the centre of profit and overall, with the purpose of achieving a diagnostic as close to reality as possible;
- The analysis of all ongoing contracts, identifying the clauses that can be modified or abolished by the debtor, both in the relationship with the client, as well as in the relationships with the supplier, with the purpose of maximizing revenue and minimizing costs;
- The analysis of the establishment plan of the staff, with respect to the sources of income and necessities;
- Analysis of the market segment and identification of necessary measures for broadening and optimizing the retail market;
- Identification of the causes which led to the financial constraint and the proposal of measures to recover them;
- Identification of the sources of funding of the plan and of the method of recovering the debts;
- The negotiation of the method of payment of the debt with every creditor of those who will vote in favor of the reorganization plan, so as to ensure minimal legal conditions imposed by art.100 and Law no. 85/2014
- And last but not least, the identification of the sources of funding of the plan and sizing the activity of the debtor, in close relation with the ensured assets.

The objectives provided in the plan lead to the fulfillment by the debtor, represented by the special administrator, but the judicial administrator also has an important role, having the duty of permanently following the activity of the debtor and the measures that have been taken, with the purpose of carrying out the measures in the plan.
BIBLIOGRAPHY


[4] In order for it to be a true code, the law should have contained regulations for the insolvenţă of the natural entity and the insolvenţă of administrative and territorial units. However if there already exists an applicable legislation regarding the insolvenţă of administrative and territorial units, even if it has a certain difficulty, that is the Government Emergency Ordinance regarding the financial crisis and the insolvenţă of administrative and territorial units – G.E.O. no. 46/2013, for the insolvenţă of natural entities, there is an existing regulation, that is Law no. 151/2015, that up until this point has yet to enter into force.


